SEC Historical Society Interview with
Michael Mann
conducted by Wayne Carroll
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MM: I started at the SEC when I was in law school at Antioch School of Law. At that time, Stan Sporkin and Ted Levine were my two securities law professors, and Antioch required that you do an one-semester internship. I was in my second year of law school and I went to work at the SEC in the Division of Enforcement. At that that time, I worked on a number of cases: one of which, involving Occidental Petroleum, I worked on, and I was the last remaining staff person there at the time that the settlement discussions were going on, and, as a result, was given a summer job offer to continue to work on the case for Ted Levine.

After that, I applied to the SEC for a job and started there full-time in October of 1981. My starting was, in some ways, coincidental with the start of the SEC's international program, because on October 5th, 1981, the day I started, the government of Kuwait announced a tender offer for all of the outstanding stock of a company called Santa Fe International. At the time, there were huge call option purchases that had been made just prior to the announcement, and the largest number of those call options had been purchased through Switzerland through five of the largest Swiss banks. Like a lot of things at the SEC, there were many other options purchases that were being investigated, all of them in the United States; but the first order of business for everyone was to get a temporary restraining order to freeze the assets that were outside the United States.

So, on October 20th, the SEC went into federal court and sought a temporary restraining order suing certain unknown purchasers of call options for the common stock of Santa Fe International, and freezing the accounts in the United States.

WC: Michael, can I ask you to set the stage for us: How were international matters dealt with administratively—internally—at the SEC as you began your career there?

MM: Well at that time, Enforcement was probably the most active in dealing with international issues. There were not that many foreign issuers in the United States; the internationalization of the American markets was really taking place in terms of trading. The large international universal banks were not near the participants were, and certainly did not have the foothold in the United States that they have today. And so it was really dealt with on a much more ad hoc basis, dealing with enforcement actions.

The international trading in U.S. markets was a huge challenge to the SEC. In March 1981, there had been another case brought, involving a take-over of a company by Seagram's, called St. Joe Minerals. By fall, these two cases were running along in sort of a parallel way. After the SEC brought its injunctive action in Santa Fe, about two weeks later Judge Milton Pollack, in the Southern District of New York, heard—in the St. Joe case—a motion to compel discovery. In that case, the SEC had sued, frozen assets at a small Italian Swiss bank called Banca della Svizzera Italiana, then sought to discover who their customers' identities were.

BSI had an office at 60 Water Street in New York and accounts in the U.S. and so was served with the papers in the U.S. The court heard the motion to compel on the grounds that there was control from the United States, and therefore the names should be turned over. Judge Pollack heard the SEC's motion, which was argued by a man named Bob Blackburn, from the SEC's New York Regional Office at the time; and ruled from the bench that it would be a travesty of justice to allow someone to trade in the American markets and then not comply with American requirements to turn over information. He ordered the bank to turn over the name. He said that he would stay his order for a period of days, but afterwards, if the order was not complied with, he would fine the bank fifty thousand dollars a day.

WC: And just for the listeners: This was before the MOU with Switzerland.

MM: This was a year and a half before the Memorandum of Understanding with Switzerland. And really, the reason why these two cases are so important is: Banca della Svizzera Italiana was a small—more of a marginal player in Switzerland. It was, however, that precedent before Judge Pollack that, I think, sent a tremor through the Swiss banking establishment. The largest Swiss banks were involved in the Santa Fe case —Credit Suisse, Swiss Bank Corporation, Union Bank of Switzerland; not to mention Drexel Burnham Lambert's Swiss branch, and Citibank. The power of the court's decision and its potential effect on Swiss banking and the Santa Fe case was anticipated after the court

ruled. At that point—there was a recognition first that Switzerland did not want to be regarded as an outlier with respect to dealing with matters like this; they wanted to be a larger player in capital markets. These banks did not want to see their access affected. Secondly, it was clear that a U.S. court could well rule against them, imposing enormous fines. So there was risk both on the business side and in the case before the court.

What happened, which, I think, is unique even in the negotiation of the MOUs, is the Swiss came forward and said: "We'd like to try to work something out." And from that, began negotiations on the SEC side with the Swiss authorities. There was an odd configuration of negotiators; on the United States side, there was the SEC and the Department of Justice and the State Department; and on the Swiss side, there was the Swiss government in their Foreign Affairs Ministry, the Swiss Department of Justice and Police, and then there was the Swiss Bankers Association, which is a private association of bankers that operates an agreement among the banks that they enforce for cooperation.

WC: You mentioned this was an initiative from the Swiss side, in certain respects. How did they approach the SEC—or whom did they approach?

MM: Well, my recollection is not all that clear on the initial approach. At the time, I was a staff attorney in the Division of Enforcement. After the case was brought, everyone else who had been working on the case moved on to investigate the U.S. trading in Santa Fe. Getting documents from Switzerland was not viewed as something that was going to be

easily done. People had other cases to get on with, and so I was left working on this matter for a trial attorney named Bob Romano. Principally, I was left to work out how we were going to get the trader's information from Switzerland.

When the Swiss approached the staff—I believe the approach was to John Fedders, who at the time was the Director of Enforcement. I was pulled in as the staff person to work conceptually on this, to try to figure out a mechanism to resolve the problem. From the SEC side, the two main people working on it were John Fedders, who was the head of Enforcement; and Ed Greene, who at that time was the General Counsel. The approach initially came from the banks themselves. They came forward and said: "We don't have a particular mechanism to recommend from a negotiation standpoint. We think what you should do is make a request under the 1973 treaty between Switzerland and the United States on mutual assistance in criminal matters."

At that time, however, insider trading was not illegal in most of Europe, and certainly not in Switzerland. We met with the Swiss Department of Justice, and the U.S. Department of Justice; in the first instance to figure out whether we could make a treaty request. We determined to do it, but the reason we determined to do it was because the Swiss came forward and said that they could make the treaty work and if it didn't, they would come up with something better. That's when the real discussions began.

WC: Just to stick with the St. Joe case for a minute: This case is described in the 1987 SEC Report on the Internationalization of Securities Markets, which is also on the Society's website; according to the outline in that case, step one was a voluntary waiver was sought of the information holders; that didn't get the SEC anywhere. And there was resort to the MLAT, but not with the desired effect, apparently.

MM: Well actually, the request under the MLAT was done long after they got the name of the tender; it was for additional information. After the court ruled, "miraculously," Giuseppe Tome, who was the beneficiary of the accounts that traded, and who was a confidante of the Bronfmans at Seagrams, voluntarily agreed to have his name put forward. Nobody knows why he so agreed, but one can imagine that there was an enormous amount of pressure on him; not the least of which was that his profits were going to pay the fines for the bank if he didn't come forward. So he came forward. The court's order was never enforced. And additional detailed information was sought under the treaty for pursuing the case.

If you want to talk about what happened under our treaty requests in Santa Fe, in the first instance, the treaty requests were made, and the Swiss Supreme Court ruled against the SEC, saying that we had not alleged with enough particularity that the person trading had been a tippee, someone who was inappropriately given corporate information. The court ruled that while insider training wasn't illegal, stealing a corporate secret was. It held that if we could allege with particularity that the trading was done by a tippee, then they

would grant assistance. In that period of time, we had been investigating, and were able to allege that there was a tippee in the case, and that is how the information had been transmitted to the traders. Ultimately, in about 1984, the court granted the SEC's request, the SEC learned the names of the unknown purchasers in the Santa Fe case, and filed suit against them. The SEC ultimately settled the case.

But the point here was: the Santa Fe case was viewed by the Swiss as the reason for starting the more detailed discussions on cooperation. In the end, they couldn't *solve* the problem without a new agreement. So while there was enormous amount of pressure to try to make the old treaty work for Santa Fe, it was clear that they needed a new approach. What was negotiated ultimately was what's been referred to as Memorandum of Understanding, and Convention 16. The Memorandum of Understanding was an agreement between the United States of America and Switzerland on how the two countries would conduct themselves, in terms of dealing with insider trading. Convention 16 was a private agreement among the bankers that provided, if certain circumstances were met, that the banks would have in their hands waivers of Swiss bank secrecy that would allow them to comply with the SEC's request that would be made through inter-governmental channels. These two agreements fit together to allow the SEC to be able to get access to evidence.

WC: And would that be an agreement on a waiver on an ad hoc basis, or would that be something as a part of a customer/bank relationship in Switzerland?

MM: It was part of the customer/bank relationship. There were a couple of things that I think are unique about it which are really important from the SEC's perspective, and from a historical perspective. The Memorandum of Understanding is incredibly narrow. It really just deals with insider trading in mergers. It only deals with very short time periods before the events involved. It has thresholds in it. It was a very narrowly negotiated agreement. At the time the judgment was made that that's where the problems were, there was an enormous amount of questions as to the advisability of this approach —including from me, as the staff person working on it—to say: "Are we getting everything we want?"

The judgment was that it was better to get less than everything, but to create something that could work right away—to try to change things—than to negotiate for years and years and years, and not really have a breakthrough. So the judgment was made to focus the registration. Indeed, a number of times during that negotiation, things broke down; because there was a lot of pushing for more; but it was a recognition that there was—as Jean Zwahlen, who was the lead negotiator for Swiss, said— there's a lacuna in Swiss law that prevented us from achieving more, as the Swiss had no securities laws. And so we said: let's put that in the agreement, and lay the foundation for future agreements.

There's a paragraph in the MOU that makes this point. It's the only international agreement I'm aware of that uses the word lacuna. It was sort of the joke among all the

negotiators that obviously this was no lacuna; this was a gaping hole. But it was characterized that way with a view towards the fact that Switzerland was going to make insider trading illegal. That's the commitment that was made; they would make it illegal, and going forward the treaty would always work. Now, as it turned out, it took many years to make insider trading illegal, but it was eventually done.

The MOU was used a variety of times to get customer information; but what was really striking about it was that it was a change in terms of negotiating; it was a change in terms of looking at the outside world, where the SEC really was able to lead the negotiation with the support of Justice and the State Department; and work out something that was a memorandum of understanding. It wasn't a treaty; it was a statement of intent between two parties. The United States generally negotiates treaties; treaties are enforceable in international law. Memoranda of Understanding are not enforceable; they're just statements of intent.

The judgment that was made at the time; which, I think, was the right judgment, and really set the tone for the way the SEC would proceed was: If it doesn't work fast; if you don't have a meeting of the minds on both sides; it's just not going to work. Markets need to move quickly; they need to resolve things. And therefore, whether it was a treaty or a statement of intent made no difference; because no one was going to go off and spend their career litigating the agreement after the fact at the Hague, or litigating at the Hague for enforceability. It was really a matter where both countries' stake in this was

their capital markets and an understanding – whether enforceable or not – was the appropriate basis for real cooperation.

WC: You mentioned that there were attempts to get more in the negotiations; did that "more" entail trying to have a general coverage of what would be a violation of U.S. securities laws?

MM: Yes.

WC: *If* that would violate the counterpart under Swiss law?

MM: Well no; the whole idea was to get *away* from this concept of dual criminality, which is sort of the touchstone in most civil law jurisdictions for providing assistance. There was a recognition that at that time Switzerland had *no* securities laws whatsoever. They had business laws; their securities markets were tiny. And they hadn't anything that they have today, in place; this is twenty-five years ago. And so there was never going to be dual criminality; it *had* to be a recognition that where one country's law was violated—and this—we were talking in a civil context here; it was not a criminal violation. The SEC was not pursuing a criminal violation.

Ultimately, what the Swiss Supreme Court said in Santa Fe was that they would regard the SEC as a criminal authority, because U.S. laws could be enforced criminally. And

so, it was a huge leap that was made by the Swiss Supreme Court in saying the SEC was, in fact, a criminal authority for these purposes. Ironically, this did not necessarily help the SEC in other jurisdictions; because in other jurisdictions, where it was argued that it was civil, it made it more difficult. It was important, though, because it bridged the gap between the Santa Fe case and the future when a new MOU and new Swiss laws would be in effect.

WC: I see. You mentioned that the issue of the SEC having to go in directly to enforce criminal aspects of the securities laws—did that lead to any discussion about possibly seeking authority for the SEC for direct criminal authority?

MM: No. The SEC never sought direct authority. I mean there was an enormous amount of discussion within the Department of Justice, because there was an Office of International Affairs at the Department of Justice that was run under a Deputy Assistant Attorney General named Mark Richard; and he had established, and led actually, the negotiation of the Swiss treaty, which was the first mutual legal assistance treaty ever negotiated. Justice was very jealous of its authority under these treaties. It really wanted to control its relationships.

The SEC was developing its own separate and new relationships, it wasn't entirely clear how that would work with the existing arrangement. It wasn't until 1989 that we obtained —or actually, probably '87, '88—where we began talking about getting -

legislation to allow the SEC to provide mutual legal assistance. But that really is sort of a later chapter in all this. Probably the next chapter we want to move from—unless you want to talk more about the Swiss MOU— is: when we came back from that negotiation; one of the things that John Fedders, I, and the chief counsel of the SEC—a man named Fred Wade—began talking about was the true meaning of Judge Pollack's decision. He said: if you play in the U.S. markets; you play by U.S. rules. We thought rather than negotiate more agreements, perhaps the best thing for the SEC to do would be to codify that principle in a rule. We tried to codify it in a phrase called "waiver by conduct."

In 1982, shortly after the Swiss MOU was negotiated, we published an article in *The Pennsylvania Law Journal* on "waiver by conduct," which was about the idea that if foreign persons trade in the United States, they should be required to waive foreign confidentiality as a matter of access to the U.S. markets. This proposal was not just written up as a law review article, but it was written up as a SEC concept release. Initially, it was written as a rule proposal. John Fedders took it to the full SEC for public discussion. Ultimately, the Commission was unsure whether the rule was appropriate, and so it was *not* put out as a rule proposal, but rather as a concept release.

When it was put out, the SEC received, I think, about eighty-five or eighty-six comments from foreign governments, from U.S. government agencies, from individuals, markets, and the like. I think *of* the eighty-six comments, eighty-five were negative, including one from the Department of Treasury that said it would "Balkanize" the American markets if

such a rule was adopted. So it was resoundingly pushed back. The only people that thought it might be a good idea were the CFTC, which was, from the SEC's perspective, not the kind of endorsement it was hoping for.

But what was really interesting about waiver by conduct is that it represented a critical transitional point for the SEC's international program. All of the countries who responded said: "Why don't you negotiate with us? We'll work this out. This is a matter of international law; if people are in our jurisdiction; if they're doing something wrong in your country, we should be able to find a way to work it out." And so, the response from John Fedders and the SEC was: Okay, well let's see whether we can work it out. And that began then, the first series of negotiations. John departed, actually, before any of the negotiations really began, in earnest. But the next really important negotiation was with Canada.

WC: I have two questions before we move on. You discussed a bit the reaction of some of the other government regulators and agencies to the *Pennsylvania Law Journal* article—

MM: The SEC published this as a concept release.

WC: When you were looking at different models for information sharing, did you look at any of the treaties in existence, or information sharing agreements, such as the ones that the anti-trust division had, as possible ways forward for the SEC?

MM: Two things: One; I don't think the anti-trust division really had anything at that point, that I recall. The anti-trust division had just gone through the whole Westinghouse fight in the U.K., where they'd been essentially blocked from getting information. Secondly, at that time, notwithstanding the fact that this agreement had been worked out with Switzerland; it was felt strongly at the SEC that unilateral means were the most appropriate way to go. If people had voluntarily come into the U.S. market, that they should not be able to hide behind the cloak of foreign secrecy law, or foreign law, for that matter; and that it would be much more appropriate to get the waivers up front.

What the MOU with Switzerland stood for was the fact that it was practical for the banks to get waivers from their customers which under certain circumstances allowed the SEC to get assistance unilaterally; so why go through international judicial means; why go on a government-to-government basis; why have a negotiation? This was something that could be done by rule. Expediency was what people were looking at; and the concern was that, at that point, the U.S. market was just exploding. Listed options were really becoming popular; we were in the middle of a take-over boom; there were an enormous number of insider trading investigations involving foreign evidence that needed to be addressed.

You could see the trading volume coming into the U.S. market from abroad. There was great fear of not being able to react quickly enough; not really knowing how to do it,

beyond that; and also in the St. Joe case the court had said, in an unequivocal way, that there was jurisdiction. Ultimately, the choice was just not to go down that path. The decision was that that waiver by conduct was not the appropriate way to go; because at the end of the day, if you won—notwithstanding any victory you'd have in the court, you'd still have appeals, and there'd still be delay. And so, you know, it wouldn't necessarily be all that expedient.

WC: Before we move on to Canada—the Katz case gave the first opportunity to test the MOU; could you briefly describe how things worked the first trial run?

MM: Actually, I don't think Katz was the first case that we used it for; but it was the first case where it was used, and the information led to information being provided where a case was brought. One of the things that I think is probably least understood is: there are lots of suspicious things that you investigate that you don't bring cases on. And one of the things that, I think, the Swiss learned from the Memorandum of Understanding, was that the SEC would often ask for information because of suspicious circumstances, and then determine it was not appropriate to pursue the matter. Katz was a case where the information actually was the ultimate information; and therefore the case could be brought.

WC: And moving on to Canada, and other MOUs?

MM: Well what happened in the hiatus between August of ’82 and January of ’88 when Canadian and Brazilian MOUs were signed was the recognition that the SEC actually did not have the power to compel the very assistance it was asking for from foreign authority. The SEC had the ability, under its inspection powers, to require a broker/dealer to turn over information. But if a foreign government went to the SEC, and said: we need some information from a bank; or: we need some information from a telephone company; under Section 21(a) of the Exchange Act, the SEC only had the power to seek evidence for violations of U.S. law. So there was a domestic limitation; there had to be a violation of U.S. law. It was somewhat odd that, as we were sitting there demanding foreign authorities cooperate with us; that there was a recognition that we, in fact, did not have the power to cooperate with them. This was a discussion that there was a lot of difference of opinion on. In most cases, because of the breadth of the U.S. law, anything that occurred in the United States could be regarded as a violation of U.S. law, but this wasn’t really what was intended by the law.

So, when we sat down to negotiate; first with the Brazilians, though it was somewhat more of a general discussion; and then with the Canadians, whose laws are really structured like the American laws—notwithstanding the fact they’re provincial regulators—there was a recognition that we had to change the law. And what we decided, in the first instance, was that we should signal each other’s cooperative intent; this was a MOU, statement of intent, after all. We would negotiate the framework for what we would want if we could change the law. And then we would go to our

legislatures, and ask them to change the law. So rather than approaching it the way you do with a treaty, which is: you negotiate the treaty, and then the treaty is ratified; we made this decision that, in fact, the better course would be to have a memorandum of understanding that created a framework, and then get the unilateral power—the organic power—under the securities laws to implement the memorandum of understanding.

And so that was what the negotiation was really about; and if you look in the memorandum of understanding, at the very beginning it says: Neither authority has the power to actually implement this MOU, but we're both committed to go out and get it. But the substance of the MOU provides a very broad statement of coverage, covering the whole of the federal securities laws; a very broad statement of the manner in which cooperation will be granted, in terms of gathering documentary evidence and testimonial evidence, confidentiality understandings.

Similarly, there were confidentiality understandings that went beyond what the SEC could, in fact, provide, because, at that time, the Freedom of Information Act applied very broadly, but the intention was to focus its effect on foreign-based evidence. This was a big problem for foreign authorities; and it was not even all that focused on at the time of the first negotiation, but it was something that came up a little bit later. And I'll get to that, I guess, in a second; but so the Memorandum was signed by the SEC, and was put in place in '88.

At the point the Canadian MOU was signed, we sat down and started to figure out how to modify the federal securities laws to implement it. There were a number of people who I worked with at the SEC—at that point, I was essentially negotiating these agreements; working for Gary Lynch, who was the Director of Enforcement; but I had responsibility for that effort. Within the Division of Enforcement, an office of international legal assistance had been set up, which I was the chief of, at that time. We were working with the general counsel's office - with Tom Riesenberg and Phil Parker - in trying to develop the legislative proposal. What we came up with was, I think, quite an elegant approach; which was: Section 21 of the Exchange Act said—as I said before—that you can investigate violations of this title, meaning U.S. law. What we did was we broke 21 into A and B; A was for the SEC—investigate any violation of this title—and B was: investigate any matters that *would* be a violation of this title if they had occurred in the United States, essentially, implementing the memorandum of understanding.

At the time we came up with this proposal, a group of enforcement officials were just beginning to meet internationally. The meeting took place outside of London, at a place called Wilton Park. We went to that first meeting—Gary Lynch, I think Rick Ketchum, and I; and, in connection with discussions about cooperation, and memoranda of understanding, we proposed trying to get all the countries to consider signing MOUs, and also consider the broadest assistance possible. And we raised this as an idea of implementing them through new legislation. There was a lot of discussion about it, but one of the things people said was: If you're going to change this; our biggest concern

with you is the Freedom of Information Act. So, would you consider seeking a legislative change there as well?

We came back and had a discussion, and decided to put forward a proposal on the Freedom of Information Act, as well; that provided that where confidential information was obtained from a foreign securities authority, it would be not subject to the Freedom of Information Act. That proposal was put together as a second piece of that legislation.

The third piece grew out of a case that the SEC had had earlier that year, where a foreigner had been trading in the U.S. market, and we had provided assistance to a foreign government, essentially to prosecute the foreigner. Then the man wanted to move to the United States to set up and work in the United States as a broker. However, the SEC had no means for barring him from being a broker, because he hadn't violated U.S. law. In an era of international markets and cooperation, that seemed ridiculous. There needed to be the ability to bar someone from the U.S. markets where they'd been found guilty of a foreign securities law violation. And so, both the Advisors Act and the Exchange Act were also proposed to be amended.

The fourth piece was to amend Section 24 of the Exchange Act, which says all the information gathered by the SEC is confidential. We were obviously going to be providing this to a foreign authority, and so we needed authority to provide information. All four concepts were wrapped up in a package; and in June of 1988, it was sent to the

Hill under a cover letter from David Ruder, who was the Chairman of the SEC. The international assistance piece passed, as part of the ITSA (Inside Trading Sanctions Act) legislation in November 1988.

The legislation was put on an incredibly fast track. There was a hearing that was held in June and there was a report that was issued by the Senate Banking Commission. While the whole piece of legislation did not go through at one time, the assistance piece was put in during the conference on ITSA. And so the SEC, with almost no fanfare whatsoever, got this incredibly powerful piece of authority in less than five months.

WC: And to round out this part of the discussion: What were the concerns of the foreign counterparts in relation to FOIA; was it fear of subsequent civil litigation based upon securities law violations—or can you describe what their concerns were?

MM: No. In their jurisdictions, their investigative records were completely confidential; and they couldn't be in a position where a person that they investigated in their country was given confidentiality, but the confidentiality went away if they gave the information to the U.S. They needed to have their investigative laws complied with as well. The legislation recognized that if the person had violated the law, the SEC could use the information any way it wanted; but where the information just ended up residing in the SEC's files with no action taken, the foreign regulators viewed it as fundamentally unfair

that that person would be subject to the Freedom of Information Act. So that's where that came out.

WC: What was going on in the capital-raising side during this period? We've talked a lot about what was going on in the enforcement side. What kind of efforts were going on in your office, and other offices, to facilitate foreign private issuers?

MM: At this time, it's still a little bit early for what I would regard as the push that the SEC made. Rule 144(a) had been developed and it was just becoming the engine of what I think Linda Quinn would have called the "try it, you'll like it" approach to accessing the U.S. capital markets. That occurred during this time period in the '80s. There were a number of privatizations that were going on during this period as well—the British Telecom and privatization of the British Airways—were probably the first two of the largest privatizations; the UK government was increasingly interacting with the SEC during this time period. Indeed, at this time period, coincident with the seeking of the legislation, the SEC negotiated a memorandum of understanding with the U.K. Department of Trade and Industry. The people who were leading that effort were—this is actually before '88, this is in '86—were also the people that were leading the effort to pass securities laws in the United Kingdom. Their goal in part to facilitate the privatizations that were taking place under Thatcher at the time.

The MOU that was negotiated in '86 was a very narrow market MOU; it didn't involve any of the things the legislation ultimately involved. But it started a conversation with the DTI, which had the power over companies. There were two civil servant leaders within DTI—a man named Brian Hilton, and another man named Jonathan Rickford, who led this effort. Hilton was the head of the business side of the DTI, and Rickford was the solicitor, the senior lawyer, at the DTI. Quite frankly, a lot of the discussion was focused on how to make rules that would make it easier for privatizations to occur and subsequent offerings in the United States.

WC: As this bilateral track continued, parallel to efforts at the international level, what determined who you were negotiating with, or talking with—which countries?

MM: Well, there was very much a "take all comers on", in a way. I think that we looked at the markets where we had the biggest involvement, number one; and secondly, the plan from the very beginning, and the reason why we negotiated first with Canada, was: the Canadian system was the closest to the American system, and their commitment to fairness, their commitment to markets was very similar. We regarded it as, potentially, the best and broadest deal that could be negotiated. And from a strategic point of view, you always want to negotiate the best deal first.

The U.K. was, obviously, the largest other market. We needed to have a relationship with them; they were playing a key role. It was a narrower agreement, because the "Big

Bang" had not really occurred yet in the U.K. They were anticipating their market regulation powers expanding, and we wanted to go from there. The next set of negotiations after those two were with The Netherlands and with France.

And those two agreements were the first two continental European agreements. We had developed, through the Wilton Park meetings, a very close relationship with The Netherlands; and they had a very robust view of what the law should be, and how cooperation should work; and had said very early on they wanted to make a broad-based commitment. France had been playing a leading role internationally in trying to internationalize IOSCO, the International Organization of Securities Commissions. And so they were also a natural party to be negotiating with. We began negotiating those MOUs in 1988, and signed them—they were the first MOUs signed by Richard Breeden; when he became Chairman of the SEC, on his first trip to Europe in December 1989.

WC: You mentioned that some countries at this time didn't have securities laws per se, and/or didn't have an exact securities regulator; so you maybe had to negotiate with a ministry or a department, or a subdivision—did that complicate matters at all?

MM: It's a good question. It didn't complicate matters in terms of the interpersonal relationships. It did complicate them in terms of the SEC's relationship with the Department of State and the Department of Justice, because everyone is jealous—in a good way—jealous of their relationships. The Netherlands, for example, was represented

by the Ministry of Finance. There was no STE, as it exists today; they didn't have a securities law yet; and the MOU was signed by the Minister of Finance. It was also ratified as a treaty in The Netherlands.

So on the United States side, it was being regarded as an MOU; and on the Dutch side, it was being regarded as a treaty, which doesn't really work in international affairs. And ultimately, what happened was we found a way, and got permission through the Department of State, and obtained the necessary authority from the Executive Branch to have it signed as an executive agreement. The Chairman signed it as an executive agreement. It was witnessed by the Ambassador. But it was a complex negotiation, both in terms of who led it, who said what was correct, and accepted it before it was actually signed. It required a multitude of approvals from the foreign affairs parts of the Executive Branch which were quite foreign to us —we were, at the SEC after all, enforcement lawyers, not diplomats. We were trying to negotiate enforcement agreements; we were trying to be very practical; and it was not always the easiest relationship on this side of the U.S. negotiation.

On the Dutch side, they made it work very well. And at the end of the day, everyone worked well together. But just even going back to the legislation that was sought; the Department of Justice recognized—and the State Department recognized - that once the SEC had this legislation to be able to sign MOUs that it would make the SEC more independent to negotiate MOUs that were at least as broad as the mutual assistance

treaties. As a result, there were a number of side letters that were written between the SEC and the Department of Justice, and assurances given to the Congress at the time, in terms of how these agreements would work to ensure that the international affairs of the United States weren't somehow impaired by this independent agency that now had very broad powers. Just an aside to all this, no other agency in the United States ever had or has this broad power that the SEC obtained.

And one question that has always occurred to us is that, but for the insider trading scandals of the '80s, would anybody have been able to have gotten such authority? The anti-trust division, when Anne Bingaman was the head of the anti-trust division, tried to obtain similar authority. I actually testified before a Senate committee in favor of their authority, which was modeled after the SEC's. By the time everyone got through with it, it was a shadow of what the SEC had; much more limited with much less discretion left in the government. The SEC's legislation does not even require a formal memorandum of understanding to utilize the legislative power to cooperate; it just requires a commitment to cooperate. Whereas, the Justice Department, which arguably should have much broader authority, has much narrower authority for anti-trust matters.

WC: Moving sort of internally to the SEC—you mentioned that there was an office of international legal assistance within the Enforcement division. Did these developments lead to a call for sort of an umbrella office of international affairs? How did that come about?

MM: Well, each of the SEC's divisions had people who dealt with international matters. There still is, to this day, an office in both Market Regulation, and Corporation Finance that does that. And everyone worked together on a cooperative basis. It worked well. There was good collaboration; there was a lot of camaraderie. The other division directors, and Gary Lynch and I, had all been longtime employees at the SEC and worked together for many years, so there was a very good cooperative approach that was taken.

When Richard Breeden came, as chairman in 1989; shortly after we came back from signing these two memoranda of understanding, he called me in his office and said: "It's ridiculous that our international affairs are run out of our Enforcement division. There are all these other initiatives, there's a need for real coordination; I'm going to set up a separate office of international affairs." And he asked me to be the first head of it. At the time, it was not met with extraordinary enthusiasm from the other division directors. Indeed, it led to what is probably the only undocumented memorandum of understanding that was negotiated between myself, Market Regulation—Rick Ketchum, who was the head of Market Regulation—and Linda Quinn, who was the head of Corporation Finance.

Basically both Linda and Rick were not in favor of an SEC department that would set policy; they viewed this as the most interesting part of what was going on at the SEC, in which their offices were going to play critical roles, and were not in favor of seeing this role diminished. And Richard said to me: "So go work it out." So Linda, Rick and I sat

down, and basically came to an understanding of how we would work together. And it was—in hindsight, I think we all laughed about it; because, I would say, none of the fears that this office would take over and start dictating international policy ever came to pass. It was always collegially run; and in fact, the efforts to negotiate were so much more bolstered by the fact that when a foreign country would come in to sit with us, they'd be sitting with a senior enforcement official, a senior international official—somebody who knew the markets better than anyone else, and someone who knew the corporate side better than anyone else—that it really played to the SEC's greatest strengths.

And under Richard's chairmanship, we not only negotiated many, many memoranda of understanding; but we worked out understandings with countries to facilitate offerings in the United States, to use the memorandum of understanding to overcome what sometimes were information imbalances, to be more flexible on various rules, but accommodate them by having greater oversight through the memorandum of understanding; and also to work with countries that had emerging markets. At this time, also, you have to remember, the Berlin Wall was falling, there were all these eastern European countries that wanted to have markets, and the Latin American and Asian markets were expanding. And what you basically had, as a result of this negotiation, was a team of people who worked together, all over the world, to try to both build markets, but also enhance the reputation of the American market. So it ended in a very interesting way; but that's how it actually began.

WC: And the agreements that you reached about the internal workings of the office and within the other divisions: was any of that written down—or was it more informal?

MM: No, there was actually a writing that was created, that was—I think each of us had a copy of it, but in essence—I haven't looked at it in years—what it really provided for was that everyone was in charge of their own space, and we worked together to enhance things. So the Office of International Affairs would be focused on international cooperation and enforcement, and would facilitate the other offices' efforts.

WC: Sort of a coordinating body.

MM: Correct.

WC: And what was the birth date of the office—was it December '89?

MM: December of '89. December of '89.

WC: And just a year later, you negotiated the first MOU with an eastern European securities regulator; is that correct—with Hungary?

MM: Now that was a very different thing than our previous MOUs. The focus of the U.S. government, with the fall of the Berlin Wall, was on trying to help these markets emerge

and develop. There was no real concern in the United States that there was going to be a lot of market abuse aimed at the U.S. from Hungary. The concern was that as this market developed—both as a competitive matter, but also as a matter of good governance - that it would be better to have the Hungarians looking to the United States for technical assistance, than looking to Europe, or somewhere else. There would be great advantage to support and develop those markets so that they would align with the American market; not just in terms of cooperation, but in terms of the whole legal scheme being developed.

It was a short memorandum of understandings, in which the SEC agreed to provide technical assistance; and there was, obviously, a paragraph of cooperation in the event of enforcement matters; but what it really was about was enhancing that Hungarian market, which was the first market to open after the fall of the Berlin Wall. The SEC had under Richard Breeden, who, I think, had enormous vision in this area, built an emerging markets profile, where agreements were reached with foreign countries to assist in the development of their markets; but also we established an international institute on securities markets development, which was taught by the senior staff of the SEC, in the headquarters office; and where we would invite two people from every emerging market to come. It was really an extraordinary event; because you had, often—and to this day, it's run annually—seventy or eighty countries would send two delegates to it each year. What it provided was an unique training program on how the U.S. markets were regulated. I once had the head of a foreign stock exchange came to me and said, "You know, it's incredibly anti-competitive that you run this international institute." I said to

him, "Why is it anti-competitive?" He said, "Well, these people come, you train them; and then they run their markets the way you run your market. They look to your law; they understand exactly how things work in the U.S.. And when we come to them and say, 'We would like to have an alliance,' they would say, 'You need to be more like the Americans.'"

But in fact, it was not just a matter of convincing people how we run our markets: rather, it created a global understanding that was extraordinary. It helped people connect with each other; and often the best teachers of how you deal with emerging markets' problems are the emerging markets. It gave the SEC insight into those markets that was extraordinary. And it gave us entrée into those markets in terms of going in when there were offerings, and talking about problems that existed.

I remember well the one time that we traveled throughout Asia with Chairman Levitt and at that time we were talking about how vital the Institute was. In every country we went to, we would meet in the chairman's office, and he would have the Institute diploma up on his wall, next to the authority granted by his government to be chairman. When we left, I remember Arthur turning to me and saying, "The power of this is greater than one could ever have imagined." It changed the way the SEC was perceived also. The SEC was never much liked internationally; it was viewed as the guy with the big stick. And to this day, I think still is viewed as someone with a very large stick. But this was a way of —by offering technical assistance; and also having an international affairs office that

negotiated MOUs—it was a way to have a conversation, and to try to work things through cooperatively and collegially.

The SEC showed another vision of flexibility, and not just for emerging markets. If you look at the offering of Daimler/Benz—which was the first German offering in the United States - there were enormous number of accommodations that had to be negotiated in order for that offering to take place. It required flexibility by the SEC; we never gave in on our principles, but we listened to the issues, understood the differences, and found a way to accomplish the goal.

If you look at any of the other international offerings during this period, I think, it was, in many respects, the SEC's greatest hour. It was able to overcome what had always been a concern. There's always been pressure on the SEC to relax its regulation because people thought it was too rigid to allow for internationalization. The New York Stock Exchange was in favor of relaxing U.S. regulation. However, in the end, by finding ways to accommodate foreign differences, we were able to stop those efforts, and the result is that GAAP financials have remained the gold standard. The American market is viewed as the Good Housekeeping seal. As a consequence, the U.S. went from having, basically, a domestic market with a lot of Canadian participation, to being an internationalized market today, with over a thousand foreign issuers.

WC: Do you think what you learned in the '80s on the enforcement side about obstacles under foreign law—did that assist in the more international capital markets program initiatives in terms of sensitizing the SEC about the obstacles, and possible accommodation?

MM: I don't want to go too far in that direction, because I think it was understanding where there was not so many obstacles, but issues that needed to be resolved; to finding ways to do it, which didn't necessarily mean just doing it the most confrontational way. Because in the end, I don't think the SEC really compromised on very much in those negotiations; but what it did was: find ways through the problems, either by going to foreign courts and getting their assistance, going to the foreign governments and getting them to change their laws; and developing understanding where there was a level of trust that things would work.

WC: I've heard things about an SEC-type office in Warsaw, Poland.

MM: Yes.

WC: Could you describe…

MM: The chairman of the Polish SEC had been one of the first participants in the SEC's international institute, Leslaw Paga. Paga had been an intellectual; he'd been in jail during the prior regime, and he was the leading proponent for setting up the securities

market in Poland. He came to the SEC, and he asked would we send somebody to Poland for a year. Bob Strahota, who was an attorney at that time in the General Counsel's office— a man of *enormous* experience, who had started at the SEC early in his career, gone out and become a partner in a major law firm, and then come back to the SEC for another chapter of his career - volunteered to go and live in Poland and help them develop their markets.

WC: Was the AID involved in any of these technical assistance programs?

MM: AID funded the office in Poland, and paid for much of the technical assistance, including often paying for the participants to come to the international institute. One of the debates we had with AID, actually— it will show you, in a sense, how *oddly* international this was—was that AID wanted to have the institute translated because it feared the participants would not speak English. So they wanted to have a bank of translators, like the U.N., in the back of the room. And we said, "Listen. This isn't going to work. The translators don't know anything about markets. In addition, English really is the language of business, and we would rather struggle with people's English, and have this all be one language so they will talk to each other, and insist that they talk to each other, than to have translators." Well we won that fight, except for one language—Russian. They said to us, "You're never going to get the Russians to come, because they just don't have the facility." At this time what we thought they meant was that the people from Russia wouldn't come and we agreed. Well, I walked into the institute the first day with the

Russian translators there, and I looked at the number of heads that had headphones on. Russia had been the second language of every eastern European and satellite country; and so there were many of the delegates—including the Vietnamese delegate, who had been trained at Moscow University, all of whom listened to the translator. Perhaps this is an irrelevant anecdote, but it shows, in a way, both how much the world was changing; when you sat down with this Vietnamese delegate, and asked him, "Why are you listening to the Russian?" He said, "Well, you know, my Russian is much better than my English. I received my economics degree in Moscow." In fact, he was there to learn about capitalism and before the end of the session, he understood the need to talk to the other delegates and his headphones came off – as did the others! So it was fascinating.

WC: Was there any push-back from, I guess, the European community at that time—concerns that the SEC programs may hinder their own integration efforts within the EC?

MM: Well, it's a good question, though I would actually spin it a little bit differently. The SEC was trying to figure out how it was going to deal with Europe, and we were somewhat concerned because everyone was interpreting European directives differently. It made negotiating with these thirteen countries very, very difficult. At the time, Sir Leon Britten was the minister who had the portfolio for securities. A SEC delegation actually went and met with him, and with his staff, and said, "We would really like to find a way to make this go more easily." And what we had in the back of our mind was: if the European countries, which jealously guarded their jurisdiction over securities regulation,

saw us going to the EU leadership, and possibly having an agreement with the EU, and losing their jurisdiction, they might be more open to negotiations.

By the same token, if we could set something with Europe that then could be emulated by the other countries, we'd be better off with those negotiations. We were very upfront about it; both with the individual countries and with the Europeans, and Sir Leon really got this point. So we negotiated a very short but direct communiqué, which was signed when the SEC hosted the IOSCO annual meeting in October of 1991. During that conference, we also signed a whole host of memoranda of understanding, one with Sweden, one with the U.K. that was very broad-based; and we also signed this communiqué with the European Union. Sir Leon came and gave a speech; the EU communiqué was heralded as broadening the possibility for new types of cooperation. In fact, it was the only agreement that the SEC ever negotiated with the EU during my tenure. What it really did was put to the Europeans the question of how were they going to deal with third countries like the U.S. consistent with European unity. I'd like to give credit to the SEC, though I'm sure it's not correct, but shortly after that communiqué was signed, the European Securities Commissions organized themselves into a coordinating body for the European Union on securities laws and regulations.

WC: As we moved into the '90s—in the meantime the GATTS Agreement is being negotiated, including how it would affect financial services, banking, securities—did that have much impact on what was going on in securities regulation?

MM: Well, actually there came a point in time where we realized that this negotiation, called the Uruguay Round, was ongoing; and that it was intended to cover the SEC's jurisdiction. Nobody had asked the SEC to participate in it, however. And so, we went to the Treasury Department, who at that time was leading the negotiation, and said, "We think we should have a seat at the table." And they said, "Well, you're not part of the U.S. government; you're an independent agency." There was a complicated discussion that culminated in the SEC participating in the negotiations; obviously not at the table *per se*, because the U.S. was represented by the executive branch; but in terms of setting the parameters for what would be acceptable. There was a lot of concern on the breadth of the agreement and its impact on SEC regulation because a lot of what the SEC does is to focus on investor protection.

What the SEC developed was a carve-out that was included into that agreement, and into subsequent agreements, like NAFTA. Actually NAFTA was before this was signed. It included very clear language about the role of the regulator and regulation and the fact that regulatory needs and investor protection supersede trade matters. The SEC participated very actively in trade negotiations.

During the Clinton administration, the SEC also had a very, very close working relationship—not just on trade issues, but sort of across the board on dealing with Japan. There were a whole series of negotiations with Japan about access of American securities

firms; and the SEC played, I think, an important role in working with the American firms and with the Treasury, to develop proposals that ultimately were put into place. These accords provided a model for negotiations by the U.S. throughout Asia.

WC: Do you recall any of the concerns that were discussed, from an SEC perspective, as the GATTS was being negotiated?

MM: Well the main concern was the ability to protect investors. And that there would not be the ability to override such regulation on a strict national treatment basis. We didn't want to end up with trade policy dictating securities regulatory policy. The biggest potential target was GAAP. The Germans have their own GAAP. We worried that they would come to the United States and say: "why should we use your GAAP to enter the U.S. market; we have our own, and denial of the right to use it is a violation of the trade accords." We resolved this concern by saying accounting is "prudential." Requiring GAAP is not a rule in terms of denying access, though it had that effect – rather it is an inverse protection rule.

Similarly, it was very important that stock exchange rules similarly be protected. Stock exchanges in the United States require residence; while in the trade agreement, residency is not a basis for denying access; but there's a prudential reason for it. And so making sure that the unique interaction between the securities laws and the self-regulatory organizations, and the way the markets operate, was something that was going to be

accommodated by the trade agreement. In the end, securities regulation is more than a trade question, such as how auto parts are sent from one country to another, or the requirements for the tensile strength of screws, or something like that. This was not like sending motion pictures, or protecting copyright; there were other interactions where the judgments needed to still reside within an investor protection agency such as the SEC. And so that's really what was the fear; and I think it was appropriately accommodated.

WC: Was the prudential carve-out the goal, or the focus, of the SEC the entire time? I believe other areas compiled lists of potential violations of MFN or NT under GATTS; sort of a listing—"list it or lose it" approach. Was that ever an issue with the SEC—or did they say we want to preserve the status quo from a regulatory perspective?

MM: Well, I think there was engagement across the board. But, I think, because most of these projects that were developed were things where, you know, there was discussion—from the SEC's perspective, I think, the focus was the prudential carve-out.

WC: Now you finished up your career at the SEC in 1996?

MM: Correct.

WC: How had the Office of International Affairs developed over the past seven years?

MM: Well, it became—it was an office of, I think, about twenty-two or twenty-three people; that was really focused not just on enforcement, but on market issues—emerging market issues, on cross-border cooperation in a more general way.

WC: Compared to how many in 1989?

MM: In 1989, there was the office of international legal assistance; which at that time, I think, had two people in it, besides myself. And so it grew substantially; but its function grew. It was really responsible for implementing the IOSCO relationship. In 1989, IOSCO was really a fledgling organization; it had been started in the '70s by the SEC, as the Inter-American Organization of Securities Associations and related affiliated organizations. It was really an effort by the Inter-American Development Bank, and AID, to do something in this hemisphere. It was only broadened to include other members, outside of the Americas, in 1986.

And it was the proposal of the creation of something called the Technical Committee, which included the G-10 markets—really didn't come into play until about 1988. The SEC's commitment to that grew in 1990 when Breeden became the chairman of the Technical Committee. And so the work of the office, in terms of implementing the work of the Technical Committee representing the Commission in various meetings; and working with the other divisions on their subject matter areas, in terms of developing agreements and protocols, became much greater in that time period.

WC: Before we wrap up the oral history; is there anything that you'd like to add—anything that stands out in particular in your tenure at the SEC?

MM: No, it was an incredible time. I think the SEC was so well-positioned. The markets were just in such an interesting time and place. It's just extraordinary when you look back and think about how much was changed. If you look up at the picture on the wall there—you see a group of SEC staff standing at the Great Wall of China with Richard Breeden, having spent two weeks traveling around Asia, meeting the heads of governments. We had access, we had their attention, because at the time, there was nothing more important than securities markets. And so, whether it was in China or Japan, or throughout Europe; we were received by the most important leaders—not just of business and industry, but of government—to talk about markets. There was interest in having discussions that were not political discussions, but were detailed discussions about the future of the world's markets. So, when I look back at it, it's extraordinary memories. I just hope my counterparts at the SEC continue to have as exciting a time as I did.

WC: Michael Mann, thank you very much for your time.

MM: Thanks a lot.