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“THE EU CHALLENGE TO THE SEC”: A VIEW FROM 2021

Howell E. Jackson*

ABSTRACT

This essay offers a retrospective appreciation of Professor Roberta Karmel’s scholarship exploring the influence of securities regulation in the United States on developments in European capital markets regulation in the late 1990’s and early 2000’s. Professor Karmel’s writings document a fascinating evolution in this trans-Atlantic relationship as the Securities and Exchange Commission transitioned from the world’s dominant capital market regulator throughout most of the post-World War II era into a more collaborative posture by the end of the first decade of the Millennium. The essay concludes by suggesting that the trends that Professor Karmel chronicled in her scholarship have persisted in recent years with U.S. regulatory authorities increasing finding themselves responding to regulatory initiatives in Europe rather than the other way around.

INTRODUCTION

It is a pleasure to be part of this panel brought together to discuss Professor Roberta Karmel’s scholarship on international securities regulation. My thanks to Professors Jim Fanto and Miriam Baer, as organizers of this event, for assembling such an impressive collection of leading practitioners, former government officials, and legal academics to recognize the substantial scholarly contributions that Professor Karmel has made to our understanding of the field of securities regulation, as well as the work of the Securities and Exchange Commission (SEC) and other regulatory bodies around the world.

As prompts for this session on the International Harmonization of Securities Regulation, my fellow panelists and I were given four articles that Professor Karmel wrote between 1999 and 2008 which explore the evolving relationship between the SEC and European securities authorities.¹ On a personal note, I was particularly happy to return to these writings as they appeared at a time when I, along with my co-author and fellow panelist Eric Pan, undertook a substantial empirical project exploring capital raising

* James S. Reid, Jr., Professor of Law, Harvard Law School. This comment reflects the helpful remarks and comments of Edward F. Green, Paul A. Leder, and Eric Pan, my fellow panelists at the May 2021 Conference A Life Navigating the Securities Markets: A Celebration of Professor Roberta Karmel’s Work, Teaching and Mentorship. The panel discussion can be streamed at <https://www.youtube.com/watch?v=C3IQDJ0KKu8>.

1. Roberta S. Karmel, *The EU Challenge to the SEC*, 31 FORDHAM INT’L L. J. 1692 (2008); Roberta S. Karmel, *Reform of Public Company Disclosure in Europe*, 26 U. PA. J. INT’L ECON. L.379 (2005); Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad to Regulate Corporate Governance*, 33 STETSON L. REV. 849 (2004); Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT’L L. 9 (1999).

practices within Europe and in transatlantic offerings.² At a time when most US academics were inclined to approach issues of international securities regulation through the relatively abstract lens of regulatory competition, extending existing work on state competition in US corporate charter to global securities markets,³ Professor Karmel was one of the few scholars well versed in legal developments on the ground. Her writings, including several of the pieces we are discussing here, were invaluable in providing thoroughly documented treatments of European Union (EU) legal developments and US-EU relations, along with admirable attention to the practical politics involved. What I did not appreciate at the time but have now learned from Professor Edward Janger's remarks during this conference is: Professor Karmel was very much working within the traditions of Brooklyn Law School in producing theoretically informed, but practically useful and important legal scholarship. As one who aspires to produce work in this pragmatic vein, I find this to be a school of thought with much to recommend it for those who seek to have influence in the real world.

As I said, there were four articles in our assignment. Reading them over in 2021, they present a fascinating quartet, chronicling an eventful and impactful decade of interactions and engagements between the SEC and the EU. In my remarks today, I will first say a few words about each of these papers. Next, I will add in my own perspectives on how transatlantic relations have evolved in the thirteen years since the last of these papers appeared and then speculate a bit about how Professor Karmel might discuss these areas of law were she to expand the collection into a quintet today.

The first piece—*The Case for a European Securities Commission*—is the only article from the last century, and was written as the euro was being launched and enthusiasm for the European project was at its zenith.⁴ As the title of the article suggests, the piece argues for stronger centralized authority over European capital markets modelled on the US approach to capital market oversight, albeit with appropriate attention to the challenges that such a move would present for national authorities, as well as potential sources of institutional resistance, including national stock exchanges and variations in market practices across different member states.⁵

To a degree, the article anticipates the creation of the European Securities and Markets Authority (ESMA) in 2011 as a mechanism for producing centralized control over certain aspects of European securities market

2. Howell E. Jackson & Eric Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe – Part II*, 3 VA. L. & BUS. REV. 207 (2008); Howell E. Jackson & Eric Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999 – Part I*, 56 BUS. LAW. 653 (2001).

3. For an example of this genre, see Howell E. Jackson, *Centralization, Competition, and Privatization in Financial Regulation*, 2 THEORETICAL INQUIRIES IN L. 649 (2001).

4. See Karmel, *Case for a European Securities Commission*, *supra* note 1.

5. *Id.*

regulation.⁶ While the integration of European capital markets has not proceeded along the lines that many anticipated and that Professor Karmel's article advocated, one can only be impressed by the number of initiatives, which were very much works-in-progress back in 1999, that have made substantial strides over the past twenty-two years. These reforms include the consolidation of International Financial Reporting Standards (IFRS) and initiatives by the International Organization of Securities Commissions (IOSCO) on harmonized disclosure standards and a workable system of memoranda of understanding.⁷ While a European SEC might have facilitated faster progress on these initiatives, analysis of the sort Professor Karmel offered in this piece helped generate momentum in these directions of coordination and thus contributed to that progress.

The next two pieces on our reading list—*Reform of Public Company Disclosure in Europe* and *The Securities Exchange Commission Goes Abroad*—have a somewhat different flavor, being written in the aftermath of the Sarbanes-Oxley Act, which represented a then unprecedented extraterritorial application of US corporate governance practices to foreign firms with particularly significant consequences for the many European firms cross-listed on the New York Stock Exchange. In *Reform of Public Company Disclosure in Europe*, the SEC appears as something of a role model for the EU to emulate in order to encourage the creation of a unified European capital market.⁸ However, in *The Securities and Exchange Commission Goes Abroad*, the Commission is described, somewhat unwillingly and in contrast with past practices, as a regulatory bully imposing US corporate law standards on EU issuers that had entered US markets under markedly different terms.⁹ In this pair of articles, Professor Karmel does a wonderful job explaining exactly how the Sarbanes-Oxley Act represented a change in US policy as well as how the European Union attempted to come to grips with these changes. The European Union reformed its disclosure practices and adopted corporate governance matters related to auditing practices, both to address the challenges of the Sarbanes-Oxley Act and to promote capital market integration through the Lamfalussy process and its resulting reforms.¹⁰

6. *Id.*

7. For subsequent discussions of these developments, see J. William Hicks, *Harmonization of Disclosure Standards for Cross-border Share Offerings*, INDIANA J. GLOBAL LEGAL STUDIES 361 (2002); Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. J. INT'L L. J. 447 (2008).

8. Karmel, *Reform of Public Company Disclosure in Europe*, *supra* note 1.

9. Karmel, *The Securities and Exchange Commission Goes Abroad*, *supra* note 1.

10. *Id.* The Lamfalussy process refers to a multi-layered approach to reforming the regulation of financial services in the European Union. The process takes its name from Baron Alexandre Lamfalussy, who authored a report on the subject in March of 2001. See European Commission, *Regulatory Process in Financial Services* (last visited Oct. 26, 2021), available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/regulatory-process-financial-services_en.

In *The EU Challenge to the SEC*, the clock has moved forward several more years to 2008, just on the eve of the Global Financial Crisis (GFC).¹¹ Tensions over Sarbanes-Oxley have subsided, but the relationship between the EU and the SEC has altered in a striking way. The challenge that Professor Karmel describes is not the harmonization of global capital markets around IOSCO standards or an SEC-inspired model of supervision.¹² Rather, the task has turned to ascertaining whether European and other regulatory standards are sufficiently similar to US requirements as to allow them to substitute for compliance with US regulatory requirements.¹³ As Professor Karmel explains, this shifting in the transatlantic terms of engagement is made possible by a convergence of international standards that the SEC helped produce, but it also reduces the pressure to achieve full harmonization of international standards and thus signals the likely persistence of considerable variation in regulatory practices at the regional or national levels.¹⁴ The movement towards substituted compliance at this time is one of the reasons why I encouraged the symposium's organizers to rebrand this panel title to *Harmonization and Beyond*. The quartet of articles in our assignment, in certain respects, is a record of a decade of movement away from aspirations of complete harmonization. Through Professor Karmel's writing you can see that process unfold.

PART I

Let me turn now to the present day and my imaginings of what Professor Karmel might say about the topics of these articles with the hindsight of, in some cases, more than two decades.

As an initial matter, one cannot help but be struck by the failure of the EU to achieve over the past two decades the kind of integrated internal capital market that EU authorities contemplated, and that Professor Karmel explored in her writings. To be sure, some degree of centralized regulatory authority has occurred through the establishment and operations of ESMA, but this evolution is far short of the European SEC that Professor Karmel advocated for in her writings. Many of the impediments that she anticipated—national politics, peculiarities of corporate structures across the region, and natural opposition to radical change—all contributed to this shortcoming.¹⁵ Indeed, if one reads over the most recent critique of European capital market integration, the June 2020 Report of the High Level Forum on the Capital

11. See Karmel, *The EU Challenge to the SEC*, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. See sources cited *supra* note 1.

Markets Union for the EU,¹⁶ many of the issues that Professor Karmel identified back in 1999 have still not been fully addressed, and one cannot help but be impressed by how similar the critiques of that report are to the ones identified in Professor Karmel's 1999 article.¹⁷

No doubt, the cataclysm of the GFC, which erupted immediately after the publication of the last piece of the quartet, explains much of the lack of progress. The GFC coupled with the Euro crisis that followed clearly shifted European reform energies away from capital markets and into the banking markets and the expansion of the European Central Bank's (ECB) competencies and capacity. And, of course, Brexit has both created another major distraction for EU authorities and, in the end, eliminated from EU bodies the member state with the greatest experience in promoting and overseeing modern financial markets.

Developments in wholesale markets and institutional investors also evolved somewhat differently than Professor Karmel and others anticipated. In her writings at the turn of the millennium, she envisioned European pension plans as a likely force in favor of integrated European capital markets on the view that these institutions would need such a market in order to find investment opportunities for growing balances of retirement savings.¹⁸ As it turned out, however, the rising power of pension plans and other institutional investors allowed for the creation of wholesale linkages across national capital markets and, somewhat counterintuitively, diminished the need for integrated public capital markets.¹⁹ Over the past twenty years in the United States, we have seen a relative decline in public companies and, until very recently, a drop off in initial public offerings (IPOs).²⁰ Something similar has been going on in Europe, creating greater access to private sources of capital and further diluting the need for integration of public markets.²¹

16. See *A New Vision for Europe's Capital Markets: Final Report of the High Level Forum on the Capital Markets Union*, EUROPEAN UNION (June 2020), available at https://ec.europa.eu/business_economy_euro/high-level-forum-final-report_en.pdf.

17. See Karmel, *Case for a European Securities Commission*, *supra* note 1.

18. See, e.g., *id.* at 34 (noting potential pressure from institutional investors, like pension plans, to create a pan-European capital market: "There remain too many barriers to cross-border investment by insurance companies and pension funds.").

19. The rising importance of institutional investors and private cross-border placements was already evident in the early 2000's in both EU internal markets and transatlantic markets, as reported in the work that Eric Pan and I wrote together at the time. See sources cited *supra* note 2.

20. For an overview of these developments in US capital markets in 2017, see *A Financial System That Creates Economic Opportunity: Capital Markets*, U.S. DEP'T OF TREASURY, 20–24 (Oct. 2017). Recently, IPOs have seen something of a resurgence, but it is not clear that this resurgence will be permanent.

21. For a discussion of the decline of public companies in Europe, see *Primary and Secondary Equity Markets in the EU*, OXERA CONSULTING, 12 (Sept. 2020) ("Our analysis shows that the number of listings in the EU-28 declined by 12%, from 7,392 in 2010 to 6,538 in 2018, while GDP grew by 24% over the same period."). See also Diana Milanese, *The Rise of the Secondary Trading of Private Company Shares in the United States, Europe, and the United Kingdom*, TTLF WORKING

Another geopolitical development that is striking as one reads through these writings from the first decade of the millennium is the near complete absence in earlier academic work (and not just Professor Karmel's work) on the global capital markets of China and the possibility that it could emerge as a capital market competitor for both the European Union and the United States.²² While the rise of China as a major trading force at the turn of the millennium was clearly evident, its increasing participation in international capital markets was less obvious back then, although increasingly apparent today. Were one writing today about challenges to the SEC or any other US financial regulator, the EU would likely not be the only named counterparty. No doubt, China and Asian markets more generally would be a principal party in interest.

Interestingly, however, when one digs into the heart of controversies between the SEC and Chinese regulatory authorities, one sees quite clearly the phenomena that Professor Karmel nicely summarized in her work, which is the extraterritorial application of the Sarbanes-Oxley Act and the inevitable confrontations that it generates for home country authorities of listed issuers.²³ Whereas the EU member states and the SEC have managed to work through this conflict, the application of Public Company Accounting Oversight Board (PCAOB) examination rules for foreign auditors has become increasingly intractable, with Congress last year lighting a three-year fuse that is only likely to increase tensions.²⁴ While the SEC's resolution of these conflicts with the EU presents a possible path forward, the absence of long-standing arrangements for negotiation with Chinese authorities and heightened Chinese sensitivity to issues related to sovereignty—not to mention geopolitical considerations—make resolution more challenging.

Another area in which Professor Karmel's work is prescient is in anticipating future developmental concerns with substituted compliance: the practice whereby the SEC determines whether a foreign country's regulatory regime is sufficiently comparable to US requirements to warrant an exception to national treatment. While the idea was something of a novelty when

PAPERS, 21 (2019), available at https://www-cdn.law.stanford.edu/wp-content/uploads/2019/11/milanesi_wp46_.pdf.

22. See Johannes Petry, *Same, But Different: Varieties of Capital Markets, Chinese State Capitalism and the Global Financial Order*, 25 *COMPETITION & CHANGE* 605 (2020). See also *President's Working Group on Financial Markets, Report on Protecting United States Investors from Significant Risks from Chinese Companies*, App. B (July 24, 2020).

23. Karmel, *supra* notes 8 and 9.

24. For an overview of the Holding Foreign Companies Accountable Act enacted in December 2020, see SEC Press Release No. 2021-53 (Mar. 24, 2021), available at <https://www.sec.gov/news/press-release/2021-53>. See also *SEC Division of Corporate Finance, CF Disclosure Guidance: Topic No. 10, Disclosure Considerations for China-Based Issuers*, U.S. SEC. & EXCH. COMM'N (Nov, 23, 2020), available at <https://www.sec.gov/corpfin/disclosure-considerations-china-based-issuers>.

Professor Karmel explored it back in 2008,²⁵ the GFC pushed the practice to the front stage, as the Dodd-Frank Act, following the Sarbanes-Oxley Act, imposed a substantial amount of extraterritorial application, albeit based on systemic risk concerns that the consolidated and global oversight of transactions and firms was necessary to safeguard financial stability.²⁶ Reforms of this sort extend US derivatives regulation²⁷ and the Volcker Rule²⁸ (restricting the proprietary trading of banks) across national boundaries. However, as a practical matter, the only sensible response in many cases is to accept foreign regulation as reasonably substituted, so long as it is sufficiently robust. Over the past ten years, the SEC and Commodity Futures Trading Commission (CFTC) have spent considerable effort making these determinations and, in other contexts, US financial regulators have had to persuade their foreign counterparts that US regulations are acceptable substitutes for the requirements of overseas markets.²⁹ And, of course, within the context of the EU, substituted compliance or substantial equivalence analysis (to use the local idiom) has become a matter of central interest as a result of the departure of the United Kingdom from the European Union, which has generated an apparent need for substantial equivalence determinations in perpetuity, posing yet another challenge to the integrated EU capital markets.³⁰ Substituted compliance and its implementation have emerged as an area of considerable practical and theoretical interest, and Professor Karmel, once again, anticipated its importance at the starting gate.

PART II

Finally, and perhaps most radically, throughout Roberta Karmel's writing on international securities regulation, the United States is cast as playing the lead role in mapping the future of global securities regulation. Whether it is offering policy advice to other jurisdictions on how to adopt SEC-style regulatory agencies, shaping the content of IOSCO initiatives to

25. The concept was floated by two senior SEC officials in a law review piece that garnered considerable academic attention at the time. See e.g., Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31, 32 (2007); see also Karmel, *The EU Challenge to the SEC*, supra note 1.

26. For an overview of this evolution in the US expansion of substituted compliance regimes, see Howell E. Jackson, *Substituted Compliance: The Emergence, Challenges, and Evolutions of a New Regulatory Paradigm*, 1 J. FIN. REG. 169 (2015).

27. See Alesey Artamonov, *Cross-Border Application of OTC Derivatives Rules: Revisiting the Substituted Compliance Approach*, 1 J. FIN. REG. 206 (2015).

28. See Christine P. Henry, *The Volcker Rule and the Presumption Against Extraterritoriality: Utterly Incompatible*, 7 WM. & MARY BUS. L. REV. 825 (2016).

29. See Jackson, *Substituted Compliance*, supra note 26.

30. For a post-Brexit overview of these issues from a practitioner's perspective, see Azad Ali & Christopher Hobson, *Offsetting the Loss of Passporting Rights in Financial Services*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Mar. 2, 2021), available at <https://www.skadden.com/en/insights/publications/2021/02/insights-special-edition-brexit/offsetting-the-loss-of-passporting-rights>.

conform (at least generally) with US approaches to securities regulation, or negotiating memoranda of understanding so as to facilitate US-style enforcement efforts for cross-border corporate malfeasance, the SEC, if not exactly setting the table, is portrayed as very much sitting at its head. At the risk of being parochial, let me say that this characterization is accurate enough for much of the post-World War II era running up to the end of the 20th century. The SEC was the world's dominant capital market regulator. But, what's interesting (and farsighted) in Professor Karmel's quartet of articles is that in the first decade of this millennium, her writings (at least implicitly) suggest that seating arrangements seem to have been shifting about somewhat.³¹ Following the perceived overstep of the Sarbanes-Oxley Act and the movement away from SEC-inspired harmonization towards more deferential substantial equivalence analysis, one can see the political economy of financial regulation of capital markets drifting away from US preeminence and moving closer to a more polycentric cosmology. Indeed, as elaborated upon below, if one takes a hard look at developments over the past five years, one can identify an increasing number of trends in global financial regulations where it is not entirely clear that US authorities have been at the table at all or at least have not had a speaking role.

In many cases, the leading movers have become European authorities, and the United States and even the SEC are becoming rule takers rather than rule makers. In this category, I would include: the adoption of General Data Protection Regulation for privacy regulation, competition policy with respect to Big Tech, and—closer to home for the SEC—the Markets in Financial Instruments Directive II rules on the unbundling of commissions and Environmental, Social, and Governance (ESG) disclosure standards.³² While under the Biden Administration, the current SEC leadership is reevaluating the establishment of disclosure standards for ESG issues,³³ one must also acknowledge that EU institutions have moved ahead much more quickly in this domain and, to some degree at least, US officials are operating under the shadow of emerging international ESG disclosure standards that do not bear a “Made-in-USA” label.³⁴ These new forms of EU challenges go beyond

31. See sources cited *supra* note 1.

32. See Howell E. Jackson & Jeffery Y. Zhang, “Nobody’s Proud of Soft Dollars”: *The Impact of MiFID II on U.S. Financial Markets*, 7 J. FIN. REG. (forthcoming 2022). See also Howell E. Jackson & Jeffery Y. Zhang, *The Economics of Soft Dollars: A Review of the Literature and New Evidence from the Implementation of MiFID II* (Mar. 3, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3673470.

33. See Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 15, 2021), available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

34. For an overview of European corporate disclosure requirements and their relatively long lineage, see the European Commission’s website on corporate sustainability reporting: https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en. In addition, the EU’s work on the responsibility of asset managers with respect to ESG issues is substantially ahead of the SEC’s work in the area. See

those identified in Professor Karmel's writings, but they are, in a sense, direct descendants.³⁵

In all of the cases, in contrast with the model of legal transmission of the latter half of the 20th century, reform initiatives began overseas, mostly in Europe, and the US and the SEC has increasingly found itself in a reactive posture. While the SEC is not necessarily bound by EU initiatives, the Commission is definitely influenced by, and in some cases constrained, by their innovations. Exactly why the SEC has come to play less of a leadership role in international securities regulation is a fascinating question and perhaps not universally accepted. The topic could well be the subject of a separate symposium, but let me offer some tentative thoughts. In part, of course, the declining role of the SEC may simply reflect the maturity of capital markets in other parts of the world and the increasing importance and throw-weight of other regulatory bodies. But other factors may also be at play. First, in recent years, the phenomenon of soft law development through international regulatory networks has become more widely understood. As a result, congressional leaders and industry participants have been more attentive to what US officials are doing in international venues, and that oversight may have led SEC officials to be more circumspect in their positions.³⁶ No doubt some officials have also become wary of international entanglements and the compromises that are necessary in order to reach consensus in international fora, producing a disinclination to engage in these processes unless positions clearly promoting US interests are in play. How European directives police climate change, data privacy, or market structure issues may not initially

Anna Maleva-Otto & Joshua Wright, *New ESG Disclosure Obligations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 24, 2020), available at <https://corpgov.law.harvard.edu/2020/03/24/new-esg-disclosure-obligations/>. See also Jean Eaglesham & Anna Hirtenstein, *ESG Disclosure Rules From Europe Challenge U.S. Fund Managers*, WALL ST. J. (Mar 22, 2021), available at <https://www.wsj.com/articles/esg-disclosure-rules-from-europe-challenge-u-s-fund-managers-11616405401>. Finally, in terms of financial accounting, international bodies have made substantial progress in developing a framework for incorporating ESG considerations in income statements and balance sheets. See *IFRS Foundation Trustees Announce Strategic Direction And Further Steps Based on Feedback to Sustainability Reporting Consultation*, IFRS (Mar. 8, 2021), available at <https://www.ifrs.org/news-and-events/news/2021/03/trustees-announce-strategic-direction-based-on-feedback-to-sustainability-reporting-consultation/>. The SEC is already being encouraged to incorporate these efforts into its own work on financial reporting, posing questions about the role of US standard setters, such as the Financial Accounting Standards Board, in setting these requirements in the United States. See Letter from Janine Guillot, CEO, Sustainability Accounting Standards Board to SEC Chair Gary Gensler (May 19, 2021).

35. If one expands the field of vision to include digital assets, one might also include efforts of other jurisdictions to adopt various forms of central bank digital currencies as an area where the United States—here the Federal Reserve Board—is playing catchup. See Timothy G. Massad, *Facebook's Libra 2.0: Why You Might Like it Even If We Can't Trust Facebook*, BROOKINGS ECON. STUD. PAPER, 42–61 (June 2020) (discussing development of digital payment systems of China as well as the PRC's efforts to adopt a CBDC).

36. For a discussion of the political economy of cross-border regulatory cooperation, see Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 INDIANA L. REV. 1405 (2013).

seem worth the efforts, but they eventually can have a profound impact on US market practices and regulation.

In addition, the internal structure of US regulatory agencies like the SEC may also inhibit effective participation in international fora.³⁷ Senior staff who participate in these engagements cannot, as a legal matter, bind their agencies. This limitation even extends to the chair of the SEC, whose recommendations must be run through the Administrative Procedure Act processes and are also susceptible to congressional oversight. This lack of authority converts the role of SEC officials from empowered negotiators into that of observers. In some instances, the subject matters may be part of broader agendas. This includes, for example climate change, privacy issues, or the rise of digital assets, where regulatory considerations reaching well beyond the SEC's jurisdiction and higher-level engagement, such as G-7 or G-20 processes,³⁸ are at play. In that case, the key actors on the US side are likely to be cabinet-level officials or members of the Executive Branch, and the SEC personnel may participate in only an advisory status, if at all. With such a peripheral position, the SEC is even less well-equipped to play an influential role in negotiations and its ability to influence the development of international standards, at least in a publicly observable matter, is further diminished. While legal structures vary considerably country-by-country, regulatory officials from many leading jurisdictions, including a number of EU member states, are more closely aligned with senior government leadership and may have a greater ability to make credible commitments in international gatherings, increasing their capacity and willingness to engage in multilateral negotiations. To be sure, the foregoing is necessarily speculative, but it does raise an interesting set of questions for future academic research: the positive question of whether and why the SEC seems to be playing less of a leadership role in the field of international financial regulation and the normative question of whether US legal structures or arrangements should be adjusted in some way to increase the ability to regain some of its traditional role. One also cannot help but wonder what Professor Karmel might have to say about these developments, or even whether she agrees with my suggestion that academic writing identified, at least implicitly, the beginnings of these developments.

CONCLUSION

In conclusion, there is so much to admire in Professor Karmel's work on international finance. It is the mark of successful scholarship that proves both useful to scholars and practitioners at the time it was written and anticipates

37. This paragraph reflects and expands upon thoughtful remarks that Eric Pan made during our panel discussion.

38. See Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L. J. 447 (2008) (explaining the heightened role of finance ministers and political appointees in the oversight of international regulatory networks after the GFC).

developments whose significance will only become apparent with the passage of time. It has been a pleasure to revisit this quartet again.