INTERNATIONAL CORPORATE LAW ANNUAL

VOLUME 2 ■ 2002

EDITED BY FIONA MACMILLAN

HART PUBLISHING

ALSO PUBLISHED BY HART PUBLISHING

Working Within Two Kinds of Capitalism
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ISBN 1-84113-158-X

International Corporate Law Annual

VOLUME 2 · 2002

Edited by
FIONA MACMILLAN
Professor of Law, Birkbeck College,
University of London

OXFORD AND PORTLAND, OREGON
2003

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

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Telephone: +44 (0)1865 245533 Fax: +44 (0) 1865 794882
email: mail@hartpub.co.uk
WEBSITE: http//:www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN 1-84113-158-X (hardback)

Typeset by John Saunders Design & Production
Printed and bound in Great Britain by
Biddles Ltd, www.biddles.co.uk

Table of Contents

List of Contributors vii
Members of the Advisory Committee of International Corporate Law ix
Contributions to the Next Volume of International Corporate Law xi

PART I

1. Globalisation of Corporate Regulation and Corporate Citizenship 3
   JOHN BRAITHWAITE and PETER DRAHOS
2. Enterprises and the Constitution of the World Economy 45
   JEAN-PHILIPPE ROBÉ
3. The Juridical Paradox of the Corporation 65
   RICHARD TUDWAY
4. Towards Ethics for the Corporation 91
   SALLY WHEELER
5. The European Union: Promoting a Framework for Corporate Social Responsibility 123
   JO HUNT
6. The Relative Importance of the Statutory Derivative Action in Australia 141
   STEPHEN BOTTOMLEY
7. Privatisation and the Challenge of Corporate Governance in Nigeria 167
   ADEDEJI ADEKUNLE
8. Importing Law Reform: Vietnamese Company Law as a Case Study 185
   JOHN GILLESPIE
9. New Business Strategies for Japanese Corporations: Live or Let Die? 229
   JUNKO UEDA
10. CLERP and its Impact on Australian Futures Regulation 249
    RASIAH GENGATHAREN
11. Multinational Enterprises, the World Trade Organisation, and the Protection of the Environment 279
    FIONA MACMILLAN

PART II—COUNTRY REPORTS

12. Suing Multinational Corporate Groups for Torts in the Wake of the *Lubbe* Case – A Comment — 313
ALEX TAWANDA MAGAISA

13. Developments in French Company Law — 323
YVES CHAPUT

14. Recent Developments in the Nigerian Capital Market — 329
DESMOND GUOBADIA

List of Contributors

ADEDEJI ADEKUNLE is Senior Research Fellow at the Nigerian Institute of Advanced Legal Studies

STEPHEN BOTTOMLEY is Professor of Commercial Law and Director of the Centre of Commercial Law at the Australian National University

JOHN BRAITHWAITE is Professor of Law in the Research School of Social Sciences at the Australian National University

YVES CHAPUT is Professor of Law at Université de Paris I

PETER DRAHOS is Professor of Law in the Research School of Social Sciences at the Australian National University

RASIAH GENGATHAREN is a Lecturer in Law at the University of Western Australia

JOHN GILLESPIE is a Senior Lecturer in Law at Deakin University, Australia

DESMOND GUOBADIA is a Partner in The Law Union, Lagos, and formerly a Senior Lecturer in Law at the University of Lagos

JO HUNT is a Lecturer in Law at Cardiff University

FIONA MACMILLAN is Professor of Law at Birkbeck College, University of London

ALEX TAWANDA MAGAISA is a Graduate Teaching Assistant and Doctoral Candidate in the School of Law at the University of Warwick

JEAN-PHILIPPE ROBÉ is the European Partner at Gibson, Dunn and Crutcher LLP, Paris

RICHARD TUDWAY is at the Centre for International Economics, London. He can be contacted at richardtudway@compuserve.com

JUNKO UEDA is Professor of Law at Sugiyama Jogakuen University, Japan

SALLY WHEELER is Professor of Corporate Law at Birkbeck College, University of London

1

Globalisation of Corporate Regulation and Corporate Citizenship[1]

JOHN BRAITHWAITE and PETER DRAHOS

INTRODUCTION

Corporations and securities are institutions that were unknown on most of the planet until the nineteenth century. Today these institutions are ubiquitous and influential everywhere on earth. They are creations of law, abstract objects quite different from physical objects like ships and food. Ships and food became global phenomena before maritime law and food law. In contrast, it is the globalisation of companies and securities law that is constitutive of the corporatisation and securitisation of the world.

Corporations, we will see, existed for more than a millennium before securities. For our purposes, a security is a transferable instrument evidencing ownership or creditorship, such as a stock or bond.[2] The legal invention of the security in the seventeenth century was the most transformative moment in the history of corporations. It enabled the replacement of family firms with very large corporations based on pooled contributions of capital from thousands of shareholders and bondholders. These in turn enabled the great technological projects of eighteenth and nineteenth century capitalism – the railroads, the canals, the mines.

When it was first invented, however, the historical importance of the security had nothing to do with the corporatisation of the world. Rather, it transformed state finances through bonds that created long-term national debts. Today as well, some of the most important securitisation involves a transformation of banking and finance that does not involve the creation of new corporations. An example is mortgage-backed securities – securities backed by bundles of loans on real estate issued by banks. These securities may not create or be issued by corporations (as when they are issued by a government home loan insurance organisation). Other forms of securitisation, such as the privatisation of frac-

[1] This is a revised version of J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000), ch 9. It was first published in (1999) 3 *Flinders Journal of Law Reform.*

[2] There are in jurisdictions around the world more formed, legally technical definitions. For a discussion, see E Sykes, *The Law of Securities* (Sydney, LawBook Co, 4th ed, 1986), 12–13.

tions of the state by selling them to shareholders, continue to accelerate the corporatisation of the world. Securitisation has therefore been a great historical force in its own right as well as the major cause of an even greater historical force – corporatisation.

While the idea of dividing the national debt into bonds was invented in Naples in the seventeenth century, it was England that managed by the eighteenth century to use the idea in a financial revolution that helped it gain an upper hand over its principal rival, France.[3] England seized full national control of public finance: formerly private tax and customs collecting were nationalised in the seventeenth century, a Treasury Board was established in the eighteenth century, and finally the Bank of England was nationalised. The Treasury Board realised that the national debt could be made in effect self-liquidating and long term, protecting the realm from extortionate interest rates at times of war and the kind of vulnerability that had brought the Spanish empire down when short-term loans had to be fully repaid after protracted war. Instead of making England hostage to a Continental banker, the national debt was divided into thousands of bonds, with new bond issues placed on the market to pay for old bonds that were due to be paid.

> The long-term debt converted itself almost spontaneously into a perpetual debt. From now on, it did not have to be repaid by the state which, by converting its floating debt into a consolidated debt, did not have to exhaust its credit or cash reserves. As for the subscriber, he could now transfer his title to a third party – this was allowed after 1692 – and thus recover his initial payment at any time. This was a miracle: the state never repaid the loan, but the lender could recover his money whenever he wanted it.[4]

Securitisation paid for the warships that allowed Britannia to rule the waves, to trade and colonise, a good investment for British bondholders and its state and a transformative one.

GLOBALISING REGULATORY INNOVATION ENABLES GLOBALISING OF THE CORPORATE FORM

A transformation of even greater importance has been the rise of the corporation. Its sweep has been utterly global; there is no nation where corporations are not dominant in economic and social life. The largest transnational corporations have incomes higher than the Gross Domestic Products (GDPs) of the majority of the world's states. In fact, for the first time in the mid-1990s, the majority of the 100 largest "economies" in the world were corporations.[5]

[3] PGM Dickson, *The Financial Revolution in England: A Study of the Development of Public Credit, 1688–1756* (Aldershot, Gregg Revivals, 1993).

[4] F Braudel, *The Wheels of Commerce: Civilization and Capitalism in the 15th-18th Century*, Vol 2 (trans S Reynolds, London, Collins, 1982), 526–7.

[5] S Anderson and J Cavanagh, *The Top 200: The Rise of Global Corporate Power* (1996).

Yet in the United States, where incorporation rose earlier and more vigorously than elsewhere, there had been only 335 incorporations by 1800.[6] Today, in contrast, when important things are done in the world, whether for good or ill, they are more likely to be the actions of corporations than of individuals. Ronald Burt[7] has shown that during the century from the 1870s to the 1970s the percentage of front page space in *The New York Times* devoted to individual persons fell continuously and the proportion devoted to corporate actors rose continuously. By the end of World War II three times as much of the front page was devoted to corporate actors compared to persons. In the middle of the nineteenth century, fewer than 20 per cent of participants in New York State Court of Appeals cases were corporations; in 1923 for the first time the number of corporate participants exceeded the number of individuals.[8]

Two inventions of northern Italian merchants were primarily responsible for the initial rise of the business corporation. One was double-entry bookkeeping developed in Italy during the fifteenth century (which in turn had been enabled by the replacement of the Roman with the Arabic number system). Double-entry bookkeeping enabled the creation of the business as a financial entity, a fund separate from the affairs of the merchants who invested in it, yet linked to them through entries of debits and credits. The metaphysics of the firm as an independent financial entity was complemented by the Italian lawyers' metaphysical invention of the corporation as a *persona ficta*. The corporation was given a legal personality distinct from that of its members, yet linked to them through rights and duties.

These are the features that define what a corporation is. It is a group of individuals who create a financial entity separate from their personal finances that is granted a legal identity by the state as a corporate person. By definition, regulation therefore creates corporations (as well as shapes their form) because state law is necessary for the authoritative designation of a group of individuals as a corporate person. Once that recognition had been granted, the corporation could own land, enter into contracts, sue and be sued and ultimately be held criminally responsible as a corporation.

The need to accommodate such a legal personality to collective entities predates the rise of the business corporation. In the middle ages, the most important corporations were the ecclesiastical owners of land and accumulators of wealth in perpetuity, municipal corporations responsible for the governance of the emerging towns and cities, universities, schools, charitable hospitals, and most importantly guilds. The Canon Law of the Roman Catholic Church performed for Europe the service of preserving principles of Roman Law that allowed monasteries and cathedral chapters to own land and otherwise act

[6] JP Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and their Relation to the Authority of the State* (New York and London, GP Putnam's Sons, 1905), vii.

[7] Ronald Burt, cited in JS Coleman, *The Asymmetric Society* (1982), 12.

[8] N Grossman, cited in Coleman, *supra* n.7, at 11.

legally as corporate persons. Canon law made its own contributions to Anglo-American company law which were at odds with the Roman tradition, such as the Christian notion of "the legal absorption of the group in its headship".[9] It was the canonists of the thirteenth century, not the earlier Roman lawyers or the later English lawyers, who delivered us the idea of the corporation as a *persona ficta*.

THE GLOBALISATION AND DECLINE OF GUILDS

Medieval guilds had many purposes including "the preservation of the peace, the promotion of social fellowship, the performance of religious worship or some other phase of social activity of common interest to its members".[10] They were the corporate organisers of entertainment such as plays, pageants and fairs in medieval towns. They funded and ran almshouses, schools and hospitals. The most consequential guilds, however, were the merchant and craft guilds, some restricted to merchants as employers, some to craftsmen who were employees. Many guilds incorporated both merchants and journeymen. Some merchant guilds effectively governed and organised the military defence of medieval cities. Many accumulated economic power because the king granted them a monopoly in a certain sphere of commerce. The grant of such monopolies made guilds the principal business regulators in the middle ages, (of ethics, price, interest rates, professional qualifications, weights and measures and other trade standards). Guilds were much more significant regulators than states.

In the end nation states crushed the guilds for precisely this reason. States acquired sufficient control over their territories progressively to take over regulatory responsibility from guilds. In doing so they were able to bestow political favours on those who wished to compete against the old guild monopolies, disperse threatening accumulations of economic and political power, and increase national wealth by enabling the greater efficiency of freer commerce.

We do not know whether the European guilds of the middle ages were modelled (through the Levant and Rome) on the guilds of ancient India. Indian guilds have been traced as far back as 800 BC, though they became firmly established only around the third century BC.[11] Even if they did, we cannot trace a line from ancient Indian to medieval European guilds to the nineteenth century business corporation because by the seventeenth century the guilds had been destroyed as centres of economic power almost everywhere. The modern corporation was given birth from a different corporate lineage.

[9] Davis, *supra* n.6, at 238.
[10] *Ibid.*, at 148.
[11] RS Rungta, *The Rise of Business Corporations in India 1851–1900* (Cambridge, Cambridge University Press, 1970), 272.

THE *COMMENDA* AND THE GLOBALISATION OF LIMITED LIABILITY

Between the fifteenth and eighteenth century the biggest fortunes were accumulated not by merchants who made things but by those who traded them. They were especially made by Genoan, Venetian and Florentine traders and by diasporas of Jews and Armenians. Their success was based on ethnic communication networks across long distances. Trusted informants of the same ethnicity living in different trading centres across the globe wrote to one another with information on prices for different commodities. Their surviving letters record where surpluses and shortages were emerging. Superior market intelligence acquired through such networks allowed them to dispatch ships to buy in the ports where prices were low and then sail to the ports where they could be sold at the highest prices. The profits were fantastic precisely because so few were well organised into trusted communication networks.[12]

But there were also great risks of ships sinking, piracy, erroneous or dated market intelligence, or predatory pricing by a competitor acting with intent to crush your monopoly on a particular trading circuit. So Italian investors were more likely to survive if they spread their risks from ownership of one ship to being the part owner of many. The institution that spread to solve this problem was the *commenda*. Under the *commenda*, the organisers of a voyage would collect funds from a number of investors. The liability of those investors would be limited to the funds they invested, whereas the liability of the promoter would be unlimited. Hence if catastrophe ensued on the voyage, the principal of the *commenda* could be bankrupted to pay debts, while the other investors could not be called upon for more than the amount they put in.

Risk spreading through limited liability for investors was not the only appeal of the *commenda*. It was also a way around the laws of usury for investors with spare cash who did not want to run a business themselves. Instead of illegally lending money for interest, the rich man could reap a legal capital gain in a *commenda*. This was also an appeal of the *commenda* to its original inventors in the Islamic world ("the Prophet himself and his wife who was a rich widow had set up a *commenda*").[13] Whether copied from the Arabs or reinvented, the Italian traders spread the institution from city to city in Europe, variations modified by local traditions being evident across the Hanseatic ports by the fourteenth century. A Florentine statute of 1408 codified the conditions of public responsibility attached to a *commenda*: "capitalists were freed of all liability beyond their contributions, while the management contracted in their own names and were responsible for the debts of the business".[14] So-called *commandite* or limited partnerships, where directors had unlimited liability and

[12] Braudel, *supra* n.4, at 400.
[13] *Ibid.*, at 556.
[14] CA Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester, Manchester University Press, 1950), 46.

investors limited liability, slowly replaced family firms throughout Europe, though not in England. *Commandite* organisations were the dominant style of firm in France in the nineteenth century until it acquired a modern law for the free incorporation of limited liability companies in 1867.[15]

JOINT -STOCK COMPANIES COLONISE THE WESTERN AND SOUTHERN HEMISPHERES

England was a laggard in all these developments. It was late to convert from Roman to Arabic numerals for recording of business transactions, late to adopt double-entry bookkeeping, and clung to the partnership form of business organisation in preference to the *commenda*.[16] However, England did charter (along with the Dutch) the most significant joint-stock companies of the early modem era. The trouble with the *commenda* and partnerships alike was that they collapsed or had to be reorganised on the death of the principals. Joint-stock companies created a permanent fund from shares in the stock of the company invested by capitalists managed by a select body drawn from the members ("a board of directors"). When members died their shares could be sold to a new member. The crucial contribution of the joint-stock company to the development of the corporate form was perpetuity: a corporation that "marches on in its elephantine way almost indifferent to its succession of riders".[17]

Some of the most important joint-stock companies started out as regulated companies – corporate charters for particular international trading activities granted to a number of specified individuals by the kings of north-west European states. These developments begin with the Muscovy Company (chartered in 1555 for trade into Russia), the Levant Company (chartered in 1581 as a regulated company and re-chartered as a joint-stock company in 1605) and the Morocco Company (1588). The most important joint-stock company – the East India Company – seems to have been an off-shoot of the Levant Company. By 1617 the Company's 954 shareholders owned thirty six vessels among other assets.[18]

Corporations like the East India Company, the Hudson's Bay Company, the Massachusetts Bay Company, the African Company and the British South Africa Company, were given charters which made them prime agents of colonial expansion for the British Empire. They were given the power to govern colonies, to make laws for them (consistent with the laws of England), tax locals and to wage war within the territories where they held sway. Significant as it was as a commercial trader, the British East India Company was more significant as the

[15] CE Freedeman, *The Triumph of Corporate Capitalism in France 1867–1914* (Rochester, University of Rochester Press, 1993), 2–5.

[16] Cooke, *supra* n.14.

[17] K Boulding, *The Organizational Revolution* (New York, Harper, 1953), 139.

[18] Davis, *supra* n.6, at 119.

private government of the Indian sub-continent in the eighteenth century. The Virginia Company was quite insignificant and short-lived commercially, but it did settle the first English colony in America, and wrote a constitution for Virginia that provided for the first representative legislature in America.[19] It was private corporate governance that first tilled the soil of democracy in Virginia that later grew a Jefferson and a Madison.

Similarly the Massachusetts Bay Company developed a democratic constitution of Massachusetts with checks and balances and a separation of legislative and judicial powers, which along with that of Virginia, became a model for other colonies aspiring to governance by elected representatives constrained by a rule of law. "The constitution of the colonial trading company was therefore perpetuated to a large extent in the State and Federal constitutions of the United States".[20] In America, governmental institutions "largely derived from corporations"[21] had a democratic vitality that was lacking elsewhere because they took root in soil clear of feudal institutions.

There is not only an historical discontinuity between the guild, monastery or municipality as corporations and the joint stock company, there is also a sharp conceptual divide between the corporation as a division of society and the corporation as an association of individuals. Corporations "were now enlarged individuals, not reduced societies".[22] But the growth into the modern liberal corporate form was far from continuous. By 1688 there were still only sixteen joint stock companies in England, but by 1695 there were 140.[23]

The English, French and Dutch stock markets crashed massively around 1720 at the end of an extraordinarily unrealistic bull market. The Board of the South Sea Company in England had been responsible for scandalous stock manipulation. It was a company established to trade African slaves to Spanish America touted as a company that would do for the (vaguely defined) South Seas what the East India Company had done in Asia. The hope was that with the peace following the War of the Spanish Succession, the company might get direct access to the Spanish colonies. So great was the outrage in Britain when the bubble burst (and the losses by members of parliament themselves, many of whom had been bribed with shares on favourable terms) that the South Sea Bubble Act 1720 put in place an out-and-out prohibition on the formation of new joint stock companies. In 1711 unfunded national debt had been compulsorily converted into shares of the South Sea Company. English thinking from 1720 was convinced that it was better to rely on business development through partnerships where the partners took a personal interest in the business. But shareholder capitalism was too resilient to be legislated out of existence. A prin-

[19] *Ibid.*, at 168.

[20] *Ibid.*, at 201.

[21] *Ibid.*, at 205.

[22] *Ibid.*, at 246–7.

[23] EV Morgan and WA Thomas, *The Stock Exchange: Its History and Functions* (London, Elek, 1962), 16–17.

cipal method of circumventing the spirit of the Bubble Act was for property to be held in a trust for an unincorporated group of investors. A body of trustees acting under a trust deed thus became a functional equivalent to the board of directors of a group of shareholders.

LIBERALISATION OF INCORPORATION AND THE GLOBALISATION OF THE INSTITUTION OF THE STOCK EXCHANGE

In the nineteenth century the policy of the Bubble Act was reversed as it became clear that progressively more liberal corporations law was needed to enable the grand capital raising required for building railways and ships, for mining and large-scale industrial enterprises. The view developed that banks should also be creatures of limited liability so as to encourage deposits. By 1870 most Western nations had adopted laws permitting free incorporation (without need for government authorisation of the purposes of the corporation) with limited liability. Even developing economies such as India had liberalised by 1870 and the Bombay share market was formally organised in 1875.[24] Liberalisation of the law had a dramatic effect on capital formation and the proliferation of the corporate form of human organisation: following liberalisation in France, incorporations increased from an average of fifteen a year (1852-1867) to 362 a year (1868-1882).[25] The limited liability corporation became a means of enticing investors to form large pools of capital in exchange for reducing their risks. This was the historical pattern in all industrialising societies.

In the second half of the nineteenth century, stock exchanges were established in most major cities in regions where capitalism flourished – approximately 250 in the United States for example.[26] Everywhere, the demand from investors was basically similar – a law that recognised simple procedures for the transfer of shares, shares of conveniently small denominations and a banking system that provided a simple means of payment. By the end of the seventeenth century, these conditions had been fulfilled only in Holland and England.[27] The first semblance of a stock exchange emerged in Amsterdam: by 1585 lists of stocks being traded existed in Amsterdam.[28] The London Stock Exchange (LSE) surpassed Amsterdam as the premier market in the world when French troops arrived in Amsterdam in 1795. It consolidated its global dominance against intermittent competition from the Paris Bourse until 1914 when the New York Stock Exchange (NYSE) assumed this mantle. The financial institutions of the Dutch republic influenced London in an era when William of Orange success-

[24] Rungta, *supra* n.11, at 257.
[25] Freedeman, *supra* n.15, at 6.
[26] RC Michie, *The London and New York Stock Exchanges, 1850–1914* (London, Allen and Unwin, 1987), 167.
[27] Morgan and Thomas, *supra* n.23, at 19.
[28] H Windcott, *The Stock Exchange* (London, Samson Low, 1946), 2.

fully invaded England and took its throne, New York took over from London on financial foundations forged when it was New Amsterdam.

Stockbroking as a profession seems to have evolved from the tally-brokers who dealt in short-term government debt.[29] The idea of partitioning a permanent national debt into divisible bonds that could be sold to many wealthy individuals both within and without the state was originally proposed by the Neapolitan Lorenzo Ponti in 1653. The brokers of Amsterdam and then of the city of London became the consummate practitioners of this idea, not only selling parcels in the British national debt, but parcelling out the national debts of many nations, making international markets in their bonds. In turn, British government loans, stock in the Bank of England and the East India Company were actively traded on the Amsterdam stock exchange both before and after the South Sea bubble burst.[30] Only in the last decade of the seventeenth century was there enough corporate stock around for brokers to begin specialising in stockbroking[31] and it was only in the second half of the nineteenth century that the LSE ceased being totally dominated by the trade in government securities.

While an Act of the British parliament of 1673 regulated all forms of broking, it made no specific mention of stockbroking. This licensing of brokers was the only form of regulation that affected stockbrokers. Their trade was a creation of spontaneous ordering forged in a number of coffee houses in the city of London and in Exchange Alley "between the salters, the Italian merchants and the Canary merchants"[32] in the Royal Exchange building. In 1697, however, an Act "To Restrain the Number and Ill Practice of Brokers and Stockjobbers" was passed. Its preamble states:

> Whereas for the Convenience of Trade Sworn Brokers have been Anciently Admitted and Allowed of within the City of LONDON, and Liberties thereof, for the making and concluding of Bargains and Contracts between Merchant and Merchant, and other Tradesmen, concerning their Goods, Wares and Merchandises, and Money taken up by Exchange, and for negotiating Bills of Exchange between Merchant and Merchant: And whereas divers Brokers and Stock-Jobbers, or pretended Brokers, have lately set up and carried on most unjust Practices and Designs, in Selling and Discounting of Talleys, Bank Stock, and Bank Bills, as may be most Convenient for their own private Interest and Advantage; which is a very great abuse of the said Ancient Trade and Employment, and is extremely prejudicial to the Public Credit of this Kingdom and to the Trade and Commerce thereof, and if not timely prevented, may Ruin the Credit of the Nation, and endanger the Government itself.

But it was only for a decade that stockbrokers were licensed as such by the City of London, the Act not being renewed in 1707.[33] Thenceforth it was the self-regulation of the brokers that set the regulatory framework for the securities

[29] Morgan and Thomas, *supra* n.23, at 19.
[30] *Ibid.*, at 52.
[31] *Ibid.*, at 20.
[32] *Ibid.*, at 27.
[33] *Ibid.*, at 23–6.

and bond markets. A building was first described as the Stock Exchange in Threadneedle Street in 1773, still without a restricted broker membership. The Stock Exchange building on its present site with a Committee restricting membership was not opened until 1802. It was not until 1812 that the first rule-book of the LSE was collated.[34] Five years later these rules were a resource when the NYSE was formally organised. Long before this codification the LSE had refined customary rules through its committee structure. As Michael Clarke[35] has shown, regulation in the City of London largely worked informally, based on trust and shame among men who shared a code of honour they had learnt at the same schools. In the 1802 structure, "[a]t the south end under the clock was a board on which the names of defaulters were exhibited".[36]

In the evolution of capitalism, there is a long period before trust becomes more generalised in a culture,[37] allowing trading in shops and in commerce with people one has never met, yet with a certain degree of trust.[38] During this painful gestation of generalised trust, trust worked in culturally homogeneous networks, including global ones of Jewish, Venetian, Genoan, Armenian and Chinese diasporas. Competitive advantage was secured when culturally homogenous, trusting communities of traders self-regulated their affairs to enable complex and sophisticated forms of quick, clean trading that other societies could not manage. This was the accomplishment of the City of London from the late eighteenth century. Earlier in the century there had been a pragmatic recognition of the kind of homogenous networks that worked in financing markets. For example, while brokers ordinarily had to be freemen of the City of London, early in the eighteenth century an exception was made for the admission of twelve Jews.[39]

Prior to the gentlemen's club era of self-regulation, female stockbrokers seemed not to be uncommon.[40] They traded in an unregulated informal market open to the general public along with others excluded as unsuitable for membership of the LSE. This happened in and around the Rotunda of the Bank of England from when it was opened in 1765 until the Bank excluded them from the precinct in 1838. By then all the reputable money was going to the LSE. Even contemporary writers have questioned the repute of the female stockbrokers in the most chauvinist way possible: "The presence of the 'female jobbers' is vouched for in contemporary illustrations though there is some doubt as to how far they were dealing in stock and how far plying an even older trade."[41]

[34] *Ibid.*, at 60.

[35] M Clarke, *Regulating the City: Competition, Scandal and Reform* (Milton Keynes, Open University Press, 1986).

[36] Morgan and Thomas, *supra* n.23, at 71.

[37] F Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London, Penguin, 1995).

[38] M Krygier, *Between Fear and Hope: Hybrid Thoughts on Public Values* (Sydney, ABC Books, 1997).

[39] Morgan and Thomas, *supra* n.23, at 65.

[40] *Ibid.*, at 53.

[41] *Ibid.*

TECHNOLOGICAL CHANGE AND THE HEGEMONY OF LONDON AND NEW YORK

There is a sense in which the NYSE made New York rather than vice versa. The financing of the Erie Canal, which made New York the commanding port of the continent came from the NYSE.[42] The communications revolution of the mid-nineteenth century – first the telegraph, then the telephone, then the ticker tape machine – caused an enormous centralisation of trading in the London and New York stock exchanges which, until then, had substantial competition from provincial markets within their own states. The Dow index of NYSE stock averages, which started in 1897, was destined to become something not just New Yorkers would hear daily as they tuned into the evening news. A century later, moves from localised open-outcry trading to screen-based trading at large distances from the metropoles reinforced the grip of the major markets at the same time it localised the stockbroking industry away from the site of the exchange, globalisation to where the investors live.

By 1910, approximately two-thirds of trading in stocks in the United States occurred on the NYSE.[43] Progressively, the market-making in major stocks happened in London for the United Kingdom, New York for the United States. The biggest markets became the hubs from which the new communications wires ran. This allowed London and New York brokers to dominate international securities arbitrage – buying stock cheaply on one international market while simultaneously selling the same amount of stock at the highest price prevailing in any of the world's markets. Since arbitrage is simply market-making in one exchange writ large as market-making across all the world's exchanges, London and then New York progressively made the world's markets in securities important enough to be internationally traded. Once rapid communication allowed this to happen, the culture of trading became for provincials to watch what was happening at the metropole and adjust accordingly.

This also put limits on how far other markets could diverge from the regulatory framework for securities trading set in London and New York. Other exchanges could, did and still do compete for the listing of lesser companies by setting lower regulatory standards than New York. They can list a new Chinese stock that might have been listed on the NYSE were it not for the company's preference for the weaker disclosure requirements on a lesser exchange. This international regulatory competition had limited impact on New York until recently. Domestically, the NYSE had always been content to concentrate on blue chips that play by their rules, allowing the second board and provincial exchanges to pick up the rest.

Needless to say, however, just as a fast, efficient, high-disclosure market like New York has been important to encouraging Western investors to put their

[42] TK McCraw, *Prophets of Regulation* (Cambridge, Mass., Belknap Press, 1984), 162.

[43] Michie, *supra* n.26, at 169.

money into equities, so less open and efficient markets in Shanghai, Hong Kong and elsewhere have been important to the formation of large private corporations in China. In all this, however, stock markets are only fundamental as a secondary market that entices investors to buy new equities with the confidence that they will be able to sell some or all of them whenever they want with low transaction costs. Stockbrokers are responsible for only a small proportion of new share issues – the primary market in equities. In the nineteenth century, the merchant bankers who had dominated the international issuance of new government bonds – Barings and Rothschilds in Britain, J P Morgan in New York – also came to dominate new share issues for private corporations.[44] Needless to say, then, the emergence of a vibrant finance capitalism was essential to the emergence of strong corporate capitalism and securities markets.

THE RISE OF STATE REGULATION AROUND THE WORLD

The licensing of brokers during the early centuries of the LSE was a regulatory responsibility of the Lord Mayor of London rather than the nation state. And even this public regulation was of little consequence compared to the self-regulation of the exchange itself. This was the global pattern of securities regulation in Europe, Asia and the Pacific, Africa and the Americas. The most important state intervention during the nineteenth century was Britain's Directors Liability Act 1890. But this established modest rights in private law rather than public law regulation. It subjected directors and promoters to civil liability for false statements in prospectuses.

It was not until the Companies Act 1929 that a somewhat systematic regime of state regulation was instituted; prospectuses had to be publicly registered and certain information to be disclosed in them was prescribed. The regulation of corporations was therefore not part of Oliver McDonagh's (1961)[45] pattern of nineteenth century government growth. Nineteenth century England is best characterised by: (a) the liberalisation of state limitations on the issuance of corporate charters; and (b) the growth and refinement of self-regulatory institutions dependent on the honour of traders. The period of government regulatory growth dates from the onset of the Great Depression and was rejuvenated by the crash of 1987.

Both the 1890 and 1929 British legislative initiatives were widely modelled throughout the British Empire of course, but more widely than that. Even China acquired a Stock Exchange Law in 1929.[46] Most critically, after Wall Street crashed in 1929, the British Companies Act 1929 was the model that shaped the

[44] *Ibid.*, at 116.

[45] O McDonagh, *A Pattern of Government Growth 1800–1860* (London, MacGibbon and Kee, 1961).

[46] PSP Hsu and LS Liu, "The Transformation of the Securities Market in Taiwan, the Republic of China" (1988) 27 *Columbia Journal of Transnational Law* 169.

rise of American state regulation.[47] But British company law provided no more than a framework into which the Americans injected details of prescription and state enforcement that remained foreign to the British state until they had to deal with outsiders who strode into the city with the internationalisation of securities trading in the 1980s.[48]

The dramatic United States development was the establishment in 1934 of the Securities and Exchange Commission (SEC). While this was one of a number of New Deal independent regulatory commissions, it was one that remained consistently powerful and effective for the rest of the century. It was also the decisive move in the takeover of corporations and securities regulation from State governments by the national government, a move that ultimately occurred in other federal states such as Germany, Australia and Canada. As will be discussed in more detail below under the principle of transparency, the securities laws of 1933 and 1934 were revolutionary in the "thirty-two categories of information that must be disclosed in the registration statements of corporations issuing new securities".[49]

Japan was persuaded to adopt United States-style securities regulation before reopening its markets after World War II. Much later, other Asian states such as South Korea modelled Japanese regulation while Latin American states modeled the United States.[50] The pattern of government growth did not spread throughout Western Europe until the first European Community Company Law Directive of 1968, and in Eastern Europe until the fall of Communism in 1989. In Germany, Switzerland and the Netherlands, state regulation of securities markets remained thin to non-existent until late in the twentieth century; liberalism reigned, tempered by self-policing clubs of securities dealers, stock exchanges and banks.[51] The Francophone states experienced the pattern of government growth earlier, setting up institutions that modelled the SEC. In 1967, the French Commission des Operations de Bourse was very considerably modelled on the SEC.[52]

It is perhaps surprising that national regulation of this early modern institution – the business corporation – with its pre-modern pre-history should come so much later than the national regulation of late modern institutions such as telecommunications, intellectual property and air transport. This lateness we will now see is also a feature of the globalisation of companies and securities

[47] PR Wood, *International Loans, Bonds and Securities Regulation* (London, Sweet and Maxwell, 1995), 260; and J Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* (Boston, Houghton Mifflin, 1982), 57.

[48] Clarke, *supra* n.35.

[49] McCraw, *supra* n.42, at 173.

[50] Wood, *supra* n.47, at 261.

[51] *Ibid.*, 262.

[52] R Bordeaux-Groult, "Problems of Enforcement and Cooperation in the Multinational Securities Market: A French Perspective" (1987) 9 *University of Pennsylvania Journal of International Business Law* 453.

regulation, notwithstanding the early emergence of international arbitrage described above. While the predecessor to the International Telecommunication Union was established in 1865, the International Organisation of Securities Commissions was fully established only in 1986.

CROSS BORDER TRADING AND UNITED STATES RESISTANCE OF THE IMPETUS TO GLOBALISATION OF REGULATION

We have seen that international regulatory competition initially had limited impact on the NYSE, which had been content to concentrate on the United States blue chips that in the decades immediately after World War II were the main game of global capitalism. Restlessness about international regulatory competition really only sharpened in New York during the bull market between 1982 and 1987. These five years saw a remarkably sudden globalisation of securities markets; in the United States, foreign securities transactions increased tenfold.[53] The big jumps in cross-border equity flows occurred in 1986 and 1987 and have not fallen back since. Even so, more than three quarters of equity transactions in 1993 remained totally domestic.

London fought back during the 1980s against the domination New York had enjoyed since World War I, more so after the deregulation of securities trading in London with the Big Bang of 1986. At the end of 1986, only fifty nine foreign companies were listed on the NYSE (a third of them Canadian) while the LSE had 512 foreign listings.[54]

But the United States of the late 1980s and early 1990s was torn between the imperatives of global regulatory competition that was seeing business go to London versus domestic imperatives to crack down on the excesses of the 1980s. The domestic imperatives were initially more profound. American voters were more moved by Hollywood's portrayal of Gordon Gecko in the movie *Wall Street* than by the need for its securities industry to be internationally competitive. Rudolf Guiliani could build a national political profile as a prosecutor of insider traders, a potential Vice-Presidential running mate and Mayor of New York. In this, the American mass public were by no means economically irrational or short-sighted: the sums they lost to shady market manipulators in the late 1980s were massive in comparison to the economic benefits from American domination of global share trading.

How did the United States state negotiate this tension? It supported the formation of the Inter-American Association of Securities Commissions in 1974 that became the International Organisation of Securities Commissions (IOSCO) in 1983, and it supported the dialogue within IOSCO toward upgrad-

[53] United States Department of Treasury, *1983 Treasury Bulletin* (March 1983) and *1988 Treasury Bulletin* (March 1988), Tables CM-V-1, CM-V-2.

[54] B Longstreth, "Global Securities Markets and the SEC" (1988) 10 *University of Pennsylvania Journal of International Business Law* 183.

ing the disclosure and other requirements of laggard securities regulators. Yet when it came to reaching agreement on global harmonisation of securities standards, for the first decade of IOSCO's existence the SEC would mostly not come to the party, steadfastly refusing any easing of its requirements to meet the regulatory laggards halfway. Instead the United States campaigned domestically within the laggard states for tougher regulation, pointing out that American capital would be shy of markets that lacked credible regulation. This strategy met with modest success. The United States was the only state that proscribed insider trading after the Great Depression (from 1934). France followed in 1970, the United Kingdom in 1980, Sweden in 1985, the Netherlands 1986, Switzerland in 1987[55] and then a host of countries after that including Japan, New Zealand, Italy, Belgium, Denmark and Ireland. In 1989 the European Community adopted a Directive on insider trading in an attempt to harmonise the enforcement approach of member states. Most of these states rarely or never imprisoned insider traders in the way the United States did, but substantial global movement toward the United States regulatory posture was certainly accomplished.

At the same time, the SEC position was supportive of "flexibility, looking behind the reasons for our rules so, for example, we can assist British Telecom to be sold in the United States ... accommodation is more important than harmonization" (1992 SEC interview).[56] For the Americans international agreement on internal auditing standards, for example, should not mean that "we have to use them for domestic purposes, but that we find them acceptable for foreign offerors" (1992 SEC interview).[57] This approach of an effective double standard – fending off competition from London by lower standards for foreign firms listing in New York than for domestic firms – is hard to sustain for the long haul and frowned upon in a United States Congress afraid of foreign Gordon Geckos. This attitude reflected the longstanding American view that they still had the upper hand with which to dictate regulatory terms: "You have to come here and convince us. Issuers will come to this big market" (1992 SEC interview).[58] The SEC was critical even in the early 1990s of:

> European Community compromises that accommodate everyone. You can't have it where you're giving something to everyone where your core concern is prudential rigor. The European Community has settled for a lowest common denominator to reach agreement. The United States position is that agreement is not the be all and end all (1992 SEC interview).[59]

[55] A L Peters and A E Feldman, "The Changing Nature of Securities Markets and the Securities Industry: Implications for International Securities Regulation" (1988) 9 *Michigan Yearbook of International Legal Studies* 33–34.

[56] In this chapter, interview references are to interviews conducted by the authors for *Global Business Regulation*, *supra* n.1. ch 3 of that work and the acknowledgements explain the sources of some 500 interviews.

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

FINANCIAL INNOVATION, DISASTERS AND PROGRESS WITH GLOBALISATION OF REGULATION

The expansion of cross-border trading was not the only impetus to global convergence in regulatory standards. The pace of financial innovation since the 1980s has been such that states did not have the luxury of opting to stick with regulatory standards that had stood them in good stead in the past. New standards had to be written for new technologies like screen-based trading, engineering of new products to reduce risk, indeed innovation into completely new types of markets (such as the futures exchanges now institutionalised in all major economies). Wall Street merchant banker Michael Milkin invented the junk bond and eventually went to prison for insider trading on a scale that had previously not been imagined. Wall Street lawyer Michael Lipton invented the poison pill that was used by hundreds of major companies to fend off the takeover frenzy of the 1980s, along with other innovations such as golden parachutes, pac-man defenses, scorched earth retreats, shark repellents and lock-ups.[60] Global regulatory convergence became somewhat easier when everyone was forced to go back to the drawing boards, especially when there was a disaster of global visibility, such as the Barings collapse, that prompted rethinking. On some key issues they decided to sit around a common drawing board.

While the G-1O managed to agree on capital adequacy standards for banks that globalised almost instantly in the 1980s, IOSCO found it impossible to settle capital adequacy standards for securities firms. The nub of the problem was the difficulty of inventing a way of assessing capital adequacy suited both to the banks that dominate securities business in some countries and the non-bank securities firms that dominate in others. Deregulation and product innovation have blurred this divide, however. European agreement on capital adequacy became somewhat easier when Britain's desire to attract business saw it allow the acquisition of member firms of its exchanges by banks. Increasingly in most of the world, banking and securities business is combined in financial conglomerates. The regulatory separation of banking and securities business has long since collapsed in Japan and is crumbling even in the United States, so the different levels of functional integration that in the past have left states with divergent interests on capital adequacy standards are beginning to dissolve.

Advances in computing power have driven innovation in engineering financial products. New financial products could be invented as a result of the new ease, speed and cheapness of collecting, processing and disseminating data. An example is securitisation itself – the conversion of cash flows from specific assets into marketable securities. Securitisation is based on the simple insight that assets are worth more if they are converted from lumpy assets to parcels of securities that can be easily traded, becoming little pieces of many investors'

[60] MJ Powell, "Professional Innovation: Corporate Lawyers and Private Lawyering" (1993) 18 *Law and Social Inquiry* 423.

diversified portfolios.[61] Another is innovation in derivative products – futures, options, swaps and various hedging instruments – and associated specialised markets. The collapse of Barings, England's oldest merchant bank, as a result of derivatives trading by a single employee in Singapore, added to global regulatory impetus for IOSCO's Working Party on Derivatives to settle with the Basle Commission on Banking Supervision a common framework for evaluating the risks of derivatives business among banks and securities firms. Their joint report on derivatives, written just before the Barings collapse, has been widely accepted as a framework for convergence by key players including the SEC and the United States Commodity Futures Trading Commission.[62] IOSCO reports on "Contract Design of Derivative Products on Stock Indices" and "Mechanisms to Enhance Open and Timely Communication Between Market Authorities Of Related Cash and Derivative Markets During Periods of Market Disruption" have also fostered convergence.

After years of impasse, in 1995 IOSCO and the International Accounting Standards Committee (IASC) reached agreement on international accounting standards which have the objective of allowing companies that meet IASC accounting standards to list on any of the world's capital markets by 1999.[63]

Major privatisations have been important sources of regulatory innovation on which cross-border regulatory cooperation has been required. The British Petroleum and British Gas privatisations, the latter being in 1986 the largest equity underwriting that had ever occurred, started a new era of equity offerings occurring simultaneously on the United States and European markets.[64] The difficulties Qantas encountered in keeping its foreign shareholdings within prescribed limits motivated the Macquarie Bank in Australia to tailor-make QanMac: "an innovative security which had the characteristics of a Qantas share, in terms of price and yield, but which was not subject to the same regulatory restrictions, since it was not considered to give foreign investors a direct shareholding in Qantas".[65] A more standardised product innovation is the Global Depositary Receipt (GDR). Banks that act as depositaries for foreign shares issue GDRs in units that represent the underlying value of those shares. Foreign investors can effectively trade the shares without having to deal with labyrinthine local registration and transfer procedures, confident that settlement will occur and with all transactions reaching them in United States dollars or the currency of their choice.[66] De facto stock owners who use GDRs find it

[61] JC Edmunds, "Securities: The New World Wealth Machine" (104 *Foreign Policy* 118–38, 1996).

[62] JH Cheek, "Approaches to Market Regulation" in F Oditah (ed.), *The Future of the Global Securities Market* (Oxford, Clarendon Press, 1996), 250.

[63] B Asher, "The Development of a Global Securities Market" in Oditah, *supra* n.62, at 6.

[64] B Becker, "Global Securities Markets" (1988) 6 *International Tax and Business Lawyer* 243.

[65] S Sackman and M Coltman, "Legal Aspects of a Global Securities Market" in Oditah, *supra* n.62, at 28.

[66] *Ibid.*, at 22.

difficult or impossible to cast votes as shareholders, complicating the principled basis of corporate governance and its regulation.

The latter illustrates how innovation generates new kinds of regulatory challenges that confront all states with a simultaneous need for regulatory redesign. Commonality and simultaneity of both financial innovation and global financial crises conduces to convergence more than grandfathered regulation that has established entrenched habits of industry practice, training, accounting, culture and structure. While these realities are the basis for expecting more rapid progress toward global convergence of securities regulation, the fact to this point is of limited accomplishment and weak institutional infrastructure for globalisation.

ACTORS

International Organisations

Political will for globalisation of corporations and securities regulation has been limited, particularly on the part of the United States, as testified by the late arrival, limited accomplishment and minimal resourcing of the most important international organisation, IOSCO. At the time of writing IOSCO still has only four staff, most of the work being done by the chairs of working groups of representatives of member Commissions. "The philosophy is to let the agencies write the solutions. Then they won't throw them in the bin" (1994 IOSCO interview).[67]

IOSCO began life as a regional coordinator for the Americas. Following an initiative by British regulators who wished to discuss cross-border insider trading, IOSCO spread its membership to all states in 1986.[68] When it finally did get underway IOSCO struggled for some years without Germany and Japan as members. Now, however, IOSCO's 110 members account for 99 per cent of global capitalisation. The history of a Pan-American organisation evolving into the global body parallels Working Party 29 of the Economic Commission for Europe becoming the de facto global standard-setting body for motor vehicles.

During its first decade IOSCOs accomplishments were minimal assessed in terms of settled harmonisations. IOSCO compared unfavourably with the Basle Committee's accomplishments on the harmonisation of banking standards during the same period. Yet during this decade IOSCO did facilitate the evolution of a common language among the world's securities regulators. It is not impossible that the structural conditions within which IOSCO now operates – expanding cross-border trading, regulatory competition, innovation in financial products and exchanges to deliver them, continuous screen-based trading, crises

[67] *Supra* n.56.

[68] SJ Davidson, "The International Organisations of Securities Commissions" in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (Auckland and Oxford, Oxford University Press, 1994), 716.

that demand a global rather than a national response – will enable it to convert its history of impotence into rapid and substantial accomplishment of regulatory convergence. For the time being at least IOSCO will remain a supra-national coordinator of securities markets rather than regulator. An example of where IOSCO has helped to facilitate a culture of cooperation in securities markets regulation has been the formulation in 1991 of principles for Memoranda of Understanding (MOU). MOUs are legally non-binding statements of cooperation between regulatory authorities. In the longer term the IOSCO principles will help to standardise cooperation between securities regulators.

Compared to other domains of business regulation, the OECD has played an extremely modest role as an incubus of ideas for convergence in companies and securities regulation. The International Federation of Stock Exchanges and the International Council of Securities Dealers and Self-Regulatory Organisations have also hardly been major forces for regulatory globalisation.

The European Community has edged Europe toward convergence of companies and securities law through a number of key Directives including the Listing Particulars Directive, the Interim Reports Directive, the Prospectus Directive, the Major Shareholders Directive, the Insider Trading Directive, the Investment Services Directive and a variety of Directives on the formation, structure, governance, accounts, audit, disclosure requirements and merger of companies.[69] The Investment Services Directive guarantees securities firms free access to all European Community markets (the European passport) so long as the regulatory authority of their home state certifies that they have met harmonized minimum requirements.

During the 1990s, the European Community also adopted more of a leadership role at IOSCO, organising European Commissions to take more unified positions to the international forum, prompting the United States to caucus defensively among the Western hemisphere members.

States

Since the New Deal the United States through the agency of the SEC has clearly been the state that has dictated terms more than any other. IOSCO's weakness as an institution indicates that this leadership has not been directed to sustained institution building.[70] While there has been activism in the 1980s and 1990s in negotiating bilateral Memoranda of Understanding, American leadership, like British, Dutch and Italian leadership before it, was more passive than active, more a result of creating domestic institutions that others copied than of regulatory diplomacy.

The influence of the SEC, thus understood, is not just about the fact that United States market capitalisation remains considerably higher than that of all

[69] E Wymeersch (ed.), *Further Perspectives in Financial Integration in Europe* (Berlin and New York, Walter de Gruyter, 1994), 251–9.

[70] For examples of other sustained institution-building, see Braithwaite and Drahos, *supra* n.1.

of Europe combined, it is also about the depth of expertise the SEC has – legal, economic and in terms of market experience – compared with any other securities regulator. And it is also about a respect for the SEC as a regulatory success story that, for example, the United States Federal Trade Commission does not enjoy, as it was put to us immodestly, but nevertheless accurately we think, in one SEC interview:

> It's not just the capitalisation of the United States that gives it weight. Still close to 40 per cent of the world's capitalisation is in the United States. Who are the success stories? The SEC has respect. Also it's the sheer size of the SEC as a regulator. The investor confidence that has come of its competence. Japan has 20 per cent of the world's market capitalisation but no one holds it up as a model of securities regulation. That's about scandals, the insider mentality begetting no international respect.[71]

Moreover, the United States has the most innovative market: innovations hit Wall Street first, so the SEC has to deal with them first. As Powell[72] has shown, Wall Street legal entrepreneurs do not passively wait for clients to ask for their latest tactics; they get out and sell them to boards, first domestically, then internationally. So the foreign regulators know that whatever is troubling the SEC now is likely to be giving them grief soon.

Business actors

The colonies of northern Italian merchants who could be found in every major commercial centre of Europe in the fifteenth century – Geneva, Lyons, Barcelona, Seville, London, Bruges and especially Antwerp – diffused double-entry bookkeeping and other forms of business knowhow, particularly concerned with the use of credit, that laid foundations for the corporatisation of the world in later centuries.[73]

One might have expected that major individual corporations that are issuers of shares, with their interest in being able to list globally, would have been major forces for the global harmonisation of companies and securities law. We have seen no evidence of this being the case. "The accounting firms try to get them [Transnational Corporations (TNCs)] interested in harmonisation but they don't care" (1994 IOSCO interview).[74] Corporations that struggle to raise capital lack the clout to shape debates; blue chips that confront little difficulty in doing so have more important fish to fry, as do the industry associations they dominate. In the nineteenth century the house of Rothschild was more powerful than most states. By the end of the century J P Morgan had become more powerful, an influence it sustained for the first few decades of the twentieth century. But the twenty-first century will have no Rothschild or Morgan (or

[71] *Supra* n.56.

[72] Powell, *supra* n.60.

[73] R Cameron, *A Concise Economic History of the World: From Paleolithic Times to the Present* (New York and Oxford, Oxford University Press, 1989), 122.

[74] *Supra* n.56.

Fugger) who can dictate terms to heads of major states.[75] Merchant banking today is an extremely competitive industry with power diffused among many firms that are tiny compared to the industrial TNCs. In short, the height of merchant banker power preceded not only the globalisation of regulation, but the rise of state regulation from 1934.

The City of London aside, in no other economy does the securities industry account for a notable proportion of GDP. National and international associations representing stock brokers have certainly been active players in international debates, but the major changes investment we have discussed cannot be attributed to their lobbying; their lot has been a more reactive one.

The stock exchanges, particularly those of New York and London, have been pre-eminently important actors. But their influence on events has been rather in the same mould as that of the United States state – more a passive one internationally than one of active diplomacy. When the NYSE sets its domestic rules, it also sets global rules simply because other actors choose to model its policies. The three major exchanges – New York, London and Tokyo – are all active participants in IOSCO deliberation, Tokyo less so than the other two. IOSCO, in the words of one official from the NYSE, has changed from a "social organisation to actually getting things done" (1994 NYSE interview).[76] Tokyo dominates trading in Japanese securities but is not a major trader of international securities. "Not many international companies want to list in Tokyo. They do want to list in the United States" (1994 IOSCO interview).[77] This seems to be about the respect and insider mentality concerns about Tokyo discussed above. Tokyo seems too embedded in the Japanese governmental matrix. Global investors remain wary of it. There are really only three major markets and two major competitors for international listings. The next largest market, the Paris Bourse, is much smaller than the big three and much less influential in global policy discussions. "Any agreement requires the United States, the United Kingdom and Japan, though if Japan doesn't agree it doesn't matter much. Then the others will follow" (interview with keyinsider).[78] In futures trading as well, London is the second market in importance after Chicago.

Some stock exchanges along with the Investment Bankers' Association took a proactive role in the United States after the Great Crash of 1929[79] in pushing for what we will argue below has been the paradigmatic shift of the twentieth century from insider capitalism to transparency capitalism. Not so the President of the NYSE, Richard Whitney, who told Senate staff investigators in 1933: "You gentlemen are making a great mistake. The Exchange is a perfect institution."[80]

[75] R Chernow, *The House of Morgan: An American Banking Dynasty and the Rise of Modern Finance* (London, Simon and Schuster, 1990), xvii.

[76] *Supra* n.56.

[77] *Ibid.*

[78] *Ibid.*

[79] McCraw, *supra* n.42, at 167.

[80] *Ibid.*, at 194.

The most influential actors in the proactive diplomacy sense have been the major accounting firms:

> the big accounting firms have been putting tremendous pressure on all the players for globalisation of accounting standards. Peat Marwick and Price Waterhouse have been the most active. They have also been very active at the GATT on their associated agenda to free up the trade in accounting services. They also lobby the SEC who lobby our Working Groups (1994 IOSCO interview).[81]

The major accounting firms are the model mercenaries in the globalisation of American regulatory and corporate governance practice.[82]

After many years of impotence, the International Accounting Standards Committee, which represents some one hundred professional accounting bodies in fifty countries, has reached an agreement with IOSCO that seems to lay down a framework for harmonised accounting rules. One would have to say, however, that the role of professional bodies here has been much less significant than that of the leading firms. Prior to the New Deal the American Institute of Accountants advanced the cause of uniform accounting rules. While the profession were advocates of transparency, they were largely a feeble force then, dominated by their corporate clients.

NGOs and mass publics

National NGOs like the Australian Shareholders' Association do exist, but they have a limited influence on national debates and none on global debates. We have seen that mass publics, more precisely the new mass of middle class equity owners, have had enormous influence in recent decades, particularly in the United States market, which has shaped so much of the global regulatory change.[83] They bayed for blood following the excesses of the 1980s and they got a level of criminalisation of insider trading which, while it might have been feeble measured as law in action,[84] transformed the law on the books of many countries and has given us the only period in the history of securities enforcement where the criminal law has loomed as being of major importance.[85] It has been the demands of middle class investors transmitted through pension funds, mutual funds and investment advisors that has transformed capitalism more structurally from localised insider investment networks to global risk-spreading based on aggressive demands for performance and transparency by those who

[81] *Supra* n.56.

[82] Braithwaite and Drahos, *supra* n.1, ch 25.

[83] According to a survey by the NYSE in 1990, roughly 51 million Americans owned equities (about one in four adults in other words): see *NYSE Fact Book* (1991).

[84] R Tomasic and B Pentony, *Casino Capitalism: Insider Trading in Australia* (Canberra, Australian Institute of Criminology, 1991).

[85] S Shapiro, *Wayward Capitalists: Target of the Securities and Exchange Commission* (New Haven, Yale University Press, 1984).

make the investments on behalf of the new middle class equity owners. In the era of networked insider capitalism, mass publics were "a befuddled chorus of common people, alternately fascinated and horrified by the doings of the major players".[86]

Under transparency capitalism (see below under the "transparency" heading) befuddled impotence is no longer an accurate way of describing the relevance of mass publics. The workings of firms are not transparent to individual investors, but they are progressively more so to those empowered by investor demands for vigilance, such as stockbrokers, advisors, mutual funds and pension funds. None of these watchdogs have become more powerful than the pre-eminent American rating agencies – Standard and Poor's Corporation and Moody's Investors' Service, Inc. No issuer of securities in the world – corporate or state – is too mighty to be beyond the power that transparency capitalism delivers to the New York ratings agencies. They all shudder at the effect on investing publics of even a hint that one of these agencies might qualify their credit rating.

Individuals

In tune with the conclusion we will reach later that modelling is by far the most important mechanism of globalisation, it is the individuals whose innovations were modelled who have been the most decisive actors in the globalisation of companies and securities regulation. It is beyond our historical reach to know who were the individuals responsible for the idea of the corporation as a *persona ficta*, the *commenda*, double entry bookkeeping, stockbroking and market-making and the Amsterdam stock exchange. Securitization seems to have been an invention of the Neapolitan Lorenzo Ponti in 1653 when he proposed partitioning national debts into divisible bonds. In terms of building primary markets for securities through developing the institution of the merchant bank, perhaps successive generations of Rothschilds should be mentioned for their pre-eminence not only in England and France but in all the major centres of early capitalist Europe.

In the twentieth century, James Landis was a pre-eminent architect of transparency capitalism: "In the history of American liberalism, Landis embodies the generational links from Brandeis [he clerked for Brandeis], the old progressive, through Roosevelt and the New Deal, down to John F Kennedy and the New Frontier. He served all three men."[87] Early in 1933, President Roosevelt asked his friend Felix Frankfurter to help with writing new securities legislation that might prevent another Great Crash. Frankfurter turned, among others, to his brilliant young co-author at Harvard Law School, James Landis. To Landis fell the task of leadership in drafting the Securities Act 1933 and the Securities Exchange Act 1934. The latter was "among the most harshly contested pieces of

[86] McCraw, *supra* n.42, at 162.

[87] *Ibid.*, at 153.

legislation in the twentieth century",[88] Landis and his colleagues being described, among other things, as "a bunch of Jews out to get J P Morgan".[89] Wall Street came to hate Roosevelt and Landis was Roosevelt's front man first as principal drafter, then as FTC and SEC Commissioner, then as SEC Chairman from 1935 to 1937.

Landis,[90] before and after, was a seminal scholar of regulatory strategy, a critic of legislative enactment uncoupled from a theory of administrative design.[91] His regulatory genius was in seeing the need for an institutional design that gave all gatekeepers – executives, accountants, brokers, bankers, lawyers – a stake in enforcing the law. Part of the disclosure regime the 1933 Act, for example, was the provision of the names and addresses of lawyers who passed on the legality of a security issue. This was a radical innovation in giving lawyers a reputational stake in enforcing the law. His ideas, subsequently modelled globally and not just in securities regulation, were for regulation that was self-enforcing, that engaged industry participants in self-regulation monitored by a federal agency. It was participatory regulation within a regulatory community, to use a term later deployed by Meidinger.[92] Landis was severely attacked both by business leaders who detested sunlight and by liberal New Dealers, including from within the SEC itself, who wanted dirigiste, punitive control rather than cooperative regulation with the business community as partners. It was the Landis vision that prevailed in the practice of the SEC and many other agencies that admired its accomplishments. Landis himself slipped into obscurity after 1937 as an undistinguished Dean of Harvard Law School who let alcohol get the better of him. He also had an undistinguished stint as Chairman of the Civil Aeronautics Board under Truman. But Landis's 1961 Report to the President-Elect, John F Kennedy, highlighted the problems of regulatory decay and the need for periodic rejuvenation of regulatory agencies, which did begin under Kennedy.

Landis had many who stood beside him, including two colleagues, Joseph Kennedy and William Douglas, who possibly administered the SEC with greater finesse than Landis.[93] He also stood on the shoulders of his mentors, Brandeis and Frankfurter. But in this respect no shoulders were sturdier than those of the man who appointed him. As Landis wrote to Roosevelt when he resigned as SEC Chairman: "Our Commission and our work sprang from your mind, your utterances, your ideals."[94]

[88] *Ibid.*, at 171.

[89] Seligman, *supra* n.47, at 96.

[90] See J Landis, "The Study of Legislation in Law Schools: An Imaginary Inaugural Lecture" (1931) 39 *Harvard Graduates Magazine* 433–42; and J Landis, *The Administrative Process* (New Haven, Yale University Press, 1938).

[91] D A Ritchie and JM Landis, *Dean of the Regulators* (Cambridge, Mass., Harvard University Press, 1980).

[92] E Meidinger, "Regulatory Culture: A Theoretical Outline" (1987) 9 *Law* and *Policy* 355.

[93] Seligman, *supra* n.47.

[94] *Ibid.*, at 155.

Epistemic communities of actors

How does one describe Wall Street and the City of London? Not as markets. They both encompass a number of markets for money, stocks, bonds, credit, insurance, reinsurance, accounting services, legal services, indeed, regulation. And both Wall Street and the City of London are involved in all of those markets. One does not have to do much fieldwork in the City and on Wall Street, and we have not done much, to realise that these are communities in quite a serious sense.

It is disappointing that only economists seem to deploy their methods to analyse Wall Street, that we do not see more anthropologists studying the rituals and custom of the natives. Neil Gunningham[95] has completed some revealing ethnographic work on the Chicago futures exchanges and the Hong Kong Stock Exchange (that demonstrates some of the ways community is a relevant variable at these sites). Roman Tomasic and Brendan Pentony[96] have undertaken interview-based research in Australia on the culture of insider trading that reveals more the character of a casino than a community. Yet they still find some professional community among lawyers, accountants and older established brokers, and plea for renewal of ethical community. Michael Clarke[97] is doubtless right in his book-length treatment of the subject that the City of London is not the tight-knit and homogenous community of decent chaps it once was. There are women in it now. Yet the common observation in the business culture literature that the City of London is more communitarian than Wall Street is still probably true.[98]

We regard the richest ethnography of Wall Street to be the intricate account by two journalists from the *Wall Street Journal*[99] of the titanic takeover battle for RJR Nabisco. The following passage illustrates, through the agency of Henry Kravis, the investment banker who won the takeover battle, that communitarian values like healing and forgiveness are important in enabling Wall Street to work. Perhaps community is transacted in a mode that seems vulgar to non-natives, especially in the way money ceaselessly colonises the world. But we would say that those who can only read market and cannot find community in the following illustration have not learnt how to read human drama:

[95] N Gunningham, "Thinking About Regulatory Mix: Regulating Occupational Health and Safety, Futures Markets and Environmental Law" in P Grabosky and J Braithwaite (eds), *Business Regulation and Australia's Future* (1993); and "Moving the Goalposts: Financial Market Regulation and the Crash of October 1987" (1990) 15 *Law and Social Enquiry* 1.

[96] R Tomasic and B Pentony, "Insider Trading and Business Ethics" (1989) XIII *Legal Studies Forum* 151; and *supra* n.84.

[97] Clarke, *supra* n.35.

[98] See, eg, J Wechsberg, *The Merchant Bankers* (New York, Little Brown, 1966), 41; and JS Coleman, *Foundations of Social Theory* (Cambridge, Mass. and London, Belknap Press, 1990), 109.

[99] B Burrough and J Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco* (London, Arrow, 1991).

> Wall Street is a small place, and in the interests of harmony Kravis wasted no time healing wounds inflicted during the fight. He made peace with Peter Cohen at a summit in February and actually hired Tom Hill to investigate the possible takeover of Northwest Airlines ... Kravis also moved to smooth relations with Linda Robinson. Soon after the Gerstner episode, Linda took a message that Kravis had called. She ignored it. Within days she received a small ceramic doghouse with a cute note from Kravis, suggesting he was in the Robinsons' [her husband Jim Robinson, the CEO of American Express, was also involved] doghouse. Linda Robinson waited a few days, then sent Kravis a twenty-pound bag of dog food. All was forgiven. She and Kravis still own "Trillion".
>
> Fees, of course, went infinitely further toward soothing Wall Street's wounds ... Kravis even spread the largesse to those whose feelings he might have bruised. Geoff Boisi's Goldman Sachs got the job of auctioning Del Monte, while Felix Rohatyn's Lazard Freres did the same for the company's stake in ESPN.[100]

In a 1993 London interview at the Securities and Futures Authority (SFA), the following diagnosis was given of the seemingly insurmountable problems at that time of getting equity markets working in the old communist states:

> You need public spirit in practitioners. In Eastern Europe they lack this. Where do you get market-makers from? People who will buy because they reckon they can sell on. Probably the black market operator who used to operate from the corner of Stalin Avenue and Lenin Boulevard. But idealistic academics like Havel somehow think they can find Western-style ethical market-makers.[101]

In retrospect, given the virulence of the corruption of many post-communist privatisations by the Russian Mafia and others, perhaps it was Havel who was the hard-headed one. Specific lament was directed during this interview at the difficulties of making a market in shares of the Bolshevik Biscuit Factory, a challenge perhaps that would have been beyond the good Lord himself. But the basic thrust of the SFA official's account remains perceptive: You can't make markets without some sort of depth of intimate relationships that work in a locally meaningful sense in a financial community.

Wall Street and the City of London are Meccas of a global epistemic community that constitutes a culture that makes stock exchanges and futures exchanges work in other parts of the world. In many other parts of the world such exchanges cannot be made to work. One reason is that the civil societies of those nations have not partaken of the culture of the global securities epistemic community. Hence there are good reasons for a senior American diplomat to suggest in our interview with him:

> If you have on your resumé that you have worked with a reputable firm in the City [of London] or on Wall Street, that will stand you in good stead in seeking any position of power in any society. I don't care what kind of power or what kind of society.[102]

[100] *Ibid.*, at 508.
[101] *Supra* n.56.
[102] *Ibid.*

THE CONTEST OF PRINCIPLES

Transparency

Transparency is emerging as the triumphant principle in the globalisation of companies and securities regulation. Transparency was decidedly not a dominant principle during the era of British hegemony of finance capitalism. The dominance of London bankers and brokers over world financial markets in the nineteenth and early twentieth century was based on networks of experts with insider knowledge in whom people with money put their personal trust. Risk was managed by relying on a combination of the knowledge an advisor had as a member of an inner financial circle and the honour he had as a member of an inner social circle – a club, a group of Eton chums.[103] In this opaque world of inner circles the principle of transparency began to emerge for banking regulation through the medium of the British state. Stability in a monetary system is not feasible without it.

American capitalism was also networked insider capitalism. Many major companies did not release annual reports until they were forced to in 1934. Corporate affairs were regarded as private and privileged, as revealed in this interrogation of Henry O Havemeyer, head of the gigantic American Sugar Refining Company, by Thomas Phillips, a member of an ad hoc Industrial Commission set up by the United States Congress in 1899:

> Phillips: You think, then, that when a corporation is chartered by the State, offers stock to the public, and is one in which the public is interested, that the public has no right to know what its earning power is or subject them to any inspection whatever, that the people may not buy stock blindly?
>
> Havemeyer: Yes; that is my theory .Let the buyer beware ... They have got to wade in and get stuck and that is the way men are educated and cultivated.[104]

In contemporary capitalism investors manage risk in a very different way. They ask their friends and the unfamiliar person in their bank or the accountancy firm that does their tax or the superannuation officer at work to recommend an investment advisor. That investment advisor is a complete stranger and essentially does not rely on insider knowledge in telling us where to put our money. What she relies on is comparative analysis of the risks of many kinds of investments in many countries she might never have visited. If she advises us to invest in a mutual fund, her advice is based on peering at quantitative data disclosed through her computer about the comparative performance of dozens of mutual funds over a number of years, at the national and international diversification of the risks they offer, at the size and quality of the group of analysts they have pouring over their computers.

[103] Clarke, *supra* n 35.
[104] McCraw, *supra* n.42, at 166.

In short, today we rely for investment advice on a more impersonal kind of (sometimes accredited) trust than on personal trust; we rely on transparency more than on insiders with the good oil. We make transparency work for us by nesting our advice. We end up investing a small fraction of our savings in a Chinese manufacturer because a Hong Kong bank and a Shanghai analyst have both provided our pension fund or mutual fund managers a lot of promising data (audited by its American accounting firm) on the financial performance of this manufacturer, because our investment advisors have had publicly disclosed to them data on the comparative performance of this mutual fund compared to others and because we have had advice from acquaintances with experience of investment advisors that this is one with a good track record. Moreover, we continue to test her advice against the daily prognostications in the investment advice columns of the popular media and we would really jump if we read that Moody's were downgrading its credit rating. This is advice on the advice on the advice of advisors where the credibility of each layer of advice depends on audited public disclosure of financial information. Global transparency capitalism has succeeded local insider network capitalism.

Even if you have a network as good as George Soros's,[105] local insider network capitalism will no longer work for you as well as global nesting of critical analysis. However good the oil of the insider, if the local currency plummets, interest rates shift, confidence collapses in the local share market, derivatives trading spirals unpredictably, our money is unlikely to perform as well as it would if prudently hedged across investment in stocks of different markets in different currencies, across stocks, bonds and property.

Since the 1990s the investing public is a mass public in the developed economies. Insider traders, compromisers of transparency, epitomise evil to the new shareholding mass public. That is why democratic forces in the most advanced shareholder democracy – the United States – have caused it to resist global harmonisation of corporate disclosure rules that water down transparency. The Landis-FDR transparency-based regulatory policy that is responsive to American shareholder democracy is the great attractor of the financial universe that is sucking, has sucked, the rest of us into its vortex.

The decisive historical moment in the shift from insider network capitalism to global transparency capitalism was the New Deal. While other economies responded to the depression by tightening the in-house rules of their financial clubs, FDR's New Dealers were not all old boys; many like Landis were new boys. Their credo was Brandeisian fervour about sunlight as the best disinfectant. At first, Americans limited the globalising of their investment pretty much to putting their money in United States transnational corporations (TNCs) that established subsidiaries around the globe. In time, however, foreign firms realised that they could attract American capital if they played the game in compliance with American rules. That meant disclosure of a lot of financial

[105] G Soros, *The Alchemy of Finance* (New York and Chichester, J Wiley, 1994).

data, checking of that data by outside directors who sit on a Board Audit committee, and most importantly of all, external audit by a major American accounting firm. Foreign firms who do that to a satisfactory level may attract investment from United States mutual fund managers, takeover bids from United States TNCs, and if they do it to an exemplary level, listing on the NYSE.

These American fund managers have been the knights on white chargers of transparent capitalism, Brandeisian crusaders who have invaded the temples of infidel money changers, making public their secrets. Rather than overturning their money tables, they have hung an American Express logo on them and put PricewaterhouseCoopers on their prospectus. The potential of American capital investment caused them to securitise their money changing business, incorporating in compliance with American standards as well as local ones. If American fund managers and the NYSE started as the great attractors for the securitisation and corporatisation[106] of the world, European and Asian fund managers soon acted on the benefits of focusing their attention on transparent foreign firms audited to American standards rather than to their own national standards.

The securitisation and corporatisation of the world was not limited to foreign private firms. In the 1990s foreign states with airlines, health care systems and telecommunications systems that were strapped for capital, securitised and corporatised major slabs of the state itself. In doing so, foreign states had to submit that part of their activities to American regulatory standards, especially with respect to transparency.

The final collapse of the British gentlemen's club model of capitalism was symbolised by Nick Leeson, a boy from Watford, sufficiently trusted that he could secretly trade into liquidation the merchant bank rivalled only by Rothschilds in its importance to the building of British capitalism, a house so powerful that in the nineteenth century the Baring Brothers were often referred to as the "sixth great power" in Europe.[107] Barings had collapsed once before in 1890, but then it had been saved by the city, led by Lord Lidderdale, Governor of the Bank of England, and with the help of the Rothschilds.[108] This time round Barings went under because global transparency capitalism was resilient enough to withstand the shock of its departure, a departure the City could not

[106] By no means does all or most securitisation involve corporatisation – the formation of new corporations. Eg, the securitisation of banking creates new classes of bondholders rather than new corporations. These bondholders acquire tradable securities in illiquid assets of the bank, such as mortgages. The bank pools, unbundles, repackages and refinances the mortgages into securities that investors can buy on capital markets. What they buy is a share in the value of the income flow due to the bank from the pooled set of mortgages. In this process something that is basically untradable, an individual loan backed by a bit of dirt, is pooled with millions of others to become a mortgage bond, itself an abstract object represented by a piece of paper that can now be bought and sold by large institutional investors in the bond markets of the world.

[107] P Ziegler, *The Sixth Great Power: Barings 1762–1929* (London, Collins, 1988).

[108] G Davies, *A History of Money* (Cardiff, University of Wales Press, 1994), 348.

have withstood a century earlier. In a television interview after the Barings collapse, Nick Leeson said that the house of Morgan and its auditors would never have allowed him to get away with the kind of massive covert trading in derivatives he managed at Barings.

In fact, it was this American merchant banker who in October 1994 did something extraordinarily significant. J P Morgan released for general use its own proprietary risk management model, RiskMetrics, accompanied by the data set on the volatilities of different types of financial products used with the model.[109] As a big player, J P Morgan realised that it was in a community of shared fate with smaller players (like Barings) that used less sophisticated risk management techniques than RiskMetrics. A major financial collapse that would effect the confidence of all might occur unless the risks of derivatives trading became more transparent. Trading in derivatives does not generate new kinds of risks, but risks that can get out of hand with a rapidity obscured by the complexity of secondary markets. Primary markets in shares in contrast are transparent and move with a speed that can be observed, as it were, with the naked eye.

Transparency capitalism depends on the value and risks of tradable assets being visible to the internal management of traders, their auditors, regulators, analysts, fund managers, rating agencies and investment advisors, if not ordinary shareholders. In the case of Barings, the risks of Nick Leeson's billion dollar losses were visible to none of these players. At the very moment of the total triumph of global transparency capitalism, the complexity of the financial products its screen-based investment has spawned seem to beckon investors back to the security of local insider network investment. J P Morgan has put its systemic interest ahead of its proprietary interest. We see a direct analogue where the nuclear industry shared their proprietary risk-management systems when they realised after Three Mile Island and Chernobyl that another disaster would cause the demise of the entire industry. Nuclear technology and the risk-engineering technology of derivatives trading both create a community of shared fate among all participants in the industry when misuse of the technology risks systemic collapse.

Contemporary capitalism is an information capitalism wherein market dominance arises from the control of abstraact objects like intellectual property more than tangible property. J P Morgan is a classic instantiation of information capitalism – a major economic force that owns no factories and little land, wealth based on knowhow in trading on financial markets. This is why it is so extraordinary that J P Morgan should give away a significant part of the information on which it flourishes. It did this because we live not only in an information society but also in a risk society[110] where the wealth born of being more sophisticated analysts of information is also vulnerable to systemic risk.

[109] R Dale, *Risk and Regulation in Global Securities Markets* (Chichester and New York, J Wiley, 1996), 165.

[110] U Beck, *Risk Society: Towards a New Modernity* (London, Sage Publications, 1992).

IOSCO, the Basle Committee, and all securities and banking regulators realise that they must reach global agreement on how to mandate risk monitoring and risk reporting of derivatives trading through regulation. The industry realises that up to a point it must share risk control technology globally. Risk spreading and global growth via diversification into off-shore investment can be facilitated by mandating off-shore compliance with international accounting standards. But it will backfire if foreign firms cultivate their own Nick Leesons who lose money they do not own through derivatives trading between audits. The regulatory challenge here is enormously difficult, as Susan Phillips of the United States Federal Reserve Board has pointed out: "with derivatives and highly liquid securities, risk profiles can change drastically not only day to day, but hour to hour and minute to minute".[111]

Regulators also must acquire great wisdom in choosing when to abandon a presumption in favour of requiring transparency of risk. If a securities trader linked to a bank (a bigger one than Barings) suddenly got into trouble through risky derivatives trading, there can be a case for the regulator to keep the lid on this, to prevent a run while the bank is given a chance to trade its way out of difficulty .There is a place for both crisis prevention through a transparency that scares investment away from unacceptable risk and crisis management that brings down the shutters when transparency has failed. Crisis prevention through transparency is the more important side of this coin. Alan Greenspan, Chairman of the United States Federal Reserve Board, has outlined what confronting it might mean for regulators:

> ... regulators would specify the magnitude of the market shocks that they expect banks to be able to withstand. The banks would then use their internal models to simulate the effects of such shocks on the market value of their trading portfolio. Banks would then be expected to maintain adequate capital to withstand the declines in market value produced by the specified market stresses. Examiners would assess the adequacy of the models and related internal controls and allow this approach only if the models and internal controls met or exceeded specified standards.[112]

A working group of the Euro-currency Standing Committee of the G-10 (the Fisher Report) has recommended that financial institutions should be required to disclose publicly their internal risk management system and the information generated by it.[113] This amounts to regulatory mandating of the step J P Morgan took voluntarily. The attraction of this proposal is that it would not only improve the dynamic assessment of risk by the market and create a market incentive to have the best risk management systems, but it would also foster learning from those with the best systems. It would be a step to seize the intellectual property rights of financial risk managers that perhaps could only be taken globally: nations could not be expected to force their traders to disclose

[111] Quoted in Dale, *supra* n.109, at 171.

[112] *Ibid.*, at 167.

[113] *Ibid.*, at 170–1.

knowhow to foreign competitors unless the competition were required to do the same.

All IOSCO Working Groups are in some important sense concerned with an international convergence of standards that assure transparency. In addition there is a Working Group on Disclosure that is dedicated to the development of a set of General Minimum Disclosure Standards.

Mutual recognition, national sovereignty, harmonisation

Up to a point mutual recognition of corporations chartered in other countries has always been a fact of life. Whenever a ship owned by a foreign corporation sails into a port and an officer of the corporation goes ashore and buys something on behalf of the corporation, the actor has been constituted as an actor under another nation's law. Domestic law for many purposes can hold individuals liable when they act for a foreign corporation; domestic registration can be required before certain activities are undertaken. But early on nations realised that it was not necessarily practical to require a visiting Pope to reincorporate the Catholic Church domestically before he was allowed to act on its behalf. We could not begin to survey the differences among national laws in the extent and circumstances in which foreign incorporation is recognised. But to our knowledge there is no state without some degree of mutual recognition of incorporation elsewhere.

Mutual recognition has been an important principle in North American securities regulations and also between Australia and New Zealand. In 1987 the latter two countries agreed that a prospectus prepared under the law of one jurisdiction could be accepted in the other. The European Community has through its system of Directives been the main exponent of harmonisation of securities regulation. At the same time, states have been jealous of their sovereignty to incorporate on their own terms domestically and to demand that firms incorporated elsewhere at least register locally before they trade to locals. Efforts to harmonise companies and securities law have been very recent and, apart from within the European Community, have so far amounted to little. In short, harmonisation has been a late and limp ideal.

Many of the world's stock exchanges have been fairly relaxed about recognising one set of standards for domestic listings, with recognition of different standards for foreign listings. This does not mean they have been attracted to "anything goes" for foreign listings, rather to particularistic judgments of how much elasticity of mutual recognition is justified in a particular case.

Lowest cost location v competitiveness, deregulation

Lowest cost location is seen to be a major issue in the corporate law literature because of the Delaware phenomenon in the United States. Delaware attracts a lot of out-of-state incorporation because of its lower costs. There is, however,

little evidence of this happening in other federal states and the European Community.[114] Internationally, if firms incorporated and listed on exchanges where costs, particularly demands for disclosure, were lowest, they would all do so in developing countries. On the contrary, what most do is incorporate and list domestically. When they want to list internationally in order to get access to foreign investors, they pursue this objective by listing on exchanges that lend them maximum credibility in the eyes of foreign investors. Listing in New York brings most credibility. Passing the test of the most stringent listing requirements constitutes maximum competitiveness in pursuit of foreign investment. Hence, competitiveness is clearly the more dominant principle than lowest cost location. In an interview at the NYSE a senior official told us that the NYSE takes the view that "higher standard regulation draws a lot of business".[115] When one of us pressed him on this, suggesting that competition amongst stock exchanges might drive down standards, he disagreed, pointing out that the United States initiative on insider trading had not resulted in trading moving off-shore.

That said, NYSE rules, particularly on disclosure, are far too demanding for most German or Chinese companies. Many of the German companies can be comfortable with disclosure to the standards required by the LSE, however. If the costs and openness demanded in London are still too high for most large Chinese companies, the competition for their listing might occur between the Hong Kong and Singapore exchanges. That competition is not a lowest-cost race-to-the-bottom competition. It is niche competition for a middling level of market credibility – lower than New York, higher than Shanghai.

There are corporate law havens where incorporation can be bought off the shelf for a pittance with no questions asked. This is a different niche market again. Its market is to serve those who seek to avoid domestic taxes by locating off-shore, to obscure movements of assets, to create a complex round robin of holding companies to conceal a fraud on shareholders or creditors, or some other form of law evasion. In the words of one of our interviewees there are always some activities that people "will want to do in the dark" (interview at NYSE, 1994).[116] What we have in the world system then is niche competition, essentially between New York and London for high-credibility, high-cost international listing; niche competition between exchanges with middling credibility (say Singapore versus Hong Kong); and niche competition at the bottom of the market for lowest cost off-shore incorporation of non-listed companies.

The high watermark of deregulation in companies and securities law was the nineteenth century. By then most monarchs had liberalised their prerogatives to dictate the terms of corporate charters. Incorporation took off when firms were

[114] R Romano, "Explaining American Exceptionalism in Corporate Law" in J McCahery, W Bratton, S Picciotto and C Scott (eds), *International Regulatory Competition and Coordination* (Oxford, Clarendon Press, 1996).

[115] *Supra* n.56.

[116] *Ibid.*

free to incorporate for any business purpose. The Great Depression saw a triumph of state regulation over the principle of deregulation. This triumph was never really reversed in the supposed heyday of Reagan-Thatcher deregulation of the 1980s. Ronald Reagan's transition team found the SEC in 1980 to have a "deserved reputation for integrity and efficiency, [it] appears to be a model government agency". Indeed it was during the 1980s that the handcuffs were out on Wall Street more than during any other period of regulatory history.[117] Particularly after the crash of 1987, while there was some deregulation, there was more tightening of standards globally to some degree.

Strategic trade, national treatment, most favoured nation, reciprocity

Strategic trade has never been an important principle in companies and securities law. This is the prescription of designing the content and stringency of regulation so as to advantage national over foreign firms. Sometimes this principle arises in faint form as in the content of simultaneous multinational securities offerings. Here the fear in the United States is that foreign issues of multinational stock will divert business from United States issuers in United States capital markets. The prescription is sometimes argued to be that national regulation should not encourage the emergence of such offerings. To some extent, as we have seen, exchanges have given domestic investors ready access to certain foreign firms by being less demanding of the foreign offerors. The content of corporations and securities law has not been contested terrain in trade policy. For this reason, the trade policy principles of national treatment, most favoured nation and reciprocity have never played a significant part of the contest of principles fought around the companies and securities law-making of any nation we know.

Rule compliance v continuous improvement

We have not encountered a company law text that discusses the principle of continuous improvement – the prescription of doing better every year than the previous year in terms of a regulatory objective, even if the requirements of the law were exceeded in the previous year. The job of company lawyers is mostly seen as advising clients in what we have defined as the principle of rule compliance: the prescription that companies ought to see legality as exhausting their obligations; to go as far as the rules require, but no further. Whereas one can see the contest with environmental law as between rule compliance and continuous improvement, in company law the contest is really between the notion that lawyers should advise clients how to comply versus advice on how to avoid or

[117] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press, 1992), ch 1. See also Organisation for Economic Co-operation and Development, *Securities Markets in OECD Countries: Organisation and Regulation* (Paris, OECD, 1995).

evade. One exception in the literature is *The Stakeholder Corporation*[118] that argues for continuous improvement in transparency and public reporting and that empirically there has been a global shift toward increased accountability.

MECHANISMS OF GLOBALISATION

Military coercion, economic coercion, systems of reward

While some American companies and securities law concepts were put in place during the occupation of Japan after World War II, these were not dictated as terms of post-war reconstruction in the way that a competition law that would break up the *zaibatsu* was dictated. British companies and securities law came to its colonies mostly as a matter of the choice of legislatures in those colonies late in the colonial experience rather than as laws that displaced indigenous law at the time of conquest. Military coercion was therefore not an important mechanism of globalisation.

Given that corporations and securities law has not been an important focus of contest in trade diplomacy, states have not sought to globalise such law through threat or use of economic sanctions or systems of reward.

Modelling

Double-entry bookkeeping and limited liability ultimately acquired legislative vindication, but their global spread was more a result of modelling custom than modelling law, at least with the former. We have seen that the LSE was the crucial model during the nineteenth century when hundreds of stock exchanges opened around the world. Again, rarely was the setting up of a stock exchange the result of a state legislative enactment. Nor is it quite right to describe it in Hayekian terms as spontaneous ordering. A stock exchange is an elaborate self-regulatory regime that came to most of the world with a rulebook copied or adapted from London. It globalised because business people in all centres where capitalism flourished – from Charters Towers to Bombay – wanted to organise themselves to raise capital and invest it.

The modelling of the SEC as a regulatory institution, shifting company law back into the public law domain from the domain of private law where it languished during the centuries of liberalisation of corporate chartering, was in contrast a modelling of law rather than a modelling of custom (that was later codified). Though more than just law in the books was modelled from the SEC; there was also modelling of the enforcement strategy and administrative practice initiated by James Landis. An explicit mechanism for this modelling has

[118] D Wheeler and M Sillanpää, *The Stakeholder Corporation: A Blueprint for Maximising Stakeholder Value* (London and Washington DC, Pitman, 1997), 340, 182.

been the bilateral MOUs the SEC has signed with many other national regulatory authorities since the 1980s. It has been the SEC that has been the initiator of these MOUs. Later IOSCO has helped to facilitate their spread. The MOUs oblige, but do not legally bind, national regulators to share intelligence, conduct surveillance in global markets at the request of their partners and conduct investigations for the foreign partner where their powers allow.

In the case of insider trading, United States diplomatic pressure was deployed, quite determinedly in cases such as Japan, for the modelling of a law that only the United States had for many years. But most of the concepts in the British and United States companies and securities laws of the 1929–1934 period were widely modelled without any diplomatic pressure to do so. While companies and securities laws differ in very important ways, the more striking fact is that comparative surveys of the law such as those of Robinson and Euromoney Publications[119] can be laid out with a comparative index covering a common set of basic concepts. Boards have different structures in different legal systems, but all legal systems have them, and there is much in common in directors' legal duties. The voting rights of shareholders vary a lot; yet there is certainly less variation in how to elect company directors than in the way citizens of the same countries elect their governments. Universally there is a concept of annual reporting based on a European calendar, something that was not even universal within the United States before 1934. There is a surprising globalisation of usage of technical concepts like incorporation itself, the debenture, the takeover announcement, the prospectus.

The main divides found by Wood[120] in a global survey of financial law heavily weighted to the consideration of corporate bankruptcy were:

- a Common Law Group of states that accounts for a surprisingly high thirty three per cent of the world's population (subdivided into a Traditional English Group of the nineteenth century British Empire and an American Common Law Group that includes Liberia and ten small Pacific states);
- a Traditional Franco-Latin legal framework (about twenty per cent of the world's population, including France, Spain, Portugal, and their former Empires covering nearly all of Central and South America, most of Africa and some of the Middle East and the Pacific, Belgium, Bulgaria, Romania and Greece);
- a Germanis and Scandinavian Group that accounts for seven per cent of the world including Germany, Indonesia, Switzerland, Poland, Taiwan and Scandinavia;
- a Mixed Franco-Latin/Germanic Group that includes Italy, Denmark, Thailand, Louisiana, the Philippines, Turkey, Austria (Hungary) and much of its former Central European empire (six per cent);

[119] MJ Robinson, *International Securities: Law and Practice* (London, Euromoney, 1985); Euromoney Publications, *International Securities Law* (London, Euromoney, 1992).

[120] PR Wood, *Maps of World Financial Law* (London, Allen and Overy, 1997).

- a Mixed Roman and Common Law Group that includes Japan, South Korea, Quebec, Scotland, Sri Lanka, South Africa and a number of other African states (five per cent); and
- an Islamic Group of seven Middle Eastern jurisdictions (one per cent).

Almost thirty per cent of the world's population lived in "Emerging" or unclassified jurisdictions, mostly former communist states, the most important being China and Russia: "It is probably too early to say which of the other groups they will join, but most appear to be leaning towards the Germanic and Scandinavian group (especially China)."[121] What is noteworthy about this interesting exercise of global mapping of financial law is that ninety nine per cent of the modelling is of a Western European model. The exception is the small Islamic Group, but even here it is noteworthy that Egypt, Iran, Iraq, Jordan, Lebanon, Syria, the United Arab Emirates, Algeria, Morocco and Libya are members of the Traditional Franco-Latin Group rather than the Islamic Group.

Western European modelling of securities law was assisted by the fact that most non-Western exchanges were run by European brokers. For example, all ninety five stockbrokers operating in China in 1914 were European, seventy two of them British.[122] Exceptions where the membership of exchanges was mainly native were the Bombay and Japanese exchanges, but even here the self-regulatory framework of the exchanges was European/North American.[123] There are significant elements of regional modelling as well. For example, the Singapore Companies Code is partly based on Australian company law and there have been some Australian influences on Malaysian, Melanesian and Indonesian corporate law, the education of key drafters in Australian law schools being a factor here.

Since the New Deal, modelling has predominantly emanated from concepts forged in Washington and New York. Consider the important instance of Board Audit Committees. The innovation begins in 1940 when the SEC recommended a Board Audit Committee of Outside Directors at an administrative hearing where it found audited financial statements prepared by Price Waterhouse for the pharmaceutical company McKesson and Robbins to be false and misleading.[124] For the next three decades the SEC only very sporadically and informally encouraged companies to have Board Audit Committees. In 1967 the American Institute of Certified Accountants responded to a wave of concern over the question of director liability by recommending Audit Committees. A special

[121] *Ibid.*, at 8.

[122] R Michie, "Different in Name Only? The London Stock Exchange and Foreign Bourses, c.1850–1914" in RPT Davenport-Hines and G Jones (eds), *The End of Insularity: Essays in Comparative Business History* (London, Frank Cass, 1988), 49.

[123] JA Sarna, "Japan and Insider Trading: Some Problems when there are Different Definitions of Right and Wrong" (1990) 14 *ILSA Journal of International Law* 67.

[124] JJ Samet and JA Sherman, "The Audit Committee: In Search of a Purpose" (1984) 7 *Corporation Law Review* 43.

committee went further in 1978 recommending Audit Committees as a condition of audit, a recommendation not accepted by the membership.

From 1974 the SEC began more formally to encourage the use of Audit Committees by requiring disclosure under the Securities Exchange Act 1934 of the existence or lack thereof of a standing Audit Committee. In 1978 the NYSE took the more potent step of requiring an Audit Committee as a condition of listing on the exchange. Non members of the exchange in the United States complied with the requirement as well because they assumed the courts would interpret the NYSE policy as establishing the standard of responsible behaviour now expected.[125] More significantly, major accounting and law firms recommended it to their clients; it became part of the standard of responsible professional conduct that protected them from negligence suits by recommending it, indeed urging it. The United States accounting and law firms applied this policy not only within the United States but globally to their large corporate client base. In many, if not most, countries whatever the major American accounting firms define as responsible professional behaviour in the accounting industry tends in time to become so defined by the domestic industry. Certainly this has been true in respect of the globalisation of Audit Committees of Outside Directors during the 1980s and 1990s.

In sum, the mechanism of modelling instantiates the principle of transparency; it helps to forge a United States style transparency capitalism based on the idea that "more information is better for most people" (1994 NYSE interview).[126]

Reciprocal adjustment, non-reciprocal coordination

Finally there is substantial evidence of reciprocal adjustment occurring, at least in respect of internationally agreed accounting standards, after centuries of indifference to this principle. IOSCO is historically a comparatively recent institution for fostering reciprocal adjustment. Again, because the hegemonic states have basically not cared whether other states modelled their companies and securities laws (except within the European Community), because they have never loomed as significant in GATT negotiations, there is no evidence of the mechanism of non-reciprocal coordination being in play. We know of no case where one state has changed its corporations law in response to a trade or other benefit offered by another state in some unrelated policy domain.

Capacity building

Capacity building is a mechanism of globalisation of only small significance. IOSCO has a Development Committee to assist emerging markets. It puts a

[125] *Ibid.*, at 46.
[126] *Supra* n.56.

dozen or so developing country regulators through an on-the-job training program each year. The 1993 IOSCO budget for this work was a meagre $20,000. France, Britain, the United States and the European Community also contribute to training developing country regulators, but only in a modest way. The SEC effort is not trivial, however. It runs an annual two week training program at the SEC for about thirty regulators from developing securities markets. Most of the investment across all these programs in recent years has gone to post-communist societies.

CONCLUSION

The globalisations of several regulatory innovations have been responsible for the rise and rise of the corporation as a twentieth century transformation of the world to rival in importance the rise of the nation state in the Middle Ages. By the end of the twentieth century many of the things that were once monopolies of either family or state are now done by corporations: child care, cooking, policing, imprisonment, rail transport, telecommunications, entertainment, water supply, electricity, even to a considerable extent the very regulation of incorporation that has been constitutive of this takeover.

An Italian legal innovation that globalised was required to facilitate this growth – the idea of a corporation as a *persona ficta* that could own land, for example. An Italian accounting innovation – double-entry bookkeeping – was essential to the separation of ownership and control, of monies due to investors and managers, that was vital to the globalisation of the business corporation. Limited liability (probably Arab), securitisation (Neapolitan) and the stock exchange (Dutch) were institutional innovations which globalised in a way that enabled the business corporation to spread.

Technological innovation – the telegraph, telephone, ticker tape and computers – centralised efficient market-making for securities in dominant metropolitan exchanges. Communication and processing of financial information became so efficient that an unimagined variety of new assets were securitised. Where once the retail stores where we shopped were owned by families, now they are corporations that build shopping centres with money supplied in small parcels by shareholders. Owners of large assets like shopping malls learnt that they were worth more if they were securitised, because there was more demand for a piece of a high quality asset than for buying it in one big lump, because investors wanted to spread risks and have a liquid asset that could be traded on a day's notice. Just as the private individual who owned a large asset found it was worth more to ten thousand shareholders than to a single buyer of the lumpy asset, so states learned that tradable fractions of the state were worth more to shareholders than they were to the state. As a consequence large slabs of states have been securitised, expanding the dominion of corporations and markets. This lesson was the obverse of the lesson of three centuries earlier that national

debt could be sold at lower interest rates by breaking it up into bonds than by selling it in one lump to family bankers, like the Fuggers, as they previously had done.

As a result of these changes, the state itself became subject to the regulatory imperatives of a corporatised, marketised world. States were no different from other borrowers and issuers of securities in requiring a credit rating by corporate risk-assessors – rating agencies such Standard and Poor's and Moody's. It follows that we cannot understand the globalisation of the regulation of corporations and securities as public or state regulation. Our understanding must be more reflexive than that because the state itself is object as well as subject of the global regulatory transformation. Moreover, our analysis suggests that the self-regulatory activities of the NYSE may have more profound effects on the regulation of major foreign corporations than their own states. The expectations for financial disclosure it transmits through the agency of large American accounting firms with their branches everywhere are important even for stock offerors with no interest in listing on the NYSE. Wall Street not only makes the most important markets, it also makes the regulatory framework for many of the less important ones.

Through their reflexive operation, the processes of corporatisation and securitisation ratchet up levels of transparency. Privatisation around the world builds listings. The NYSE gets the cream but the total pool also increases. Other stock exchanges also pick up listings. Emerging stock exchanges around the world experience an expansion and this changes the nature of their market operation. Their growth forces them to reassess their practices. They move closer to New York's standards because they are growing and want to keep on growing. And more than ever before the NYSE cannot lower its standards.

Our story has been one of triumph of the United States model of regulated transparency, progressive securitisation of the world on terms that will attract United States purchasers of securities. A "big four" accountancy firm audits the privatised Chinese widget manufacturer not because that is what the Chinese state wants, not because that is what the United States state wants (though the SEC applauds). It happens because United States investors want the auditor to be a transmission belt for United States regulatory standards that they long since forced upon United States companies through the agency of the United States Congress, the SEC and the NYSE. United States investor demand for United States regulatory standards apply whether the United States investors are institutional or retail, whether the investment occurs inside or outside the United States. European and Japanese institutional investors, by contrast, do not care for United States disclosure requirements for their domestic investment; at home they have a comparative advantage over American capital because they have insider understanding of local risks and opportunities. When they spread their risks into offshore investment, they too quite like United States-style investor protection before they put their toe in the water.

The big picture of the history of the twentieth century in this account is that

every nation in the world corporatised and securitised, some more completely than others. But all have their credit rating set in New York. The decisive historical moment in this process is the New Deal. The decisive regulatory idea is transparency, demanded of United States security markets by the SEC, later to be transmitted by the NYSE and American accounting firms as a global regulatory ideal when investment globalises. Neither IOSCO nor any other international institution is a central actor in this process, though IOSCO became more important after the Barings fiasco dramatised the risks of insufficiently transparent derivatives trading. Modelling by actors who want to flourish in the face of global market imperatives – states, corporations, self-regulated exchanges, IOSCO itself -is the key mechanism of globalisation.

Of course, economists would say that the market is the key mechanism. And it is true that one reason the institution of the stock exchange has globalised is because it works in satisfying actors' economic interests. Yet the evidence suggests it to be a false theory that stock exchanges will spontaneously organise wherever they are functional for capital formation. Many places in the world are quite incapable of market-making; at some point in history all places were incapable of doing so. Securitized, corporatised capitalism might have taken off in Italy, Spain or Poland centuries earlier than it did.[127] The knowhow, starting capital, banking infrastructure and economic interest were no less accessible in such places than in England. Indeed, why not go back further and ask the same question about China, given its greater economic development than England until the last few centuries, or the Arab world which invented the numeration system, the *commenda*, even the steam-powered turbine[128] a millennium or more before England made so much of these innovations.

Our account is that to understand the corporatisation and securitisation of the world by the modelling of London and New York we need to understand the way specific entrepreneurial actors kept innovating, building one institution on another (for example, a futures (secondary) market on top of a primary market), taking non-tradable assets and turning them into tradeable ones (for example, the mortgage bond market) and on and on. This requires more than a

[127] F Braudel, *The Perspective of the World: Civilization and Capitalism 15th-18th Century*, Vol 3 (trans S Reynolds, London, Collins, 1984), 91:

Paul Grousset ... claimed that "contemporary capitalism has invented nothing". Armmondo Sapori is even more explicit: "Even today, it is impossible to find anything – income tax for instance – which did not have some precedent in the genius of one of the Italian republics." And it is true that everything seems to have been there in embryo: bills of exchange, credit, minted coins, banks, forward selling, public finance, loans, capitalism, colonialism – as well as social disturbances, a sophisticated labour force, class struggles, social oppression, political atrocities.

One might add to this list holding companies, which were invented in Florence: Braudel, *ibid.*, at 128. Flourishing capitalism is based less on original invention than on appropriating and institutionalising the inventions of others – witness Japan. Even blast furnaces and mining techniques fundamental to English industrialisation were appropriated purposively from more technically advanced Germany by importing Germans with the knowhow: *ibid.*, at 552.

[128] Braudel, *ibid.*, at 543.

market. The market is constituted by an epistemic community hospitable to entrepreneurship and by institutions that are constitutive of more elaborated institutions. These institutions by our account are created by purposive action, not just because they are functional. Most importantly, regulatory institutions, not just laws, but the customs of the LSE or the *lex mercatoria* are constitutive of abstract objects like corporations and securities that transform the whole world. Entrepreneurial lawyers in this story are not passive agents waiting on instructions from the powerful, nor are they superstructural dupes in the vulgar Marxian sense. They forge structures actively by selling ideas like the *persona ficta,* the securitisation of the national debt, intellectual property protections and poison pills to Popes, potentates, princes, parliamentarians and monied principals.[129]

Understanding purposive entrepreneurship at the centre as appropriating ideas like limited liability from the periphery is not enough for understanding the corporatisation and securitisation of the whole world. To understand that, we also need a theory of modelling from centre back to periphery.

[129] Powell, *supra* n.60. See also M Cain, "The Symbol Traders" in M Cain and C B Harrington (eds), *Lawyers in a Postmodern World* (New York, New York University Press, 1994); and D McBarnett, "Outlining a Theory of Legal Practice" in Cain and Harrington, *ibid.*

2

Enterprises and the Constitution of the World Economy

JEAN-PHILIPPE ROBÉ

INTRODUCTION

Notwithstanding globalisation, the traditional concept of state sovereignty is still perceived as a cornerstone of the institutional system of exercise of power in the world economy. Whatever the reduction of the states' autonomy in a globalised world, the state is still treated in legal theory as a sovereign with an independent capacity to regulate the objects falling under its jurisdiction. One is forced, however, to recognise as a matter of fact that in a globalised economy the margin of action of the state is rather limited. Let any given state adopt norms impacting on the economy (the setting, for example, of minimum salaries, safe working conditions, strict environmental regulations, and so on) against the stream of what is being done in competing states and enterprises located on its territory will be in an unfavourable competitive position in global markets and/or will "delocalise" to find in other locations more favourable "supplies" of legal norms. Fearing these negative consequences of their regulatory activity, states are hindered to adopt independent norms by the existence of an open economy which therefore constrains them. In the traditional legal analysis, this situation is a mere *fact* of no impact on the attribution of the sovereign power to regulate given by *law* to the institutions of the state. One would have to accept that there is a loss of effective power of no consequence for the traditional understanding of legal ordering, for which the state remains "sovereign" whatever its incapacity to exercise its formal competence.

This chapter will try to demonstrate that one may not understand or act upon a globalised economy without taking into account the autonomy benefiting enterprises in liberal legal systems and drawing the appropriate conclusions for the understanding of *legal ordering*. The traditional analysis neglects the fact that companies, especially large ones operating on a global scale, have such power and such a degree of autonomy, both from individual rights holders and from public institutions, that they can not be neglected in the study of the effective functioning of the *legal* system existing in the world today. My thesis is that globalisation gives us the opportunity to better understand the pluralist nature of legal ordering in a liberal society, and to draw the appropriate conclusions for