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BUMPER CARS: THEMES OF CONVERGENCE IN INTERNATIONAL REGULATION*

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In this Article, Professor Malloy examines the convergence of regulatory standards among international regulators, suggesting that the dynamic of financial services regulation can best be understood as a conceptualized version of the bumper cars ride at an amusement park. While Professor Malloy suggests that a certain degree of convergence has already occurred in international regulation, thus decreasing the number of "bumps" in the ride, he also recognizes that much of this convergence remains prospective rather than actual, and currently is dominated by a pattern of regionalized regulation. Professor Malloy argues that, unless a converged pattern of regulation continues to develop, the now-internationalized field of financial services will remain an arena in which large, but still uncoordinated, regionalized bumper cars carom and collide.

IN my brief remarks, I hope to identify a gradual historical progression towards greater convergence of regulatory standards among international regulators—particularly bank regulators—and also to suggest that this convergence is slow and fragile and needs to be better understood. Underlying my discussion is the assumption that, as a matter of fact, the change in the contours of our financial markets is directed towards increasing "internationalization," whatever that concept may be taken to mean.[1] If this is so, however, then internationalization must be consid-

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1. What "internationalization" (or "globalization" or "transnationalization") means, in terms significant to regulatory policy, is a subject requiring further study. *See* Staff of the United States Securities and Exchange Commission, Report to the Senate Comm. on Banking, Housing and Urban Affairs and the House Committee on Energy and Commerce Concerning Internationalization of the Securities Markets (1987) (analyzing implications of "internationalization" for United States securities regulation) [hereinafter SEC Staff Study Concerning the Internationalization of the Securities Markets]. *See generally* Malloy, Internationalization of the Securities Markets, 12 Md. J. Int'l L. & Trade 103 (1987) (reviewing the SEC Staff Study).

ered not just in terms of the size and character of those markets, but also in terms of the manner in which they should be regulated.

In addition, I intend in the course of this discussion to suggest certain themes of convergence that may be operating in international regulation. These are: (1) that a loose institutional framework for the regulation of the international financial environment currently exists;[2] (2) that a coalescence is occurring among individual financial markets into an internationalized set of markets; and (3) that a framework of regional cooperation is expanding that may ground the process of internationalization.[3]

It is my suspicion, however, that the regulation of financial services remains—for the most part—a dynamic of individual, domestic systems of regulation that interact in various ways transnationally. The nature of these interactions is such that convergence of regulatory standards may be impeded, to the detriment of the internationalized markets. Accordingly, in my remarks I shall first examine the dynamic of financial services regulation.[4] Second, to track the direction of change in the financial markets, I shall review briefly the historical roots of current United States banking regulation.[5] Third, I shall offer some contemporary examples of the growing need for coordination and internationalization in financial services regulation.[6] Finally, I conclude that, while the factual predicates of internationalization have clearly proceeded in their development, the convergence of regulatory standards capable of dealing with an internationalized financial services environment has lagged. In large part, this delay is due to the use of a sometimes inappropriate dynamic of regulation in an increasingly internationalized context.[7]

I. THE DYNAMIC OF FINANCIAL SERVICES REGULATION: THE BUMPER CARS THEORY

I suggest that the dynamic of financial services regulation may be best understood as a conceptualized version of a bumper cars ride at an amusement park. I believe that this conceptual framework explains many of the tensions and accommodations that have been exhibited in recent years by financial services regulation in the internationalized environment.

2. *See* Wegen, *Transnational Financial Services—Current Challenges for an Integrated Europe*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S91, 92-94 (1992) (discussing international institutions and groups involved in financial services regulation).

3. *See* Note, *Banking on Europe: 1992 and EMU*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S395, S395-428 (1992) (discussing developments in convergence of standards within the European Community).

4. *See infra* notes 8-21 and accompanying text.

5. *See infra* notes 22-26 and accompanying text.

6. *See infra* notes 27-50 and accompanying text.

7. *See infra* notes 51-66 and accompanying text.

For anyone who has not recently visited an amusement park, or who customarily avoids such high-impact rides as bumper cars, the following basic description may be helpful. Bumper cars are squat, round single- or double-seat cars with disproportionately large rubber bumpers. Typically, each car is attached by a long, vertical pole to a source of power and to a tracking mechanism that guides the car's movement. The individual cars have steering wheels but, in practice, these tend to have little or no effect on the direction in which the car will travel.

As soon as the patrons are seated in their cars and the power is turned on, the cars carom around the enclosed space in which the cars are situated, bumping into each other apparently at random and with increasing frequency and power, with the result that the direction, speed, and civility of each car's ride becomes more unpredictable as the amusement ride proceeds. It is possible, of course, for an individual patron to influence the direction and degree of impact of his or her car by the application of simple principles of physics—namely, by "shoving" oneself forward, typically in the moment prior to likely impact with another car, to increase the degree of impact and the likely consequent rebound. Nevertheless, looking at the bumper cars ride as a total system, there is no apparent object or rational pattern to its activity.[8]

I submit that, to the extent that the domestic regulation of financial services proceeds without specific reference to the broader international environment, its dynamic is not unlike that of the bumper cars amusement ride. The impact of the domestic system with other, foreign systems of regulation of activity primarily taking place in those other jurisdictions appears to be at random, and the severity of the impact on the domestic system is likewise a matter of chance. It is true that basic, traditional principles of private international law—for instance, conflict of laws rules,[9] jurisdiction-preference rules such as those contained in the two Restatements of the Foreign Relations Law of the United States,[10] and the like—may moderate the severity of the impact. Nevertheless, these principles tend to be no more than extrinsic rules governing the operation of the legal amusement park in general, rather than specific, substantive rules of conduct crafted for the particular ride. In the absence of such substantive rules, regulatory systems simply continue to collide, with increasing frequency and severity of impact as the level of internationalized activity rises.

8. Whether such apparently random movements within a defined field do nevertheless constitute a purposeful system is the subject of some dispute. *See* D.R. Hofstadter, Gödel, Escher, Bach: an Eternal Golden Braid 37 (1980) (noting the difficulty of perceiving a system not previously recognized).

9. *See* North, *Reform, But Not Revolution*, in 220:I Hague Acad. Recueil des Cours 154-76 (1990) (discussing the general course of private international law and choice of law principles in the context of contracts).

10. *Compare* Restatement (Second) of Foreign Relations Law §§ 3, 18-19 (1965) *with* Restatement (Third) of Foreign Relations Law §§ 401-03, 431 (1987) (concerning types of jurisdiction, as well as jurisdiction to prescribe and to enforce laws).

Assuming little or no internationalized activity, the "dynamic" of financial services regulation would resemble a bumper car enclosure before the ride is activated, as shown in Illustration 1. There may be considerable movement and activity within each individual car, as each regulator fidgets with the domestic regulated entities, but little or no activity or impact occurs across the field as a whole.

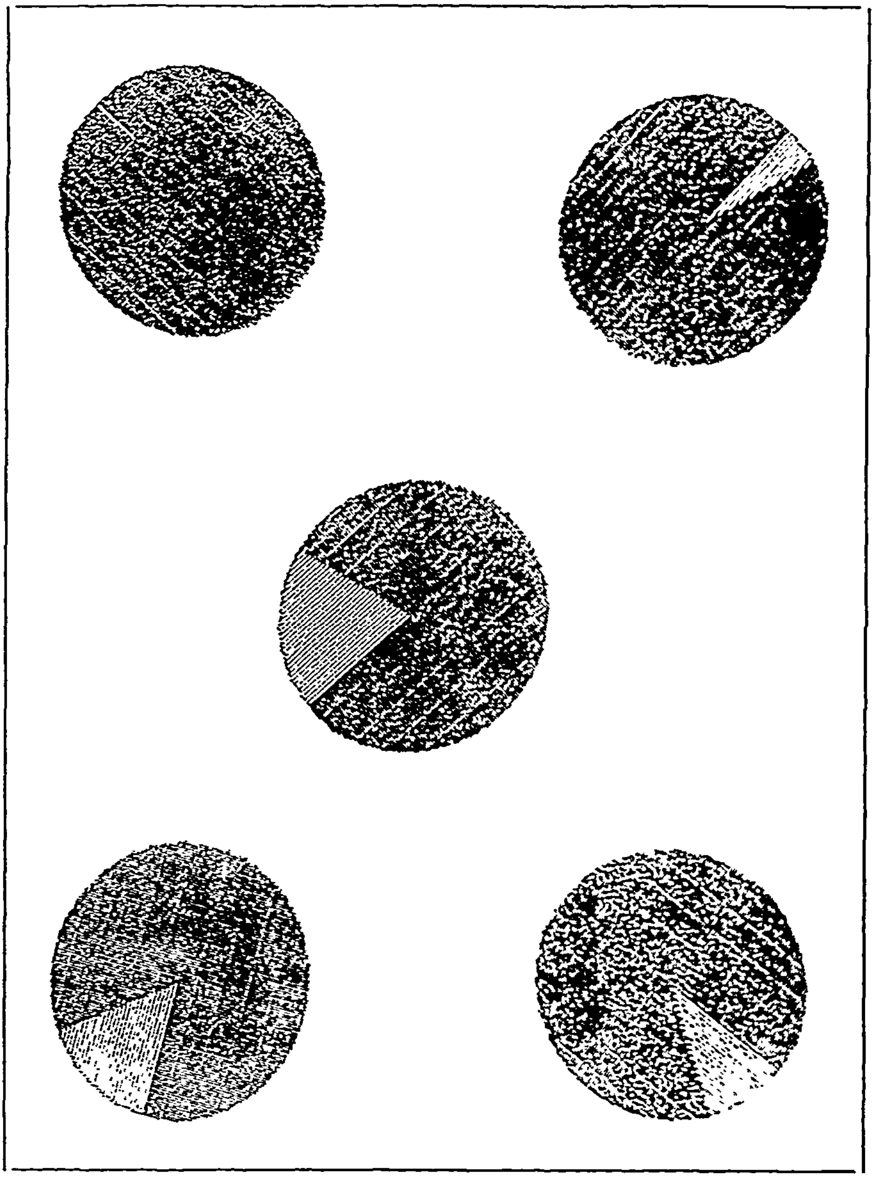
What would happen when the amusement ride is activated—that is, once a significant degree of transnational, but domestically regulated, activity begins to occur? With no adjustment or accommodation for the transnational nature of this activity by or among the individual national regulators, one would achieve the very model of the modern bumper cars ride, as is pictured in Illustration 2. Of course, in practice, it is unlikely that this degree of raw impact between systems would occur without some accommodation, if only on a case-by-case basis.[11]

It is the very image of this full-tilt bumper car activity that causes regulators, and regulated participants as well, to seek to avoid overlap or contact with other regulatory systems. One traditional response found in securities practice is the phenomenon of "clustering," displayed in Illustration 3. Fearing the full disclosure, apparent complexity, and supposed high cost of the United States securities regulation regime, many non-U.S. participants simply cluster their securities offerings outside the United States, making a concerted effort to avoid impact with the United States securities market.[12] To the extent that techniques like clustering are effective, they have the effect of excluding the target of clustering—here, the United States and U.S. investors—from the game altogether. If the stakes in the game begin to rise, and it becomes important to the excluded player to obtain entry, then it is not unlikely that the excluded player may seek to moderate its perceived potential impact (perhaps by agreeing to a "no-shoving" rule). In fact, as transnational capital formation has become more important, this is precisely what the Securities and Exchange Commission ("SEC") has done in moderating the impact of the United States securities laws on foreign-based participants in the

11. *See* Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C. J. Int'l & Com. Reg. 1, 9-13, 17-24 (1983) (discussing the relatively *ad hoc* resolution of the conflict between the Securities and Exchange Commission and the Swiss banking industry over confidentiality of banking records relevant to United States securities enforcement investigations).

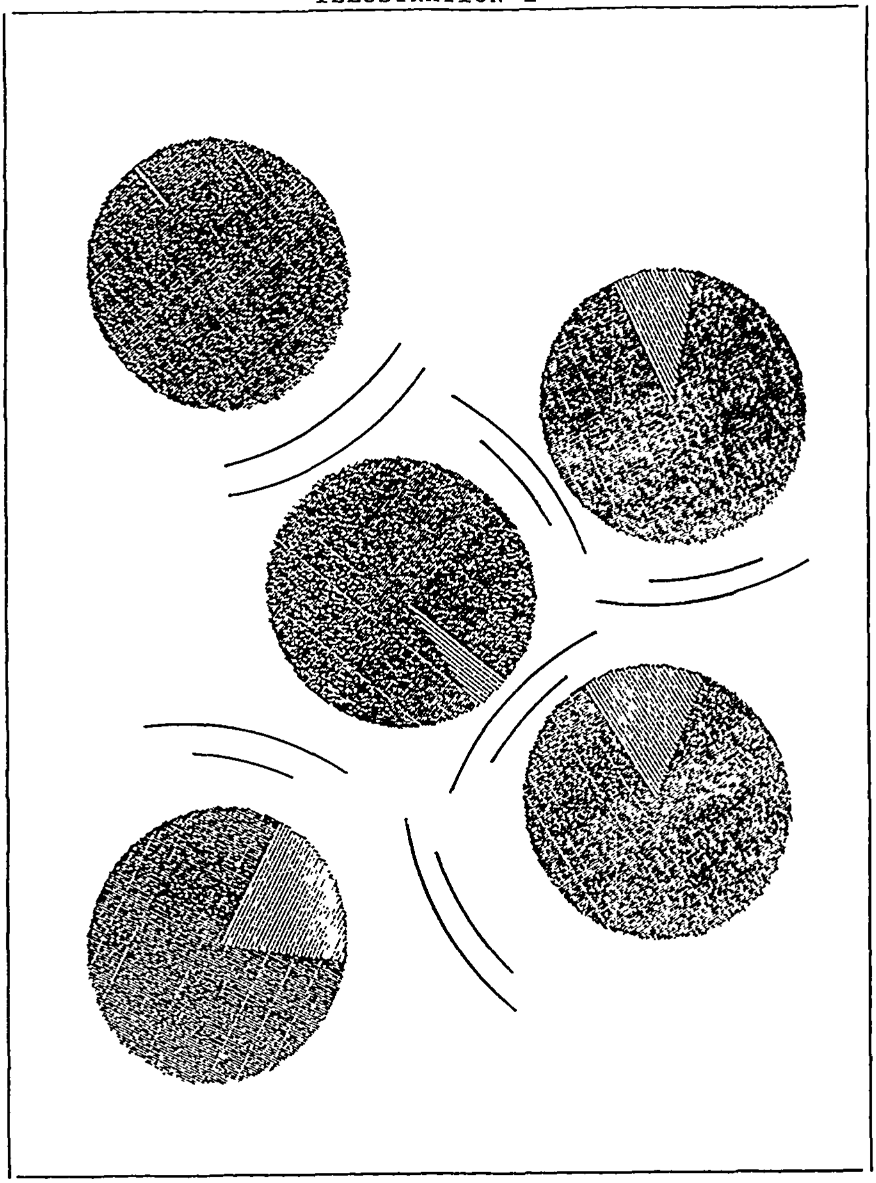
12. *See* 55 Fed. Reg. 18,306 (1990) (to be codified at 17 C.F.R. § 200); 55 Fed. Reg. 18,308 (1990) (to be codified at 17 C.F.R. § 230); Note, *Increasing United States Investment in Foreign Securities: An Evaluation of SEC Rule 144A*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S179, S183-86 (1992) (discussing hesitancy of foreign offerors of securities to use United States securities markets and the use of Rule 144A to attract foreign offerors through relaxed disclosure requirements) [hereinafter Note, *Increasing U.S. Investment*]; Note, *The SEC's Proposed Regulations of Foreign Securities Issued in the United States*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S203 (1992) (providing a more generalized discussion of the same) [hereinafter Note, *Proposed Regulations*].

ILLUSTRATION 1



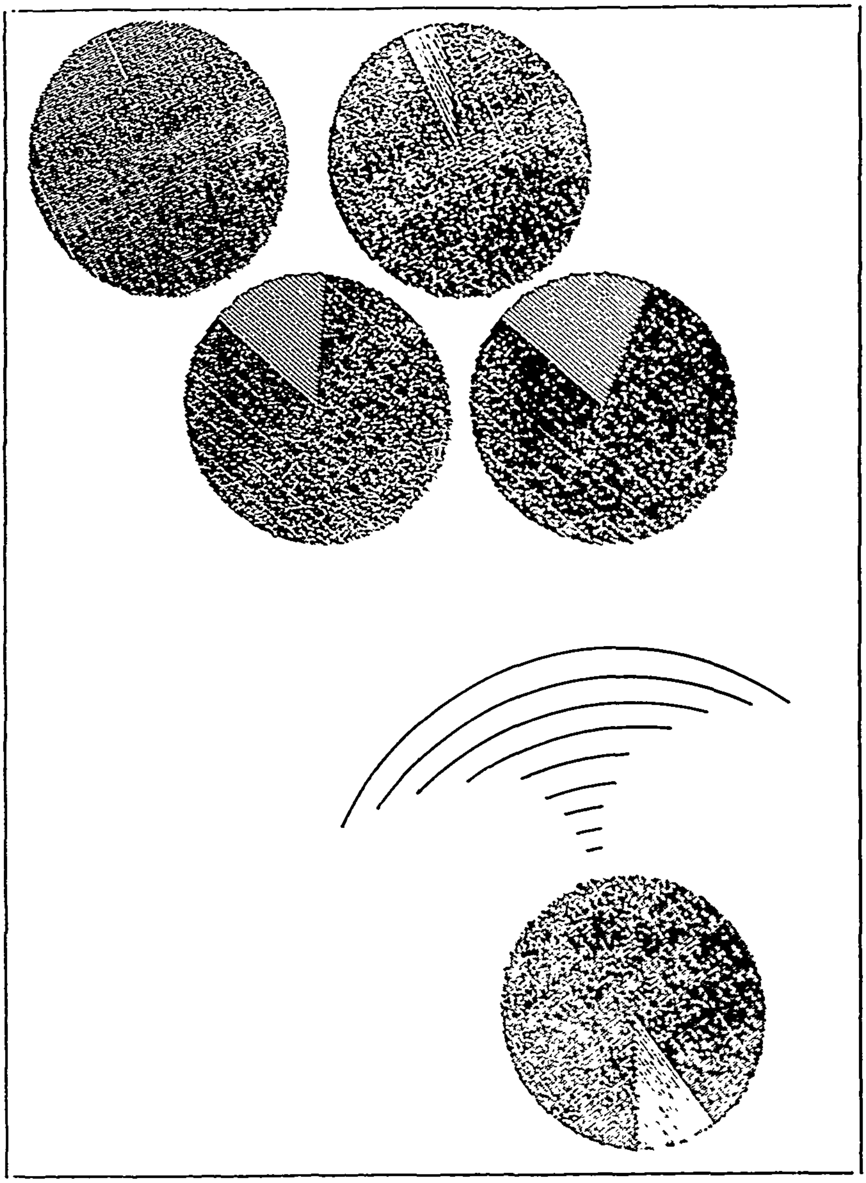
STATIC FIELD -- LITTLE OR NO INTERNATIONALIZED ACTIVITY

ILLUSTRATION 2



GAME AT FULL

ILLUSTRATION 3



CLUSTERING

market,[13] while retaining the right to use certain basic "bumpers," like the anti-fraud rules.[14]

An alternative approach may suggest itself within certain sub-fields of the playing area of the bumper cars ride—specifically, through consolidation or regionalization of the rules of the game. This strategy has the effect of creating a multi-passenger bumper car, in which four or five or more players (*i.e.*, individual regulators or national regulatory systems) may ride together. There are, of course, at least two possible advantages to this approach. First, the approach almost completely eliminates the possibility of collision between any of the regulatory systems now consolidated into the one regulatory bumper car.[15] Second, it gives the consolidated bumper car more "throw-weight" in any collision with other individual bumper cars, thus increasing the likelihood that the impact on the consolidated system will be minimalized. In many areas, most notably in the securities field,[16] the European Community is harmonizing regulatory rules and is in fact building a bigger bumper car to secure these advantages. Similarly, one could argue that the decision in 1933 and 1934 to create a system of federal securities regulation within the United States[17] in effect resulted in the construction of a bigger bumper car, although the contemporary motivation for this effort was not specifically directed at the advantages of a bigger car.

The prospect of two such consolidated bumper cars, as pictured in Illustration 4, nevertheless raises its own set of problems. With these two behemoths potentially caroming around the track, serious dangers for other bumper car drivers still exist. More to the point, however, these two large vehicles may be sufficiently well-matched that they would mutually neutralize the second advantage of consolidation—minimizing the relative seriousness of impact with other cars—in any collision between

13. *See, e.g.*, Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S77 (1992) (discussing SEC initiatives with respect to foreign-based participants); Note, *Increasing U.S. Investment*, *supra* note 12, at S182-87 (same); Note, *Proposed Regulations*, *supra* note 12, at S211-15 (same).

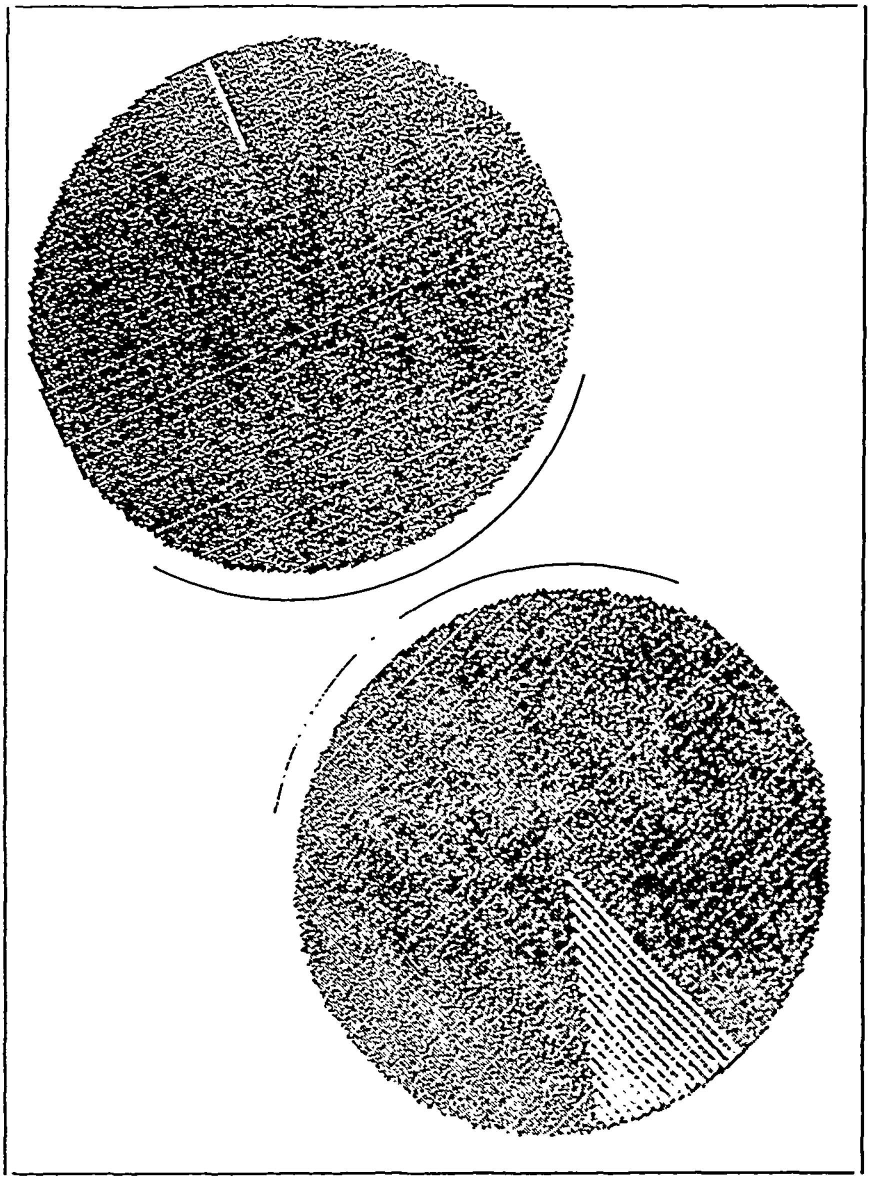
14. 55 Fed. Reg. 18,308.

15. The consolidation approach does not, of course, eliminate the possibility of collision due to intra-system variance with respect to specific regulatory rules, if the terms of the consolidation still give a degree of individual competence and discretion to the individual regulators. This has occurred, for example, in the case of coordinated rules with respect to capital adequacy. *See infra* note 45 and accompanying text (discussing dissent over specific features of capital adequacy rules). This may also occur with respect to the regulation of banking within the European Community under the Second Banking Directive, *see* Wegen, *supra* note 2, at S93, although that remains to be seen, once the directive is fully operative.

16. *See* Goebel, *Remarks*, in Malloy, Internationalization of the Securities Markets, 1988 Proceedings Am. Soc'y Int'l L. 299-305 (discussing EC directives on harmonization of securities disclosure rules).

17. *See* Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1988); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*

ILLUSTRATION 4



SUB-FIELD -- CONSOLIDATION/REGIONALIZATION the two. This prospect, in fact, has increased the need for accommodation between the two systems in the future.

An alternative sub-field response to the bumper cars phenomenon is to reach specialized, bilateral accommodation on mutually perceived problem areas in substantive regulation. This was done, in effect, when United States and United Kingdom regulatory authorities agreed in principle on rules governing capital adequacy assessment for banks in early 1987.[18] This has also been done by the SEC, on a country-by-country basis, in negotiating enforcement "Memoranda of Understanding" ("MOUs").[19] While such a bilateral approach might rationalize the regulatory treatment of transnational competitors subject respectively to the two authorities—thus reducing the regulatory competitive disadvantage between them—it does not work well in a field in which significant competition occurs across a broader transnational spectrum, as indicated in Illustration 5.

To the extent that significant players are not included in the bilateral arrangement, the ultimate effect on the market participants subject to the arrangement may be extremely negative. The two systems are bound to the extent of their shared substantive rules, and are mutually affected by the impact of collision with other bumper cars. In a concrete case, for example, tying United States and British banks to significant capital adequacy requirements—and the costs to banks attendant on such rules—exacerbates the impact of competition with Japanese banks that might be subject to more favorable capital adequacy requirements. At the same time, the bilateralized regulatory regimes would lack the independent discretion to respond to such impact.

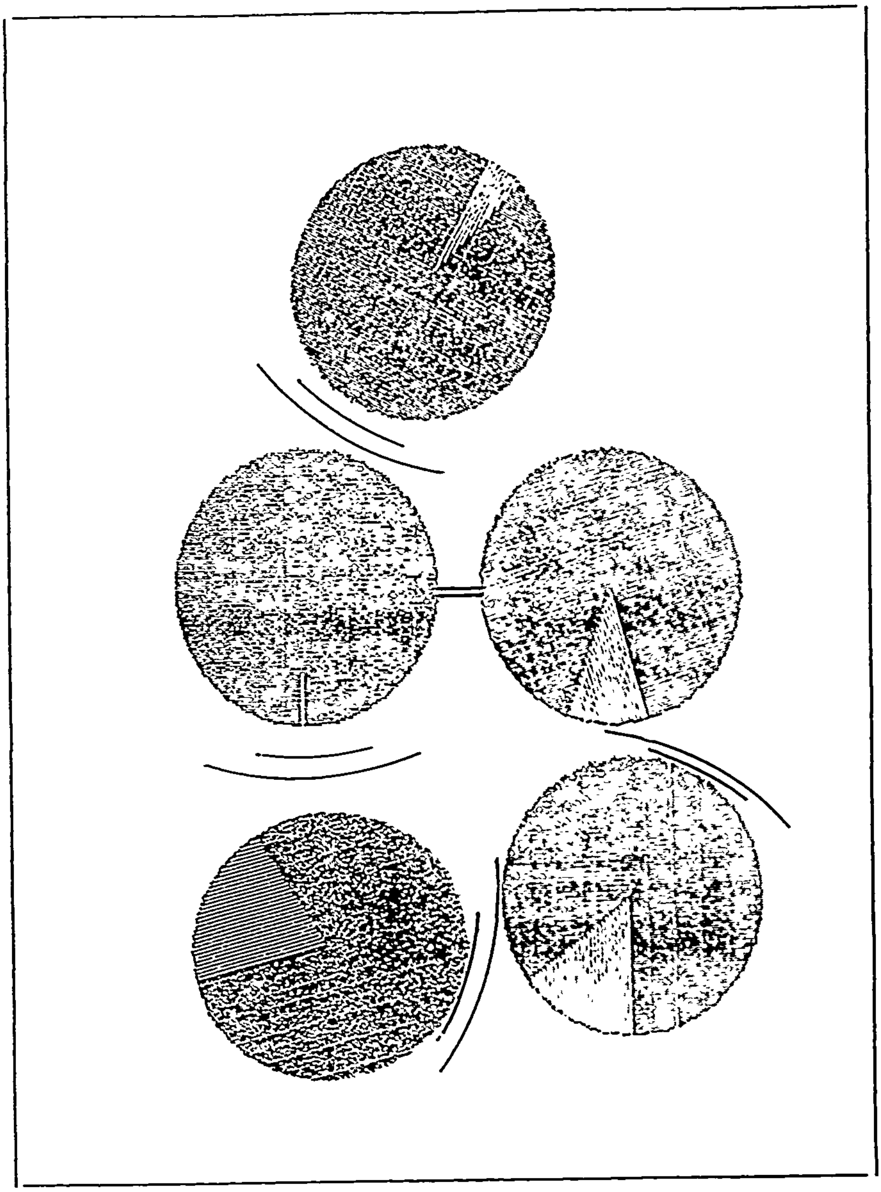
The bilateral approach has therefore not often worked as an independent response, although it may be effective as a first step or prelude to a broader coordinated response. This has been the case, in fact, in the area of capital adequacy supervision, where the United States-United Kingdom arrangement was quickly replaced by a multilateral response, including Japan, the other members of the Group of Ten ("G-10"),[20] and Luxembourg and Switzerland under the aegis of the Committee on Banking Regulations and Supervisory Practices of the Bank for International

18. *See* Agreed Proposal of the United States Federal Banking Supervisory Authorities and the Bank of England on Primary Capital and Capital Adequacy Assessment, *reprinted in* 3 Fed. Banking L. Rep. (CCH) ¶ 33,151 (Feb. 27, 1987); *see also* Malloy, *U.S. International Banking and the New Capital Adequacy Requirements: New, Old and Unexpected*, 7 Ann. Rev. Banking L. 75, 88-105 (1988) (discussing the joint proposal between the United States and the United Kingdom).

19. *See* Doty, *supra* note 13, at S83-84 (discussing the use of MOUs); *see also* Honegger, *supra* note 11, at 21-24 (discussing the United States-Swiss MOU).

20. The Group of Ten is a group of industrialized western democracies that offer primary support to the Bank for International Settlements (BIS) located in Basle, Switzerland. The Group consists of: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States. *See* Malloy, *supra* note 18, at 77 n.13.

ILLUSTRATION 5



SUB-FIELD -- BILATERAL ACCOMMODATION

Settlements ("BIS").[21] In effect, this multilateral response has managed to create a converged pattern of regulation—as seen in Illustration 6—among all significant bumper cars in this particular game. I would argue that it is only such a converged pattern that can eliminate the vagaries and dangers of the bumper cars phenomenon.

II. The Historical Roots of United States Banking Regulation and the Need for Convergence

International coordination of regulatory supervision is needed, not because of an abstract desire for symmetry, but because domestic regulation of financial services cannot, as a practical matter, be truly effective unless it is coordinated with the efforts of other members of the international community. Similarly, convergence of international regulatory standards is not needed to satisfy an abstract need for harmony, but rather because gratuitous variations among national standards create inefficiencies and inequities among participants in the same set of international markets.

At least for United States banking regulation, the development of convergent standards raises special problems because historically our regulatory system has itself been radically divergent at the domestic level.[22] Following the rise of the Jacksonian coalition in 1828, no serious attempt at rationalizing United States banking regulation occurred until the crisis created by the Civil War. Thus, it was a major military crisis that prompted the first significant step forward in the development of bank regulation in the modern period. The war required not only guns and men to carry them, but money (or credit) to pay for them. Part of the solution to the credit problems of waging the war has outlasted the crisis itself, and has become one of the central features of the contemporary United States bank regulatory system—namely, the passage of the National Bank Act of 1864, which authorized federal chartering of national banks.[23]

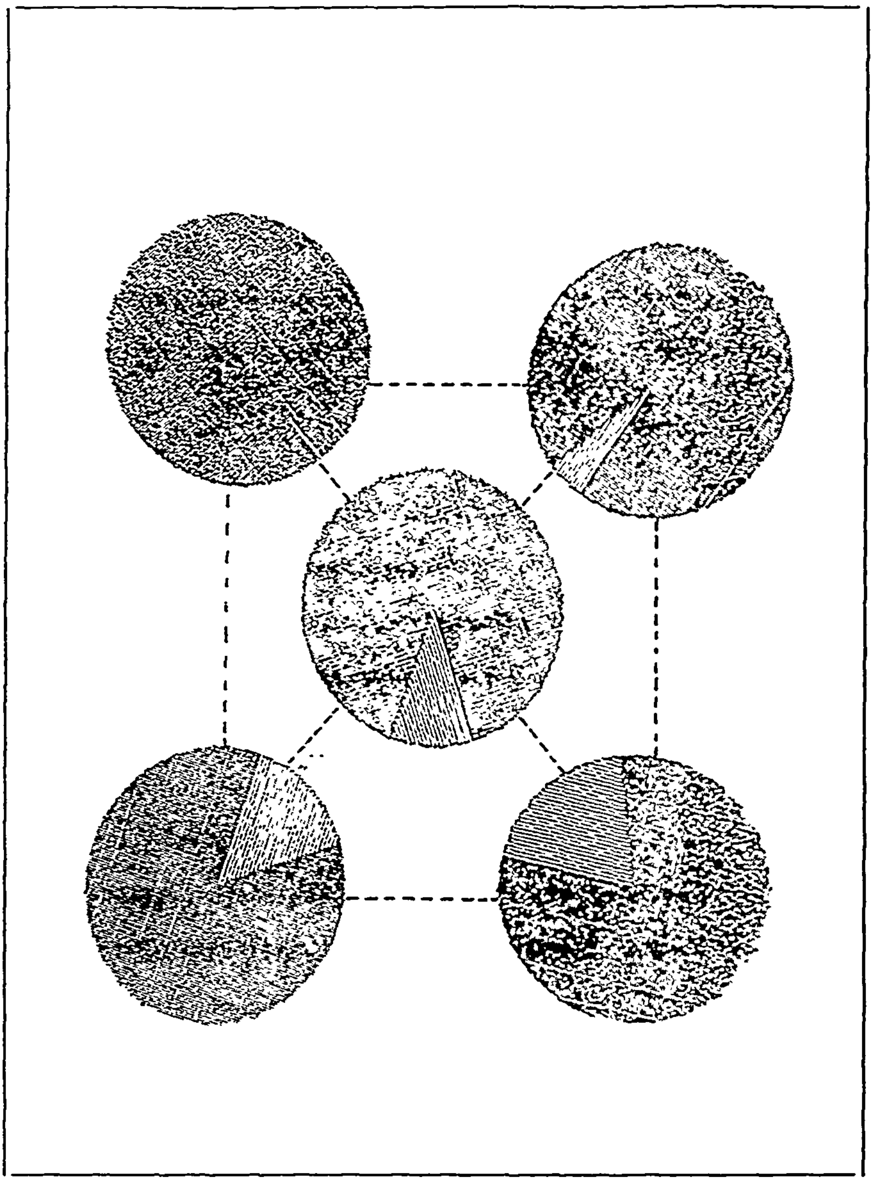
Until the enactment of the Federal Reserve Act in 1913, the National Bank Act was the nation's most important banking code, although the competition from state bank chartering systems continued, as it has to this day. Thus, the very creation of a "national" banking system was, in the first instance, a matter of expediency. To the extent that the federal

21. *See id.* at 112-21 (discussing the BIS initiative).

22. *See* Conference of State Bank Supervisors v. Conover, 715 F.2d 604 (D.C. Cir. 1983) (illustrating the divergence among state and federal approaches to admission of foreign bank branches into the domestic markets). The radical divergence has been increasingly mitigated in recent years by a significant increase in pervasive federal regulation of financial services, particularly in the banking and securities sectors. *See* Malloy, *Seeing the Light: Savings Association Conversions and Federal Regulatory Realignment*, 10 Ann. Rev. Banking L. 189, 221-24 (1991) (arguing that pervasive federal regulation of depository institutions has effected significant regulatory realignment of this sector).

23. *See* 2 Documentary History of Banking and Currency in the United States 1261-65 (H.E. Krooss ed. 1969).

ILLUSTRATION 6



CONVERGED PATTERN

legislation did nothing to eliminate or otherwise absorb the state banking systems, their continued existence was simply a matter of practical fact and not policy.[24] For this reason, the bifurcation of the United States banking system has continued to this day.

In the literal sense, a national banking system was created by the enactment of the National Bank Act; that is to say, authority was granted to the executive to charter private banking corporations that were subject, to a significant degree, to federal law in their corporate structure, powers to do business, and the like. In a broader sense, however, a truly *national* banking system surely entailed more than the mere participation by the federal government as another incorporator of banks competing with the states. A consistent and coherent national policy for the regulation of banking would seem to be implied in the notion of a "national" banking system. In fact, the United States has been slow to achieve any such policy. Nor is it likely that complete consistency and coherence probably will be achieved under present circumstances,[25] due to two basic factors. First, our banking system is as federal as our system of government. Second, the entities subject to regulation in the United States, and the number of federal and state regulators, are almost irrationally diverse in character. This may in part explain why a significant American presence in international banking really did not emerge until the post-World War I period.[26]

III. The Growing Need for Convergence: Some Contemporary Examples

In any event, banking has had a long history and, from early on, international banking has been a continuing focal point in that history.[27] Nevertheless, it required a series of fundamental crises in our century to move developments along the paths of international coordination and convergence.

European financial institutions have operated transnationally for centuries, led by the Italian banks from the Twelfth through the Sixteenth centuries. As colonial adventures arose and were fueled by the promise of broadened international trade, British, Dutch, Belgian, and (later) German financial institutions expanded throughout the world. Americans followed only belatedly and did not fully emerge into the international market until this century.

24. The argument may be made, however, that elimination of the state banking systems is beyond the constitutional power of the federal government. *See* Malloy, *supra* note 22, at 211-23 (examining the effect of the Tenth Amendment on federal regulatory authority in the banking field).

25. *But see* supra note 22 (discussing the convergence between federal and state banking regulations precipitated by federal legislation in recent years).

26. *See generally* Haley & Seligman, *The Development of International Banking by the United States*, in The International Banking Handbook 35 (W.H. Baughn & D.R. Mandich eds. 1983) (discussing the development of U.S. international banking).

27. *See id.*

In the cruel logic of history, it was World War I and the postwar conditions that gave the first significant impetus to the development of American international banking. Because European exports were curtailed during the war, United States exports began to fill the gap and American banks began to follow their commercial customers all over the globe. In the postwar period, of course, United States foreign trade continued to grow and with it United States involvement in international banking.

The motive power of economic expansion, carrying banking with it along the paths of trade, eventually stumbled on its own feverish success in the postwar period of the 1920s. Overextension of credit, unbridled and brutal trade competition, and finally the economic dislocation following from the market failure of 1929, triggered the collapse of the international banking market. Worldwide depression and a second global war completed the cycle, while also setting the conditions for a new direction towards coordination and convergence.

Having experienced the potential advantages of global expansion as well as the wasteland of the Great Depression and the Second World War, the international community began a process of reflection and negotiation for a fundamental change in the character of the international financial environment. This environment had proceeded from an initially fragmented and essentially *ad hoc* series of arrangements, through the experience of a rapid and rabid process of expansion still grounded in local and national interests, until it finally confronted the sharp and critical need for systemic coordination and convergence of national policies. I offer three examples of contemporary responses to this critical need.

A. *Creation of the International Monetary Fund*

At the broadest systemic level, this need for convergence led to the creation of the International Monetary Fund ("IMF"),[28] which, in its present form, is committed to a series of goals that are obviously linked to the process of international coordination. The first of these goals includes the promotion of international monetary cooperation, "through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems."[29]

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28. For a brief description of the historical conditions and motivations that led to the creation of the IMF, see The Role and Function of the International Monetary Fund 1-2 (1985) [hereinafter "IMF Role and Function"]; *see also* J.K. Horsefield, The International Monetary Fund, 1945-1965: Twenty Years of International Monetary Cooperation (1969) (providing additional background information); Note, *The World Bank and the International Monetary Fund: At the Forefront of World Transformation*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S349, S351-52 (1992) (same).

29. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. I, ¶ (i), 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, as amended, 20 U.S.T. 2775, T.I.A.S. No. 6748 (May 31, 1968), 29 U.S.T. 2203, T.I.A.S. No. 8937 (April 30, 1976) [hereinafter "IMF Articles"].

Second, the IMF has a basic mandate for the facilitation of "the expansion and balanced growth of international trade,"[30] by rationalizing the financial environment in which international trade takes place.

Third, in support of this rationalization of the financial environment, the IMF is devoted to the promotion of foreign exchange stability and to the maintenance of "orderly exchange arrangements among [IMF] members,"[31] as well as to the avoidance of the sort of "beggar-thy-neighbor," destructively competitive exchange rate manipulation that was so common among states during the 1930s. Until the mid-1970s, this goal was promoted by a system of fixed par values for IMF member currencies, supervised by the IMF itself rather than by national regulators. This fixed par value system eventually gave way, however, to a modified system of floating exchange rates, coordinated and supervised by the IMF under the Second Amendment of its charter, effective April 1, 1978. The role of gold as an obligatory means of payment in transactions between the IMF and its members was terminated, and the IMF Special Drawing Right was given a greater role as the principal reserve asset of the international monetary system.

Fourth, the IMF has assisted in "the establishment of a multilateral system of payments"[32] among its members, and it has aided in the "elimination of foreign exchange restrictions which hamper the growth of world trade."[33]

Fifth, the IMF has the power to provide temporary financial assistance to enable IMF members "to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."[34] This power has, of course, become an increasing focus of IMF activity in the face of the debt crisis experienced by developing countries since the beginning of the last decade.

Finally, in accordance with the goals already described, the IMF is charged under its charter with the objective of ameliorating "disequilibrium in the inter-nation balances of payments of [IMF] members."[35]

Of course, it would be naive to imagine that the objectives of the IMF have as yet been fully realized, or that they could ever be easily accomplished. The IMF itself has experienced institutional crisis, particularly in the mid-1970s when its original system of par value exchange rates was challenged and eventually dismantled in favor of the current managed float system of exchange rates.[36] Currently, the IMF is still con-

30. *Id.* art. I., ¶ (ii).
31. *Id.* art. I, ¶ (iii).
32. *Id.* art. I, ¶ (iv).
33. *Id.*
34. *Id.* art. I, ¶ (v).
35. *Id.* art. I, ¶ (vi).
36. For a detailed discussion of this fundamental change, see J. Gold, The Second Amendment of the Fund's Articles of Agreement (IMF Pamphlet Series No. 25, 1978). *See generally* M. Garritsen de Vries, The International Monetary Fund, 1966-1971: The

fronted with the dramatic challenge of the international debt crisis that emerged in 1982,[37] and it is newly confronted, along with the World Bank, with the development challenges of Central and Eastern Europe. What is significant for our purposes, however, is that the objectives of the IMF are not merely the abstract, hortatory yearnings of a fragmented international financial market, but rather are basic normative principles of a binding juridical system that operates palpably and effectively in a genuine international financial environment.

B. *Internationalization of Financial Markets*

The IMF is merely the clearest and most complete example of the process of globalization of the financial environment. The character of individual financial markets has today coalesced into an internationalized financial market. The phenomenon of internationalization of the financial markets—and particularly of the securities markets—is becoming more fully established, at an apparently increasing rate, as dramatic developments in the markets succeed one another.

The practical consequences of such developments, reflecting a trend towards "internationalization," are significant. One need only examine the almost choreographic precision with which the markets in major centers worldwide fell during the October 1987 "market correction" to appreciate the implications of closely interrelated markets. The emerging regulatory concerns are equally significant. Are disparate national regulatory systems capable of adequately monitoring transnational market developments? Are these regulatory systems, with their differing requirements and objectives, inadvertently impeding the natural development of orderly transnational markets? Is the apparently increasing volume of transnational activity beyond the responsive capabilities of the national regulatory systems?

Attempts at comprehending the contours of the phenomenon of internationalization, as well as the practical and regulatory implications of the phenomenon, have already begun in earnest on many fronts. Certainly one of the most noteworthy early efforts was the exhaustive 1987 study of internationalization prepared by the staff of the Securities and Exchange Commission.[38] The SEC Staff Study appears to take the position that "internationalization" is not a new phenomenon at all because, throughout history, investors have assumed the risks of investing in foreign economies. According to the SEC study, "The degree to which the world's securities markets have become internationalized, however, is unprecedented. These developments are a result both of technological advances and of the removal of restrictions on foreign participation by many of the

System Under Stress (1976) (discussing the exchange rate crisis and the collapse of the par value system); M. Garritsen de Vries, The International Monetary Fund, 1972-1978: Cooperation on Trial (1985) (discussing reform towards a float system).

37. *See* IMF Role and Function, *supra* note 28, at 11-13.

38. *See* SEC Staff Study, *supra* note 1.

world's securities markets."[39]

One obvious model of an "internationalized securities market" would appear to be the secondary trading market in Eurobonds, now of long standing. Still, there remain many practical limitations on the emergence of an integrated, truly internationalized market. For example, the lack of international clearance and settlement links to facilitate cross-border settlements, and the wide variance in clearance and settlement systems within national markets, are still major impediments to internationalization.

Nevertheless, even in its present state of development, notable features of an "internationalized" market may be identified. Among other things, the internationalized market is, or will be, marked by increased direct competition among the participants in the world's national securities markets. In addition, the significant growth in transactions by investors outside their home country would appear to give some definition to the emerging global character of the securities markets.

Furthermore, in the international distribution market, it appears that mechanisms that have traditionally been utilized in debt offerings are beginning to be mobilized for equity offerings as well. Clearly, transnational markets are beginning to play a more significant role in international capital formation.

In addition, deregulation—at least as to ease of entry into other national markets—would seem to presage an increase in direct worldwide competition in equity securities. In fact, a corresponding development in the secondary markets is already upon us. With the increase in multinational stock listings and transnational trading in equity securities, there is heightened interest among professionals in the development of a twenty-four-hour global stock market.

These examples, then, are some of the potential characteristics of the emerging trend towards internationalization. The challenge for the future is thus: How will the current national regulatory systems respond to this trend? At the very least, greater bilateral and regional cooperation in regulatory efforts will be required.

C. *Coordination at Regional Levels*

Themes of coordination and convergence are already evident at the regional level. Indeed, one can clearly observe an expanded framework of regional cooperation underlying the process of globalization. The best example of this is, of course, the creation of the European Community ("EC"). With the lowering of tariff barriers among the original six members, transnational corporations reentered the market, and transnational banks once again followed their customers into this market. This process has continued with the expansion of EC membership.

39. *Id.* at I-1. *Cf. id.* at II-5 (noting relatively rapid growth of internationalization in 1980s).

Another new challenge for globalized financial services may also be presented by the promised integration of the EC as of December 31, 1992.[40] Convergence of the financial services markets in the EC, however, will require the elimination of capital controls, the harmonization of taxation, and the integration of regulatory systems. How realistic this project will be remains to be seen. Mutual recognition of national supervisory authorities within the EC, with principal supervision by the home-state regulator, will result, at least in the near term, in regional coordination rather than complete convergence and centralization.[41]

One other recent development at the regional level also illustrates the theme of convergence in international banking. This is the emergence of the framework regulating capital adequacy standards for international banking enterprises, sponsored by a committee of the BIS.[42] This coordinated effort was explicitly intended to achieve a convergence of regulatory standards that should eliminate a situation of competitive disadvantage, in which regulation of capital adequacy by home states has been so varied as to place international banks on a markedly unlevel playing field.[43] The new framework is now in the process of implementation.[44] With little dissent or variation,[45] the members of the G-10,[46] plus Switzerland and Luxembourg, have agreed to a convergent regime of capital adequacy under which their banks will be required to maintain a specified ratio of capital to assets.

By the end of 1992, this minimum required ratio will be eight percent, of which half must be constituted of core elements of equity capital.[47] The assets, which constitute the denominator of this ratio, will be adjusted to reflect their relative risk (and hence their need to be covered by capital) by factors ranging from a zero-percent risk weight for cash and cash-like assets, to a 100-percent risk weight for such assets as claims on the private sector.[48] In addition, off-balance-sheet items will also be in-

40. *See* Wegen, *supra* note 2, at S96-97 (discussing the 1992 project).

41. For a useful critique and assessment of the prospects for international banking in the 1992 consolidation, see Weatherstone, *An American View of Europe's Consolidation in 1992, Remarks before Swiss-American Chamber of Commerce (Zurich, 20 June 1988)*, *reprinted in* Am. Banker, June 24, 1988, at 4.

42. For a discussion of the development of these risk-based capital adequacy standards, see Malloy, *supra* note 18, at 112-21.

43. *See id.* at 75, 78-80.

44. *See* Final Report for International Convergence of Capital Measurement and Capital Standards, *reprinted in* 1 Fed. Banking L. Rep. (CCH) ¶ 5403 (July 15, 1988) [hereinafter "Final Report"].

45. *See, e.g., id.* at 3310 n.3 (argument of one member country that the international definition of capital should be narrower than provided for in the report); *id.* at 3314 n.4 (argument of one member country that a lower risk-weight should be applied to certain categories of assets); *id.* at 3318 (discussing the discretion of national authorities administering rules with respect to the calculation of potential future credit exposure of items contingent on foreign exchange and interest rates).

46. *See supra* note 20 (describing the Group of 10).

47. *See* Final Report, *supra* note 44, at 3314.

48. *See id.* at 3317.

cluded in the denominator. These contingent items, however, will first be adjusted through the application of appropriate "credit conversion factors," intended to account for the potential risk to a bank in carrying such contingencies.[49]

The intended result of this new regime of capital regulation is that *any* bank with a relatively riskier portfolio of assets and contingent items would be required, under the prescribed ratio, to carry a higher amount of capital to cushion against potential loss in the value of assets than would *any* bank with relatively less risky assets and contingent items. This would be so even though the amount of assets accounted for on their balance sheets otherwise looked exactly the same.

The hope is that this convergence in the rules governing capital measurement and capital standards for international banks will result in a more accurate method of calculating relative assets risk, and in greater safety and soundness for the banks supervised under this regime. The degree of coordination among national supervisors, in such a technical area of regulation, is in itself striking. It illustrates how far we have come from the historical roots of bank regulation. Where there once was fragmentation and destructive competitiveness in international banking—as reflected in the attitudes of the individual national authorities—we now have a genuine concern with and practical movement towards coordination and convergence. What may be equally significant for the future is the fact that the BIS Committee has already circulated the final report of its efforts "to supervisory authorities worldwide, with a view to encouraging the adoption of this framework in countries outside the G-10 in respect of banks conducting significant international business."[50]

CONCLUSION: BUMPER CARS ON THE REBOUND?

It cannot have escaped notice that each of the three contemporary examples of the growing need for convergence in financial services regulation remains mostly prospective rather than fully actualized. The first example—the experience of the IMF[51]—represents a fully converged pattern of regulation,[52] in which a field of regulation is occupied by an international institution with full regulatory authority within its sphere of concern.[53]

The second example—the internationalization of private financial markets[54]—appears to be taking on the pattern of a series of bilateral accommodations,[55] as is evident from recent SEC initiatives.[56] As this series

49. *See id.* at 3317-19.
50. *Id.* at 3309.
51. *See supra* notes 28-37 and accompanying text.
52. *See supra* notes 20-21, accompanying text, and Illustration 6.
53. *See* IMF Articles, *supra* note 29, at art. XXIX (interpretation of terms exclusively a power of IMF Executive Board and Board of Governors).
54. *See supra* notes 38-39 and accompanying text.
55. *See supra* notes 18-19, accompanying text, and Illustration 5.

proliferates, and as awareness of the need for coordination becomes clearer among national regulators, we may expect to see something like a converged pattern of regulation,[57] held together by a "weak force" of overlapping bilateral commitments.[58] By contrast, at least on a regional level, the converged pattern of regulation is being achieved in the field of securities regulation within the European Community,[59] held together by a "strong force" of coordinated regulation.

The third example—multilateral banking regulation of capital assessment and capital standards[60]—represents another converged pattern of regulation held together by a "weak force" of individual national undertakings. Here again, this pattern may be contrasted with the "strong force" converged pattern of European Community initiatives to develop generally applicable rules in the field of bank regulation.[61]

Certainly, as internationalization continues, the SEC and other national regulators will confront new challenges to effectively regulate of the markets.[62] The models of regulation available offer a range of possible responses. Regionalized solutions, or the subfield convergence of regulatory patterns held together by the weak force of individual national adherence to multilateral or bilateral principles of regulation, have been the primary resort. While that dynamic remains the dominant pattern of regulation, the theme of convergence will continue to be prospective, and possibly merely a hope.

One test of wills may emerge in the area of the implementation of the BIS capital adequacy guidelines.[63] Another such test may emerge in the implementation of the Second Banking Directive in the EC.[64] Successful implementation and enforcement of these two initiatives, and their acceptance generally as working models of international regulation, may provide the basis for the future development of a "strong force" converged pattern of regulation.[65] Failure to move these developments in

56. *See* Doty, *supra* note 13, at S77-90.

57. *See supra* notes 20-21, accompanying text, and Illustration 6.

58. *See* Henriques, *Regulators Add to Ties Abroad*, N.Y. Times, Sept. 24, 1991, at D1, col. 5 (discussing recent bilateral agreements between the SEC and the EC Commission, the United Kingdom, Norway, and Sweden with respect to securities enforcement).

59. *See* Wegen, *supra* note 2, at S92-93.

60. *See supra* notes 42-50 and accompanying text.

61. *See* Wegen, *supra* note 2, at S93.

62. *See* Lohr, *At the End of a Twisted Trail, Piggy Bank for a Favored Few*, N.Y. Times, Aug. 12, 1991, at Al, col. 1 (analyzing the international fraud behind the failure of the Bank of Credit and Commerce International (BCCI)); *see also* Note, *Putting the Super Back in the Supervision of International Banking, Post-BCCI*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S467, S479-89 (1992) (discussing the BCCI scandal and the need for cooperative international regulation).

63. *See supra* notes 42-50 and accompanying text.

64. *See supra* notes 40-41 and accompanying text; *see also* Wegen, *supra* note 2, at S93 (discussing the Second Banking Directive).

65. *Cf. supra* text accompanying note 50 (BIS report distributed to other national regulators).

this direction may leave us with a stultifying pattern of subfield consolidation[66] in which larger, but still uncoordinated, regionalized bumper cars will carom around the internationalized arena of financial services.

66. *See supra* notes 16-17, accompanying text, and Illustration 4.