Stock Exchange Mobility, Unilateral Recognition, and the Privatization of Securities Regulation

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ABSTRACT

This Article identifies a new type of dynamics affecting today's international securities markets, which it dubs "stock exchange mobility." Competition in these markets has now reached such levels that even the largest stock exchanges in the world are exposed to threats on their very existence. In their struggle to survive stock exchanges are starting to transform into transnational business firms with shareholders, issuers, and traders of diverse nationalities. As they become wholesale agents of stocks and trades, they also acquire unprecedented bargaining power vis-א-vis national securities regulators. Some of the latter respond in ways that constitute a new regulatory paradigm, which this Article dubs "unilateral recognition." These developments may undermine the nature of securities regulation as a nationally specific body of law and also imply that regulatory reform proposals based on issuer choice need to be adjusted to the new market reality. However, the traditional characterization of securities regulation as public law is likely to remain intact, *inter alia*, because securities regulators are likely to retain their beneficial role as regulators of tomorrow's markets.

I. INTRODUCTION

This article identifies a new type of dynamic affecting today's securities markets, which it dubs "stock exchange mobility." Competition in international securities markets has now reached an unprecedented level, such that even the largest stock exchanges in the world are exposed to threats to their very existence. In their struggle to survive, stock exchanges are transforming. The traditional pattern of a member-owned entity, regulated by its national securities regulator, and enjoying a dominant position in its home country is disappearing. Instead, stock markets come in all shapes and sizes. More importantly, they cross national boundaries and are freer to choose their regulatory regime.

With few exceptions, regulators constantly lag behind these new initiatives and fail to adjust their regulatory regimes to them. Private sector actors and other commentators may thus find it tempting to decry regulatory stagnation and advocate a sweeping hands-off approach in order to facilitate progress and lower the costs of capital formation. This article takes advantage of the perspective available from the academic ivory tower in order to assess the implications of these developments on national securities regulation systems in a more detached fashion. This is not an easy task. The globe today is criss-crossed by innumerable and different, existing and would-be, transnational linkages between national equity markets, which nonetheless are governed by national regulators.

The goal of this article is first, to organize the more significant developments in a sensible way, and second, to assess their implications and the potential regulatory responses. Based on this analysis, this article will argue that securities regulation will likely retain its principal character as a body of public law, but also that its character as particular national law is bound to attenuate.

Part II begins by reviewing major recent developments in international securities markets. Stock exchanges react to the increasing competition in various ways but out of the details a clear pattern can be discerned. These reactions typically include a combination of demutualization, mergers and alliances, or international linkages. Other stock exchanges opt for an aggressive lobby of their regulators to adapt their laws to competitive standards. The latter respond in ways that constitute a new regulatory paradigm, one which this article dubs "unilateral recognition."

Part III revisits the classification of securities regulation as public law by tackling the taxonomy from different angles—doctrinal, critical, structural and functional. Against the backdrop of the relations between securities regulation and corporate law, and notwithstanding several reservations, this Part concludes that securities regulation is still best perceived as public law.

Part IV identifies stock exchanges as the new agents of change in today's securities markets, and argues that stock exchange mobility changes the rules of the game in the international regulatory competition. If competition for issuers and investors is likened to competition in the retail market, then stock exchanges are, and behave like, wholesale agents. Because they are so big yet still under genuine competitive threat, stock exchanges enjoy an unprecedented bargaining position vis-א-vis national regulators. Regulatory reform proposals based on issuer choice thus need to be adjusted to this new reality.

This Part then identifies several challenges engendered by the transformation of stock exchanges into private, transnational firms, such as determining their nationality and assigning regulatory responsibility over them. In particular, this Part argues that the national identity of stock exchanges would be most usefully determined by the regulator in charge of its supervision. The issues of supranational securities regulation and supranational antitrust regulation of stock exchanges are also discussed in this regard. The entire issue, however, still nascent, will clearly require further research.

II. DEVELOPMENTS IN INTERNATIONAL SECURITIES MARKETS

At the turn of the Millennium, the internationalization of securities markets has ceased to be an issue of newsworthy value. Investors in most developed countries now have access to foreign securities, and issuers in almost every country can tap the major stock markets in the United States and Europe to raise equity capital. Until very recently, however—at least until the late 1990s—the main facets of this internationalization were foreign listing and cross-border trading.[1] In the near past, issuers used to have their securities listed on their home country market.[2] Foreign investors could either use a chain of broker-dealers to

1. Very roughly, about 5–15% of the companies listed on the major American and European markets are foreign. The share of foreign securities in those markets' capitalization in some cases is even higher. For excellent statistical data on the scope of transnational listings and trading, *see* the International Federation of Stock Exchanges (last visited March 6, 2001) <http://www.fibv.com/statistics.asp>. The numbers for cross-border trading volume are also quite staggering. These numbers, however, are also notoriously difficult to analyze and compare. *See* AMIR N. LICHT, REGIONAL STOCK MARKET INTEGRATION IN EUROPE, (Harv. Inst. for Int'l Dev., CAER Discussion Paper No. 15, 1998); Marco Pagano & Benn Steil, *Equity Trading I: The Evolution of European Trading Systems*, *in* THE EUROPEAN EQUITY MARKETS: THE STATE OF THE UNION AND AN AGENDA FOR THE MILLENNIUM 52 (Benn Steil ed., 1996) [hereinafter EUROPEAN EQUITY MARKETS].

2. By "home country" I mean primarily the country of incorporation. One should bear in mind, however, that the issue of corporate nationality is more complex than that. The rule in common law countries is reflected in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §213 (1987) [hereinafter RESTATEMENT] ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."). Under most continental European systems, however, the nationality of a corporation is determined according to the *siege social* (or *siege reel*) of the corporation, which emphasize the principal place of management, and also look behind the formal designation of a principal office. In practical effect, it is an additional requirement, since jurisdictions using that standard, such as the French, require that a firm be incorporated in the state where it has its *siege*. *See* RESTATEMENT, *supra*, §213, at cmt. c. The situation in the European Union is in flux, however, following the decision in the Centros Case. Case C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen, 1999 ECJ CELEX LEXIS 2723 (1999). For a review, see EDDY WYMEERSCH, CENTROS: A LANDMARK DECISION IN EUROPEAN COMPANY LAW (Financial Law Institute Working Paper No. 1999-15, 1999).

trade in these securities or the issuers would need to bring their securities close to investors by making a foreign listing. American Depository Receipts (ADRs) and similar instruments in other markets (e.g., Global Depository Receipts and Singapore Depository Receipts) are the common vehicles for this purpose.[3]

The situation began to change in the late 1990s, and the change became dramatic during 1999-2000. The stock market downturn that began in late 2000 may have slowed down the trend but did not reverse nor stop it. The academic community so far has failed to notice this shift, however. This Part presents the core details of numerous internationalization initiatives currently underway around the world. A careful look at these details reveals a new reality emerging with regard to national stock markets. Fierce competition between stock exchanges causes them to abandon the protective stance they used to take in favor of much bolder steps intended to secure business and, at the foundation, their survival.

The following discussion describes a profound change in the nature of stock exchanges as a result of two interrelated trends, namely, demutualization of, and international mergers or alliances between, national stock exchanges. The outcome is a new level of stock exchange mobility. I then sketch another line of development under which stock exchanges put pressure on their national regulators to reform securities law such that their international competitive position would improve. The outcome is a new regulatory paradigm of unilateral recognition.

A. *Stock Exchange Mobility*

This Section deals with the trend of privatization, embodied in denationalization of stock markets and stock exchange mergers and alliances. The majority of these initiatives take place in Western Europe, mainly among European Union (EU) stock markets. This fact warrants at least two preliminary notes as to what extent developments in Europe can be regarded as examples of a global trend, or rather as exceptions, economically significant though they may be.

First, the EU enjoys a unique regulatory environment, which is based primarily on the Investment Services Directive (ISD).[4] The ISD and

3. *See* Amir N. Licht, *Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions*, 2000 COLUM. BUS. L. REV. 51, 58–60 (reviewing ADRs); Mark A. Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L. REV. 48, 48–54 (1993) (same).

4. *See* Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field, 1993 O.J. Eur. Comm. (No. L 141).

other EU directives establish a regime of mutual recognition in member states' securities regulation, under which a regulatory approval by one member state—say, of a prospectus or a stock market—is valid across the Union and serves like a "single passport."[5] This regime proves exceptionally conducive to stock exchange integration. The regime is also part and parcel of a much broader supranational political and legal structure and a policy that strives for ever-growing economic and political integration in Western Europe.[6]

Second, relatively few people remember that Europe has already witnessed a considerable number of plans and projects for stock market integration. The reason that names like IDIS, Euroquote, Eurolist and Nordquote are now largely forgotten is that these projects have all failed and been shut down. They have failed because the various stock exchanges involved in these projects were never able to reach meaningful cooperation, which would have required them to overcome mutual rivalry and competition.[7] One could thus rightly wonder how current projects like iX, Euronext and Norex described below differ in any ways other than their title.

Elsewhere I have expressed some skeptical views as to the viability of past European integration projects.[8] Nevertheless, this article asserts that the situation is different this time around and that Europe does offer some globally applicable lessons. This is because the internal structure of stock exchanges now faces a period of change and because external competitive threats to them are much more real and immediate than before. Both of these aspects may be more emphasized in, but are definitely not limited to, the European Union.

1. *Demutualization*

A significant factor spurring the merger and alliance movement is the demutualization of stock exchanges, namely, the transformation of stock exchanges from not-for-profit mutual associations to for-profit

5. *See generally* Manning Gilbert Warren III, *The European Union's Investment Services Directive*, 15 U. PA. J. INT'L BUS. L. 181 (1994) (providing a basic review of the ISD). For assessments of the ISD's impact on European stock markets, see generally EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND (Guido Ferrarini ed., 1998) [hereinafter EUROPEAN SECURITIES MARKETS]; Benn Steil, *Equity Trading IV: The ISD and the Regulation of European Market Structure*, *in* EUROPEAN EQUITY MARKETS, *supra* note 1, at 113.

6. *See* Licht, *supra* note 1, at 19–20; *see generally*, WILLIAM WALLACE, REGIONAL INTEGRATION: THE WEST EUROPEAN EXPERIENCE (1994).

7. For a detailed account of these projects and an analysis of their failure, see Licht, *supra* note 1, at 40–49.

8. *Id.* at 40–58.

business corporations.[9] Some of the stock exchanges that demutualize also take a bolder step and become publicly held corporations as they list their stocks on their own boards. These structural reforms signify a profound change as compared to the tradition of a mutual association structure that lasted for centuries.

The harbinger of this trend was the Stockholm Stock Exchange (SSE), which in 1993 became a subsidiary of a publicly traded corporation, OM Gruppen AB. Consequent to its merger into OM Gruppen in 1998, the SSE became a publicly held corporation in its own right. Around 1997, the stock exchanges of Amsterdam, Copenhagen and Helsinki became for-profit corporations, although not publicly traded, and the stock exchanges of Milan and Athens were privatized by selling share blocks to private investors.[10]

The Australian Stock Exchange (ASX), which demutualized in 1998, indeed was the world's first exchange with its own shares listed on its own market.[11] ASX officials assessed that the move was imperative in order to confront competitive threats from foreign stock exchanges as well as electronic commerce networks (ECN's), which—as privately-held businesses—are more attentive to market forces. "As a listed, for-profit entity, the ASX is now driven by bottom-line considerations rather than the needs of a stockbrokers-only club," according to ASX Managing Director Richard Humphries.[12]

Within less than three years, a wave of demutualization has in some way swept over almost every stock exchange on the globe, with similar reasons mentioned for all these projects. In July of 1999, both the NYSE and NASDAQ were considering plans to convert from non-profit institutions to for-profit corporations.[13] A year later, in July 2000, the London Stock Exchange became a quoted company, listed on its own board, after some 220 years as a mutual society owned by its stockbro-

9. On the implications of perceiving stock exchnages as business firms, see Carmine Di Noia, *Competition and Integration Among Stock Exchanges in Europe: Network Effects, Implicit Mergers and Remote Access*, 7 EUR. FIN. MGMT. 39 (2001).

10. For an excellent review and analysis, see Guido Ferrarini, *Exchange Governance and Regulation: An Overview*, *in* EUROPEAN SECURITIES MARKETS, *supra* note 5, at 245. *See also* Ailsa Roell, *Competition Among European Exchanges: Recent Developments*, *in* EUROPEAN SECURITIES MARKETS, *supra* note 5, at 213, 220; Vincent Boland, *ASX Set to Demutualise Next Month*, FIN. TIMES (LONDON), Sept. 22, 1998, at 30; Simon Davies, *Demutualisation: Trading on Borrowed Time*, FIN. TIMES (LONDON), Mar. 24, 1998, at 2.

11. *See* Masako Fukui, *Australian Exchange Breaks New Ground in Efficiency Push*, THE NIKKEI WEEKLY, Oct. 26, 1998, at 28.

12. *Id.*

13. *See* Diana Henriques, *Nasdaq and Big Board Move Ahead With Plans to Go Public*, INT'L HERALD TRIBUNE, July 26, 1999, at 13.

ker members.[14] According to the International Federation of Stock Exchanges (FIBV), in late 1999, demutualization was under consideration by forty-four of FIBV's fifty-two members—with several also considering public stock offering.[15]

The full implications of demutualization become clear when stock exchanges are publicly traded and thus exposed to hostile takeover bids. This scenario used to be purely hypothetical but became reality during the writing of this article. About a month after the LSE went public, the OM Gruppen once again stunned the financial community when it announced, for the first time, a hostile bid for LSE shares. The bid took place only two weeks before LSE shareholders were supposed to vote on the merger plan with Frankfurt's Deutsche Boerse. From that point onward, events quickly unfolded as they would in a typical American hostile bid, but in a manner very atypical for national stock exchanges.

Although LSE officials and shareholders tended to treat the cash-and-share offer as too low, the bid forced LSE management to indefinitely postpone the vote. In the face of mounting criticism, the LSE had to call off the merger, even after the Deutsche Boerse reconsidered its terms.[16] Pursuant to the City Code on takeovers and mergers, the LSE published a strongly worded Defence Document,[17] to which OM responded quite vehemently.[18] Meanwhile, several "white knights" were mentioned as potential counter-bidders, including NASDAQ, the just-established Euronext, and even the Deutsche Boerse, possibly with the Madrid and Milan Stock Exchange.[19] The bid eventually fell through due to very low tendering from LSE's shareholders.[20]

14. *See* Patrick Jenkins, *Setting Sail on a Sea of Compromise: Can the London-Frankfurt Stock Exchange Merger Deliver*, FIN. TIMES (LONDON), July 29, 2000, at 1.

15. *See* Thomas Crampton, *Stock-Market Leaders Fret About On-Line Upstarts*, INT'L HERALD TRIBUNE, Oct. 21, 1999, at 15. The members of FIBV were then representing 97 percent of the world's market capitalization. *Id.* For further analysis of stock exchange demutualization, see Ferrarini, *supra* note 10; Marco Onado, *Competition Among Exchanges or Financial Systems?*, *in* EUROPEAN SECURITIES MARKETS, *supra* note 5, at 238–40.

16. *See, e.g.*, Alan Cowell & Suzanne Kapner, *Takeover Fight Under Way for London Stock Exchange*, N.Y. TIMES, Aug. 30, 2000 (internet edition); Paul Betts et al., *Officials Rally to Defend Merger Plan*, FIN. TIMES (LONDON), Aug. 30, 2000, at 2; Nicholas George & Charles Pretzlik, *Stock Exchange Up for Grabs*, FIN. TIMES (LONDON), Aug. 30, 2000, at 2; Dan Gledhill & Jason Nisse, *The Thing Is . . . The Stock Exchange*, THE INDEPENDENT (LONDON), Sept. 17, 2000, at 3.

17. *See* LONDON STOCK EXCHANGE PLC, *A SUCCESSFUL AND VALUABLE BUSINESS: REJECT OM GRUPPEN'S BID* (visited March 6, 2001) <http://www.londonstockexchange.com/defence/>.

18. *See* OM GRUPPEN AB, OM GROUP: STATEMENT ON LSE DEFENCE DOCUMENT, REG. NEWS SERVICE, Sept. 25, 2000 ("LSE's defence document demonstrates again that LSE has: No Strategy; No Management; No Vision").

19. *See* Andrew Garfield, *Breuer: 'LSE Lacks Platform to Go It Alone'*, THE INDEPENDENT (LONDON), Sept. 26, 2000, at 14; Jill Treanor & Mark Milner, *Exchange Battle Begins: Defence*

The eventual outcome of the battle over the LSE is of secondary importance for the present analysis. The crucial point is that demutualization, and especially public floatation of stock exchanges, transform them into regular business corporations that can be bought, sold, and reorganized like any other firm—according to the private interests of private actors. In terms of regulation, OM estimated that "[t]he operations of the LSE will not initially change materially and, therefore, issues relating to market integrity structure and surveillance should not arise."[21] While this might be true for the initial stage, efforts to change the venue of the Exchange's operations are likely to entail regulatory consequences, as the projects of stock exchange mergers discussed below exemplify.

2. *Mergers and Alliances*

Even before stock exchanges could be bought and sold, they could get together in various ways, ranging from joint lists to joint information feeds to other forms of linkage. As already noted, these "integration" projects—particularly in Europe—have all failed, mainly because they tended to represent efforts to thwart competition and protect members' interests on a national territorial basis.[22] The growing levels of foreign listing and cross-border trading, together with electronic private trading systems brought competition in this field to a new level. They have forced stock exchanges to consider in earnest, for the first time, real mergers and alliances in order to survive.

The number and scope of merger and alliance projects underway or in operation in the second half of 2000 are dazzling, as exemplified by the following partial list. Beyond exigencies of scope, the details provided on each program are sparse because their configuration is still vague or has become immaterial.[23]

> *iX* – the aborted merger between the LSE and the Deutsche Boerse (DB). The stock exchanges of Milan and Madrid ex-

Document Against OM Expected to Trigger Bids from Rivals, THE GUARDIAN (LONDON), Sept. 26, 2000, at 22.

[20] *See Swedish OM Group Fails in Bid for London Sock Exchange*, DEUTSCHE PRESSE-AGENTUR, Nov. 10, 2000

21. For the entire offer document, see LONDON STOCK EXCHANGE, *OFFER BY OM GROUP*, REG. NEWS SERVICE, Aug. 29, 2000, at Appendix I.

22. *See, e.g.*, Licht, *supra* note 1, at 56–57; *see also infra* note 30.

23. *See also* Alberto Cybo-Ottone, Carmine Di Noia, & Maurizio Murgia, *Recent Development in the Structure of Securities Markets*, *in* BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES 2000, 223 (Robert Litan & Anthony M. Santomero eds., 2000) (reviewing consolidation deals among securities exchanges in the EU and the United States during the past decade).

pressed their intent to join iX after it is implemented and NASDAQ had also been mentioned as a partner in iX (after the LSE rejected its merger offer).[24]

Euronext – a merger between the Amsterdam, Brussels, and Paris Bourses into a Dutch firm, Euronext NV, which is to go public in 2001.[25] The Lisbon Stock Exchange announced plans to join Euronext in early 2001.[26]

Global Equity Market (GEM) – a planned alliance between Euronext's members and seven other stock exchanges in New York, Tokyo, Hong Kong, Sidney, Mexico City, Toronto and Sao Paolo, which would offer 24-hour trading.[27]

Virt-X – an alliance between the Swiss Stock Exchange (SWX) and Tradepoint, the London-based electronic trading system, which offers a pan-European trading platform for blue-chip stocks. The US-based Archipelago Exchange, an alliance between Archipelago and the Pacific Stock Exchange, said it could link to Virt-X.[28]

Norex – an alliance between the stock exchanges of Stockholm, Copenhagen, Oslo and Iceland. Baltic stock exchanges in Estonia, Latvia and Lithuania expressed intent to join it by mid-2001.[29]

Euro NM – a network of trading lists for growth companies, each run separately by the stock exchanges of Frankfurt, Paris, Amsterdam, Brussels and Milan.[30] Euro NM was dis-

24. *See, e.g.*, Dan Gledhill & Jason Nisse, *Nasdaq Merger Offer Shunned by London*, THE INDEPENDENT (LONDON), July 23, 2000, at 2; Grant Ringshaw, *City: The 10 Fatal Flaws of the iX Merger*, SUNDAY TELEGRAPH (LONDON), July 23, 2000, at 6.

25. *See, e.g.*, Gordon Cramb, *International Capital Markets: Dutch Jobber Gives Warning on Euronext*, FIN. TIMES (LONDON), Aug. 8, 2000, at 28; *Euronext Exchange is Launched on Promise to Seek Early Listing*, AGENCE FRANCE, Sept. 22, 2000.

26. *See* Peter Wise, *Lisbon Bourse Starts Talks to Join Euronext in 2001*, FIN. TIMES (LONDON), Oct. 4, 2000, at 36.

27. *See, e.g.*, Andrew Garfield, *Ten Exchanges Plan Global 24-Hour Dealing*, THE INDEPENDENT (LONDON), June 8, 2000, at 18; John Labate & Aline van Duyn, *International Capital Markets: GEM and iX Choose Different Paths*, FIN. TIMES (LONDON), June 8, 2000, at 38.

28. *See, e.g.*, John Labate, *New Exchange Looks Towards European Link*, BUS. WEEK, July 14, 2000, at 26; Stanley Reed, *The Battle for Europe's Blue-Chips*, BUS. WEEK, July 24, 2000, at 68.

29. *See, e.g.*, *Baltic States Prepare to Join Nordic Alliance*, FIN. TIMES (LONDON), June 15, 2000, at 37.

30. For a historical account of Euro NM, see Licht, *supra* note 1, at 52–54.

banded at the end of 2000 subsequent to the commencement of Euronext's operation.

This list does not include several overseas alliances to which NASDAQ is a party in some way.[31] Nor does it include announced alliances that seem dubious on their face, such as the one between NASDAQ and the stock exchanges of Tel Aviv, Cairo and Istanbul.[32] Finally, the list does not include ECN enterprises that operate or plan to operate across national borders, such as Instinet, E-Crossnet, Posit and the recently announced Jiway.

3. *Regulation*

The projects described in the previous subsection vary in several major respects that may be critical to their success but need not be dealt with here, e.g., clearance and settlement and the trading platform technology. Another conspicuous issue among these factors is regulation. Because these projects are transnational by definition, they could entail a head-on clash with regulatory institutions that are traditionally national. Some of the projects—e.g., the Euro NM network—sidestep the problem by retaining the separation between national regulatory jurisdictions. But this, of course, also derogates from their true international character.[33]

Other projects may acknowledge the difficulty associated with regulation and use it to their advantage. For instance, the choice of Virt-X to be based in London stems, among other reasons, from the fact that it would thus be regulated by the British Financial Services Authority (FSA). This would ensure certainty as to the applicable regulatory regime and therefore contribute to cost minimization. It would also serve as quality certification, since investors are likely to consider British regulation as providing a high level of investor protection.[34]

Note, however, that the said certainty and quality of regulation in projects like Virt-X apply primarily to regulation of the trading process, namely, of broker-dealers and the stock exchange itself. The most contentious issue in this regard is the transparency of trading, namely, the speed and accuracy in which transaction information (mainly price and

31. *See infra* Section II–B–4.

32. *See infra* note 74.

33. This may not be surprising in light of the likely original purpose of Euro NM to actually preserve the separation between stock markets rather than erode it.

34. The notion that market players may opt into particular securities regulation regime in order credibly to commit to a certain level of investor protection is further explored below, *infra* note 161 and accompanying text.

size) are disclosed.[35] In contrast, when issuer regulation is involved—e.g., the regulation of disclosure—issuers who are already listed on several markets might be subject to multiple regimes that are not necessarily identical.[36] Other regulatory issues, such as fraud and insider trading, may have a significant effect on the process of price formation and discovery yet be subject to several regulatory regimes and authorities.

The potential complexity of regulation in multinational trading systems is manifested in the iX project, which would have comprised a pan-European market for blue chip stocks, a pan-European high-growth market, and other trading lists. According to the information document issued by the LSE and Deutsche Boerse, trading on the blue chip market would have been subject to UK regulation, supervised by the LSE from London, and trading on the high-growth market would have been subject to German regulation, supervised by the Frankfurt Stock Exchange.[37] Existing companies were not, and could not be, required to give up their home country listing to be admitted to trading on iX, and iX indicated that newly admitted companies would continue to be listed through the competent authority of their choosing.[38]

One must not underestimate the difficulties in regulating such a multinational operation. Notwithstanding the upbeat tone of the information document, it did not provide much more detail about the regulatory structure envisaged for iX. iX regulation was harshly criticized as "a mess,"[39] "the biggest black hole in the scheme,"[40] "a nightmare,"[41] and so on.[42] The LSE's Chairman tried to appease critics by saying that the FSA and BAWe are working closely to ensure the two regulatory re-

35. *See, e.g.*, Pagano & Steil, *supra* note 1; Roell, *supra* note 10. Pagano and Steil provide an excellent analysis of the policy and regulatory implications of transparency. Note, however, that since the writing of their text the LSE has moved from pure quote-driven trading to a mixed order/quote-driven method in its new SETS system.

36. At least within the EU the "single passport" principles ensures that issuers would need only to comply with the regulatory regime of one member state.

37. iX-INTERNATIONAL EXCHANGES PLC, INFORMATION DOCUMENT IN RESPECT OF THE MERGER OF LONDON STOCK EXCHANGE AND DEUTSCHE BOERSE NEWCO 4 (2000). Respectively, the two markets would have been regulated by the British FSA and Germany's Federal Securities Trading Supervisory Office (BAWe).

38. *See id.*

39. *See Doomed from Birth*, THE BANKER, Sept. 1, 2000.

40. *See* Ringshaw, *supra* note 24.

41. *See* Jim Stanton, *iX Merger Plan Dealt Blow Over Regulation*, EVENING NEWS (EDINBURGH), Sept. 8, 2000, at 8.

42. For an extensive critical review of iX, see ANDREW HILTON & DAVID LASCELLES, IX: BETTER OR JUST BIGGER? (Center for the Study of Financial Innovation, Working Paper 2000) (visited March 6, 2001) <http://www.csfi.demon.co.uk/index2.htm>.

gimes are harmonized, especially with regard to transparency,[43] but as the plan was losing momentum in the late Summer, FSA officials admitted that "any practical level of harmonization" would be difficult to achieve.[44] The issue became moot after iX was called off, but the lessons it provides, *post mortem*, remain valid nonetheless.[45]

Regarding issuer regulation, moving an issuer's listing from one country to another might subject it to a new regime. This could be a bit less of a problem within the EU in terms of state regulation due to the principle of mutual recognition with minimum standards. But consider the potential complexity of regulation if a similar action were taken in the planned 10-country GEM. In any event, differences are likely to exist at the level of stock exchange regulation, since some stock exchanges impose additional disclosure and governance requirements on their issuers beyond the statutory ones.

Problems could be more pressing in what regards trading regulation. The bitter battles fought between the "Club Med" countries and the "North Sea Alliance" over transparency and concentration during the drafting of the ISD[46] may give reason for pessimism. One major difference from the ISD precedent, however, is that the negotiating governments then were under pressure from the their local markets to protect their different interests, while now the markets press for harmonization so as to facilitate the operation of the merged enterprise. The FSA's Chairman indeed opined that "[i]t was 'logical' to expect convergence of regulatory practices if the [iX] merger went ahead."[47] The regulators of Euronext already seem to have taken lesson from the iX failure.[48] Overall, there is recently a discernable change of mood among Euro-

43. *See* Vincent Boland, *iX Report Stresses Liquidity Benefits of Size*, FIN. TIMES (LONDON), June 18, 2000, at 27.

44. Stanton, *supra* note 41 (citing a secret report commissioned by Merrill Lynch). Fears from regulatory arbitrage in iX, had it materialized, were thus not unfounded. *See infra* text to note 149.

45. It was thus reported that while the three national regulators of Euronext will continue to exist, they are working on the harmonization of listings requirements so that they will be virtually identical. *See* William Wright, *Why Europe's Technology Sector Needs a Single Regulator with One Set of Rules*, FIN. NEWS, Oct. 9, 2000.

46. *See* Licht, *supra* note 1, at 24–28; Steil, *supra* note 5, at 124–26. For a critical review, see Guido Ferrarini, *The European Regulation of Stock Exchanges: New Perspectives*, 36 COMMON MARKET L. REV. 569, 578–84 (1999).

47. *See* Vincent Boland, *FSA Wants Regulatory Harmony for iX*, FIN. TIMES (LONDON), June 23, 2000, at 34

48. *See* Wright, *supra* note 45.

pean securities regulators toward greater harmonization and cooperation.[49]

B. *Unilateral Recognition*

1. *The New Regulatory Paradigm*

The initiatives described in this section share the same general plot: a small to medium-sized stock exchange in a developed market economy faces stiffening competition over listings of and trading in stocks that the stock exchange has perceived as its past or future specialty. In order to secure a competitive edge with regard to these securities the stock exchange lobbies its national securities regulator to change the laws of public offering and on-going disclosure, and to proscribe exemptions from various standard requirements under the local securities laws. The idea is to make dual listing on the particular stock exchange less burdensome as compared to regular public offerings. This is achieved by allowing issuers to fulfill local requirements by using documents prepared under another regulatory regime.

The scenario described so far is not entirely new. Stock exchanges are very sensitive to the regulatory burden imposed on their issuer-clients. Indeed, both the NYSE and the LSE happen to operate in countries whose securities regulation regimes are also commonly considered among the most demanding. Although both markets traditionally had had a significant number of foreign listings[50] and have attractive levels of depth and liquidity, foreign issuers often shied away from them because of their disclosure regime, and at least in the U.S., also because of potential liability. The City's Listing Rules for a long time allowed foreign issuers whose shares were quoted on the LSE's SEAQ-International (SEAQ-I) system to use their home country disclosures.[51] The NYSE had a harder task as it had to persuade the Securities

49. *See* The Forum of European Securities Regulators, A "European Passport" for Issuers: A Report for the EU Commission (2000) (visited Apr. 1, 2001) <www.europefesco.org/v1/default.asp>; *see also* Guido Ferrarini, Securities Regulation and the Rise of Pan-European Equity Markets: An Overview, paper presented at the Conference on "Capital Markets in the Age of the Euro: Cross-border Transactions, Listed Companies, and Regulation," Genoa (Nov. 10–11, 2000) (on file with author).

50. *See* International Federation of Stock Exchanges, *supra* note 1. For comparative historical statistics with regard to the LSE and other European markets, see Licht, *supra* note 1, at 13–16.

51. For a general overview, see Jay D. Hansen, Note, *London Calling?: A Comparison of London and U.S. Stock Exchange Listing Requirements for Foreign Equity Securities*, 6 DUKE J. COMP. & INT'L L. 197 (1995). *See also* Sidney J. Gray and Clare B. Roberts, *Foreign Company Listings on the London Stock Exchange: Listing Patterns and Influential Factors*, *in* THE DEVELOPMENT OF ACCOUNTING IN AN INTERNATIONAL CONTEXT: A FESTSCHRIFT IN HONOUR OF R.H. PARKER 193 (T.E. Cooke and C.W. Nobes eds., 1997). Effective May 1, 2000, the Brit-

and Exchange Commission (SEC) to relax regulatory requirements for foreign private issuers, and in the late 1970s the SEC did just that. Foreign private issuers can now report using Form 20-F, which includes several exemptions from the disclosure regime applicable to domestic American issuers under Form 10-K.[52]

Another way in which securities regulators came to accommodate foreign issuers was through mutual recognition arrangements. The European Union provides the quintessential example of supra-national mutual recognition. The EU's Single European Market plan envisioned, *inter alia*, the integration of securities markets of all member states.[53] Its general strategy was to implement the principle of mutual recognition among member states' regulatory regimes—the aforementioned "single passport" principle.[54] The SEC and securities regulators from three Canadian provinces undertook a somewhat similar initiative by establishing the Multi-Jurisdictional Disclosure System (MJDS). MJDS also implements the principle of mutual recognition. Under this system, regulators from each jurisdiction recognize the disclosure statements of corporations from all other jurisdictions.[55]

What is new then in the following cases? This article intends to advance that these cases represent a new regulatory paradigm that has not yet been acknowledged—one that may be called "unilateral recognition." Regulators that allow their regulatees to comply with their regime by fulfilling duties under a foreign regime unilaterally recognize the latter as sufficiently equivalent to their national regime. They do not request permission from the foreign regulators to do so, nor do they expect them to respond in kind. Being relatively small and in competition with the foreign market, they cannot reasonably expect the foreign

ish Financial Services Authority (FSA) has been appointed as the United Kingdom's "competent authority" to decide on the admission of securities for listing. *See* Official Listing of Securities (Change of Competent Authority) Regulations 2000.

52. For a thorough review of the reduced requirements from foreign private issuers, see, e.g., LOUIS LOSS & JOEL SELIGMAN, 2 SECURITIES REGULATION 758-85 (1989).

53. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL 4 (1985).

54. For overviews of stock market integration and regulation in the EU, see generally EUROPEAN SECURITIES MARKETS, *supra* note 5; EUROPEAN EQUITY MARKETS, *supra* note 1.

55. *See* Multijurisdictional Disclosure and Modification to the Current Registration and Reporting System for Canadian Issuers, Exchange Act Release No. 33-6902, 49 SEC Docket (CCH) 260 (June 21, 1991). For an assessment of MJDS, see Joel P. Trachtman, *Recent Initiatives in International Financial Regulation and Goals of Competitiveness, Effectiveness, Consistency, and Cooperation*, 12 NW. J. INT'L L. & BUS. 241, 303 (1991). This general description, however, is misleading. In practice, Canadian issuers that offer securities in the United States under MJDS must comply with generally acceptable accounting practices of the United States (US GAAP) and are subject to American liability duties. For them, the savings embodied in MJDS are mainly limited to avoiding the interaction with the SEC's bureaucracy in Washington, D.C.

regulators to negotiate with them a mutual recognition agreement akin to the Single European Act or the MJDS. Unilateral recognition is the weapon of the weak to survive in modern securities markets.

2. *Belgium*

The purest example of unilateral recognition is the Belgian regulatory treatment of Easdaq—a Brussels-based, pan-European market for growth companies.[56] Easdaq began its way as an EU-sponsored project and ended up as a national Belgian one. In November of 1993, the EC Commission found that small and medium-sized enterprises (SMEs) have difficulties to access long-term equity capital. Impressed by the success of NASDAQ to cater to the needs of growth companies, the Commission became interested in implementing a similar market in the EU.[57] In November of 1994, several investment banks and securities firms led by the European Venture Capital Association (EVCA) established the European Association of Securities Dealers (EASD) with a view to establish Easdaq (EASD Automated Quotation).[58] The EU Commission provided financial and political support for the project as part of its efforts to advance SMEs,[59] and in March 1995, Easdaq S.A. was incorporated in Belgium as a stock company.[60]

In May of 1996, the Belgian cabinet approved Easdaq as a recognized stock market.[61] This meant that pursuant to the Investment Services Directive, it became a "regulated market," accessible to participants from all over Europe as their national stock market. According to Belgian law, Easdaq S.A. was recognized as Easdaq's "Market Authority"—the entity responsible for the functioning and surveillance of the market.

56. For a detailed chronology and analysis of the EASDAQ project, see Licht, *supra* note 1, at 49–53.

57. *See generally* COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION, 'REPORTING ON THE FEASIBILITY OF THE CREATION OF A EUROPEAN CAPITAL MARKET FOR SMALLER ENTREPRENEURIALLY MANAGED GROWING COMPANIES', COM(95) 498 final, Oct. 25 1995.

58. Clearly, the choice of name as well as structure for Easdaq were made in order to connote with Nasdaq's remarkable success in creating a market for growth companies in the US. In order to ensure the required momentum for the market at the outset, Easdaq has reached an agreement with Nasdaq to cross-list 20 of the European companies then listed in the US. That plan, however, never materialized, and Nasdaq—which still retains an equity interest in Easdaq—always preferred to compete with Easdaq.

59. *See EVCA Launches 'EASD' to Build Europe's New IPO Market*, EUROPEAN VENTURE CAPITAL J., Dec.-Jan. 1994, at 5.

60. Shareholders in Easdaq S.A. included the EVCA, Nasdaq, a group of British financiers called EASDAQ-UK, and the Paris Bourse (which left in 1995 after establishing the competing Nouveau March'). *See* Jennifer Jury, *Latest Developments in Europe's New Growth Companies Markets*, EUROPEAN VENTURE CAPITAL J., May 1996, at 45.

61. *See In Brief*, CORPORATE MONEY, June 5, 1996, at 4.

The market authority operates under a second tier supervision of the Belgian Banking and Finance Commission.[62]

After its launch in September of 1996, Easdaq encountered considerable difficulties in establishing itself as the European NASDAQ. First, Easdaq faced direct competition from NASDAQ—which included luring European companies to list on it and repeating announcements that it intends to establish a European extension. Second, Easdaq was shadowed by competing small-issuer markets established by the traditional stock exchanges under the brand name Euro NM ("New Market" in various languages), and primarily from the German Neuer Markt.[63]

Determined to assist Easdaq in this competition, Belgium took a very bold step. At the recommendation of the Banking and Finance Commission, the Belgian Parliament in July of 1999 amended the law regarding securities public offering prospectuses.[64] The amendment is a fascinating piece of legislation that undoubtedly deserves further study. According to its background statement, its explicit purpose is to increase the attractiveness of Belgian securities markets other than the Brussels Stock Exchange in an environment of increasing international competition over listings of high technology, biotechnology, and telecommunication companies.[65]

The amendment authorized the market authority to exempt foreign issuers from the duty to file a prospectus with the Belgian authority when they list their securities on that market, provided that the Belgian market confirmed that the issuer is subject to equivalent disclosure duties where its stocks are currently listed. The amendment goes even further and allows the Belgian market to quote prices for such issuers, namely, to establish trading in their securities even without the issuer's consent and without formal approval from the issuer's home country securities regulator.

Pursuant to the July amendment, Easdaq, in November 1999, announced that it would launch facilities for dual listing of European, Israeli and U.S. companies as well as facilities for dual trading (i.e., without issuer-backed listing). Listing was to be free of charge.[66] By August

62. Letter from Easdaq to the Author, July 17, 1996.

63. *See, e.g.*, Sharmila Devi, *Battle is on to Acquire Listings*, FIN. TIMES, March 23, 1999, at 4; Gail Edmonson, *Liberty! Equality! Liquidity!*, BUS. WK., Feb. 22, 1999, at 59.

64. Arret Royal modifiant l'arret royal du 31 octobre 1991 relatif au prospectus publier en cas d'emission publiquie de titre et valeurs, 6 julliet 1999. Thanks to Albert Verhoeven, Vice President Legal at Easdaq, for this reference.

65. *Id.*

66. *See* Press Release from Easdaq, *EASDAQ Announces Details of New Dual Listing and Dual Trading Facilities*, Nov. 5, 1999 (visited Feb. 4, 2001) <http://www.easdaq.com>. The inclusion of Israeli issuers in the list stems from their prominence in the foreign listing market and

of 2000, thirty-two American and six Israeli stocks were trading on Easdaq, out of which seventeen and three, respectively, were dual listed.[67]

3. *Israel*

Israel provides another example of a regulatory reform establishing unilateral recognition that was initiated and driven by the needs of the local stock exchange. Since the mid-1990s, Israel has stood out as the second largest supplier of foreign securities to U.S. markets. As of mid-2000, there were approximately one- hundred Israeli securities listed on American markets, out of which eighteen were dual listed.[68] In fact, almost every IPO of Israeli "new economy" firms was carried out in the U.S.[69] This anomalous situation has led to a regulatory program aimed to lure U.S.-listed Israeli issuers to dual list on the Tel Aviv Stock Exchange (TASE) as well.[70]

By the mid-1990s, TASE officials had already realized that if they kept losing business this way they would lose the entire shop. In response, they started to promote the idea of a fast track dual listing of U.S.-listed Israeli companies[71]—what later came to be called "automatic dual listing." The dual listed firms were supposed to jump start the dormant local market and provide the necessary volume for maintaining the viability of the local financial sector.

In February 1998, an expert committee nominated by the Israeli Securities Authority (ISA) recommended the exemption of issuers listed only on the national U.S. markets from filing a prospectus under Israeli law and to allow the issuers to rely on their American disclosure docu-

is based on a study conducted by Easdaq, which found that the Israeli securities regulation regime is of adequate quality in terms of investor protection. Telephone Interview with Albert Verhoeven, Vice President Legal at Easdaq (Nov. 11, 1999).

67. *See* Easdaq (visited Aug. 16, 2000) <http://www.easdaq.com>.

68. Data from the TASE Research Department to the Author (June 7, 2000)(on file with author).

69. The reasons for this anomalous situation are manifold. Some of them trace back to two financial crashes, in 1983 and 1994, which caused the public to lose its confidence and made the TASE dormant until 1999. Consequently, the fast growing high technology sector was unable to tap the TASE for the funds it needed during the 1990s. As a venture capital industry was also largely undeveloped at that time, start-up companies began seeking funding in the U.S., and with Silicon Valley venture capital fund managers on their boards of directors, the road to Nasdaq was the natural one to take.

70. For a detailed chronology and analysis of the Israeli dual listing project, see Amir N. Licht, *Managerial Opportunism and Foreign Listing: Some Direct Evidence* _ U. PA. J. INT'L ECON. L. (forthcoming 2001); Amir N. Licht, *David's Dilemma: A Case Study of Securities Regulation in a Small Open Market*, 2 THEORETICAL INQUIRIES L. (forthcoming 2001).

71. *See* Merav Arlozorov, *TASE: Dual Listing Will Contribute at Least Another US$100M to Trading Volumes*, GLOBES, Jan. 8–9, 1997.

ments, provided the disclosures are augmented to domestic American disclosure standards.[72] The committee's report is based on the following findings:[73]

> • The legal and accounting regime applicable to American issuers—based primarily on Form 10-K periodical disclosure under the Exchange Act—is substantially equivalent to the Israeli regime in terms of the investor protection it provides and, therefore, can be relied on for regulating dual listed securities.
>
> • In contrast, the U.S. regime applicable to foreign issuers—based primarily on Form 20-F—is inferior both to the Israeli regime and the Form 10-K requirements.
>
> • Although Israeli issuers in the U.S. are required to use Form 20-F, most of them supplement their reports with voluntary disclosure of 10-K-like business data.

When the report was released in September 1998, its recommendations were pioneering in terms of the regulatory paradigm they reflected, i.e., the unilateral recognition of a foreign securities regulation regime. But the TASE, backed by the Public Companies Association, staunchly objected to requiring even an iota of additional disclosure and lobbied aggressively for an automatic dual listing arrangement. Its position was perceived as genuine in light of intensifying competition.[74] The ISA eventually caved into political pressure and retreated from its proposals for additional disclosure. In July 2000, the Israeli Parliament, the Knesset, adopted an amendment that allows Israeli issuers listed on na-

72. *See* ISRAEL SECURITIES AUTHORITY, COMMITTEE REPORT ON DUAL LISTING OF SECURITIES 25 (1998) (Hebrew). The committee's working assumption was that the situation was unacceptable and likely to lead to irreversible harm to Israel's high-tech sector and capital market. *Id.* at 14.

73. *Id.* at 15–16. The committee opined that only the latter standard is suitable for investor protection in Israel and would prevent discrimination against local issuers. *Id.* at 25.

74. In early 2000, Easdaq started trading in several Israeli U.S.-listed stocks, which were the coveted Holy Grail for the TASE due to their high trading volume. In February 2000, Nasdaq's Chairman, Frank Zarb, visited Israel and during his visit it was announced that Nasdaq intends to open an extension in Tel Aviv. There is reason, however, to take the announcements about Nasdaq's plans with a grain of salt. Within two days, news articles were published about plans to open an extension in Tel Aviv, about cooperation with the TASE, and on a joint platform connecting Nasdaq, the TASE, and the stock exchanges of Cairo and Istanbul. The immediate threat to the TASE, however, was evident. *See, e.g.*, Boaz Levi, *"Capital Has No Passport"*, HAARETZ, Feb. 16, 2000; Keren Zuriel & Zeev Klein, *Tightening Connections between Nasdaq and Israeli Companies Listed on it to be Examined*, GLOBES, Feb. 12–13, 2000.

tional U.S. markets to list their stocks on the TASE based entirely on disclosures they make overseas under U.S. law or voluntarily.[75]

4. *Conclusion*

The cases of Easdaq and the TASE are not isolated exceptions. Many other stock exchanges, particularly in East Asia, have elevated the competition for listings and trading volume to a new level by establishing (or planning to establish) special arrangements for dual listing of foreign "superstar" stocks and stocks of firms from their home countries. The list includes stock exchanges in Hong Kong,[76] Japan,[77] Australia,[78] Singapore[79] and Taiwan.[80] In most of these cases the basic idea is to dual list prominent NASDAQ stocks in order to strengthen the local exchange's position as a financial center. At least in the case of Hong Kong, the program involves a regulatory reform, which implemented a system of unilateral recognition in American securities regulation, probably similar to those in Belgium and Israel.[81]

III. SECURITIES REGULATION AS PUBLIC LAW

The classification of securities regulation as public law may seem straightforward, if not self-evident, to most lawyers who would have given it a thought. The implicit assumption that this field is a part of public law in turn allows one to ponder whether it could be privatized—a question which underlies this Colloquium. This Part makes this assumption explicit in order critically to examine its meaning and usefulness in the new international market environment. The framework of the analysis is the relation between securities regulation, generally held to be public law, and corporate law, which is often viewed as private law.

75. Israeli Securities Law (Amend. No. 21), 5760–2000.

76. *See* Hui Yuk-Min, *Nasdaq Firms Poised for Dual Listing in New Year; Nasdaq Dual Listing Close to Agreement*, S. CHINA MORNING POST, Nov. 30, 1999, at 1; Hui Yuk-Min, *Nasdaq Mainstays Closer to SAR Listings*, S. CHINA MORNING POST, March 4, 2000, at 2.

77. *See* Alexandra Nusbaum, *Survey—Japan: Corporate Fund-Raising: Mothers Planning to be Nimble: The New Stock Markets*, FIN. TIMES, Dec. 17, 1999, at 4; *Nasdaq Japan to Attract Firms from Rival Markets: Pres. Saeki*, JIJI PRESS TICKER SERVICE, Mar. 2, 2000.

78. *See Dual Listing Expected of Stocks at Home, Abroad*, THE KOREA HERALD, April 29, 2000.

79. *See* Barry Porter, *Singapore Joins Fray in Pushing US Stocks*, S. CHINA MORNING POST, June 2, 2000, at 1 (describing plans for cooperation with Amex and the NYSE); *Singapore/Australia to Sign Cross-Listing Agreement Later Today*, AFX-ASIA, June 6, 2000.

80. *See* Sofia Wu, *Taiwan Stock Exchange, Nasdaq Planning Cross Listing*, CENT. NEWS AGENCY, Feb. 18, 2000.

81. *See* Yuk-Min, *supra* note 76.

These classifications have been unstable and subject to pointed critiques, especially in the United States.[82]

A. *Background on the Public/Private Distinction*

1. *The European Perspective*

It is methodologically easier to begin with the continental European perception of the public/private distinction that prevails in all civil law systems. The distinction between public law and private law seems to many continental European lawyers to be fundamental, necessary and, on the whole, evident. Although the distinction is often attacked, the average continental lawyer *knows* that public law and private law are essentially different.[83] The distinction thus has been dubbed the "mighty cleavage,"[84] a "great dichotom[y],"[85] and the "*summa divisio*."[86] It dates from antiquity, with its historical roots tracing back to the very early sources of Roman law,[87] and is prevalent today in all Civil Law systems.[88]

European legal doctrine divides all law into private law and public law. Public law is the body of law that governs the relationships to which the state, in whatever capacity and shape, is a party. Private law, in contrast, applies to relationships between private persons, including legal entities, such as corporations.[89] Thus, public law is said, schematically, to involve vertical relationships while private law concerns horizontal relationships. However, the ever-increasing expansion of administrative law, caused by increased governmental interference in all spheres of social activity, has led to the multiplication of encroachments upon the private law sphere. A new branch of law, a sub-part of admin-

82. *See generally* Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227 (1998).

83. *See* Ren' David, *Introduction*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 10 (Ren' David ed., 1971) [hereinafter 2 INT'L ENCYLCOPEDIA] ("[I]n the eyes of Romano-Germanic lawyers recognition of a distinction between public and private law is natural, just, and necessary."); John Henry Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3, 3 (1968); *see also* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 300 (5th ed. 1988) ("In a civilian mind, all law is automatically divided into private law and public law.").

84. Merryman, *supra* note 83, at 3 (citing T. HOLLAND, THE ELEMENTS OF JURISPRUDENCE (12th ed. 1917)).

85. SCHLESINGER ET AL., *supra* note 83, at 299.

86. Charles Szladits, *The Civil Law System*, *in* 2 INT'L ENCYCLOPEDIA, *supra* note 83, at 15.

87. The distinction is said to have been recognized by Ulpian and reflected in Justinian's Digest. *See* SCHLESINGER, *supra* note 83, at 300; Szladits, *supra* note 86, at 15.

88. *See* Szladits, *supra* note 86, at 20.

89. *See id.* at 56.

istrative law called "economic law," thus was defined. This resulted in a situation where the public/private distinction, although still effective in practice, became blurred by the interpenetration of public law and private law.[90]

2. *The American View(s)*

According to the great comparativist, Ren' David, the distinction between public law and private law in common law countries is not rejected (as it was in socialist doctrine); it is simply unknown.[91] In English law, the distinction is not felt at all, having been traditionally denied by English practicing lawyers. Unlike continental Europe, there are no special courts for public law questions, but only a few rules and remedies special to public law, and almost no distinctive attitude of mind.[92]

Although the United States clearly exhibits the basic characteristics of a common law system, a related dichotomy—the public/private distinction—continues to gain much importance here in the United States. The discussion focuses on the validity of classifying social phenomena as public or private instead of on a classification based on their governing legal fields.[93] In the eighteenth century, most American lawyers recognized that a variety of institutions and organizations, including business corporations, most accurately were described as partly private and partly public in character.[94]

In the nineteenth century, lawyers began to find increasingly problematic the fact that these organizations exercised special powers and privileges usually associated with governments, such as the powers of taxation and eminent domain. A movement has begun to separate the public and private "spheres," driven to a large extent by the ideology of classical liberalism. In this context, there was a "virtual obsession"[95] on behalf of orthodox judges and jurists to create a legal science that would sharply separate law from politics. Private law came to be understood as a neutral system for facilitating voluntary market transactions and vin-

90. *See id.* at 48, 75; *see also* Merryman, *supra* note 83, at 14-18; s*ee generally* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE (Tony Weir trans., 1995).

91. *See* David, *supra* note 83, at 12.

92. *See* Tony Weir, *The Common Law System*, *in* 2 INT'L ENCYCLOPEDIA, *supra* note 83, at 77, 94–95.

93. *Cf.* Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

94. For the purpose of briefly recounting the history of the public/private distinction, the text draws liberally on AMERICAN LEGAL REALISM 98–129 (William W. Fisher et al. eds., 1993), and Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

95. *See* Horwitz, *supra* note 94, at 1425.

dicating injuries to private rights.[96] Towards the end of the 1800s, a more formal and systematic distinction between public and private law began to be articulated.[97]

The first half of the twentieth century saw the decline of the public/private distinction in the United States as a result of relentless attacks by the Legal Realist Movement.[98] That distinction, however, refuses to die.[99] In many doctrinal contexts it in fact seems alive and well.[100] In light of the impressive longevity of its civil law counterpart, and notwithstanding the considerable strains it is withstanding in modern times, there is ground to believe that the distinction will not vanish from the legal landscape anytime soon. To be sure, the distinction is definitely malleable, and legal argument could abuse it.[101] But its vitality indicates that it provides a beneficial service in helping lawyers orient themselves in the legal landscape. False or inaccurate theories can nevertheless be quite useful for this purpose once their limitations are acknowledged.[102]

B. *The Relations between Corporate Law and Securities Regulation*

Loss and Seligman trace the historical origins of the disclosure and anti-fraud components of modern securities regulation in the United States to the English Companies Act of 1844.[103] In that Act, Parliament enacted the first modern prospectus requirement.[104] A later version of that Act, the English Companies Act of 1929[105] (the "1929 Act")—served as the foundation for Felix Frankfurter and his team in drafting

96. *See id.* at 1425-26.

97. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 11 (1992).

98. For prominent expositions, see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1928); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

99. This is often decried by scholars of the Critical Legal Studies movement. *See, e.g.*, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); *see also* Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987).

100. *See, e.g.*, AMERICAN LEGAL REALISM, *supra* note 94, at 100.

101. For a fine demonstration of this malleability, see Kennedy, *supra* note 99.

102. For example, the Apollo lunar mission was planned using calculations that were based on Newtonian physics. That theory is clearly false in light of Einstein's theory of relativity, but was found to be sufficiently accurate for the "limited" purpose of getting to the moon and back. *See* Letter from Stephen Garber, NASA Headquarters History Office, to Author (June 2, 1998) (on file with author).

103. An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 1844, 7 & 8 Vict., ch. 110 (Eng.).

104. *See* LOUIS LOSS & JOEL SELIGMAN, 1 SECURITIES REGULATION 6, 5–6 (3d ed. 1989). Interestingly, the need to regulate market professionals was perceived as early as 1285 A.D. *Id.* at 3.

105. The Companies Act, 1929, 19 & 20 Geo. 5, ch. 23 (Eng.).

d as the foundation for Felix Frankfurter and his team in drafting the Securities Act of 1933.[106] In particular, the 1929 Act was the source of two major components of the current American securities law, the concept of full disclosure,[107] and the civil liabilities of the registrant, its officers, directors, and experts.[108]

The importance of the legislative history goes beyond mere anecdotal interest. After all, the 1933 Act's drafters were not the only ones to perceive the value of full disclosure. Frankfurter's team was indeed implementing President Roosevelt's policy which championed full disclosure as the preferable remedy to the malaise of American financial markets at the time.[109] Roosevelt often referred to Louis Brandeis's famous maxim, that "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[110] The significant point here is that the very principle which constitutes the central pillar of the securities regulation regime in one country was located, at virtually the same point in time, at the heart of another country's corporate law.

In a number of cases, the courts were called to distinguish between corporate law and securities regulation. This happened whenever the outer boundaries of the Securities Acts needed delineation as an instrumental step towards discerning the degree to which they could preempt state corporate law. The cases cover a variety of central issues, such as fiduciary duties,[111] proxy solicitation,[112] and dual class common stock capitalization.[113] But the considerable judicial effort yields only casuis-

106. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 57 (rev. ed. 1995); James M. Landis, *The Legislative History of the Securities Act of 1933,* 28 GEO. WASH. L. REV. 29, 34 (1959); *see* also Patrick Moyer, *The Regulation of Corporate by Securities Regulators: A Comparison of Ontario and the United States,* 55 U. TORONTO FAC. L. REV. 43, 46 (1997) (stating similarly that "[s]ecurities law in Canada evolved from the disclosure requirements imposed by English corporate law in the late 19th century. Securities regulation remained exclusively part of corporate law until Manitoba adopted the *Sale of Shares Act* in 1912").

107. *See* Landis, *supra* note 106, at 34.

108. *Id.* at 35.

109. *See* SELIGMAN, *supra* note 106, at 41–42.

110. *See id.*

111. *See* Santa Fe Industries v. Green, 430 U.S. 462 (1977) (examining the extent to which the Securities Acts' anti-fraud provisions can be used for creating a federal law of fiduciary duties).

112. *See* Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985) (same, with regard to proxy solicitations).

113. *See* Business Roundtable v. S.E.C., 905 F.2d 406, 414 (D.C. Cir. 1990) (anulling Rule 19c-4, 17 C.F.R. § 240.19c-4 (1998), on the grounds that that the SEC's general authority to regulate corporate voting in the public interest did not permit it to regulate corporate law).

tic rulings and fails to provide a principled distinction between the two fields.[114]

It appears wrong to assume that with sufficient analytical effort one could produce a clear separation of fields.[115] From a substantive point of viel, the distinction between corporate law and securities regulation is extremely tenuous. The issues which the two fields of law cover overlap considerably, since federal securities law regulates the core of the corporate governance system—the voting mechanism—through the proxy rules.[116] Federal securities law also regulates fundamental changes in corporate structure, such as going-private transactions[117] and hostile takeovers.[118] Finally, federal securities law regulates insider trading, perhaps the most contentious issue in the relationship between public shareholders and company insiders.

The invasion of federal securities law into the traditional areas of corporate law reaches beyond particular issues. According to Dean Seligman, federal securities law has become "the new corporate law."[119] Seligman documents a decline in state law standards regarding the duty of loyalty and the duty of care and argues that securities law, through its emphasis on preventive action and deterrence, has profoundly changed the content of these duties.[120] The entire discussion thus reflects a

114. In Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 503 (7th Cir. 1989), the court distinguished between "process," which is the realm of the federal Securities Acts, and "substance," the realm of states' corporate laws. This distinction, however, is far from clear, and indeed the court gives examples for cases where the distinction would be difficult to implement. *Id.*

115. *Cf.* Moyer, *supra* note 106, at 48 ("In the United States, historical accident and judicial statutory construction have produced a clear separation of corporate law and securities law."). It thus seems wrong on Moyer's part to decry the fact that "the boundary between the two [fields] has become blurred in Canadian law." *Id.* at 46.

116. Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m(a)(1998). *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 827 (2d ed. 1997) ("Indeed, since voting rights are so fundamental to the process of corporate governance, there are few areas of securities regulation where both the interplay and tension between federal securities law and state corporation law are as vivid.").

117. *See* Section 13(e) of the Exchange Act and Rule 13e thereunder. 17 C.F.R. § 240. 13e-1 (1998).

118. The Williams Act, as embodied in Sections 14(d) and 14(e) of the Exchange Act and Rules thereunder. Section 13(d) of the Exchange Act and Rules thereunder should also be considered part of this regulatory scheme as an "early warning system." COX ET AL., *supra* note 116, at 865.

119. Joel Seligman, *The New Corporate Law,* 59 BROOK. L. REV. 1, 2 (1993) [hereinafter Seligman, *New Corporate Law*]; Joel Seligman, *Accounting and the New Corporate Law,* 50 WASH. & LEE L. REV. 943 (1993); *cf.* William T. Quillen, *The Federal-State Corporate Law Relationship—A Response to Professor Seligman's Call for Federal Preemption of State Corporate Fiduciary Law,* 59 BROOK. L. REV. 107 (1993).

120. *See* Seligman, *New Corporate Law, supra* note 119, at 3. *See also* Edmund W. Kitch, *The Theory and Practice of Securities Disclosure,* 61 BROOK. L. REV. 763 (1995); Louis Lowenstein,

deeper reality, namely, that the two fields are in fact highly integrated, as it is hard to imagine a good description of the law of business corporation while omitting one of them. Moreover, securities regulation and corporate law are interdependent to the extent that one of them could remedy deficiencies in the other.[121]

C. *Classifying Corporate Law and Securities Law*

The public law/private law distinction between securities regulation and corporate law generally holds at a basic level. In continental Europe, the division between branches of public and private law varies both across civil law countries and according to the various ends to be served by the classification of law.[122] At the core of private law are the classic subjects (contract, tort, and property) which together with related subjects are invariably codified. Company law is usually classified as part of commercial law, the most private law beyond the inner core of civil law proper.[123] By contrast, securities regulation would be classified and located well within the boundaries of public law. This discussion begins with some basic, formalistic indicators. It then revisits these classifications within the critical framework delineated above. It argues that the persistence of the private character of the corporation is due largely to the rise of securities regulation as the public companion of corporate law.

1. *Basic Indicators*

From a structural perspective, company law and securities regulation exhibit a number of differences which, taken together, support the classification of the two fields as private and public law, respectively. First, like all private law, company law emanates from the primary legislative body (the parliament). Securities regulation is more complex, as its first principles are enacted by the legislature, but the greater part of its legal corpus is typically promulgated by a governmental body.

Financial Transparency and Corporate Governance: You Manage What You Measure, 96 COLUM. L. REV. 1335 (1996).

121. *See* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHIC. L. REV. 1047 (1995) [hereinafter Mahoney, *Mandatory Disclosure*] (arguing that Congress's legislative intention in enacting the Securities Acts was to curb the agency problem); *but see* PAUL G. MAHONEY, THE POLITICAL ECONOMY OF THE SECURITIES ACT OF 1933 (University of Virginia Law School, Legal Studies Working Paper No. 00-11, 2000) (arguing that in enacting the Securities Acts, Congress was restoring the position of investment houses in the stock market).

122. *See* Szladits, *supra* note 86, at 21.

123. *See id.* at 72.

Second, company law, like other fields of private law, is administered and enforced primarily by retroactive dispute resolution within the court system (except for minor issues not involving disputes such as company registration). By contrast, securities regulation is administered primarily proactively through administrative approval with only secondary resort to the courts.

Third, company law in general is enabling. It offers a set of default rules, which can be changed by company organizers to fit their preferences. In contrast, securities regulation is mostly mandatory and often prohibits opting out of its provisions.[124] These features, respectively, are characteristic to provisions of private and public law.

The basic indicators enumerated above can only mark the starting point in the way towards a classification of securities regulation. These indicators are largely superficial, and almost every generalization they rely on could be refuted by some examples. The remainder of this Part thus makes another effort towards classification in a more critical mode in light of the functional relations between the two fields.

2. *Classifying Corporate Law*

In the United States, the classification of company law has taken the shape of classifying the business corporation as "public" or "private." Initially, business corporations were considered public entities. However, during the nineteenth century business corporations came to be perceived as private entities despite several waves of academic and political attacks.[125] During the first decades of the twentieth century, the legal realist movement also discussed the nature of the firm.[126] In 1932 Berle and Means published their seminal book, *The Modern Corpora-*

124. In the United States scholars debate the possibility and desirability of opting out of the Securities Acts even in limited liability corporations (LLCs). *See* Park McGinty, *The Limited Liability Company: Opportunity for Selective Securities Law Deregulation*, 64 U. CIN. L. REV. 369 (1996)(arguing that private parties should be permitted to opt out of securities regulation by private agreement); Larry E. Ribstein, *Form and Substance in the Definition of a "Security": The Case of Limited Liability Companies*, 51 WASH. & LEE L. REV. 807 (1994)(same); Larry E. Ribstein, *Private Ordering and the Securities Laws: The Case of General Partnerships*, 42 CASE W. RES. L. REV. 1 (1992)(same); Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH & LEE L. REV. 519 (1999).

125. *See* Licht, *supra* note 82, at 258–61.

126. In an influential article, John Dewey argued that the whole debate about corporate personality was pointless and that either theory could be deployed to support both intervention and non-intervention. While Dewey's argument could not be used to advocate one particular classification, it gave equal, albeit dubious, legitimization to both. *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); *see also* Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932); Paul Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594 (1924).

tion and Private Property,[127] in which they observed the separation between ownership of corporate shares and control over the corporation's assets. Shareholders were said to have retained the former but to have surrendered the latter to management. Unlike the standard law and economics interpretation of Berle and Means, they advocated the conception of corporations as public again. They wrote that "by surrendering control and responsibility over the active property, [shareholders] have surrendered the right that the corporation be operated in their sole interest. . . . They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control [group] but all society."[128]

Berle and Means's call was not answered and, after Dewey's famous article on corporate personality,[129] the whole issue suddenly vanished from controversy.[130] This article proposes that to a large extent this tension was defused by the enactment of the Securities Acts. Public investors were the constituency at the focus of public attention after the crisis in Wall Street. Instead of intruding into the perceivably private sphere of the corporation with no apparent tools to remedy problems,[131] Congress preferred to burden corporations with disclosure duties having an equivalent effect.[132] This new arrangement was convenient. It let management remain largely shielded from regulation in the private sphere of the corporation and allowed regulators to try to protect public investors through public law, i.e. securities regulation.

Theoretical developments in the theory of the firm, particularly Jensen and Meckling's depiction of the corporation as a nexus of contracts,[133] further strengthened the perception of corporations as private entities arising from numerous contractual arrangements. Easterbrook and Fischel, among others, later turned this metaphor into the central pillar of their theory of corporate law. Under this view, the legal framework that governs the corporation should generally stem from private,

127. ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

128. *Id.*

129. *See supra* note 126.

130. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175 (1985).

131. Such a strategy would have also involved constitutional difficulties for reasons of federalism, as is manifested by the recurring litigation over the SEC's jurisdiction.

132. *Cf.* Mahoney, *Mandatory Disclosure*, *supra* note 116 (arguing that the agency problem was the legislative purpose of the Securities Acts).

133. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

contractual choice.[134] The modern perception of the corporation as a private contractual arrangement is starting to come under growing attacks from progressive legal scholars.[135] However, an important recent critique by Bradley *et al.* acknowledges the superiority of the contractarian paradigm that characterizes the Anglo-American corporate form, but calls for better understanding its limitations.[136]

3. *Classifying Securities Regulation*

At first glance, securities regulation exhibits all the central features of public law, as detailed earlier in this Part. Judged by its structure and content, and, of course, by its title, the field is a model of modern regulatory law with which the state intervenes in legal relationships that were traditionally governed by private law. Like in the case of corporate law, however, this classification is not clear-cut.

To begin, the Securities Acts' antifraud provisions are in essence private law as they provide potent causes of action for breaching duties under the Acts.[137] Other pure regulatory provisions in the Securities Acts were given private law extensions whenever private causes of action were implied by the courts.[138] Certain breaches of securities law duties, such as manipulation or misstatements in secondary market disclosure, may be viewed as tortious in nature as they don't require a preexisting relationship between the plaintiff and the defendant. Many

134. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Luigi Zingales recently argued that corporate governance is best understood as a set of solutions that overcomes the impossibility of complete contingent contracts. *See* Luigi Zingales, *Corporate Governance*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 497, 502 (Peter Newman ed., 1998).

135. For critical analyses, see William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (book review); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201; *see also* Paul N. Cox, *The Public, The Private and the Corporation*, 80 MARQ. L. REV. 391 n.4 (1997) (collecting references).

136. *See* Michael Bradley, Cindy A. Schipani, Anant K. Sundaram, and James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROB. 9 (1999).

137. *See* Louis Loss, *The Assault on Securities Act Section 12(2)*, 105 HARV. L. REV. 908, 915 (1992).

138. The scope of implied private causes of action under the Securities Laws has expanded and contracted over time. For an overview, see COX ET AL., *supra* note 116, at 968–71; Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727 (1994); Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*," 108 HARV. L. REV. 438 (1994); Joel Seligman, *The Merits Still Matter: A Rejoinder to Professor Grundfest's Comment Why Disimply?*, 108 HARV. L. REV. 748 (1994).

other breaches, however, can be seen as breaches of contractual or quasi-contractual duties, e.g., misstatements in a prospectus and insider trading.

The Securities Acts' public character had also been eroded in a line of cases about the arbitrability of disputes under the Acts. The issue of arbitrability is relevant because the Securities Acts, like other regulatory regimes, preclude waiver of their protection. In the past, arbitration was deemed inadequate for consideration of public law claims, including securities regulation ones.[139] Later, the United States Supreme Court narrowed the rule and held that a claim under the Securities Exchange Act was arbitrable, provided that it arose from an "international" transaction.[140] More recently, the Court reversed the basic rule and held that claims under the Securities Exchange Act, both domestic and international, are arbitrable.[141] In so doing, the Court has given the Acts a distinctive flavor of private law.

But the issue of arbitrability pales in comparison to a much stronger trend that is currently under way, namely, the growing number of foreign listings. A foreign listing allows actors in today's equity markets to choose—through private, contractual choice—a securities regulation regime that fits their tastes. The menu of options for issuers is limited in certain important aspects. For instance, a foreign listing ordinarily only allows for opting into securities regime but not for opting out. It is also limited to the host country's entire securities regime and does not allow a more refined combination. But in the end, would-be issuers can—with sufficient planning—avoid their home country regime and opt into one they consider more beneficial. Israeli U.S.-listed issuers and European issuers listed on Easdaq are prominent examples of such a move. The effect of this trend is to render securities regulation a *de facto* private institution, notwithstanding its inherent character as public law.

More broadly, scholars have argued for allowing market participants to pick the securities regulation regime of their choice irrespective of their home country and without need for a foreign listing. Under such proposals, issuers would be able to be listed on a particular market under the regulatory regime of any country provided that they made appropriate disclosure.[142] A similar logic underlies proposals for issuer

139. *See* Wilco v. Swan, 346 U.S. 427 (1953).

140. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

141. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

142. *See generally* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 SO. CAL. L. REV. 903 (1998) [hereinafter Choi & Guzman, *Portable Reciprocity*]; Stephen J. Choi and Andrew T. Guzman, *National Laws, International Money: Securities Regulation in Global Capital Market*, 65 Fordham L. Rev. 1855

choice of securities regulation in the domestic U.S. context.[143] Such regimes would be similar to choice-of-law provisions in private contracts and could thereby privatize securities law considerably. Implementation of such schemes seems remote, however.

In conclusion, the fact that corporate law and securities law cannot precisely be defined as "private" or "public" is hardly surprising. In light of their common early source and their mutual inter-penetration today in terms of subject matter, such an effort is bound to be imprecise. But the wide penumbra in each field should not obstruct the observation that these fields have a solid, determinable core consisting of private and public law, respectively.

IV. SECURITIES REGULATION AND STOCK EXCHANGE MOBILITY

The frantic manner in which stock exchanges around the world compete in the global equity market stands in stark contrast to the conservative characterization of securities regulation as national public law, which, as such, has territorial application. This contradiction between mobility and stability causes significant friction and uncertainty. The iX project provides a vivid example for both, irrespective of its fate. But iX and other projects also demonstrate the fundamental change in the dynamics of international stock exchange competition. This Part discusses the implications of this new reality on the nature of securities regulation.

A. *Wholesale Agents of Change*

Let us begin with the seemingly mundane observation that the agents of change in securities law reforms are now primarily stock exchanges. Stated so broadly, this observation is not that novel, since at least in the United States the NYSE has been lobbying the SEC for many years to adapt the federal securities law to international markets, usually by reducing disclosure duties imposed on foreign issuers. Recent years, however, have witnessed more stock exchanges joining this number and aggressively lobbying their regulators to accommodate the needs of

(1997); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998). For a pointed critique and a rejoinder, see Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is not Investor Empowerment*, 85 MICH. L. REV. 1335 (1999); s*ee also* Robert W. Hillman, *Cross-Border Investment, Conflict of Laws, and the Privatization of Securities Law*, LAW & CONTEMP. PROBS., Autumn 1992, at 331. Although Hillman limits his proposal to private placements, these transactions do not always warrant invoking the protective umbrella of the Securities Acts, as was acknowledged by the Supreme Court in *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995).

143. *See* Romano, *supra* note 142.

foreign clients, either issuers or traders. Many other stock exchanges are involved in various international merger or alliance projects.

The importance of this observation could be better appreciated when one realizes that it challenges the basic premises of the lively academic debate over market-based securities regulation. Market approach reform proposals—to use Romano's terminology—rely on the assumption that the consumers in the international market for securities regimes are existing and would-be issuers. Romano thus writes:

> Under the market approach, foreign firms (firms not incorporated in the United States) would be able to choose their securities domicile for U.S. trading purposes, and therefore would not need to comply with SEC disclosure requirements in order to trade in the United States.[144]

A similar model of issuer choice underlies the analyses of proponents and opponents of the market approach.[145] Related works—like Joel Trachtman's insightful analysis of international regulatory competition—also share this premise.[146] These assumptions are correct and become even more so over time with the increase in foreign listings. But they fail to reflect the fact that in addition to issuers and investors, stock exchanges today make the most significant choices. When national exchanges merge, take over one another, or establish overseas extensions, they create an environment of stock exchange choice rather than issuer or investor choice.

Stock exchange mobility changes the rules of the game in the international regulatory competition by adding new, powerful choice makers in the market for regulatory regimes. Competition for issuers and individual investors (including institutional ones) can be likened to competition in the retail market. In contrast, stock exchanges are, and behave like, wholesale agents. Their unit of reference is not the individual stock but rather the entire board of a country. Readers who can recall the ex-

144. Romano, *supra* note 142, at 2420.

145. *See*, respectively, Choi & Guzman, *Portable Reciprocity*, *supra* note 142, at 922 ("Under a portable reciprocity regime, an issuer of securities may select the regulatory regime that will govern its securities. Once the regime is selected and the issuer has complied with its requirements, securities transactions may commence.") and Fox, *supra* note 142.

146. *See* JOEL P. TRACHTMAN, REGULATORY COMPETITION AND REGULATORY JURISDICTION IN INTERNATIONAL SECURITIES REGULATION 24 (The Fletcher School of Law and Diplomacy Working Paper 1999) (visited March 5, 2001) <http://www.papers.ssrn.com/paper.taf?ABSTRACT_ID=193688> ("[T]here is already substantial ambit for competition in the international securities law system, as issuers of, and investors in, securities may with relatively little restriction choose, internationally, the jurisdiction in which they wish to offer securities or purchase securities.").

citement raised by the listing of Daimler Benz on the NYSE in 1993[147] will appreciate the implications of listing the entire German blue chip sector on the LSE and listing the entire British growth sector on the Deutsche Boerse. Even they, however, probably would find difficulties to fully grasp the implications of a project like GEM, should it go through.

Because stock exchanges operate like wholesale agents, the challenge (and threat) they pose to national regulators is of a magnitude different than those challenges posed by individual issuers and investors. The bargaining power they can wield vis-à-vis national regulators is thus much greater. Consider a situation, in which several large public companies complain to their national regulator that its disclosure regime is too burdensome. Consider now another situation, in which the national stock exchange makes the same complaint. The reality in today's equity markets is such that a stock exchange's complaint of this sort could be sincere and reflect a credible threat of its demise. Alternatively, consider a giant market like the NYSE or NASDAQ that shops around for an overseas outpost and submits a few requests to the local regulator. In situations like these, regulators are much more likely to respond favorably to requests that they would probably reject in the former scenario.

The cases of Belgium and Israel, described in Part II–B–2 and II–B–3, demonstrate how realistic these scenarios are. Both cases show how stock markets—in the Belgian case, not even the traditional national market—can effectively lobby for reforms in securities regulation and how regulators and the legislatures take bold actions to promote the market's interests. The novel feature in these cases lies in the regulatory technique of the unilateral recognition they involve. As a direct consequence, that discretion over the applicable legal regime has moved from the regulator toward the regulated market. A similar development takes place with regard to the basic regulatory task of deciding which stocks are deemed appropriate for listing, which used to be jointly fulfilled by regulators and the exchanges. This task has moved further toward private control of the process and further diminishing of regulators' role, since the unilateral recognition effectively means wholesale listing approval, at least of foreign stocks.

Another consequence of unilateral recognition and stock exchanges mobility is a new manifestation of regulatory externality, or regulatory arbitrage—both positive and negative. When the Belgian Parliament

147. The listing of Daimler Benz is perhaps the most significant foreign listing event in history. *See, e.g.*, Lee H. Radebaugh et al., *Foreign Stock Exchange Listings: A Case Study of Daimler-Benz*, 6 J. INT'L FIN. MGMT. 158, 168 (1995).

allowed Easdaq unilaterally to recognize certain foreign securities laws as sufficient it initiated an improvement—in the eyes of Easdaq—in the regime that applies in Belgian market. A more complicated effect took place consequent to the Israeli dual listing project. On the one hand, the project catalyzed several long-needed reforms in Israeli corporate and securities laws and brought them into line with American law. On the other hand, the complete alignment with the U.S. foreign-issuer regime meant considerable derogation from the regime that applies to regular issuers in Israel.[148] Complaints about potential regulatory arbitrage were also voiced with regard to iX, in light of the fact that English issuers would become regulated by German regulators and vice versa.[149]

More fundamentally, these developments demonstrate the shift that is taking place in the goal securities regulators define for themselves. While in the past the standard regulatory purpose used to be stated as investor protection, today regulators find themselves more inclined toward promotion of economic interests of the financial sector. To be sure, regulators never shied away from protecting these interests, nor were they oblivious to the tension that sometimes exists between it and investor protection.[150] What is changing, however, is the scope of the former, and equally importantly, the willingness of regulators openly to declare financial sector interests as part of their agenda.

B. *The Private, Transnational Stock Exchange*

The transformation in global equity markets and the emergence of stock exchange mobility as a dominant factor in this process are each directly connected to the transformation in the structure of stock exchanges, as described in Part IIA. The demutualization trend entails more than improved competitiveness and higher attention to investors' needs. With interests in stock exchanges freely tradable, stock exchanges also become more private in nature than they were as mutual societies. To be sure, even under the previous structure, stock exchanges were formally private entities. But they were entrusted with a major public asset—the national stock market—and as non-profit organizations it was conceivable to present them as fulfilling a public role. The shift to for-profit entity structure greatly strengthens their private character.

148. *See* Licht, *supra* note 70 (both sources).

149. *See* Hilton & Lascelles, *supra* note 42, at 9.

150. *See* LOSS & SELIGMAN, *supra* note 52, at 763 ("[T]he adoption of [the] foreign integrated disclosure system . . . required the Commission to balance the goal of investor protection, its 'primary mandate,' . . . with the 'free trade goal' of 'facilitating the free flow of capital among nations'." (footnote and italics omitted)).

In parallel, stock exchange demutualization also facilitates their denationalization, even though it is not necessarily a precondition for the latter.[151] Inasmuch as foreigners are allowed to purchase shares in the stock exchange (and some countries may limit this possibility), ownership in the exchange is likely to become nationally mixed. The scenario that unfolded with regard to the LSE—in which takeover bids for it were made or contemplated by the Swedish OM Gruppen, the Deutsche Boerse and NASDAQ—was unimaginable only a short time ago. The great stock exchange of London, England almost ceased to exist as such.

Should the trend of stock market internationalization continue to proceed along the paths broke by projects like iX, GEM and OM's LSE bid, stock exchanges will end up as regular business corporations held by shareholders of multiple nationalities, serving a multinational clientele, and using global facilities. Euronext, for that matter, will be no different than Airbus, iX could have resembled DaimlerChrysler, and NASDAQ could resemble Ford Motor. This transformation will immediately raise the question of their national identity.

Now the issue of determining the nationality of a multinational corporation (MNC) is an old one and much has already been written about it, but unfortunately with inconclusive results. Legal doctrine in common law countries determines a company's nationality according to its country of incorporation, while the doctrine in Civil Law systems looks at the company's "real seat," which is determined by a combination of factual links, including the place of incorporation.[152] These tests, however, fail to provide satisfactory answers when the corporation has a significant transnational element, such as foreign subsidiaries, employees or shareholders. They collapse completely when the country of incorporation seems as a marginal factor or worse yet, a mere facade.

The debate over MNC's nationality heats up every couple of years, each time in a different context. From the 1970s until the mid-1980s, third world countries were concerned about being taken over by Ameri-

151. Recall that one of the consequences of the ISD was to enable securities firms from different EU member states to become members of every EU stock exchange. The Stockholm Stock Exchange again pioneered in taking advantage of this change by allowing remote membership and thus doing away with any need for physical presence in Sweden. In the United Kingdom a similar transformation took place even before the ISD was adopted. As trading on the LSE used to be based solely on market makers, there was no need for having "seats" on the stock exchange's floor (which was the situation in order-driven exchanges in continental Europe). Thus, already in 1991, market makers in foreign stocks on the LSE's SEAQ-I system were dominated by American-owned companies. This American domination continues to have its effect to this day. *See* Roell, *supra* note 10, at 214; Cowell & Kapner, *supra* note 16.

152. *See infra* note 2.

can MNCs.[153] The early 1990s had seen the United States sliding into recession and turning from being the main source of foreign direct investment into becoming the main target.[154] Robert Reich then sparked the debate in its purest formulation when he posed the question "Who is Us?"[155] Realizing that the legal tests are inadequate for policy-making purposes, scholars have offered tests based on the nationality or domicile of shareholders, employees, business operations, etc. Lawyers have tried to refine the legal tests, mainly by relying on the concept of "control."[156] It seems that the answers—that is, the indicators according to which an MNC's nationality should be determined—depend heavily on the context, or purpose, of the determination exercise.

Returning to stock exchanges, this article asserts that their national identity would be most usefully determined by the regulator in charge of their supervision. This is the factor that makes Easdaq a Belgian pan-European market and one of the major causes for the identity crisis in iX. With a brand name tarnished by recurring failures and a trading system outperformed by competitors, one major asset that the LSE could still be proud of is regulation by the City Code and the FSA. As already noted, being subject to British regulation is also considered one of Virt-X's advantages.

The case for giving securities regulators such a weight is easy to make. With the disappearance of physical trading floors and outsourcing of clearance and settlement, the main function left for stock

153. *See generally*, HUGH STEPHENSON, THE COMING CLASH: THE IMPACT OF MULTINATIONAL CORPORATIONS ON NATIONAL STATES (1972); LOUIS TURNER, MULTINATIONAL COMPANIES AND THE THIRD WORLD (1973); RAYMOND VERNON, STORM OVER THE MULTINATIONALS: THE REAL ISSUES (1977); TRANSNATIONAL CORPORATIONS AND WORLD ORDER: READINGS IN INTERNATIONAL POLITICAL ECONOMY (George Modelski ed., 1979).

154. For a sharp analysis, see EDWARD M. GRAHAM AND PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (3d ed. 1995); s*ee also* RAYMOND VERNON, ARE FOREIGN-OWNED SUBSIDIARIES GOOD FOR THE UNITED STATES? (1992); RAYMOND VERNON, IN THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES (1998).

155. *See* Robert B. Reich, *Who is Us?*, 68 HARV. BUS. REV. 53 (1990); *see also* Ethan B. Kapstein, *We Are US*, NAT'L INTEREST, Winter 1991-92, at 55; Paul Magnusson, *Why Corporate Nationality Matters*, BUS. WK., July 12, 1993, at 142; Robert B. Reich, *Does Corporate Nationality Matter?*, ISSUES SCI. & TECH., Winter 1990-91, at 40; Robert B. Reich, *Who is Them?* 69 HARV. BUS. REV. 77 (1991).

156. *See*, *e.g.*, Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283 (1990); s*ee also* Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEORGETOWN L.J. 563 (1999) (advocating a test of "economic commitment"). Determining corporate nationality for tax purposes is yet another issue. For a review, see Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301 (1996).

exchanges as "markets"[157] is to offer an orderly framework for price discovery and provide the data streams generated by it.[158] The Chairman of the NYSE was indeed quoted to say that the NYSE's biggest mistake has been its failure to recognize that its greatest asset are its data. "We are in the data and media business," he said.[159]

The integrity of the price discovery process is crucial to the success of a stock exchange that operates in a competitive environment. It is affected by timely disclosure and accuracy of issuer-related information and trading-related information, and by being free of fraud, insider trading, manipulation, and so on. Many of these regulatory and surveillance functions are performed by stock exchanges themselves as SROs. Others (ideally) are performed by market professionals such as accountants and investments bankers, who put their reputation on the line. However, the only way for these reputation intermediaries credibly to commit to high-quality service is to subject themselves to a high-quality regulator.[160] In the end, the entire quality control system needs to rely on a securities regulator that is honest and has the staff, skill, and budget to pursue complex securities cases and on a similarly competent judicial system.[161] In other words, the private components of securities regulation have to be backed by a public backbone.

C. *Future Challenges*

Before closing, this article will briefly address a few more challenges that stock exchange mobility and unilateral recognition will pose for international regulation of securities markets. An immediate question arises with respect to the parameters that should determine which regulator may assert jurisdiction over a particular market. Several options come to mind: the location of the trading system, the nationality of listed/quoted issuers, the domicile of broker-dealers, and the nationality

157. On the definition of "market", see William J. Carney, *Jurisdictional Choice in Securities Regulation*, 41 VA J. INT'L L. 717, 730 n.59 (2001).

158. *See* J. Harold Mulherin, Jeffry M. Netter, & James A. Overdahl, *Prices are Property: The Organization of Financial Exchanges from a Transaction Cost Perspective*, 34 J.L. & ECON. 591, 594 (1991) (the product of financial exchanges is accurate information as reflected in pricing). An equally important function (some would say the primary one) is to provide depth and liquidity. But depth and liquidity are in fact provided by market participants and the stock exchange "only" serves as a focal point for realizing the network externalities of a market with numerous traders. In contrast, ensuring the integrity of the price discovery process is a function that is inherent to the market as such.

159. *The Battle for Efficient Markets*, THE ECONOMIST, June 17, 2000, at 86.

160. On the importance of high-quality reputational intermediaries for a well-functioning securities market, see Bernard S. Black, *The Legal and Industrial Preconditions for Strong Stock Markets*, 48 UCLA L. REV. (forthcoming 2000).

161. *Id.*

and/or domicile of end-investors. It is not too difficult to show that each of the aforementioned parameters suffers from some weakness as a decisive determinant. In particular, none of these parameters can resolve a dispute between two regulators asserting jurisdiction and trying to impose conflicting requirements.

At this point, it may be tempting to call for "increased regulatory cooperation" as a panacea for these difficulties. But such calls are often more of a placebo than real remedy. International cooperation in securities regulation is difficult to achieve and to maintain.[162] Although national regulators have made considerable strides towards increased cooperation—*inter alia*, under the auspices of international bodies like the International Organization of Securities Commissions (IOSCO) and the International Accounting Standards Committee (IASC)—frictionless regulation of multinational securities markets is still a long way ahead. These problems are not surprising when one recalls analogous difficulties in determining the desirable scope of extraterritorial jurisdiction in traditional issues like disclosure and antifraud regulation.[163] By extension from issuer-choice proposals, one could further ponder whether markets should be allowed to opt into a coveted regulator's jurisdiction absent such factual linkages.[164] This author wishes to leave these questions open for future research and only note that implementing such arrangement should prove a mighty challenge.

A related issue that may warrant rethinking is the desirability of a global regulator. Certain commentators indeed advocated establishing such an institution, either globally[165] or within the European Union.[166] Prominent European scholars, however, seem to be like-minded in their

162. *See generally* Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61 (1999).

163. The literature on this issue is closely related to the debate over issuer-choice regulation. *See, e.g.*, Choi & Guzman, *Portable Reciprocity*, *supra* note 142; Romano, *supra* note 137; *see also* James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, LAW & CONTEMP. PROBS., Autumn 1992, at 157; Merritt B. Fox, *Insider Trading in a Globalizing Market: Who Should Regulate What?*, 55 L. & CONTEM. PROB. 263 (1992); Merritt Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498 (1997); Donald C. Langevoort, Schoenbaum *Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, LAW & CONTEMP. PROBS. 241 (1992).

164. *See, e.g.*, HOWELL E. JACKSON, THE SELECTIVE INCORPORATION OF FOREIGN LEGAL SYSTEMS TO PROMOTE NEPAL AS AN INTERNATIONAL FINANCIAL SERVICES CENTER (Harvard Law School, John M. Olin Working Paper No. 241, 1998)(visited March 6, 2001) <papers.ssrn.com/paper.taf?ABSTRACT_ID=146600>.

165. *See* Uri Geiger, *Harmonization of Securities Disclosure Rules in the Global Market—A Proposal*, 66 FORDHAM L. REV. 1785 (1998).

166. Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT'L L. 9 (1999).

opposition to the idea, albeit to various degrees.[167] The idea of a Euro-SEC resurfaced in the EU after the iX merger plan was announced but was accepted with skepticism.[168] Needless to say, such proposals are diametrical to market approach reform proposals such as Romano's. In any event, it is clear from the above discussion is that the phenomenon of stock exchange choice adds another degree of complexity to existing legal frameworks of international securities regulation as well as to reform proposals based on issuer choice.

The feasibility of such centralized institutions outside the EU is dubious as probably is their desirability. Among the different forms of international cooperation between sovereign states, strong central institutions are only rarely justified and require special efforts and resources to establish and maintain. Managed competition institutions seem to dominate them in most cases.[169] As a result, securities regulation—including stock exchange regulation—will remain in the foreseeable future in the hands of national administrative agencies. These public agencies will continue to apply their own version of public law and enforce it through their national court system.

One aspect that might warrant rethinking at some point in the future is supra-national antitrust regulation of stock exchanges. International competition among stock exchanges is likely to bring with it anti-competitive conducts of the sort well known in other industries. The Euro NM network is a case in point. One of the purposes that originally underlay Euro NM was protectionist in essence as it served for territorial market splitting.[170] Under most advanced competition laws such conduct in another industry would be condemned as per se illegal. Existing and future mergers and alliances among stock exchanges may

167. *See,* Steil, *supra* note 5, at 136. S*ee also* Ferrarini, *supra* note 10; Andrew Whittaker, *A European Law for Regulated Markets? Some Personal Views*, in EUROPEAN SECURITIES MARKETS, *supra* note 5, at 269 (favoring regulatory cooperation).

168. *See* Hilton & Lascelles, *supra* note 42, at 9 ("It is an open secret that [French] Finance Minister Fabius's goal is that [an EU 'wise men' committee] should recommend a 'Euro-SEC'—which (surprise) would be located in Paris.")

169. *See generally* Licht, *supra* note 162; Trachtman, *supra* note 146.

170. *See* Licht, *supra* note 1, at 52–54. In May 1996, it was reported that

> Markets participating in the Euro NM will undertake not to compete for one another's domestic IPO candidates. The Paris Nouveau Marche is now actively seeking to attract companies from throughout the EU, Austria and Switzerland, but is not approaching Belgian and German candidates, the 'property' of the other network members.

Jennifer Jury, *Latest Developments in Europe's New Growth Companies Market*, EUR. VENTURE CAPITAL J., May 1, 1996, at 45. It is remarkable that issuers listed on Euro NM markets adhered to their home country segment notwithstanding the advantages of others. *See Neuer Market Reaffirms Dominance*, FIN. NEWS, Dec. 13, 1999 (reporting the first dual listing by a Euro NM company within the Euro NM network, on the dominant, German member of the network).

raise similar concerns, either of collusive conduct or abuse of dominant position (monopolization).

Suppose that the Dublin Stock Exchange wanted to join GEM or some other global alliance but that GEM refused. This raises the questions if Dublin can force itself on GEM by invoking the essential facility doctrine[171] and which forum would adjudicate the dispute. American courts may hold to the expansionist view that they have extraterritorial jurisdiction but it is unclear whether such a case has any adverse effects in the U.S. so as to make them assert jurisdiction over it.[172] The EU is the only supranational institution that could entertain such a claim but query whether it would do so with regard to non-EU markets.[173]

Current legal doctrine in the United States holds that conduct which is effectively regulated under the Securities Acts would be immunized from antitrust review.[174] Similar logic militates for granting securities regulators authority over structural aspects, including mergers of markets, concentration of order flow, etc. Although the SEC constantly revisits these issues with regard to the domestic U.S. market,[175] it is again unclear what jurisdiction can it claim—and effectively impose—over transnational alliances.

While the regulatory framework is bound to retain its public character, it would be reasonable to predict that it will gradually lose many of its national peculiarities. The growing levels of foreign listing and cross-border trading mean that regulators who provide an umbrella of investor protection also do this for foreign investors and with regard to

171. *See* Associated Press v. United States, 326 U.S. 1 (1945). For an analysis of access claims to network joint ventures, see Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 108 *et seq*.

172. *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). For a review and analysis, see Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997); *see also* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000).

173. *Cf.* Ferrarini, *supra* note 46, at 589 (discussing denial of access to an exchange that enjoys a dominant position within the EU).

174. Gordon v. New York Stock Exchange, 422 U.S. 659 (1975). Hence, even the most egregious antitrust infringement such price fixing would be immunized when securities brokers engaged in it. Merril Lynch, Pierre, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). For a review, *see* LOSS & SELIGMAN, *supra* note 52, at 648-52. It should be noted, however, that in the recent dispute over the size of bid and ask quotations in Nasdaq, the Department of Justice was involved in investigating charges of collusion. *See* Suzanne Manning & Rachel Wilmer, *NASD Settles SEC Charges Over Alleged Abuses in Nasdaq Market*, 28 SEC. REG. & L. REP. (BNA) 967 (Aug. 9, 1996).

175. *See, e.g.*, Regulation of Exchanges, Exchange Act Release No. 38,672, 62 Fed. Reg. 30,485 (June 4, 1997) (Concept Release).

foreign issuers.[176] Stock exchange mobility accelerates this trend as it entails greater mobility of listings and trades. In other words, the constituency of national regulators will become less and less of their own nationality. A likely consequence of this process is further pressure for harmonization of securities laws and accounting standards, and the justification for international diversity between securities regimes will diminish respectively.

Elsewhere I have argued that national securities regulation regimes are bound to hit some roadblocks on the way to convergence. Rigidities and "sticky points" that exist in national corporate governance systems are likely to affect the structure and content of their securities regulation counterparts and vice versa.[177] Among other reasons, the inertia of corporate governance systems is caused by the private character of corporate law, which, in turn, is molded by each country's social and political conditions.[178] There is reason to believe, supported by convincing evidence, that national corporate governance systems reflect each nation's most fundamental cultural values.[179]

The stiffening competition among stock exchanges, however, may help change this situation by imposing corporate governance requirements as part of their listing conditions, thereby creating corporate governance regimes that are disconnected from particular national laws. Stock markets in the United States have done so in the past and are continuing to break new grounds in issues such as audit committees.[180] Markets like Easdaq that want to position themselves similarly to that in America follow suit, e.g., by requiring outside directors.[181] Should this trend become universal, international diversity in corporate laws may continue to exist but will become less pronounced. It is too early, how-

176. The recent Regulation FD is thus a departure from this rule, as it denies investors of its protection with regard to foreign private issuers. 17 C.F.R. 243.100-103 (2000). For a critical review of Regulation FD, *see* Merritt B. Fox, *Regulation FD and Foreign Issuers: Globalization Strains and Opprtunities*, 41 VA. J. INT'L L. 653 (2001).

177. *See* Licht, *supra* note 82, at 230.

178. *Id.* at 278–84.

179. *See* Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DELAWARE J. CORP. L. 147 (2001); Amir N. Licht, Chanan Goldschmidt, & Shalom H. Schwartz, Culture, Law, and Finance: Cultural Dimensions of Corporate Governance Rules, Working Paper (2000) (on file with author).

180. *See* Lois Herzeca, *Audit Committee Disclosure Rules Effective, Increasing Accountability*, NEW YORK L.J., Feb. 7, 2000, at 9 (audit committee rules adopted by U.S. markets).

181. *See* EASDAQ, ISSUERS' CONTINUING OBLIGATIONS 10-18 (2000)(visited April 6, 2001) <http://www.easdaq.be> (providing corporate governance requirements for Easdaq issuers).

ever, to make predictions in this respect and a healthy dose of skepticism seems to be in place.[182]

V. CONCLUSION

This article has identified stock exchange mobility as a new type of dynamic affecting today's international securities market and has argued that stock exchanges have become the new agents of change in regulatory reform. These dynamics may have direct implications on the way we have traditionally perceived securities regulation, namely, as a national body of public law. Securities regulation is increasingly dominated by actors, interests, and regimes that are both private and foreign while the major public players—namely, securities regulators—find it difficult to keep abreast with market developments.

The transformation of stock exchanges into regular multinational corporations is likely to engender the same problems and challenges that MNCs have been posing for decades. In a world dominated by sovereign nation states, these problem will not disappear anytime soon. Regarding the fundamental issue of stock exchanges' national identity, however, this article argues that it should be resolved according to the national regulator supervising each exchange.

The dynamics of stock exchange mobility will also affect the character of securities regulation. Here indeed, there is little room for discussing traditional patterns since this is a relatively young field of law. In most countries it is inspired to some degree by the American model, which is often repackaged and relabeled under the auspices of IOSCO and IASC. Stock exchange mobility and stock exchange choice will exert further pressure for eroding significant differences between national securities regimes. They may also work toward further separation between the nationalities of issuers, investors, and markets. In contrast, the basic nature of securities regulation as public law is likely to remain intact because securities regulators are likely to retain their beneficial role as regulators of tomorrow's markets.

182. For an extensive analysis, *see* William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 219 (1999) (global convergence of corporate governance systems is unlikely because each national governance system is a system tied together by a complex incentive structure); *see also* Licht, *supra* note 82, at 261 (securities regulation and corporate law together constitute a system in the sense used in systems analysis).