Securities Regulation By Enforcement: An International Perspective

Paul G. Mahoney†

Harvey Pitt and Karen Shapiro present a comprehensive review of the Securities and Exchange Commission's regulatory and enforcement activities during the past decade and discuss the use of *ex post* enforcement actions as a means of controlling the behavior of market participants. They note several dangers inherent in the use of enforcement actions to regulate behavior, such as the absence of sufficiently precise definitions of the prohibited activities and the lack of procedural safeguards associated with the formal rulemaking process. Because Pitt and Shapiro generally support comprehensive regulation of the financial markets, however, they stop short of raising a more fundamental concern—that the use of enforcement actions to define prohibited conduct short-circuits debate over whether the conduct should be regulated at all.

In the United States, because the Securities and Exchange Commission (SEC) is generally perceived as a model regulatory agency and perhaps because there has been no repeat of the economic conditions that led to the adoption of the federal securities laws, there has been little debate over the structure of securities regulation—a debate that, in this author's view, is long overdue. As the securities markets become increasingly international, however, that debate may take place on a global stage, with the SEC's view being only one of many, and the outcome not necessarily the triumph of the American model. As the flow of investment across

†Associate, Sullivan & Cromwell, New York, New York. J.D., Yale Law School, 1984. Mr. Mahoney was a law clerk to the Honorable Ralph K. Winter, Jr., Court of Appeals, 2d Circuit (1984-1985) and a law clerk to the Honorable Thurgood Marshall, U.S. Supreme Court (1985-1986). The views expressed in this Comment are solely those of the author.

2. See, e.g., id. at 206-07.
3. See, e.g., sources cited id. at n.27 and accompanying text.
4. Throughout this Comment, "the American model" will be used as a shorthand for the regulatory structure embodied in the Securities Act of 1933, 15 U.S.C. § 77a-77aa (1988), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78ll (1988). The fundamentals of this structure include mandatory registration with a governmental agency of public securities issues, a mandatory disclosure system, issuer liability for material inaccuracies in registration statements and offering documents and for failures to register, broad anti-fraud and anti-manipulation provisions, and government oversight of brokers, dealers, securities exchanges, and other market participants.
national borders has increased, the SEC has sought to avoid such a conflict by arguing that more uniform regulation of international markets would benefit investors. It is clear, moreover, that the uniform system the SEC advocates is one patterned on the American model.

Pitt and Shapiro treat these efforts to achieve convergence of regulatory approaches as a sensible development unrelated to their broader theme of regulation by enforcement. The two phenomena are related, however, and are likely to become more so. In the international context, the SEC faces genuine disagreement over the value of the American model of securities regulation and therefore has an incentive to use its enforcement authority whenever possible both to control behavior in the international marketplace and to gain leverage with foreign regulators.

This Comment will present a less harmonious picture of the relationship between the SEC and foreign regulators than does Pitt and Shapiro’s view. Part I will briefly discuss the growing internationalization of the securities markets and will argue that the convergence of international securities regulation may serve the interests of the SEC more than those of foreign securities markets or of investors. Part II will discuss the SEC’s response to internationalization, focusing on its use of persuasion and enforcement mechanisms to further the SEC’s own goals for international regulation. The Comment concludes by arguing that rather than pursuing uniformity, the SEC should be more attentive to the lessons that other regulatory systems may hold for United States securities regulation.

I. The Growth of International Markets

Cross-border trading of securities has increased dramatically in the past decade. The market for debt securities of blue chip corporations is truly international. Well-known U.S. issuers raise debt capital with ease in the relatively unregulated Eurodollar market, and major foreign corporations that are willing to bear the

5. Pitt & Shapiro, supra note 1, at 216-17, 242-43.
6. The U.S. dollar-equivalent amount of capital raised in the Eurobond market rose from $18.8 billion in 1980 to $175.6 billion in 1988. See The Euromarket in Figures, 1963-1989, Euromoney, June 1989, at 163, 166. Three years ago the Director of the SEC’s Division of Market Regulation noted that “with respect to primary offerings there is a genuine international market in debt. For the major United States foreign corporations it is a matter of indifference to them where they raise their money with respect to debt.” Ketchum, The Role of the Securities and Exchange Commission in Regulating International Securities
expense of compliance with the U.S. securities laws can tap the vast resources of the U.S. capital markets as well as other external markets. International equity trading has also expanded greatly. Both the purchase of U.S. equity securities by foreigners and the purchase of foreign equities by U.S. buyers have increased by approximately a factor of twenty over the last ten years.

It is important to note that this growth did not come about through foreign regulators abandoning their own regulatory systems in favor of the American model and consequently reaping the benefits of increased investor confidence. Different countries maintain very different standards of accounting, disclosure, and market regulation. Furthermore, the principal regulators themselves vary, and include central banks, stock exchanges, self-regulatory organizations, and specialized agencies such as the SEC. The United States maintains securities regulations that are generally stricter and more vigorously enforced than the securities laws of other major markets.

The most plausible explanation for the failure of the major securities markets to adopt regulations patterned on the American model is that investors have not demanded them as a precondition of committing funds, even as internationalization has increased the number of competitors for investors' capital. The Eurobond market


10. See Karmel, Can Regulators of International Capital Markets Strike a Balance Between Competing Interests?, 4 B.U. INT'L L.J. 105, 105 (1986) ("International securities markets have grown to be as large and vibrant as they are in part because the participants in those markets are not interested in regulation"). It is only fair to point out that, in Professor Karmel's view, investor confidence will not be maintained in the long run without effective regulation.
is instructive. It developed precisely in order to avoid regulation
and taxation. Changes in the United States tax code, however, have
diminished the tax advantages for foreigners of investing in a
Eurobond as opposed to a security of the same company issued in
the United States. The yields on Eurobonds have generally been
less than the yields on comparable SEC-registered securities, but the
difference is decreasing as the tax differentials erode. All other
things being equal, however, investors in Eurobonds should demand
a greater yield to compensate for the lack of SEC registration if
those investors believe that registration benefits them. While it is still
not quite possible to conclude that all other things are equal, the
evidence available from the Eurobond market at least suggests that
investors do not attach any significant value to SEC registration.

Perhaps even more interesting is the willingness of U.S. investors
to withdraw money from the U.S. market to invest in the Tokyo
stock market, which has long been noted for extremely lax
enforcement of insider trading laws. It is seductively easy to
respond that investors are willing to accept the risks posed by insider
trading in search of the high returns offered by the Tokyo market.
Nevertheless, if rampant insider trading destroys investor confidence,
then Tokyo investors should be a demoralized lot. It is difficult to
explain the level of enthusiasm evident in the Tokyo market's rise
without assuming either that these investors cannot rationally
evaluate the losses they suffer as a consequence of insider trading or
that they do not perceive such losses to be significant.

11. See The Unspoken Question: Eurobond Market, Is This Goodbye?, EUROMONEY, Sept.
1989, at 38.
12. The Tax Reform Act of 1984 repealed the withholding tax on foreign individuals
and corporations, thus making it possible for such persons to purchase securities issued in
the United States without payment of the 30% withholding tax on income not connected
1987) (repeal of withholding tax on corporations).
14. The SEC recently noted that purchases and sales of Japanese corporate equities
by U.S. investors increased from $12 billion in 1985 to approximately $64 billion in 1989.
See SEC, Japan Say Talks Should Begin on Possible Brokerage Data Exchange, 22 Sec. Reg.
15. See infra notes 64-66 and accompanying text.
16. Long-term investors might actually prefer the absence of a ban on insider trading.
Critics of insider trading regulation have argued that permitting corporate insiders to profit
from nonpublic information causes nonpublic information to be reflected promptly in the
stock price to the ultimate benefit of investors, and that it constitutes an efficient means of
compensating entrepreneurs. See H. MANNE, INSIDER TRADING AND THE STOCK MARKET
(1966). Others have argued that, at a minimum, insider trading does not differ suffici-
If the explosion in cross-border investment in the past decade did not result from the adoption of stricter securities regulation in the world's major financial markets, there must be factors other than the presence of comprehensive regulation that are of greater importance to investors as they decide where to commit capital. One factor is the sheer expansion of investment opportunities in other markets. As the economies, and consequently the securities markets, of other nations have grown, the highly-regulated U.S. market no longer holds the commanding lead in investment opportunities that it once maintained. In 1970, the U.S. stock market accounted for roughly two-thirds of the aggregate value of the stocks traded on the world's major exchanges. However, by September 30, 1989, it accounted for less than one-third of the world market, and was less than three-quarters the size of the Tokyo stock market. Investors generally seek to diversify their portfolios to the extent necessary to protect against firm, industry, and market specific risks. As the U.S. market comprises an ever smaller percentage of the securities available for investment, an investor seeking to maximize effective portfolio diversification must do so with securities from other markets.

Another factor contributing to internationalization is the advancements in the mechanics of execution and settlement; that is, the process by which contracts for the sale of securities are created and performed. The major securities markets have devoted considerable attention to automating and streamlining the process by which title to a security is transferred from the seller to the buyer. An entire industry has sprung up to provide securities safekeeping, settlement, and reporting services to institutional investors.

ently from other stockholder-management issues that it should be the subject of federal regulation as opposed to contracting between stockholders and managers. See Carlton & Fischel, The Regulation of Insider Trading, 35 STAN. L. REV. 857 (1983). Short-term investors such as arbitrageurs, on the other hand, may benefit from a ban on insider trading. See infra note 51.

18. DAIWA INST. OF RESEARCH LTD., World Stock Markets (As of end September 1989), TOKYO STOCK MARKET QUARTERLY REVIEW, Sept. 30, 1989 at 6. The comparisons are made in dollar terms. It is also instructive to note that the volatility of the Tokyo stock market, measured by taking the standard deviation of the monthly return in local currency over a five-year period, is lower than that of the Standard & Poor's 500. Id.
mundane developments have been critical in attracting new investors to the affected markets.21 In addition, regulatory developments outside the securities field, such as the relaxation of foreign exchange controls and tax reforms, have facilitated the movement of investors' funds across national borders.22

Internationalization of securities trading and the contributing factors noted above should teach two lessons. First, investors view such criteria as the size and liquidity of a market, and the sophistication of execution and settlement systems, as important when deciding where to commit funds. Second, investors in the aggregate do not demand market regulation patterned on the American model when deciding where to commit funds. To its credit, the SEC has taken note of the first point and has devoted substantial attention to execution and settlement procedures in the United States as well as in foreign markets.23 The SEC does not appear to have accepted the second point.

II. The SEC's Response to Internationalization

Internationalization poses a troublesome dilemma for the SEC. As the world's securities markets directly compete for capital, investors appear increasingly willing to invest in markets that, from the SEC's point of view, offer inadequate protection. One possible response, of course, would be for the SEC to welcome the existence of a variety of regulatory systems, confident that competition for capital will cause those systems to flourish that offer the optimal mix of safeguards to the investing public.24 The risk, of course, is that over time the American model may be found to be less beneficial to investors and issuers than competing systems. Such a result would surely be a blow to an institution that is, by virtue of its excellent reputation and personnel, and the breadth of its legislative mandate, widely regarded (certainly by itself) as uniquely qualified to decide

21. See, e.g., id. at 1, col. 1 ("Without [global custody], the explosion since 1980 of cross-border investment by pension funds and institutions could not have happened").
22. See Facilitation of Multinational Securities Offerings, supra note 7, at 87,319.
23. See, e.g., Exchange Act Release No. 21,958, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,759, at 87,390 (Apr. 18, 1985) ("[A]s the trend toward international trading increases, it will become increasingly important for foreign trading markets to establish efficient, safe and accurate comparison, clearance, and settlement systems . . . "). Unfortunately, however, the SEC appears to view the creation of efficient systems as principally a regulatory problem. See infra note 34 and accompanying text.
24. At least one former SEC official has acknowledged the validity of this view. See Spencer, supra note 9, at 116.
questions of investor protection. The SEC's response to globalization accordingly shows a determination to curtail competition among regulatory schemes.

The prospect of international competition for capital is strongly reminiscent of the competition for corporate charters in the United States that has been won, for the time being at least, by Delaware. The notion that Delaware had prevailed in a "race for the bottom" led to calls for minimum federal standards for corporate law, federal chartering of public companies, or a uniform state law containing various new corporate governance provisions. Similarly the SEC has advocated coordination, if not uniformity, of disclosure and market regulation among the principal international securities markets. As in the corporate law context, such a move to uniformity ignores the benefits of competition among regulatory structures.


26. The prevalence of Delaware as a domicile for publicly-held corporations led to claims that Delaware, in an attempt to capture incorporation fees and other economic benefits, had adopted regrettably lax rules that permitted corporate managers to take advantage of shareholders. See Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663 (1974). Others responded that competition among states will produce optimal, rather than inadequate, rules as investors commit their capital to firms that provide them with the highest returns and firms incorporate in states whose rules enable them to maximize those returns. See Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. LEGAL STUD. 251 (1977).

27. Cary, supra note 26, at 666. The term was intended to describe the competition in adopting lax rules so as to attract corporate charters.


A. The SEC’s Policy Statement on Internationalization

The recent SEC Policy Statement on Regulation of International Securities Markets (Policy Statement), while claiming to recognize “cultural differences,” states that the SEC’s goal is to “minimize differences between systems.” The Policy Statement displays no reticence in declaring which system should be adopted as the model. It states:

An effective regulatory structure for an international securities market system would include the following features:

(1) Efficient structures for quotation, price, and volume information dissemination, order routing, order execution, clearance, settlement, and payment as well as strong capital adequacy standards;

(2) Sound disclosure systems, including accounting principles, auditing standards, auditor independence standards, registration and prospectus provisions, and listing standards that provide investor protection yet balance costs and benefits for market participants; and

(3) Fair and honest markets, achieved through regulation of abusive sales practices, prohibitions against fraudulent conduct, and high levels of enforcement cooperation.

The Policy Statement further notes that “[t]he United States Securities and Exchange Commission believes it has a responsibility to assume a leadership role in international securities regulation. [The SEC] considers the principles and goals contained in this Policy Statement to be central to achieving a truly global market system.”

Whatever else one may say about the SEC’s desire to see other countries adopt U.S.-style securities regulation, the policy has at least

32. Id. at 89,576.
33. Id.; see also id. at 89,578.
34. Id. at 89,576.
35. Id.
received support in academic and Congressional circles in the United States. The reception abroad, however, has been less enthusiastic. Regulators and practitioners in foreign markets, not surprisingly, defend their own regulatory systems. The SEC's stated desire to facilitate multijurisdictional securities offerings through coordinated disclosure requirements has been insufficient to induce any other country to implement a mandatory disclosure system that is satisfactory to the SEC. Instead, the pace of multijurisdictional securities offerings and tender offers has been set by the SEC's

36. See, e.g., Karmel, supra note 10, at 106.

37. See S. REP. NO. 155, 101st Cong., 1st Sess. 13 (1989) ("The Committee would . . . warn against the dangers of a 'competition in laxity' as regulators attempt to shape their laws to create regulatory climates most favorable for competition"). The SEC's new chairman appears also to be wary of competition among regulatory schemes. See Breeden, Response to Questions from Senate Banking Committee in Connection with Confirmation Proceedings for Richard C. Breeden as a Commissioner of the Securities and Exchange Commission, Sept. 29, 1989, at 8 (exchange between Senator Donald W. Riegle, Jr. and Richard C. Breeden on how "committed American leadership" can help avoid a "race to the bottom" in securities regulation).

38. The 1989 annual conference of the International Organization of Securities Commissions (IOSCO), an institution formed to further international cooperation, was marked by the reluctance of participants to "alter[] key aspects of their regulatory schemes." Harmony and Warness Coexist at IOSCO's Conference in Venice, 2 Int'l Sec. Reg. Rep. (BNA) No. 20, at 1 (Sept. 27, 1989); see also Convergence, More than Harmonization, is Key Word in Cautious Working Group Sessions, 2 Int'l Sec. Reg. Rep. (BNA) No. 20, at 8 (Sept. 27, 1989):

In [a session of the IOSCO conference], most of the panel members talked more about respecting individual markets than about harmonization. German Stock Exchange Federation executive vice-president Ruediger von Rosen made the obligatory bow to "a certain degree of harmonization," but emphasized that "value should be attached to the possibility of giving issuers and investors a choice between quite different rules and regulations."


40. Although the SEC requested comments in 1985 on proposed methods of facilitating multijurisdictional primary offerings of securities, Securities Act Release No. 6568, supra note 7, and has more recently proposed for comment a series of rules and forms that would permit certain Canadian issuers to register offerings of securities in the United States using disclosure documents prepared in accordance with Canadian laws and regulations, Multijurisdictional Disclosure, Securities Act Release No. 6841, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,492 (July 26, 1989), there does not currently exist any foreign jurisdiction that has registration and disclosure requirements that are sufficient, in the SEC's view, to permit a primary offering in the United States by means of a prospectus prepared in accordance with local law.
willingness to grant case-by-case exemptive relief. These exemptions are simply a form of administrative largesse that apply only to the case at hand and do not represent a concession by the SEC or by any foreign regulatory body that the regulations of either agency should be changed to facilitate cross-border investment.

B. Insider Trading

Insider trading was one of the SEC's principal regulatory and enforcement focuses during the 1980s, and the SEC's extension of that focus to the international markets was more strident and less flexible than its initiatives on multinational securities offerings. The SEC's attempts to convince foreign regulators of the benefits of strict insider trading laws should take on increasing significance as the globalization of securities trading progresses. The SEC has long viewed the absence of extensive insider trading as a sine qua non of investor confidence. Were internationalization to produce any substantial evidence that investors in the aggregate are not overly concerned with insider trading, the theoretical underpinnings of a vast regulatory and enforcement history would be threatened.

Moreover, as the SEC has achieved success in its effort to expand the concept of insider trading beyond the trading on material nonpublic information by corporate officers and directors, it has brought within the purview of U.S. law a variety of actors and conduct that may exceed the effective reach of its investigatory and enforcement methods. Thus, the SEC's continued ability to assert


It is worth noting that the SEC often uses these exemptive applications as a lever to obtain undertakings from foreign nationals that extend beyond the subject matter of the application. See, e.g., id. at 77,895 (exemption conditioned upon agreement of each member of underwriting syndicate to make information, not limited to information concerning the British Petroleum offering, available to SEC pursuant to a Memorandum of Understanding).

42. See, e.g., Pitt & Shapiro, supra note 1, at 199-200.


44. See, e.g., Pitt & Shapiro, supra note 1, at 206-07.

45. The partial success of the "misappropriation theory" in United States v. Carpenter, 484 U.S. 19 (1987), opens the door to prosecution, for example, of a foreign national who misappropriates information in a foreign country and subsequently uses the information to trade, or to tip someone who trades, on a U.S. securities market. See, e.g., SEC v. Vaskevitch, 657 F. Supp. 312 (S.D.N.Y. 1987). In order to maintain the integrity of the misappropriation theory, the SEC must necessarily seek out and prosecute such persons; however, they are not readily subject to investigation and prosecution absent foreign
An International Perspective

the primacy of its views on market regulation, and to defend and expand upon the successes of those views in the U.S. courts, would be furthered by foreign countries adopting the American model of insider trading prohibition. The SEC has brought considerable pressure to bear on foreign countries and their citizens in an attempt to achieve that result. While the SEC's legal actions have been styled simply as attempts to gather information from foreigners for use in policing U.S. insider trading laws, the SEC has been in effect asking foreign governments to subordinate their own policies, such as bank secrecy laws, to an international crackdown on insider trading. Although these attempts have generated criticism, the SEC's ability to use its enforcement power to impose costs on foreign actors has generated more success in harmonizing regulatory approaches with respect to insider trading than in any other field.

Pitt and Shapiro implicitly adopt the prevalent view that other countries, with the SEC's guidance, are coming to realize the benefits of strict insider trading prohibitions as these countries seek to inspire confidence in their markets and attract foreign capital. Despite the simple appeal of this view, I believe it is not entirely logical. Most obviously, while this argument could potentially explain a global move to stricter insider trading laws followed by a worldwide bull market and a many-fold increase in cross-border investment, it has considerably less explanatory power over a fact pattern that is chronologically reversed. Moreover, the very magnitude of the assistance.

This Comment is concerned with the advisability of the SEC's approach to international securities regulation, not the legal ability of the U.S. government to reach foreign actors whose conduct has effects within the United States. For a discussion of the latter, see Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, 50 LAW & CONTEMP. PROBS. 11 (1987).

46. See Levine & Callcott, supra note 8, at 120-24 ("[T]he SEC’s litigation efforts showed that it was willing and able to impose significant costs on persons and institutions from countries that were unwilling to cooperate with U.S. authorities").

47. See, e.g., Pitt & Shapiro, supra note 1, at 213-15.

48. This is particularly clear with respect to Switzerland, discussed infra notes 56-63 and accompanying text.

49. See Levine & Callcott, supra note 8, at 123, 145; The SEC’s Extra Mile, Wall St. J. (European ed.), July 15, 1988, at 6, col. 1 (characterizing the SEC’s proposal of the International Securities Cooperation Act of 1988 as “seizing the mile that it was sure to take once foreigners began giving the first inch of cooperation”).

50. Pitt & Shapiro, supra note 1, at 212-17; see also The Insider-Trading Dragnet is Stretching Across the Globe, BUS. WK., Mar. 23, 1987, at 50.

51. Both Japan and Switzerland adopted stricter insider trading prohibitions in 1988, see notes 56-73 and accompanying text. Although insider trading has been illegal in the United Kingdom since 1981, there have been only a handful of prosecutions. See Putting Insiders Inside, THE ECONOMIST, Oct. 15, 1988, at 18. Even in the United States, as Pitt and
SEC's efforts concerning multijurisdictional insider trading belies the conclusion that foreign markets and regulators are providing the impetus behind the expansion of insider trading prohibitions. A summary of the SEC's efforts illustrates the point.

1. The United Kingdom

A recent insider trading action involving securities traded on London's International Stock Exchange (ISE) demonstrates the SEC's expansion of "regulation by enforcement" to the international arena. In SEC v. Collier,82 the SEC brought a civil complaint against an employee of a U.K. merchant bank who misappropriated information concerning two English companies and used the information to trade in the shares of those companies on the ISE. Unfortunately for Mr. Collier, who was employed in London, his trades were placed through a U.S. broker-dealer, and the SEC therefore contended that Collier had violated Rule 10b-5.83

As both the challenged conduct and the affected market in the Collier case were offshore,84 there was no threat to the fairness or efficiency of the U.S. securities markets. Rather, Collier represents an attempt by the SEC to export U.S. insider trading regulation to the more mature markets. Shapiro points out, the SEC's insider trading enforcement efforts began to bear highly-visible fruit only in mid-1986. See Pitt & Shapiro, supra note 1, at 151-52. By June 30, 1986, the Standard & Poor's 500 Index had already more than doubled since the beginning of the decade and the Tokyo Stock Price Index and Financial Times Index each had almost tripled. See Daiwa Securities Research Inst., Tokyo Stock Market Quarterly Review, June 30, 1986. The same period witnessed unprecedented growth in cross-border investment. See Ketels, An Overview of International Trading, 4 B.U. Int'l L.J. 11 (1986).

The adoption of insider trading prohibitions in mature markets is, however, consistent with the view that securities professionals are the principal beneficiaries of strict insider trading rules. Large and mature markets provide the major securities firms with numerous opportunities for risk arbitrage in connection with takeovers and restructurings. Because risk arbitrageurs seek to profit from uncertainty, they will in general dislike insider trading precisely because it causes information to be more promptly reflected in the stock price and therefore reduces uncertainty. See generally Haddock & Macey, A Coasian Model of Insider Trading, 80 Nw. U.L. Rev. 1449, 1458-59, 1463 (1986).


54. Both of the companies involved were English and all of Collier's trading occurred on the ISE. Shares of one of the companies, Cadbury-Schweppes p.l.c., were quoted in the United States through the National Association of Securities Dealers Automated Quotation System; the other, Associated Engineering p.l.c., was neither listed on an exchange nor quoted on an inter-dealer system in the United States.
An International Perspective

London market through an enforcement action. The SEC, while lacking regulatory authority in foreign jurisdictions, appears willing to use its enforcement authority to alter standards of conduct in foreign markets.

2. Switzerland

The SEC's ability to use enforcement actions to regulate insider trading in European markets could be hampered by the existence of bank secrecy laws, particularly in Switzerland, which has a tradition of stringent bank secrecy laws. The conflict between Swiss law and the SEC's insider trading program led the SEC to mount an aggressive, and ultimately successful, campaign to persuade the Swiss government to bring its insider trading legislation into line with U.S. law as interpreted by the SEC.

The Swiss insider trading law represents a triumph of SEC pressure through persuasion and enforcement. Often frustrated or delayed in its attempts to obtain information within Swiss jurisdiction because of the "dual criminality" requirement of the U.S./Swiss Treaty on Mutual Assistance in Criminal Matters, the SEC had attempted unilateral action through the U.S. courts as well as a

55. The United Kingdom, like Japan, is frequently criticized for the laxity of its insider trading enforcement. See Puttting Insiders Inside, supra note 51.
56. Levine & Callcott, supra note 8, at 124.
57. See West Germany Plans Tighter Insider Trading Rules, Reuter Bus. Rep., Aug. 2, 1988 (BC Cycle) ("The United States recently pressured Switzerland into enacting insider trading laws after a series of cases in which it was denied access to Swiss bank records").
58. Schweizerisches Strafgesetzbuch, Code penal suisse, Codice penale Svizzero Art. 161 (Switz.) (Penal Code) (effective July 1, 1988) [hereinafter Article 161].
59. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019. The Treaty generally provides for mutual assistance in the investigation of matters that are criminal in both countries. Although Swiss laws protecting trade secrets may have made it illegal for an insider to tip material information to others, prior to the enactment of Article 161 there was no specific prohibition in Swiss law against the use of material nonpublic information by insiders. See Swiss Supreme Court Opinion Concerning Judicial Assistance in the Santa Fe Case, 22 I.L.M. 785 (1988).
60. See, e.g., SEC v. Banca Della Svizzera Italiana, 1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,546 (S.D.N.Y. 1981). For a description, written by an SEC official who played a significant role in the effort, of the SEC's attempts to procure information from Swiss banks despite the refusal of Swiss courts to compel production under the Treaty on Mutual Assistance, see Mann & Mari, Developments in International Securities Law Enforcement, in PRACTISING LAW INST., SEC. ENFORCEMENT INST. 615, 636-46 (1989). For a more colorful history, see The Long Arm of the SEC, Am. Law., June 1988, at 119, 120-21 (describing the SEC's "bludgeon approach" in dealing with Switzerland and quoting a former assistant U.S. attorney as stating that the Swiss "were ready to go to war, at least with the Southern District [of New York], if not with the United States") (bracketed language in original).
Memorandum of Understanding with the Swiss government and the Swiss Bankers' Association specifically dealing with insider trading to obtain evidence relevant to insider trading investigations. At the same time, however, the SEC directed its efforts to convincing the Swiss government to enact insider trading legislation that would parallel the U.S. approach and thereby remove the dual criminality obstacle.

That the SEC is the principal beneficiary of Article 161 cannot be seriously disputed. While the Swiss government and local commentators have understandably avoided direct acknowledgment of this fact, a commentary on the new law by a practitioner and academic who was involved in its creation gives considerable prominence to the tensions between U.S. enforcement efforts and Swiss law in discussing the background of Article 161. More importantly, the value of Article 161 to Swiss markets is minimal. As Switzerland lacks a separate securities law or securities regulatory agency, the new insider trading law is unaccompanied by the type of information-gathering and monitoring resources that would be necessary for enforcement. Because the law is responsive to the needs of the SEC and not to any articulated local need, the Swiss are not likely to create such resources. Indeed, Article 161 is frequently referred to in Swiss legal circles as the "lex Americana." The law provides the SEC with a double victory: it can claim that yet another country has recognized the good sense of having insider trading laws like those of the United States, and it provides an enforcement lever that may be used to export U.S. insider trading law to still other jurisdictions.

3. Japan

Japan presents perhaps the greatest obstacle to uniformity in insider trading law. Although Japan's securities laws were created just after World War II and are based on the American model, the Japanese securities market has developed a very different set of practices and norms than the U.S. market. One divergence between

63. Cf. id. at 3, 31 (arguing that Article 161 is not solely a "lex Americana").
64. JAPAN SECURITIES RESEARCH INST., SECURITIES MARKETS IN JAPAN 212 (1988).
the two systems is Japan's virtual indifference to insider trading. Indeed, one difficulty faced by would-be reformers of the Japanese market is the widespread participation of politicians in insider trading, a practice that will presumably impede any strong crackdown by the Japanese government.

The existence of rampant insider trading in the world's largest stock market clearly disturbs the SEC, which has been a persistent and vocal critic of Japan's relaxed attitude. The SEC has used newly-established regular meetings between its staff and Japan's Ministry of Finance (MOF) as a forum to seek cooperation on insider trading. When the MOF responded to American pressure by proposing stricter insider trading legislation, Chairman Ruder traveled to Tokyo during the drafting process and pronounced the result satisfactory. The legislation was passed by the Diet in May 1988.

While on the surface the SEC has won a significant victory in the passage of the Japanese legislation, the game may be far from over. Market participants and regulators in Japan do not appear to view insider trading as a "problem" to the extent that the SEC does. While some critics believe that the Japanese will become more concerned with insider trading as their market matures, others contend that the mores of the Japanese market reflect Japanese culture and are unlikely to change even under the influence of increased foreign participation.

Perhaps recognizing that cooperation in securities regulation must share the stage with a variety of contentious trade and financial issues between the U.S. and Japanese governments, the SEC has relied principally on verbal criticism in its attempts to alter Japanese market practices. If criticism is unavailing, however, the SEC may be

---

70. Note, Regulation of Insider Trading in Japan, supra note 65, at 1303.
71. See Whitener, supra note 67, at 15 ("Trading on insider information is viewed by many Japanese investors as a legitimate, even necessary, basis for stock market investments"); see also Japanese Insider Trading: New Laws for Old, THE ECONOMIST, Oct. 1, 1988, at 92.
72. See Japan's Different Stock Market, supra note 65.
tempted to use other forms of pressure, and the extensive participation of Japanese institutions in the U.S. market will offer ample opportunities to export regulation by enforcement. Therein lies a significant opportunity for friction between the SEC and the Japanese government that could expose the weak foundations of harmony in international securities regulation.

Conclusion

The SEC has responded to internationalization of the securities markets with calls for uniformity in securities regulation, a uniformity that is to be based on the American model. Internationalization has also provided the SEC with opportunities to use its enforcement powers as a lever to press for greater cooperation and uniformity among the world's securities regulators. As foreign markets grow and attract a greater share of worldwide investment, the SEC's desire to maintain the primacy of the American model of securities regulation may lead to an increase in the SEC's efforts to export regulation, resulting in greater friction between the SEC and foreign regulators.

The issue for the 1990s, however, should not merely be whether the SEC should take a more or less confrontational approach to international securities regulation, but whether there is any value in the deliberate convergence of regulatory approaches in the first place. This Comment has argued that there is not, and from that argument a number of conclusions follow. First, the SEC should abandon its calls for international uniformity in securities regulation. As the Policy Statement on Regulation of International Securities Markets makes clear, the SEC considers the American model of securities regulation to represent a vital public policy that the United States should not abandon even in order to facilitate global markets. It is simply arrogant not to attach the same importance to other nations' regulatory policies. Even when the absence of uniform regulation can impede the full achievement of the SEC's domestic regulatory goals, as with respect to insider trading, other countries' regulatory practices should be recognized as important. Finally, and perhaps most important in the long run, the SEC, as well as the Congress, should closely observe the securities markets and regulations of other countries and critically compare our system to others. Such a comparison might ultimately induce a reappraisal of the American model of securities regulation.