Mutual Assistance Between Business Regulatory Agencies: The International Dimension

A Background Paper prepared by the Commonwealth Secretariat for the Meeting of Commonwealth Law Ministers, Mauritius, November 1993

Background

At the Meeting of Senior Officials of Commonwealth Law Ministries held in Singapore from 30 March to 2 April 1992 it was decided to recommend that it would be appropriate for Law Ministers to revisit the subject of mutual assistance between business regulatory agencies when they meet in Mauritius in November 1993. In order to facilitate such consideration the Commonwealth Secretariat was invited to prepare both an analysis of relevant legislative developments in member countries and an overview of international practice in this important area of concern.[1] This paper is intended to deal with central aspects of the latter subject. The former area has been addressed in the Commonwealth Secretariat memorandum entitled "Mutual Assistance Between Business Regulatory Agencies"[2]. Given the nature of the interface between the domestic legislative regimes which are currently in place in certain member countries and the international cooperative practice which has evolved therefrom some element of duplication of information has proved to be unavoidable. However, in contrast to the treatment of domestic law, this paper includes selective coverage of aspects of the practice of foreign States and international organisations and institutions as well as Commonwealth developments.

The Context

Recent years have witnessed an unprecedented internationalisation of activities in the world's securities and futures markets[3] and this seems set to continue. Among the major factors influencing this trend are rapid advances in communications and computer technology, growing economic interdependence, the increasing tendency of major investors to diversify their investments on a global basis, and the growing inclination of major businesses to rely on foreign debt and equity markets to raise capital.[4] These developments have, in turn, posed significant challenges for national business regulators whose task it is to ensure fairness and honesty in the market place.[5]

Although the regulatory problems posed by this increase in international trading are many and varied particular concern has been expressed about the new opportunities which have been presented for engaging in transnational criminality and malpractice.[6]

It is now widely accepted that the situation requires both improved information sharing between regulatory bodies and the enhanced provision of mutual assistance, tailored to the special needs of this sector, if the efficiency of national markets, and investor confidence in them, is to be maintained. As has been pointed out elsewhere, "Only international cooperation can minimise the opportunities for fraud and evasion of the rules of each individual market from abroad. Without cooperation among nations, multi-jurisdictional fraud would become an increasingly serious international problem. Those countries which do not solicit cooperation may invite the unscrupulous to exploit their domestic market participants. Every country that does not stand willing to provide cooperation may invite the unscrupulous to use that country as a haven from which to conduct operations."[7] It is also now agreed that, for a variety of reasons, including the significant differences which have evolved in terms of domestic regulatory structures, the prominent use of administrative sanctions and civil legal proceedings in the process of the regulation of market activities, and substantive dissimilarities among countries as to the reach and role of the criminal law in relevant spheres of activity, the requirements of cooperation can not "be adequately satisfied by relying on the established mechanisms for mutual assistance in traditional criminal matters".[8]

Developments in International Cooperation between Business Regulatory Agencies

As with mutual assistance in criminal matters, international practice in this area is of relatively recent origin. Indeed, in its most modern form it can be traced back to the conclusion of a Memorandum of Understanding between the United States and Switzerland in 1982 which addressed the issue of multi-jurisdictional insider trading.[9] The success of the 1982 negotiations was of particular significance in that it stimulated the U.S. Securities and Exchange Commission (SEC) to enter into further bilateral arrangements of ever increasing scope and complexity; "broad-based agreements that would cover the full range of cases that it could expect to confront as markets continue to become international". In doing so the SEC has tended to favour the use of informal international instruments, such as Memoranda of Understanding (MoU), rather than treaties and this approach has similarly commended itself to the majority of governments and regulators which have since become active in this new area of international cooperation.[10] It is also the first preference of the Montreal based International Organisation of Securities Commissions (IOSCO) which has played a prominent role in creating, through its resolutions and studies, an atmosphere conducive to enhanced mutual assistance.

The prominence of the Memorandum of Understanding is to be explained, in part, by the acknowledged advantages it has over the treaty form. As has been pointed out elsewhere, "The main procedural reasons for using informal instruments in preference to treaties are simplicity, speed, flexibility, and confidentiality."[11] At the same time they establish an agreed process for obtaining necessary information and "provide the parties with experience in international cooperation and a better understanding of the differences between regulatory systems and markets. The MoUs build a watershed of positive experience which can form the basis for future, more expansive cooperation".[12] Finally, in the view of many it is an advantage that such instruments are not intended to give rise to binding legal obligations.[13] As an April 1990 paper prepared by the Australian Attorney-General's Department for consideration by Commonwealth Law Ministers noted, "the request by the relevant foreign agency would not, and would not be intended to, give rise to a binding international legal obligation to provide the assistance requested; it would provide a facility to the domestic agency to provide the assistance requested in appropriate cases".[14]

Dominant though the MoU form has become recourse to bilateral treaties is by no means unknown. For example, the 11 December 1989 U S - Netherlands Agreement enjoys such a status in international law. Similarly the 14 December 1989 Administrative Agreement between the SEC and the Commission des Operations de Bourse of France is intended to be binding in nature.

Although the preponderant practice thus far has been bilateral a limited number of multilateral agreements have been concluded. Of particular significance in this regard is the 1989 Council of Europe Convention on Insider Trading and its Protocol. This Convention "is intended to create mutual assistance by exchanges of information between Contracting Parties, to enable supervision of securities markets to be carried out effectively and to establish whether persons carrying out certain financial transactions on the stock markets are or are not insiders, which would reveal whether their transactions were fraudulent or proper".[15] Interestingly, this instrument makes provision in Article 3 for the extension, on the basis of reciprocity, of mutual assistance beyond the confines of insider trading. This optional facility would encompass "the exchange of information necessary for the surveillance of operations carried out in the organised stock markets which could adversely affect equal access to information supplied to investors in order to ensure honest dealing".[16]

The Protocol to the Council of Europe Convention is designed to accommodate the special position of such member states of the European Communities (EC) as elect to become parties to it. It provides that, "In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned." The basic approach adopted by the EC in this regard is, in turn, articulated in the Council Directive of 13 November 1989 on co-ordinating regulations on insider dealing.[17] Members of the EC were due to take the necessary steps to ensure compliance with its terms prior to 1 June 1992 but there has been some delay in meeting this commitment. As has been pointed out elsewhere, "The importance of this Directive stems from the fact that it is to produce harmonised laws relating to insider dealing within the twelve Member States of the EEC with a virtually compulsory mutual assistance scheme attached."[18] Pursuant to Article 11 the EC may conclude agreements with non- member countries on the matters which are covered by the Directive.

Significant Elements of International Practice

Concern has, on occasion, been expressed that the emphasis placed on the development of bilateral relationships to promote mutual assistance between regulators would result in a highly diverse "patchwork" system characterised by a lack of uniformity in underlying principles.[19] That such fears have, in large measure, proved to be unfounded is due primarily[20] to the progress which has been achieved following discussions held under the auspices of IOSCO. Of particular importance were the developments at its XVIth Conference, held in Washington, D.C. in September 1991. There the President's Committee approved a set of ten "Principles" representing the components thought to be necessary for an optimal MoU. (The text of this important document is reproduced in full as an appendix to paper LMM(93)22.) In the words of the Conference Communique, these Principles "represent a consensus among regulators about provisions that should be included in MoUs in order to effectively fight fraud and other abuses in the securities and futures markets".[21]

The IOSCO Principles deal with a variety of issues ranging from procedural and cost sharing questions to weighty matters relating to the degree of confidentiality to be afforded to information which is provided and restrictions on the use of such material. Although a comprehensive examination of these principles lies beyond the scope of this introductory paper, the approach adopted to the key areas of the nature and scope of the assistance to be provided and grounds for refusal are reviewed below.

In so far as the former is concerned Principle 7 reads, "MoUs should provide that the Authorities will take all reasonable steps to ensure that they can utilise their full domestic powers to execute requests for assistance. The available assistance should include, where the Requested Authority has such powers, obtaining documents and the statements or testimony of witnesses, granting access to the Requested Authority's non-public files, and conducting inspections of regulated entities." In framing the above it was recognised that domestic legislation in many countries would require modernisation before full effect could be given to its terms in practice. This is particularly so in the critical area of the use of compulsory powers on behalf of a requesting authority in the absence of any indication of a violation of local law. The absence of the ability to place compulsory evidence gathering powers at the disposal of overseas authorities severely limits the effectiveness of international cooperation. In the words of the IOSCO text, "Since law violators may refuse to produce incriminating information on a voluntary basis, and legal impediments may prevent an innocent intermediary from voluntarily providing information, the Requesting Authority may be unable to obtain critical information at the investigative stage of a matter if production of such information cannot be compelled by the Requested Authority." Similarly, the 1990 Australian paper, to which reference was made above, opined that, "Such powers are the most effective weapon in the armoury of national business regulatory agencies to deal with the challenges of international fraud and misconduct in the financial markets."[22]

Relatively few jurisdictions have yet taken this step. Those which have include Australia, France, New Zealand, the United Kingdom, and the United States. A similar position has been reached in certain of the Provinces of Canada where securities regulation falls under the jurisdiction of the component parts of the federation as a matter of property and civil rights.[23] In the absence of such compulsory powers the tendency has been for interested parties to negotiate a more limited agreement than that contemplated in Principle 7. This was the course of action followed by the United States and the United Kingdom in 1986.[24] That arrangement was subsequently replaced by a more comprehensive Memorandum of Understanding dated 25 September 1991 which was concluded after the necessary alterations in domestic law had been effected.[25] An alternative approach was, however, adopted in the January 1988 MoU concluded between the SEC and the relevant authorities in Ontario, Quebec and British Columbia the text of which is reproduced at Appendix A. Article 2(3) thereof recognised that the parties "may not in all circumstances possess the legal authority to provide the assistance contemplated ..... Subject to such limitations of legal authority, the Authorities will use all reasonable efforts to obtain the necessary authorisation to provide the assistance described in this Memorandum of Understanding".

The IOSCO Principles treat the issue of denial of assistance by simple reference to a public policy exception; a concept which, in the words of Principle 6, "would include issues affecting sovereignty, national security, or other essential interests". This approach, which contrasts sharply with the more elaborate provisions to be found in the area of mutual assistance in criminal matters, has been adopted in a number of even the most advanced MoUs. In others further grounds for refusal are afforded specific mention.[26] For instance, the 28 October 1992 MoU between the U K Treasury and the Securities and Investments Board and the Australian Securities Commission, the text of which is reproduced at Appendix B, mentions, in addition to the public interest, assertions of jurisdiction not recognised by the requested country, and "matters specified" by the laws and regulations of the requested country, as relevant to any decision of whether or not to decline a request. In any event, the difference of approach between that adopted in the regulatory context and that found in treaty based instruments dealing with the provision of assistance in criminal matters may be more apparent than real. Under informal and legally non-binding Memoranda of Understanding the provision of assistance is always discretionary. For a more complete picture of the factors which will actually govern the exercise of this discretion it will often be necessary to consult the relevant provisions of the domestic law of each party. Thus, both section 82 of the UK Companies Act 1989 and sections 7 and 8 of the Australian Mutual Assistance in Business Regulation Act 1992 provide an essential context for the proper interpretation of the 1992 MoU. By way of illustration, in the case of Australia the legislative criteria to be considered include, among others, whether anything provided to the requesting authority is likely to be used for punishing a person for an offence of a political character or to harm such a person because of his or her "race, sex, religion, nationality or political opinions".

The 1991 IOSCO Principles, it should be noted, also seek to ensure that the provision of information and assistance will not be precluded or frustrated by considerations of dual illegality (Principle 1). It is felt by many that in the business regulatory field such a requirement "not only may severely limit the scope of an agreement but it may also make the processing of a request for information much more complicated".[27] This approach has been followed in several of the arrangements concluded thus far.

The conclusion of a bilateral Memorandum of Understanding or treaty concerning the provision of mutual assistance in a business regulatory context will often have the effect of adding to, rather than substituting for, other preexisting mechanisms for obtaining cooperation. For instance, many of the countries which possess highly developed financial markets are parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[28] Similarly, informal channels of communication may also be available. In so far as criminal offences are concerned, however, an issue of some significance arises if, as is increasingly the case, avenues for the provision of formal mutual assistance in criminal matters subsist between the parties. No consensus has yet emerged as to the best manner in which to treat the interface between these two cooperative mechanisms - a matter which is complicated in practice as a result of the selection of different channels of communication in each, and by virtue of the fact that both "provide for assistance in the investigative phase".[29]

Of the solutions adopted thus far that found in the U.S.-Netherlands Agreement of 1989 has the merit of clarity. Article 8 is worded as follows:

1. Mutual cooperation in criminal matters between the Contracting Parties shall continue to be governed exclusively by the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters of June 12, 1981.

2. Prior approval by the Competent Authority of the Requested State is required for the use in a criminal proceeding of information that previously has been exchanged under this Agreement.

A broadly similar approach to this question has been adopted by Australia. As the Explanatory Memorandum for the Mutual Assistance in Business Regulation Bill of 1992, circulated to Parliament by the Commonwealth Attorney General, was to stress its provisions "make it clear that this Bill is intended to complement the scheme of mutual assistance established by the *Mutual Assistance in Criminal Matters Act 1987*. The provisions of this Bill are not intended to be used as an alternative to that Act where a foreign regulator is investigating a criminal offence".[30] Here the intention is not to frustrate the provision of assistance but rather to ensure that requests relating to criminal offences are dealt with by those who are specialised in such matters acting within a framework designed to safeguard the rights of criminal suspects.[31] Accordingly paragraph 10 of the 1992 Australia-UK Memorandum stipulates that "the requested Authority will consider whether the request might be dealt with via channels for mutual assistance in criminal matters".

In the 1989 Council of Europe Convention on Insider Trading a somewhat more liberal approach is adopted in Article 7(4). This is contained within Chapter II which governs the exchange of information between the parties. As the Explanatory Report notes, "The committee of experts considered that information obtained by administrative means may be used before the criminal courts where this information could have been obtained within the framework .... "of the 1959 European Convention on Mutual Assistance in Criminal Matters and its Protocol or other mutual assistance in criminal matters agreements subsisting between the countries concerned.[32] This is somewhat similar to the concept reflected in Article 11(2) of the 1988 Canada-U.S. Memorandum of Understanding which regards it and the Mutual Legal Assistance Treaty between the same states[33] as jointly constituting "a framework of principles and procedures for investigating and obtaining information concerning certain kinds of securities law offences".

Even in instances where a relatively free choice of means is available questions of substance will often arise. Thus, in the case of requests to the United Kingdom a requesting country can utilise, for example, either the provisions of the 1989 Companies Act, designed specifically to assist overseas regulators, or those of Part I of the 1990 Criminal Justice (International Co- operation) Act, which makes detailed provision for mutual assistance in criminal matters.[34] However, the compulsory powers available under each differ. As Chase has pointed out, those under the 1989 enactment "are restricted to requiring witnesses, on pain of criminal penalty for refusal, to attend before those authorised, and to requiring the production of documents from those in whose custody they are held. However, such powers do not extend to the search or seizure of documents. Herein lies an important difference for the investigator between these powers and those in the 1990 Act .... ".[35] In practice if it is felt that an overseas request could be more appropriately processed within the United Kingdom by an authority other than that which has received it it is understood that it will be passed on internally to that authority for action.[36]

Conclusions

As with the early stages in the evolution of international mutual assistance in criminal matters, the growing practice of cooperation between business regulatory bodies has been predominantly bilateral in nature. The rapid growth of a substantial network of such arrangements has, in turn, been facilitated by the use of informal Memoranda of Understanding which provide a framework within which each party will exercise its discretion, on a case by case basis, on whether to respond positively or not to incoming requests. The absence of legal obligation in such MoUs has, in turn, made it easier than would otherwise have been the case to persuade legislatures to make available to overseas bodies, in areas of great national sensitivity, powers of compulsion in the absence of any violation of domestic law. In this regard the recent trend has been particularly encouraging. These developments, when viewed in the light of the growing consensus as to basic principles

REFERENCES

1. See generally, "Mutual Assistance Between Business Regulatory-Agencies", SOLM(92)11.
2. See, LMM(93)22.
3. See. eg. C Baltic, "The Next Step in Insider Trading Regulation: International Cooperative Efforts in the Global Securities Market" (1992) 23 *Law and Policy in International Business* p. 167, at pp. 169-175.
4. See "International Securities Enforcement Act of 1989: Report", 101st Congress, 1st Session, HOUSE OF REPRESENTATIVES, Report 101-240, p.2.
5. See, "Mutual Assistance in Business Regulation Bill 1992: Explanatory Report" (Parliament of the Commonwealth of Australia, House of Representatives: 1992), p.2.
6. See, eg. US General Accounting Office, *Securities and Futures Markets: Cross-Border Information Sharing is Improving, but Obstacles Remain* (1992), p.10.
7. W. McLucas "Protecting Investors from International Fraud - Legal and Enforcement Developments" (Paper presented to the XVIth IOSCO Conference, Washington, DC, 23-26 September, 1991: typescript), pp.32-33.
8. "Mutual Assistance Between Business Regulatory Agencies: A Paper by the Australian Attorney-General's Department" in Commonwealth Secretariat, *1990 Meeting of Commonwealth Law Ministers: Memoranda Part I* (1991), p.250, at p.250.
9. "Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading" (1983) 22 *International Legal Materials*, pp.1-12. See also, E. Stultz, "Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks" (1988) 21 *Vanderbilt Journal of Transnational Law* p.63, at pp.107-112.
10. Supra, note 7, at p.29. See also, P. Jimenez, "International Securities Enforcement Cooperation Act and Memoranda of Understanding" (1990) 31 *Harvard International Law Journal*, pp.295-311.
11. As of June 1992 IOSCO had on file numerous MOUs and similar agreements involving participation by regulators in some 18 states.
12. A. Aust. "The Theory and Practice of Informal International Instruments" (1986) 35 *International and Comparative Law Quarterly*, p.787, at p.789.
13. M. Mann and J. Mari, "Developments in International Securities Law Enforcement" (1990: typescript), at p.5.
14. On the legal status of such informal instruments see generally, supra, note 12; and, O. Schachter, "The Twilight Existence of Non-binding International Agreements" (1977) 71 *American Journal of International Law*, at pp.296-304.
15. Supra, note 8, at p.254.
16. "Explanatory Report on the Convention on Insider Trading and its Protocol" (Council of Europe, Strasbourg: 1989), at p.6.
17. Id., p.9.
18. 89/592/EEC, OJ/L334/30. See generally, A. Stutz, "A New Look at the European Economic Community Directive on Insider Trading" (1990) 23 *Vanderbilt Journal of Transnational Law*, pp.135-177; and T. Tridimas, "Insider Trading: European Harmonisation and National Law Reform" (1991) 40 *International and Comparative Law Quarterly*, pp.919-937; and, supra, note 3, at pp.192-196.
19. D. McClean, *International Judicial Assistance* (1992), p.297.
20. See, eg. B. Begin, "A Proposed Blueprint for Achieving Cooperation in Policing Transborder Securities Fraud" (1986) 27 *Virginia Journal of International Law*, p.65, at p.96.
21. See, E. Barlow, "Enforcing Securities Regulations Through Bilateral Agreements with the United Kingdom and Japan: An Interim Measure or a Solution?" (1988) 23 *Texas International Law Journal*, p.251, at p.266.
22. "Final Communique of the XVIth Conference of the International Organization of Securities Commissions" 26 September 1991 (typescript), p.4.
23. Supra, note 8, at p.252.
24. For the position in selected Commonwealth jurisdictions see generally, supra, note 2. For the position in the United States see, Insider Trading and Securities Fraud Enforcement Act of 1988. See generally, J. Thomas, "Icarus and His Waxen Wings: Congress Attempts to Address the Challenges of Insider Trading in a Globalized Securities Market" (1990) 23 *Vanderbilt Journal of Transnational Law*, pp.99-134. Also of relevance to the position of the SEC in this context is the International Securities Enforcement Cooperation Act of 1990, discussed in J. Naylor, "International Securities Enforcement Cooperation Act of 1990" (1991) 12 *Company Lawyer*, at p.30. These legislative initiatives did not, however, apply to the US Commodity Futures Trading Commission (CFTC) which continued to lack appropriate powers to assist overseas regulators. This defect was cured, in large measure, by the Futures Trading Practices Act of 1992. Since that time the CFTC has been more active in concluding international agreements. Eg. in January 1993 it concluded an MOU in respect of Taiwan and in April 1993 an Agreement with The Netherlands.
25. See, "United Kingdom - United States: Memorandum of Understanding on Exchange of Information in Matters Relating to Securities and Futures" (1986) 25 *International Legal Materials* at pp.1431-1437. Of particular interest are paragraphs 11 and 17 thereof.
26. For the full text see, supra, note 1, Appendix B.
27. See, eg. Article 4(3) of the 1989 agreement between France and the United States which contains specific reference to the concepts, among others, of duplicative remedial sanctions and double jeopardy.
28. See, eg., J.P. Michau, "Information Sharing Between Securities Regulators" (Paper presented to the XVth IOCSO Conference, Santiago, Chile, 1990: typescript), p.7.
29. See, eg. supra, note 19, at pp.85-105.
30. Supra, note 28, at p.24.
31. Supra, note 5, at p.6.
32. See, id., at p.7.
33. Supra, note 16, p.12. See also, Article 12 of the Convention.
34. Canada-US Treaty on Mutual Legal Assistance in Criminal Matters (with Annex) of 18 March 1985, *Canada Treaty Series*, 1990, No.19 (entered into force 24 Jan.1990). For the application of this instrument to securities offences see, Article I and the Annex. See also, Article III.
35. Other UK statutory provisions, including those relating to the Serious Fraud Office, also contribute to what has been described as a developing "global regulatory system ... in financial services and cross border crime". M. Levi, *Customer Confidentiality, Money Laundering, and Police-Bank Relationships: English Law and Practice in a Global Environment* (1991), p.27. See also, supra, note 2, at pp.4-6.
36. B. Chase, "Mutual Assistance to Overseas Business Regulatory Bodies" in *Action Against Transnational Criminality: Papers from the 1992 Oxford Conference on International and White Collar Crime* (1993), p.27, at p.30.
37. See, UK Central Authority, Home Office, *International Mutual Assistance in Criminal Matters: United Kingdom Guidelines* (August 1991), at p.12.

which should govern activities in this area, suggest that progress will continue to be recorded in ensuring that international cooperation is widely available to those seeking to combat crime and abuse in an era characterised by global trading.

* ***The Commonwealth Secretariat acknowledges, with thanks, the assistance provided by Dr William C Gilmore of the University of Edinburgh, Scotland in the preparation of this paper.***

APPENDIX A

MEMORANDUM OF UNDERSTANDING

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

AND

ONTARIO SECURITIES COMMISSION

COMMISSION DES VALEURS MOBILIERES DU QUEBEC

BRITISH COLUMBIA SECURITIES COMMISSION

JANUARY 7, 1988

Memorandum of Understanding

(To enable this document to be incorporated within the present volume the text has been reproduced in a different format)

The United States Securities and Exchange Commission, the Ontario Securities Commission, the Cammission des valeurs mobiliers du Quebec and the British Columbia Securities Commission, recognising the increasing international activity in securities markets and the corresponding need for mutual cooperation in matters relating to the administration and enforcement of United States and Canadian securities laws, have reached the following understanding with respect to requests for assistance as set out herein made between the United States Securities and Exchange Commission and a Canadian securities regulatory authority:

Article 1: Definitions

1. For the purposes of this Memorandum of Understanding:

(a) "Authority" means:

(i) the Securities and Exchange Commission of the United States; or

(ii) the Ontario Securities Commission, the Commission des Valeurs Mobilieres du Quebec, the British Columbia Securities Commission or any other Canadian securities regulatory authority which becomes a party to this Memorandum of Understanding in the manner set out in Article 12.

(b) "requested Authority" means:

(i) where the requesting Authority is the United States Securities and Exchange Commission, the Canadian securities regulatory authority to which the request under this Memorandum of Understanding is made; or

(ii) where the requesting Authority is a Canadian securities regulatory authority, the United States Securities and Exchange Commission.

(c) "requesting Authority" means an Authority making a request under this Memorandum of Understanding.

(d) "person" means a natural person, unincorporated association, partnership, body corporate, government, political subdivision, agency, or instrumentality of a government.

(e) "issuer" means a person who issues or proposes to issue any security.

(f) "investment businesses" means investment advisers, investment advisory services, investment companies, other collective investment undertakings, investment banks, brokers, dealers and equivalent entities.

(g) "securities processing businesses" means clearing corporations or securities transfer agents.

(h) "laws or regulations" means the laws, regulations and regulatory policies applicable in the jurisdictions of the Authorities concerning securities regulation including, without limitation:

(i) insider trading;

(ii) misrepresentation or the use of fraudulent, deceptive, or manipulative practices in connection with the offer, purchase or sale of any security;

(iii) the duties of persons to comply with periodic reporting requirements or requirements relating to changes in corporate control;

(iv) the duties of persons, issuers or investment businesses to make full and fair disclosure of information relevant to investors;

(v) the duties of investment businesses and securities processing businesses pertaining to both their financial, operational or other requirements and their duties of fair dealing in the offer and sale of securities and the execution of transactions; and

(vi) the financial and other qualifications of those engaged in, or in control of, issuers, investment businesses or securities processing businesses.

Article 2: Scope of Assistance

1. The Authorities will provide the fullest mutual assistance, as contemplated by this Memorandum of Understanding. Such assistance will be provided to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of the requested Authority is needed to determine whether, or prove that, the laws or regulations of the requesting Authority may have been violated.

2. Assistance available under this Memorandum of Understanding includes but is not limited to:

(a) providing access to information in the files of the requested Authority;

(b) taking the evidence of persons; and

(c) obtaining documents from persons.

3. The Authorities recognise that they may not in all circumstances possess the legal authority to provide the assistance contemplated in this Memorandum of Understanding. Subject to such limitations of legal authority, the Authorities will use all reasonable efforts to obtain the necessary authorisation to provide the assistance described in this Memorandum of Understanding.

Article 3: General Principles

1. This Memorandum of Understanding sets forth a statement of intent of the Authorities regarding the exchange of information between the Authorities.

2. The execution of this Memorandum of Understanding does not prohibit any Authority from taking measures other than as provided herein to obtain information, evidence or documents located in the jurisdiction of another Authority or in the possession or under the control of a national of another Authority necessary to ensure compliance with or enforce the laws or regulations of its jurisdiction, provided that such Authority:

(i) utilises moderation and restraint in taking such additional measures;

(ii) where the information is located within the territory of the other Authority, makes a request to the other Authority pursuant to this Memorandum, or otherwise, prior to taking such other measures;

(iii) notifies the other Authority before using measures not contemplated by this Memorandum of Understanding of Understanding; and

(iv) consults, if so requested, concerning how such measures may affect the interests of the other Authority and its government.

Notwithstanding these restrictions:

(a) a requesting Authority may communicate with any person in the jurisdiction of the requested Authority who voluntarily agrees to provide the information or documents requested; and

(b) requests for information which is available from any public source in the jurisdiction of the requested Authority may be communicated on an informal basis without compliance with the terms of this Memorandum of Understanding.

3. The provisions of this Memorandum of Understanding will not give rise to a right, directly or indirectly, on the part of any person, other than the Authorities, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance under this Memorandum of Understanding.

4. Assistance under this Memorandum of Understanding may be denied by the requested Authority on grounds of public interest.

Article 4: Requests for Assistance

1. Requests for assistance must be made in writing and addressed to the requested Authority's contact officer listed in Appendix A.

2. The request for assistance will specify the following:

(a) a general description of the documents, information and testimony of persons sought by the requesting Authority;

(b) a general description of both the matter which is the subject of the request and the purpose for which the information is sought;

(c) the persons believed by the requesting Authority to possess the information sought, or the places where such information may be obtained, if the requesting Authority is knowledgeable thereof;

(d) the legal provisions pertaining to the matter which is the subject of the request; and

(e) the desired time period for the reply.

3. Requests for assistance may be denied where the request is not in accordance with the provisions set forth in this Memorandum of Understanding.

4. In the event of urgency, requests for assistance and replies to such requests will be effected by summary procedures or by means of communication other than the exchange of letters, provided that all such communications are confirmed in the manner prescribed in this Article.

Article 5: Execution of Requests

1. In making a request for assistance the Requesting Authority may designate the persons whose testimony it wishes to be taken.

2. The testimony of persons involved, directly or indirectly, in the activities underlying the request or holding information which may assist in carrying out the request will be taken, and the production of other evidence will be required, by the requested Authority or any other party or parties that it designates.

3. The testimony of persons will be taken in the same manner and to the same extent as in investigations or other proceedings in the jurisdiction of the requested Authority. Notwithstanding any other provision of this Memorandum of Understanding, any person giving testimony as a result of a request made under this Memorandum of Understanding will be entitled to all of the rights and protections of the laws of the jurisdiction of the requested Authority. Assertions regarding other rights and privileges arising exclusively pursuant to the

law of the jurisdiction of the requesting Authority shall be preserved for consideration by the courts in the jurisdiction of the requesting Authority.

4. Access to information held in the files of the requested Authority will be provided upon request of the requesting Authority.

5. When requested by the requesting Authority, testimony will be taken under oath and a transcript will be made. In addition, a representative of the requesting Authority may be present at the taking of testimony and, subject to approval by the requested Authority and to paragraph 6, may prescribe specific questions to be asked of any witness or otherwise participate in the examination of any witness.

6. Subject to the following conditions, a requested Authority may grant a request made by the requesting Authority that a person or persons designated by the requesting Authority be permitted to conduct the interrogation of any person:

(a) the requesting Authority must specify the reasons for this request;

(b) the request may be granted or denied by the requested Authority in its discretion. The requested Authority may impose such conditions on the participation of the requesting Authority as it deems appropriate.

(c) if the request is granted and the laws of the jurisdiction of the requesting Authority require the opportunity for counsel to the witness or any party to the proceeding, his counsel, or both, to pose questions to the witness, such participation will be permitted; and

(d) if the request is denied, the Authorities agree to consult pursuant to Article 8 concerning the reasons for the denial and the circumstances under which the request might be granted.

Article 6: Permissible Use of Information

1. The requesting Authority may use the information furnished solely:

(a) for the purposes stated in the request with respect to ensuring compliance with or enforce ment of the laws and regulations of the requesting Authority including the legal provisions specified in the request and related provisions; and

(b) for purposes within the general framework of the use stated in the request including conducting a civil or administrative enforcement proceeding, assisting in a criminal prosecution, assisting in a self-regulatory enforcement proceeding, or conducting any investigation related thereto for any general charge applicable to the violation of the provisions specified in the request.

2. The requesting Authority will not use the information furnished for any purpose other than those stated in paragraph 1 of this article, unless it has first informed the requested Authority of its intention and the requested Authority has not objected to such intended use of the information. If the requested Authority opposes such use, the information may be used only under the conditions imposed by the requested Authority. If use of the information is opposed by the request Authority, the Authorities agree to consult pursuant to Article 8 concerning the reasons for the refusal and the circumstances under which use of the information might otherwise be allowed.

Article 7: Confidentiality of Requests

1. Each Authority will keep requests made under this Memorandum of Understanding, the contents of such requests, information gathered in response to requests, and any other matters arising during the operation of this Memorandum of Understanding, including consultations between the Authorities, confidential, to the extent permitted by law, except for disclosures which are absolutely necessary to carry out the request, provided that such confidentiality may be waived by the mutual agreement of the requesting Authority and the requested Authority.

2. The Authorities will keep confidential, to the extent permitted by law, any information provided pursuant to this Memorandum of Understanding subject to the terms of this paragraph, unless it is disclosed in furtherance of the purpose for which it was requested under Article 6.

3. Except as contemplated by Article 6, the requesting Authority will not offer the information to, and shall use its best efforts to ensure that it is not obtained by, any other person. Unless otherwise agreed, if such information is obtained by any other person, the requesting Authority will use its best efforts to ensure that such information will not be used by that person in any way that involves disclosure to any other person.

4. The requesting Authority will notify the requested Authority of any legally enforceable demand for information prior to complying with the demand and will assert such appropriate legal exemptions or privileges with respect to such information as may be available.

5. As soon as the requesting Authority has terminated the matter for which assistance has been requested under this Memorandum of Understanding, it will return to the requested Authority, to the extent permitted by law, all documents and copies thereof not already disclosed in proceedings referred to in Article 6 and other material disclosing the contents of such documents, other than material which is generated as part of the deliberative or internal analytical process of the requesting Authority.

6. Any document or any other material provided by an Authority in response to a request under this Memorandum of Understanding and any other material disclosing its content, other than material which is generated as part of the deliberative or internal analytical process of the requesting Authority, will not become the property of the requesting Authority, and must be redelivered to the requested Authority without delay on demand to the extent permitted by the law of the requesting Authority; provided that such demand may be made only if the requested Authority has reason to believe that the information has been or is likely to be disclosed or used otherwise than as contemplated by Article 6 above.

Article 8: Disputes and Consultations

1. In any case of dispute over the meaning of any term used in this Memorandum of Understanding, the parties will define the terms herein in accordance with the relevant laws of the jurisdiction of the requesting Authority.

2. The Authorities will engage in consultations with respect to this Memorandum of Understanding with a view to improving its operation and resolving any matters which may arise. In particular, the Authorities will consult upon request in the event of:

(a) a refusal by one Authority to comply with a request for information on the grounds set forth in paragraph 4 of Article 3; or

(b) a change in market or business conditions, or in the legislation governing the matters set forth in paragraph 1(h) of Article 1, or any other difficulty which makes it necessary or appropriate to amend or extend this Memorandum of Understanding in order to achieve its purposes.

3. The Authorities may agree on such practical measures as may be necessary to facilitate the implementation of this Memorandum of Understanding.

4. Any of the conditions of this Memorandum of Understanding may be amended, relaxed or waived by mutual agreement.

Article 9: Unsolicited Assistance

1. To the extent permitted by the laws and regulations of its jurisdiction, each Authority will use reasonable efforts to provide the other Authority with any information it discovers which gives rise to a suspicion of a breach, or anticipated breach, of the laws or regulations of the other Authority.

Article 10: Costs of Investigation

1. If it appears that responding to a request for assistance under this Memorandum of Understanding will involve substantial costs being incurred by the requested Authority, the requested Authority and the requesting Authority will establish a cost sharing arrangement before continuing to respond to such request for assistance.

Article 11: International Law

1. The execution of this Memorandum of Understanding will not prejudice the respective positions of the Authorities and their governments concerning the principles of international law applicable to procedures for obtaining information located in another jurisdiction as contemplated in Article 3.

2. The Authorities acknowledge that when the treaty between the governments of Canada and the United States of America on Mutual Legal Assistance in Criminal Matters is duly implemented and ratified it, in addition to this Memorandum of Understanding, will constitute a framework of principles and procedures for investigating and obtaining information concerning certain kinds of securities law offences.

Article 12: Execution

1. This Memorandum of Understanding will be effective from the date of its execution by the United States Securities and Exchange Commission, the Ontario Securities Commission, the Commission des valeurs mobilieres du Quebec and the British Columbia Securities Commission.

2. Any Canadian securities regulatory authority may become a party to this Memorandum of Understanding by executing a counterpart thereof together with the Securities and Exchange Commission and providing notice of such execution to the other Canadian securities regulatory authorities which are parties to this Memorandum of Understanding.

Article 13: Termination

1. This Memorandum of Understanding may be terminated as to any Authority by that Authority giving 30 days notice to the other Authorities that this Memorandum of Understanding is no longer in effect as to the terminating Authority's area of competence. If any Authority gives such notice, this Memorandum of Understanding will continue to have effect with respect to all requests for assistance which are made before the effective date of notification until the requesting Authority terminates the matter for which assistance was requested.

DATED this 7th day of January, 1988

(Signed)

D.S.RUDER
Chairman, United States Securities & Exchange Commission

S.M.BECK QC
Chairman, Ontario Securities Commission

D.M.HYNDMAN
Chairman, British Colombia Securities Commission

P.GUY
President, Commission des valeurs mobilieres du Quebec

APPENDIX A

CONTACT OFFICERS

United States Securities & Exchange Commission
450 5th Street N W
Washington D C
U S A 20549

Tel: (202) 272 2900

Attention: Director, Division of Enforcement

Ontario Securities Commission
Suite 1800, 20 Queen Street West
Toronto
Ontario M5H 3SB
Tel: (416) 597 0681

Attention: Deputy Director, Enforcement & Market Regulation Branch

Commission des valeurs mobilieres du Quebec
Tour de la Bourse
C.P.246, 17th Floor
Montreal, Quebec
H4Z 1G3
Canada

Attention: Director, Enforcement & Legal Services

British Columbia Securities Commission
Suite 1100, 865 Hornby Street,
Vancouver, B.C.
V6Z 2H4

Attention: Manager, Compliance Branch

APPENDIX B

Memorandum of Understanding (MoU) between The Treasury and the Securities and Investments Board of the United Kingdom and the Australian Securities Commission

To enable this document to be incorporated within the present volume the text has been reproduced in a different format

Introduction

1. The Commissioners of Her Majesty's Treasury (the Treasury) have responsibility for policy and legislation in the sphere of financial services and for the regulation of investment business under the UK Financial Services Act 1986, oversight of the Securities and Investments Board (SIB) and arrangements with overseas regulators for exchanging information. The Treasury liaises closely with other bodies and agencies, the UK Department of Trade and Industry in particular, which have responsibility for policy, legislation and enforcement in other areas relevant to the scope of this MoU.

The SIB is the designated agency under the Financial Services Act 1986. It is responsible for most of the financial services functions under that Act, including the oversight of the self-regulating organisations and investment exchanges and for making rules under which investment business is conducted in the UK. It has statutory powers of investigation.

The Australian Securities Commission (ASC) is the national corporate and securities regulator established under section 7 of the Australian Securities Commission Act 1989. The ASC is responsible for the administration and enforcement of the Corporations Law and the Australian Securities Commission Act 1989 which provide for the regulation of corporations and the securities and futures industry. The ASC's ability to exercise coercive powers on behalf of foreign regulators is governed by the Mutual Assistance in Business Regulation Act 1992.

In this MoU, "Authorities" means the ASC, the Treasury and the SIB.

2. The Treasury and the SIB on the one hand, and the ASC on the other, recognising the increasing international activity in the securities, futures and options markets and the corresponding need for mutual cooperation between the relevant national authorities, have reached the following understanding.

Principles

3. (a) The Authorities intend to ensure that the full est mutual assistance is provided within the terms of the Memorandum of Understanding (MoU). The MoU does not modify or supersede any laws or regulations in force in, or applying to, the United Kingdom or Australia.

   (b) The MoU does not create any enforceable rights.

4. The purpose of the MoU is to protect investors and to promote the integrity of the securities, futures and options markets by providing a framework for cooperation, including channels for communication, increased mutual understanding, the exchange of information and investigative assistance, to the extent permitted by laws and practices.

5. To the extent permitted by laws and practices, each Authority will use reasonable efforts to provide the other Authority with any information that is discovered which gives rise to a suspicion of a breach, or anticipated breach, of the rules or laws of the other Authority.

Scope

6. The Authorities propose to ensure that mutual assistance is provided in the following areas:

   (a) insider trading, market manipulation and other fraudulent and manipulative practices in relation to companies, securities, futures contracts, options and collective investment schemes;

   (b) enforcement of the laws and regulations relating to dealing in, arranging deals in, managing and advising on securities, futures contacts, options and collective investments;

   (c) ensuring that only fit and proper persons are authorised or registered to conduct the business referred to in subparagraph (b) and promoting high standards of fair dealing and integrity in their conduct of that business;

   (d) the disclosure of interests in the securities of companies;

   (e) the duties of issuers of and offerors for securities to make full and fair disclosure of information relevant to investors;

   (f) breaches of companies legislation.

Requests

7. The MoU does not affect the ability of the Authorities to obtain information from persons on a voluntary basis, provided that any procedures in place in the country of each Authority for the provision of such information are observed.

8. To facilitate assistance, the requesting Authority should specify:

   (a) the information required (identity of persons, specific questions to be asked etc.);

(b) the purpose for which information is sought (includ ing details of the rule or law which is suspected to have been breached);

(c) a description of the conduct or suspected conduct which gives rise to the request;

(d) the link between the suspected breach of rule or law and the regulatory functions of the requesting Authority;

(e) the relevance of the requested assistance to the suspected breach of rule or law;

(f) whether it is desired that, to the extent permitted by the laws applying to the requested Authority, any persons from the country of the requesting Authority should be present during interviews which form part of an investigation, and whether it is desired that such persons should be permitted to participate in the questioning;

(g) any other matters specified by the laws and regulations in the country of the requested Authority.

9. Any document or other material provided in response to a request under the MoU and any copies thereof must be returned on request, to the extent permitted by law.

10. Each request will be assessed on a case by case basis by the requested Authority to determine whether assistance can be provided under the terms of the MoU. In any case where the request cannot be accepted completely, the requested Authority will consider whether there may be other assistance which can be given. In particular, the requested Authority will consider whether the request might be dealt with via channels for mutual assistance in criminal matters.

11. In deciding whether to accept or decline a request the requested Authority will take account of:

(a) matters specified by the laws and regulations in the country of the requested Authority;

(b) whether the request involves an assertion of jurisdiction not recognised by the country of the requested Authority and

(c) whether it would be contrary to the public interest to give the assistance sought.

12. The requested Authority may, as a condition of agreeing that assistance is given under the MoU, require the requesting Authority to make a contribution to costs. Such a contribution may, in particular, be required where the cost of a request is substantial or where a substantial imbalance has arisen in the cumulative costs incurred.

Confidentiality

13. The information supplied will be used solely for the purpose of:

(a) securing compliance with or enforcement of the rule or law specified in the request by initiating or assisting in criminal prosecution arising out of the breach of such law;

(b) conducting or assisting in civil proceedings arising out of the breach of the rule or law specified in the request and brought by the Authorities or other law enforcement or regulatory bodies within the jurisdictions of the United Kingdom or Australia;

(c) taking regulatory action or imposing regulatory requirements within the areas set out in paragraph 6 above.

14. Each Authority will keep confidential to the extent permitted by law:

(a) any request for information made under the MoU and any matters arising in the course of its operation unless such disclosure is necessary to carry out the request or the other Authority waives such confidentiality;

(b) any information passed under the MoU unless it is disclosed in furtherance of the purpose for which it was requested.

15. Unless the request provides otherwise, the confidentiality provisions of the MoU shall not prevent the authorities from informing other law enforcement or regulatory bodies within the jurisdictions of the United Kingdom or Australia of the request or of passing information received pursuant to a request to such bodies, provided that:

(a) such agencies or bodies have responsibility for prosecuting, regulating or enforcing rules or laws falling within the areas set out in paragraph 6 above;

(b) the purpose of passing such information to such an agency or body falls within the areas set out in paragraph 6; and

(c) the requesting Authority has provided any undertaking in relation to the information requested which is required by the law of the country of the requested Authority.

Consultation

16. The signatories may consult informally, at any time, about a request or proposed request.

7. The Authorities may consult and may revise the terms of the MoU in the event of a substantial change in laws or practices affecting the operation of the MoU.

Termination

18. The Memorandum of Understanding shall continue to have effect unless terminated by any one of the Authorities by giving 30 days' advance written notice to the other Authorities that the understanding set out herein is no longer to have effect.

Contact Points

19. All communications between Authorities should be between the principal points of contact unless otherwise agreed.

20. The Head of Division 1, Securities and Investment Services Group is the principal point of contact in the Treasury.

21. The Group Director, Compliance and Enforcement, is the principal point of contact in the Securities and Investments Board.

22. The Director, Policy and International Relations, Office of the Chairman (Sydney), is the principal point of contact in the Australian Securities Commission.

23. Addresses for contact points are given in Annex A.

Entry into Effect

24. This MoU will be effective from the date of its signature by the Treasury, the Securities and Investments Board and the Australian Securities Commission.

Signed this 28th day of October 1992

The Treasury
ANTHONY NELSON
Economic Secretary

Securities and Investment Board
ANDREW LARGE
Chairman

Australian Securities Commission
ANTHONY HARTNELL
Chairman

ANNEX A

Contact Officers

The Treasury:
Head of Division
Securities and Investment Services Group
HM Treasury
10-18 Victoria Street
London SW1H 0NN
United Kingdom
Telephone: 44 71 215 3109
Fax: 44 71 215 3508

SIB: Group Director
Compliance and Enforcement
Securities and Investments Board
Gavrelle House
2-14 Bunhill Row
London EC1Y 8RA
United Kingdom
Telephone: 44 71 638 1240
Fax: 44 71 382 5906

ASC: Director
Policy and International Relations
Office of the Chairman, Sydney
Level 9, Norwich House
6-10 O'Connell Street
GPO Box 4866
Sydney NSW 2001
Australia
Telephone: 612 390 3016
Fax: 612 390 3034