CORPORATE DISCLOSURE ON-LINE: AN APPROPRIATE RESPONSE TO GLOBALISATION?

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I. INTRODUCTION: GLOBALISATION AND INTERNATIONALISATION

This paper considers one aspect of the challenges to traditional notions of adequate corporate disclosure which are posed by the apparent globalisation of the corporate sector. Part II of the paper considers the meaning of the concept of globalisation and the extent to which this concept may be distinguished from that of internationalisation. It will be argued in Part III of the paper that while internationalisation has been a prevailing norm of corporate behaviour and regulation in the modern era, it may be giving way to more globalised forces. Included in Part III of the paper is a consideration of the role which new international agreements, especially the OECD's Multilateral Agreement on Investment (MAI), are likely to play in the movement from internationalisation to globalisation. Part IV of the paper looks at the role of disclosure in securing corporate accountability and the consequent peril in which corporate law places itself if it fails to respond to the forces of globalisation with an appropriate disclosure regime. A model for such a regime in the information age is considered in Part V.

II. INTERNATIONALISATION VERSUS GLOBALISATION

The expression 'globalisation' has been described as a portmanteau word,[1] meaning different things to different people in different places and contexts. In this paper globalisation will be used in contradistinction to the notion of

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1 G Walker, S Mellor, M Fox and S Francis, "The Concept of Globalisation" (1996) 14 *Company and Securities Law Journal* 59.

internationalisation. Walker, Mellor, Fox and Francis[2] have identified key differences between the concepts of globalisation and internationalisation. One is "that globalisation denotes a process of *denationalisation*, whereas internationalisation refers to the cooperative activities of *national* actors".[3] They also note that globalisation concerns itself with the interests of all humanity while internationalisation looks to the national interest.[4] Hence notions of global human rights, global peace and so forth. A consequence of these distinctions between two concepts is that where globalisation occurs it amounts to "the erosion and irrelevance of national boundaries".[5]

The concurrence of a number of factors has resulted in a global, rather than an international, market for capital. In a nutshell, the major forces here have been economic liberalisation, deregulation and advances in rapid communication technology:[6]

> Deregulation and financial liberalization have put down barriers that restricted the flow of capital across national borders. Restrictions on exchange rates and capital markets controls have been eliminated in many countries. Greater reliance has been placed on market forces to allocate capital and price the value of firms. Along with these factors, rapid pace in information and communication networks has contributed to accelerate the process of data analysis and information dissemination. Moreover, fast-moving communication technologies have facilitated the trade of currencies and securities across national borders around the clock, which has lead to increased financial activities and enhanced arbitrage opportunities between markets.[7]

Wriston has emphasised, in particular, the importance of technology in the development of global financial markets:

> Technology has made us a 'global' community in the literal sense of the word. Whether we are ready or not, mankind now has a completely integrated, international financial and information marketplace capable of moving money and ideas to any place on this planet in minutes. Capital will go where it is wanted and stay where it is well treated. It will flee from manipulation or onerous regulation of its value or use, and no government power can restrain it for long.[8]

It does not seem to be contentious to assert that the significance of major corporations as players in these globalised capital markets lends a global lustre to many of their activities. Is this enough, however, to lead to the conclusion that a global corporate sector exists?

2 *Ibid.*
3 *Ibid* (emphasis as in original).
4 *Ibid.*
5 *Ibid.*
6 G Walker et al would also add to this list "the rise of global business strategies", privatisation and "the rise of the institutional investor: *ibid* at 60.
7 DK Ghosh and E Ortiz, "The Changing Environment of International Financial Markets: Introduction" in DK Ghosh and E Ortiz (eds), *The Changing Environment of International Financial Markets*, St Martin's Press (1994) 1 at 4-5.
8 WB Wriston, *The Twilight of Sovereignty*, Scriber Maxwell Macmillan (1992) pp 61-2.

III. IS THERE A GLOBAL CORPORATE SECTOR?

There can be little doubt that the financial markets, while being perhaps the most obvious example, are not the only global markets in which corporations act. It is arguable that other markets in which members of the corporate sector trade are also global, in the sense that the relevant commodities move around with little respect for the national borders which they cross. Further, corporations are often involved in global business strategies:

> Globalisation is an important emerging business mandate relevant to virtually all businesses. It is an Information Economy, as opposed to an Industrial Economy, business concept. Modern communications enable businesses to operate in multiple countries with diverse shapes and forms of organisation and control. They make it possible to send information to any part of an organisation instantaneously, enabling every part to know what every other part – and the organisation as a whole – is doing all the time.[9]

On the other hand, at least prior to the conclusion of the MAI it is arguable that, notwithstanding the involvement of corporate players in global markets and strategies, no corporation could be regarded as truly global. There are two prongs to this argument: one relates to the juridical nature of the corporation and the other relates to commercial realities. So far as the arguments concerned with the juridical nature of the corporation are concerned, whichever theoretical basis is adopted to describe the juridical nature of the corporation, it is not possible to escape the conclusion that any single corporation is a national entity. It is traditional to identify three different theories to explain the juridical nature of the company.[10] The concession[11] or fiction[12] theory regards the company as an artificial entity, created and supervised by the state.[13] Modern variations on the theory, such as the communitarian or corporatist theory,[14] which (amongst other things) move away from the notion of incorporation as a privilege, nevertheless affirm the idea that the corporation is a creation of the state. The second commonly postulated theory is the contractual model[15] which, in its modern economic manifestation, perceives the company as a nexus of contracts between

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9 P Bradley, M Housman and P Nolan, "Global Competition and Technology" in P Bradley, M Hausman and P Nolan, *Globalization, Technology and Competition: The Fusion of Computers and Telecommunications in the 1990s*, (1993) p 4. The role which the possession and communication of information or knowledge plays in the strategies of international corporate players is emphasised by a range of social and cultural commentators: see for example, JF Lyotard, *The Postmodern Condition: A Report on Knowledge*, Manchester University Press (translation: G Bannington & B Massumi) (1984) p 3.

10 For a general discussion of theories and their consequences, see F Macmillan Patfield, "Challenges for Company Law" in F Macmillan Patfield (ed), *Perspectives on Company Law*, Kluwer Law International (1995) pp 1, 7-15.

11 See for example S Bottomley, "Taking Corporations Seriously: Some Considerations for Corporate Regulation" (1990) 19 *Federal Law Review* 203 at 206-8.

12 See for example M Stokes, "Company Law and Legal Theory" in W Twining (ed), *Legal Theory and the Common Law*, B Blackwell (1986) pp 155 and 162.

13 For variations on the concession/fiction theory, see WW Bratton, "The New Economic Theory of the Firm: Critical Perspectives from History" (1989) 41 *Stanford Law Review* 1471 at 1475.

14 Stokes, note 12 *supra*, p 178; D Millon, "Communitarians, Contractarians and the Crisis in Corporate Law" (1993) 50 *Washington and Lee Law Review* 1373.

15 See for example, M Stokes, *ibid*.

the various people involved in it.[16] While this theory would seem to suggest that the company exists irrespective of state intervention, its proponents cannot easily resist the argument that state intervention is necessary in an enabling capacity (nor can they easily explain the existence of mandatory rules in company law).[17] The position is similar with respect to the third theory, the natural entity theory.[18] Its supporters argue that by acting together to create a company, those who formed it create, as a result of the nature of things, an entity separate from themselves. Nevertheless, this separately constituted entity does require enabling intervention from the state in order to operate. Ultimately, therefore, the capacity of a company to operate, if not its very existence, is dependent on the state. In these circumstances it is difficult to see how any corporate entity could be regarded as global in any legally meaningful sense.

Commentators have also doubted whether corporations can be regarded as global in a commercially meaningful sense. Following is a sample of the views of international experts consulted by Fleenor:[19]

> A truly global company operates not only on a worldwide basis, but coordinates its activities across national borders. Hence, 'global' refers not only to geographical scope, but also to the cross-border integration within the company. Very few firms have worldwide sales, but more importantly very few companies are able, or find it necessary, to engage in extensive cross-border coordination. Thus, few companies have purely global strategies and matching organizational structures. When most people say 'global' all they really mean is 'very international'.[20]

> A global company is one in which the corporation and its management have been transformed into an entity in which it is difficult to discern a single country bias. Today, very few if any corporations qualify as global; that is, a company without a country.[21]

Fleenor herself stated "[t] he global corporation is a fable. It cannot be defined because it simply does not exist".[22]

As suggested by the foregoing material, when many people speak of global corporations they are really thinking of multinational corporations. Certainly, there is a good argument for what has been described as "conceptual blurring"[23] with respect to multinationals:

> [I]nsofar as a multinational operates in many nations and integrates its activities across borders via a strategy based on the interests of the group as a whole, it is an example of globalisation. On the other hand, insofar as a multinational pursues a strategy of maximising the interests of each entity within the group within the

16 WW Bratton, "The Nexus of Contracts' Corporation: A Critical Appraisal" (1989) 74 *Cornell Law Review* 407.

17 EW Orts, "The Complexity and Legitimacy of Corporate Law" (1993) 50 *Washington and Lee Law Review* 1565 at 1569.

18 See for example, M Stokes, note 12 *supra*, pp 162-3.

19 D Fleenor, "The Coming and Going of the Global Corporation" (1993) 28 *Columbia Journal of World Business* 6.

20 Ron Meyer in D Fleenor, *ibid* at 8.

21 Sheldon Weinig in D Fleenor, note 19 *supra* at 8.

22 D Fleenor, note 19 *supra* at 8.

23 G Walker et al, note 1 *supra* at 60.

national boundaries in which it operates, it could be viewed as an example of internationalisation.[24]

Prior to the conclusion of the MAI, the strongest argument in favour of the existence of a global corporate sector hinges upon the business activities of a very small group of multinationals, the operation of which might have been said to have transcended the merely international and embraced the global. Hovering in the background, however, is the fact that, while the activities of a corporate group may well have been global or international, the legal structure of the group recognises national borders. This tends to suggest that it is probably more appropriate to regard the group as internationalised rather than globalised. Nevertheless, it is important not to overlook the fact that the globalisation of markets has already given rise to the type of business strategies which have tended to internationalise corporate power and, as a result, make the relationship between the corporate sector and the governments of nation states problematic.[25]

The burning question now is whether or not the conclusion, that the multinational corporate sector is better described as international than global will still hold good in the new era ushered in by the MAI.[26] The central plank of the MAI is to require signatory states not to discriminate between investors. This is to be achieved through the principles of national treatment and Most Favoured Nation treatment.[27] The principle of national treatment will require signatory states to treat foreign investors as least as favourably as it treats its own national investors for the purposes of its laws and regulations on investment. Most Favoured Nation treatment, on the other hand, requires signatory states not to discriminate between investors or investors emanating from other MAI member states. With respect to both national treatment and Most Favoured Nation treatment the prohibition on discrimination extends to "the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments".[28] The notion of "investment" under the MAI is defined widely and means, in the current negotiating text, "[e]very kind of asset owned or controlled, directly or indirectly, by an investor".[29] "Investor" is also widely defined to include natural persons and:

> a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or

24 *Ibid.*

25 See JF Lyotard, note 9 *supra*, p 5: "the problem of the relationship between economic and State powers threatens to arise with a new urgency."

26 Exactly when this new era will commence (assuming that it commences with the conclusion of the MAI) is unclear. Under the original negotiating schedule the terms of the Agreement were due to be settled in April 1998, however the April 1998 negotiations stalled as a result of failure to reach agreement in relation to a number of different issues: see Report by the Chairman of the Negotiating Group, 28 April 1998 <http://www.oecd.org/daf/cmis/mai/repor98.htm>. The next meeting of the negotiating group is due to take place in October 1998: Ministerial Statement on the Multilateral Agreement on Investment, 28 April 1998 <http://www.oecd.org/news_and_events/release/nw98-50a.htm>.

27 MAI Negotiating Text (as of 24 April 1998), Article III.

28 *Ibid.*

29 MAI Negotiating Text (as of 24 April 1998), Article II(2). This definition is followed by an inclusive list of "investments", the inclusion of some of which is proving contentious.

government owned or controlled and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.[30]

The MAI, however, is not only about non-discrimination.[31] It also imposes what are described as "specific disciplines"[32] on contracting parties.[33] Effectively, these are uniform rules imposed on contracting parties which limit their freedom to legislate in a number of areas touching on investments under the agreement. These include matters such as immigration laws regulating the entry into a contracting state of investors and key personnel,[34] investor participation in the privatisation of public enterprises,[35] as well as a wide variety of restrictions referred to in the MAI as "performance requirements".[36] A brief examination of these performance requirements gives some idea of the level of restraints on domestic legislation which are envisaged by the MAI. In general terms, the requirements in the current negotiating text prevent a contracting state from enforcing any of the following types of restrictions: export requirements; domestic content requirements; territorial restrictions on the acquisition of goods or services; export, import or foreign exchange restrictions; territorial sales restrictions; technology transfer restrictions; rules on location of head offices; requirements relating to minimum levels of research and development; requirements relating to a minimum level of national employees; requirements for domestic participation in joint ventures; and, requirements relating to domestic equity participation. There is provision in the current negotiating text for some general exemptions from these requirements,[37] as well as the possibility of negotiating country specific exemptions.[38] The scope of the various different types of exceptions and exemptions is one of the areas of controversy in the current negotiations.[39]

Before considering the significance of the MAI in terms of the present inquiry, it is worth pausing briefly over the Fifth Protocol to the General Agreement on Trade in Services (GATS), which deals with the liberalisation of financial services. GATS is described by its promoter, the World Trade Organisation, as "the world's first multilateral agreement on investment, since it covers not just cross-border trade but every possible means of supplying a service, including the right to set up a commercial presence in the export market".[40] Like the MAI,

30 MAI Negotiating Text (as of 24 April 1998), Article II(1).

31 In passing it might be noted that the advent of the MAI hardly reinforces the already very dubious proposition that non-discrimination is a type of motherhood principle. Perhaps this is another example of what postmodernist scholars have described as the failure of the meta-narrative: see N Andrews, "What Would Sir Samuel Griffith Have Said? Postmodernism in the 1990s Company Law Classroom" (1998) 5(2) *E-Law, Murdoch University Electronic Journal of Law*.

32 OECD, "The Multilateral Agreement on Investment: Frequently Asked Questions and Answers": <http://www.oecd.org/daf/cmis/mai/faqmai.htm>.

33 MAI Negotiating Text (as of 24 April 1998), Article III.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 Including exemptions for putting into effect temporary safeguards to protect certain types of national interests: MAI Negotiating Text (as of 24 April 1998), Articles 3 & 6.

38 *Ibid*, Article 9.

39 See Report by the Chairman of the Negotiating Group, note 26 *supra*.

40 WTO, "General Agreement on Trade in Services – The Design and Underlying Principles of the GATS": available at <http://www.wto.org/wto/services/services.htm>.

GATS embraces the principles of national treatment and Most Favoured Nation treatment in relation to the supply of services. A difference between the MAI and GATS is that the level of permissible derogation from these principles is probably considerably greater than that which will prevail under the MAI.[41] The Fifth Protocol to GATS also has a narrower scope than the MAI. It deals with insurance services, banking services, and a range of other types of financial services relating to matters such as foreign exchange, securities underwriting, derivatives and asset management. The Protocol was agreed upon in December 1997. It is open for ratification by WTO members until January 1999 with the new commitments under the Protocol expected to enter into force by the beginning of March 1999.[42] The negotiations for the Fifth Protocol gave WTO members the opportunity to change the obligations they had taken in relation to financial services in the GATS Interim Agreement on Financial Services which was concluded in July 1995. Overall, the negotiations for the Fifth Protocol resulted in substantial liberalisation of trade as a number of parties withdrew or reduced the scope of their exemptions from the principle of Most Favoured Nation treatment.[43] The WTO's own summary of the new environment of financial services liberalisation as a consequence of the Fifth Protocol to GATS is as follows:

> The new commitments contain inter alia significant improvements allowing commercial presence of foreign financial service suppliers by eliminating or relaxing limitations on foreign ownership of local financial institutions, limitations on the juridical form of commercial presence (branches, subsidiaries, agencies, representative offices, etc.) and limitations on the expansion of existing operations. Important progress was also made in 'grandfathering' existing branches and subsidiaries of foreign financial institutions that are wholly, or majority, owned by foreigners. Improvements were made in all three of the major financial service sectors – banking, securities and insurance, as well as in other services such as asset management and provision and transfer of financial information.[44]

Where does this leave us? Nothing in the MAI or the Fifth Protocol has the effect of removing the legal requirement that a corporation have a home jurisdiction in which it is registered. However, the direct effect of these agreements, especially the MAI, is to render almost meaningless the distinction between a corporation registered in a particular jurisdiction and a corporation registered outside that jurisdiction. It is tempting to argue that the provisions of the MAI, in particular, have a destructive effect on national sovereignty across a wide range of areas. The OECD seems sensitive about this criticism and is at pains to

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41 This, of course, is likely to be a reflection of the considerably wider membership of the World Trade Organisation compared to the membership of the OECD. The WTO currently has 132 member states, see: <http://www.wto.org/htbin/htimage/wto/map.map?92,33>; compared with the OECD's 29 members, see: <http://www.oecd.org/about/member-countries.html>.

42 WTO "The Results of the Financial Services Negotiations under the General Agreement on Trade in Services (GATS)" available at: <http://www.wto.org/wto/services/finance_background.htm>.

43 For the new commitments and exemptions of member countries, see Schedules of Specific Commitments and Lists of Article II Exemptions to be Annexed to the Fifth Protocol of the General Agreement on Trade in Services: <http://www.wto.org/wto/services/finsched.htm>. For a country by country summary of the new commitments, see WTO, *Non-attributable Summary of the Main Improvements in the New Financial Services Commitments*, February 1998: <http://www.wto.org/wto/services/finsum.htm>.

44 Note 42 *supra*.

point out that that the MAI will be "fully consistent with the sovereign responsibility of governments to conduct domestic policies":[45]

> The MAI will not immunise foreign investors from domestic laws. It will not remove the authority of domestic courts, tribunals and regulatory authorities over foreign investors and their enterprises.
>
> The MAI will not deprive national governments of their sovereign right to promote economic development, encourage a cleaner environment, protect cultural diversity and other public policy goals through regulations or incentive programmes, *so long as they do not discriminate.*[46]

The actual terms of the MAI may well be consistent with the OECD's protestations. However, the significant point seems to be that the relatively unfettered market for international business investment introduced by the MAI, and supported by other agreements such as the Fifth Protocol to GATS, is likely to have the effect of depriving national governments of any real remaining autonomy across a whole range of areas, such as taxation rates, labour standards, health and safety issues (to name but a few). The reason for this, in a nutshell, is that due to the lifting of restrictions on establishment of enterprises in other member states, international business organisations will be free to move from jurisdiction to jurisdiction. Once every jurisdiction is effectively a market for investment, it will need to take steps to make itself attractive to the potential investors. It is also worth noting that the current draft provisions governing withdrawal from the MAI tend to reinforce the argument that it will result in a substantial loss of national sovereignty. MAI signatories commit themselves for an initial five year period, after that they may withdraw on six months' notice. After withdrawal, however, the obligations under the MAI last for fifteen years in relation to investments made prior to withdrawal.[47] It is, perhaps, overkill to observe that this period is considerably longer than the life of most democratically elected governments and that, accordingly, the withdrawal rules of the MAI make sensible domestic planning in relation to participation in the MAI problematic. All this is very likely to mean that national boundaries will become irrelevant to the operations of international corporate players. As the national boundaries fade away in terms of legal regulation this will be likely to be mirrored by an increase in the level of truly globalised corporate strategies and operations.

To its proponents at least, the MAI may be seen as a logical and irresistible response to the problems posed by globalisation.[48] There is no question, however, that the MAI and members of its supporting cast, such as the Fifth Protocol to the GATS, restrike the balance of power between the international corporate sector and the political power of any individual nation state. The emasculation of the regulatory power of the nation states as a consequence of the trade liberalisation agreements seems likely to have a symbiotic relationship with the rate at which

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45 Note 32 *supra*.

46 *Ibid* (emphasis added).

47 MAI Negotiating Text (as of 24 April 1998), Article XII.

48 See for example F Cotti, "Foreign Policy and Globalisation", Address by the President of the Swiss Confederation, 15 December 1997, Geneva and International Report: <http://w3.iprolink.ch/gnir/>. See also, OECD, note 32 *supra*.

their socio-economic power will be eroded by the increasing power of the corporate behemoths. The decline in the power and significance of the nation state and the corresponding growth of rival powers in the form of a global corporate sector has, obviously, profound implications for notions of corporate regulation. We will need at some stage to grapple with the fact that once corporations become truly global it will not be possible to regulate them without some type of global regulatory structure. In the meantime, however, in what might very well be the transitional period between an internationalised corporate sector and a global corporate sector, a first step to meaningful regulation might be to ensure the global accessibility of corporate information.

IV. DISCLOSURE AND ACCOUNTABILITY

The requirement that corporations publicly disclose certain basic information such as their status, address, constitutional documents and officers has been a feature of corporate law from its very inception, at least in the United Kingdom. Throughout its history in common law countries it has been put to various uses.[49] In its contemporary setting, disclosure of corporate information including financial information, has become an important device in a number ways. It is a useful source of information for potential investors and creditors and, in this respect, a rigorous disclosure regime contributes to market transparency, which in turn contributes to the prevention of fraudulent activity. It is also an important tool in achieving the accountability of management to shareholders and the accountability of the corporation to the general public. The need for accountability of companies to the general public is a consequence of the social and economic power wielded by the corporate sector.[50] The role of accountability in this context is to act as a device for legitimating corporate power (in much the same way as democratic elections and the principles of administrative law make government accountable for its power and therefore legitimate that power).[51] Disclosure on its own is not, of course, sufficient to ensure accountability, but it would be very difficult to achieve any form of corporate accountability without mandatory disclosure rules. Not only does mandatory corporate disclosure give private individuals insights into the operation and constitution of a corporation, it also supplies information which can be used by regulators charged with enforcing certain standards of corporate behaviour in the public interest.[52]

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49 See M McGregor-Lowndes, "Corporate Disclosure, the Internet and the Australian Securities Commission" (1996) 14 *Company and Securities Law Journal* 219 at 220.

50 See further, S Bottomley, note 11 *supra* at 215; JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law*, Clarendon Press (1993) p 372: "given the magnitude and pervasiveness of corporate power, it is arguable that in a society committed to democratic principles the presumption should be in favour of the maximum availability of information about company practices and impact"; A Chayes, "The Modern Corporation and the Rule of Law" in Mason (ed), *The Corporation in Modern Society* (1959, reprinted 1980) at 25; Curtis Publishing Co v Butts 338 US 130 (1967) per Warren CJ at 163; F Macmillan Patfield, "Defamation, Freedom of Speech and Corporations" (1993) *Juridical Review* 294 at 299-300.

51 See further, F Macmillan Patfield, note 10 *supra*, pp 11-15.

52 For a useful discussion of the possible roles of disclosure, see Parkinson, note 50 *supra*, p 372-83.

The fact that a function of disclosure is to secure corporate accountability, and the fact that such accountability is necessary because of the power of corporations, suggests why disclosure is so important in the case of international or multinational corporate actors, arguably on their way to becoming global actors. It seems that the socio-economic power of multinational corporate groups is greatly enhanced by the mere fact of their multinational operation. This is partly a factor of their size and influence across a number of jurisdictions. Such groups may, for example, be able to insulate themselves from market pressures in one jurisdiction by relying on the strength of their market in another jurisdiction. This effect can only be increased as these corporate groups become global and the rival power of the nation states decline.[53] If it is true that international, multinational or global corporations wield an unusually wide degree of private power, then it is appropriate to ensure that rigorous disclosure obligations apply to such corporate groups internationally.

Interestingly, arguments about the importance of disclosure for multinational enterprises have been taken on board by the OECD. The matter of disclosure is addressed in the OECD's *Guidelines for Multinational Enterprises*,[54] a set of voluntary standards which form Annex 1 its 1976 Declaration on International Investment and Multinational Enterprises. The Guidelines say that, by way of supplement to the disclosure requirements of national law, multinationals ought to "publish in a form suited to improve public understanding a sufficient body of factual information on the structure, activities and policies of the enterprise as a whole". According to the Guidelines this will be achieved by, at least annual, disclosure of financial statements plus other pertinent matters, an inclusive list of which is included in the Guidelines. The "pertinent matters" listed are:

(a) The structure of the enterprise, showing the name and location of the parent company, its main affiliates, its percentage ownership, direct and indirect, in these affiliates, including shareholdings between them;

(b) The geographical areas where operations are carried out and the principal activities carried on therein by the parent company and the main affiliates;

(c) The operating results and sales by geographical area and the sales in the major line of business for the enterprise as a whole;

(d) Significant new capital investment by geographical area and, as far as practicable, by major lines of business for the enterprise as a whole;

(e) A statement of the sources and uses of funds by the enterprise as a whole;

(f) The average number of employees in each geographical area;

(g) Research and development expenditure for the enterprise as a whole;

(h) The policies followed in respect of intra-group pricing; and

53 At present a strong argument can be made that the use of multinationals which may be made by national governments in the exercise and pursuit of their own foreign policy initiatives confers significant power on such corporate groups: see further, Chayes, note 50 *supra*. It will be interesting to see how the power dynamics of this relationship are altered in the post-MAI era.

54 1991 Revision: <http://www.oecd.org/daf/cmis/cime/mnetext.htm>.

(i) The accounting policies, including those on consolidation, observed in compiling the published information.

As the commentary on the Guidelines observes, many of these disclosure obligations go beyond the legal disclosure requirements in OECD member countries. However, the commentary asserts that "[t]hey confirm the importance Member countries attach to the objectives of this chapter".[55] These objectives have not been overlooked in the negotiations for the MAI. It is intended that the OECD *Guidelines for Multinational Enterprises* will form an annexe to the MAI.[56] However, this will not change their regulatory status: that is, they will remain a voluntary code. This, it is submitted, is not adequate to legitimate the power of multinational corporations. In order to achieve the benefits of disclosure, which have been noted in this section, it is essential to move towards a supranational or global legal regime of mandatory disclosure for multinational or global business enterprises. It is possibly an understatement to suggest that this is far from being a simple task. Attempts at legal harmonisation in this area will be dogged by difficulties familiar to those attempting harmonisation in other areas of regulation. The most obvious of these being the difficulties of operating uniform systems of regulation in jurisdictions with differing legal and economic systems. There are also specific problems in the disclosure area as a consequence of the fact that there is no universally accepted model of disclosure.[57] Even within jurisdictions there are debates about the frequency and extent of disclosure.[58] Nevertheless the dangers of failing to introduce a supranational or global mandatory disclosure regime are great, bearing in mind the power wielded by multinational and global business entities. The very significance of this power argues in favour of a strong mandatory disclosure regime, encompassing at least those matters referred to in the OECD's *Guidelines for Multinational Enterprises*.[59] It is clear, therefore, that the substance of a supranational or global mandatory disclosure regime is critical. The form of such a regime, given the environment in which it must operate, is also of great importance and this matter is addressed in the next section of this paper.

V. CORPORATE DISCLOSURE IN THE INFORMATION AGE: THE ROLE OF THE INTERNET

It has been suggested above that the very existence of global or international groups of companies is due, in part, to their ability to communicate information across borders more or less instantaneously. Any attempt at international

55 OECD, *The OECD Guidelines for Multinational Enterprises*, March 1997.

56 MAI Negotiating Text (as of 24 April 1998), Article X.

57 I am obliged to Mr Angus Corbett of the University of New South Wales Faculty of Law for pointing out the need to surmount these types of difficulties.

58 As an example of one such debate in Australia, see J Webster, "Continuous Disclosure for Proprietary Companies" (1992) *Company and Securities Law Journal* 226; Q Digby, "Proposed Continuous Disclosure Legislation" (1992) *Company and Securities Law Journal* 342.

59 See note 54 *supra* and accompanying text.

corporation regulation must be able to mimic this behaviour, as must any future system of supranational or global regulation. Accordingly, any regime of disclosure must permit regulators to access the information disclosed more or less instantaneously.

McGregor-Lowndes[60] has proposed a disclosure model based on the use of Internet technology. He argues that disclosure of information by the corporation on a web page is the most appropriate way forward. Under the model which he proposes, corporations would be required to discharge their disclosure obligations by the regular maintenance of their web page. Certain types of corporations may be required to update that information more regularly than others. Central authorities would be required to monitor the accuracy level and timeliness of disclosure on the web page. He points out a number of particular advantages of such a system:[61] a company would no longer have to file information with a central registry, with an obvious cost saving for both company and registry; material would be available at any time for search and retrieval; corporations could be required to link their web pages to those of related corporations, thus giving a fuller picture of group activities. In the present context, disclosure has a particular merit. As McGregor-Lowndes points out:

> As the Internet does not recognise international boundaries, this model of corporate disclosure may be applied to transnational trading blocks seeking to harmonise their corporate regulation. For example, European, American, or Southeast Asian trading blocks could agree on protocols for corporate disclosure via the Internet as part of trade harmonisation.[62]

One might even hope for wider transnational protocols and the model certainly also seems to be capable of sustaining global rules on Internet disclosure.

McGregor-Lowndes evaluates his proposed model against the mission statement of the Information Division of the Australian Securities and Investment Commission (ASIC).[63] This mission statement reflects the obligations of the ASIC under the *Australian Securities Commission Act*.[64] The mission statement provides a useful example of a current national approach to the role of a national instrumentality in securing corporate disclosure. It provides:

> Australian international competitiveness, and a strong Australian corporate sector, call for the ASIC's Information Division to provide a public record that is:
>
> - accurate;
> - timely;
> - complete; and
> - which adds value to Australian commerce; and
> - exploits information technology for maximum ASIC core business effect.

McGregor-Lowndes concluded, with respect to each of these points, that the model of disclosure on the Internet would enable each of these objectives to be met, and would allow improvement on the current situation.[65]

60 Note 49 *supra*.
61 *Ibid* at 223-6.
62 *Ibid* at 224.
63 Formerly the ASC: see now *Financial Sector (Amendments and Transitional Provisions) Act* 1998 (Cth).
64 Section 1(2).
65 Note 49 *supra* at 226-9.

He notes with respect to accuracy and completeness, that eliminating double handling of information, so that the regulatory body acts as an intermediary by receiving and promulgating the information, can only improve accuracy.[66] Of course, eliminating this intermediary role has the potential to deprive the regulatory body of the chance to vet and analyse information as it arrives. McGregor-Lowndes suggests that there are 'web spider' programmes[67] capable of carrying out the vetting task. It may be that if there is to be analysis of the information supplied this will have to be done by human intervention. Nevertheless, it seems quite feasible to suggest that such analysis may be prompted electronically by a programme which monitors the content of web pages. The costs of such monitoring as against the costs of the present system are clearly an important issue for the feasibility of the Internet model.[68] The other important issue regarding accuracy is the importance of ensuring that information on a web page is not tampered with by someone with no authority to alter the web page.[69] While Internet technology and know how is constantly developing to meet the security challenges posed by the virtual world,[70] it is unlikely that any system of on-line disclosure of information will be completely tamper proof. On the other hand, programmes permitting the constant monitoring of changes to any web page and the immediate report by email[71] might be used as a back up to other security devices. What we have to decide is whether or not the advantages of on-line disclosure outweigh the potential disadvantages arising from possible security breaches. If the current situation with respect to security of information prevails then it seems likely that they will, because of the ability of on-line disclosure to answer the pressing problems raised by the increasing globalisation of corporate activities.

The timeliness of disclosure ought, in general, to be improved by disclosure on the Internet, especially if corporations can be encouraged or required to set in train processes for regular maintenance of the web page. Again, this would be a consequence of the absence of double handling by the regulatory authority.[72] Accessibility would be greatly improved, especially across national borders. As McGregor-Lowndes points out, one potential problem with his proposed web page disclosure model, especially when compared to existing systems of on-line disclosure through electronic lodgement and public access to the regulator's database,[73] is the speed of accessing information. Generally speaking, response time is faster and eventual connection more assured when accessing regulators' databases than when using the Internet.[74] While this is clearly an advantage of a regulator operated on-line disclosure model, and may offset the double handling

66 *Ibid* at 226.

67 These are discussed at *ibid* at 223-6.

68 *Ibid* at 226.

69 *Ibid.*

70 M McGregor-Lowndes suggests some solutions: *ibid.*

71 *Ibid* at 225.

72 *Ibid* at 227.

73 For example, the US SEC's EDGAR project or the Australian ASC's (now ASIC) EDGE project: see *ibid* at 225.

74 *Ibid* at 227.

disadvantages inherent in such a system, there is another important advantage of the model proposed by McGregor-Lowndes. This advantage is that it makes a move away from national based and administered systems of disclosure which have an inherent tendency to be blind (or, at least, short sighted) to the international or global implications of the relevant corporations' activities. At the same time McGregor-Lowndes' model does provide more than adequate information to national regulators.[75]

The fact that the notion, referred to in the ASIC's mission statement,[76] of an "Australian corporate sector" (or, indeed, any other national corporate sector) may become a questionable or outmoded concept as a consequence of the emergence of a more truly globalised corporate sector, does not fatally undermine the utility of an Internet disclosure model enforced by national regulators. If national systems of regulation are going to have any continuing relevance they must adopt a method which allows the acquisition and making available of pertinent information about corporations both widely and quickly. There are a number of different users of this information, such as members of the public and potential investors. However, one particularly important set of users in the present context are other national regulators. In the present multinational environment, there can be no meaningful regulation of multinational business entities unless all relevant regulators have a quick and accurate system of gaining necessary information about all the activities of that multinational enterprise (not just those taking place in one jurisdiction). It hardly seems controversial to suggest that one thing multinationals do well is isolate and fragment their markets along national lines in order to gain competitive advantages.[77] These advantages are often gained at the expense of things about which we purport to care, such as consumers, workers, the environment, cultural policy[78] and so forth. If regulators and members of the public, who (it should not be forgotten) elect the governments who direct the regulators, had greater information about multinational enterprise structures and activities, the opportunities for sensible regulation and policy making would be increased. This may very well prove to be the beginning of an approach which will keep some degree of national sovereignty alive in the likely era of increased globalisation. However, whether national sovereignty is eradicated or not, a system of Internet disclosure will be a useful information tool in any system of global or supranational regulation. Of course, in order to secure these types of benefits it will not be enough simply to use the Internet as a means of disclosure, although such a rapid and globalised system of communication will be essential. It will also be necessary to mandate broad disclosure. As argued above, corporate enterprises need to be required, by way of international agreement or supranational regulation,

75 Furthermore, it seems that the model is able to do this on a cost efficient basis: see *ibid* at 227-9.

76 See text accompanying note 64 *supra*.

77 For just one example of this, see F Macmillan, "Copyright and Culture: A Perspective on Corporate Power" (1998) 3(2) *Media and Arts Law Review* 71.

78 All of which have been matters of contention during the MAI negotiations: see (in part by reading between the lines) Ministerial Statement on the Multilateral Agreement on Investment (MAI), note 26 *supra*; Report by the Chairman of the Negotiating Group, note 26 *supra*; OECD, "The Multilateral Agreement on Investment", OECD Policy Brief, No 2, 1997: <http://www.oecd.org/publications/Pol_brief/9702_pol.htm>; OECD, note 32 *supra*.

to disclose the matters listed in the OECD *Guidelines for Multinational Enterprises*.[79] If, as the Guidelines suggest, disclosure of the matters listed in the Guidelines will "improve public understanding" then disclosure of those matters ought to be required. There can be no regulation without such understanding.

VI. CONCLUSION

This paper has been concerned with addressing the need for a rapid, comprehensive and, most importantly, international system for disclosing corporate information. The paper recognises that any such system must be designed so that it is capable of enforcement by national authorities, while at the same time remaining internationally accessible. It is clear that such a system requires harmonisation between jurisdictions with respect to the actual disclosure obligations, the appropriate use of technology and the monitoring and enforcement of disclosure by national authorities. Without such a harmonised system of international disclosure, any attempt to require international corporate actors to account for their behaviour will be doomed to failure. This paper has argued that the difficulties posed for rules about corporate disclosure as a result of the development of a strong multinational sector will only be intensified by any move towards genuinely global business entities. The fact that the brave new world of the MAI may provide a basis for the creation of such entities is something that should not be ignored if we believe that business entities should be subject to regulation.

An international or supranational system of on-line mandatory disclosure on the Internet is, this paper has argued, capable of meeting the regulatory needs of a disclosure regime in the present period of transition between the emergence of multinational business entities and their global counterparts. On-line mandatory disclosure is, therefore, an appropriate response to globalisation. But is it an adequate one? The answer to this is probably that it is not. Even mandatory global disclosure will remain somewhat toothless unless there is some more general system of global corporate regulation to which it relates. The passage towards such a global system of corporate regulation is most likely to be achieved by way of supranational agreements. Ironically, the MAI is just such an agreement, yet it can hardly be regarded as much of a comfort to those concerned about the growth of unaccountable blocs of private power which will transcend the power of national governments. What went wrong? The answer may be that the MAI is a wrong step in the right direction. It is a wrong step because it concerns itself with constraining the power of the nation states rather than the power of international business, at a time when the former are arguably already weaker than

79 See the text accompanying notes 54 and 55 *supra*.

the latter.[80] However, the direction is right because it amounts to a recognition that securing accountability and regulation of international business entities requires action at the supranational level. A right step in the right direction now would be a supranational agreement which concerned itself with adequate mechanisms for the regulation and accountability of international and global corporate power, and which included an extensive, rigorous disclosure regime which could take advantage of all that modern global communications technology has to offer.

80 It is interesting to note that eighteenth century thinkers, including Montesquieu and Sir James Steuart, recognised the power of international business as being a more than sufficient counterweight to the power of despots and other autocrats: see AO Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph*, Princeton University (1977), especially Part 2. At the close of the twentieth century we seem to have chosen to load the dice in favour of international business and against democratically elected and accountable governments of nation states.