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THE LEGISLATIVE JURISDICTION OF STATES OVER TRANSACTIONS IN INTERNATIONAL ELECTRONIC COMMERCE

By TAPIO PUURUNEN

I. INTRODUCTION - THE PROBLEM

Throughout history, technological innovations have questioned the adequacy of traditional methods of conducting business. These innovations have had positive effects on national and international trade. They have made commercial transactions easier and faster to execute, expanded business opportunities, and broadened the selection of goods and services available to consumers. These novelties have also required law-prescribing authorities to address this new situation. In the nineteenth century, for example, the advent of the telegraph provoked discussion of whether existing rules on contract law were sufficient for telegraph transactions. Due to this uncertainty businesses occasionally resorted to older technologies that were already regulated. Gradually, businesses, parliaments, and courts elaborated rules and practices covering such transactions. Both the legislature and judiciary had to re-evaluate the relationship between international law and existing national civil and criminal law, procedural law, and private international law. Eventually, affected States managed to regulate the field.

The latest technological innovations used in international electronic commerce ("e-commerce") are yet another addition to this continuum. Old legal paradigms have to be applied, modified, or abandoned to measure up with societal goals. The present tools have established an unprecedented technical structure that defies geographical boundaries. For example, traders established in one State can have their Web site acces-

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sible to computers in other States. Any person connected to the Internet may access this site. Therefore, traders are capable of being subject to the rules of numerous distant and nearby jurisdictions, including those with whom they never intended to do business. Activities that previously had only local reach may now have global effect. Contracts can be executed, and goods and services may be advertised, bought, and sold over the Internet. Products and services may be delivered through traditional means, or entirely through the Internet. The novel structure affects consumers since there are no signposts to inform the consumer that they have moved from one jurisdiction to another. Traders and consumers are often unaware of each other’s physical location. As Johnson and Post have pointed out:

Location remains vitally important, but only location within a virtual space consisting of the ‘addresses’ of the machines between which messages and information are routed. The system is indifferent to the physical location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction. Although the domain name initially assigned to a given machine may be associated with an Internet Protocol address that corresponds to that machine’s physical location (for example, a ‘.uk’ domain name extension), the machine may be physically moved without affecting its domain name. Alternatively, the owner of the domain name might request that the name become associated with an entirely different machine, in a different physical location. Thus, a server with a ‘.uk’ domain name need not be located in the United Kingdom, a server with a ‘.com’ domain may be anywhere, and users, generally speaking, are not even aware of the location of the server that stores the content that they read.

The ambiguity of location has lead the United States Supreme Court to recognize, that “[t]aken together, [the tools of the Internet] constitute a unique medium known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”

In the absence of clear and comprehensive factual criteria that could be invoked to connect a transaction to a physical location, a State wishing to regulate international e-commerce must resort to a policy argument. Resorting to a policy argument is prone to raise international concern, due to Internet’s global reach. Consequently, international law must be structured and applied to minimize conflicts between the policy

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measures of States. If States do not succeed in avoiding conflicts, the disputes must be properly resolved.

There are various definitions of e-commerce. Porter and Cauffiel have defined e-commerce "grandly, as the collection of processes, people, technologies, and measurements that drive strategies for competitive advantage in the emerging economy." Essentially, e-commerce involves a wide range of technologies, processes and practices, resulting in the automation of business transactions through largely paperless mechanisms. E-commerce can also be defined to include a number of communication and information retrieval methods of early origin, such as the telephone, the television, the facsimile, and more recent innovations such as electronic payment, money transfer systems, and Electronic Data Interchange ("EDI"). The most dramatic developments have been achieved through the evolution of the Internet. The Internet is far more versatile than any other e-commerce device. The Internet can be used to transmit text and oftentimes sound, pictures, and moving video images.

For purposes of this article, e-commerce only includes situations where the Internet Service Provider ("ISP") supplies the merchant with a service level that can operate without resorting to more traditional communication devices. This focus will demonstrate the whole potential of jurisdictional problems that may arise in international electronic transactions.


7. See The World Trade Organization, Electronic Commerce and the Role of the WTO, 2 Special Studies 1, 10 (1998) [hereinafter WTO]. EDI is used in a closed network to transmit data automatically. It is used for computer-to-computer exchange of business transactions. Prior to the emergence of the Internet, EDI relied on Value-Added Network (VAN) service providers. The distinction between EDI and the Internet will become somewhat artificial, once the EDI is operated through Internet gateways open to anyone. See also id. at 5-14 (discussing the main instruments of e-commerce).

8. See id. at 5.

9. See id.


A consumer may use the traditional communication devices in conjunction with the Internet. For example, the consumer may use the novel and formidable opportunities offered by the Internet to search, either individually or by a search engine, for businesses that sell the product in question. Having visited one or a large number of Web sites worldwide containing information of the terms for sale, the consumer may, thereafter, make an
essential tools in e-commerce. The Web's large potential in consumer trade justifies its analysis.

The Internet is a forum providing for a new means of transacting business, transmitting text, pictures, sound, and moving images at an enormous speed rendering international business more effective. Transcription costs of a document are only a fraction of the cost of sending the same document through traditional delivery systems. Maintaining an Internet Web site costs considerably less than, for example, renting business premises abroad. National legislators must devise a new legal framework or modify the existing legal structure to accommodate international business and consumer sales. Businesses must adapt to the idea that distance does not exclude competition. The Web's interactive features enable a close simulation of the traditional business environment. The Internet has redefined the significance of time and distance. Through the Internet, traders and consumers are brought together worldwide for effective commerce simply at the click of a mouse.

The global dimension of the Internet has exacerbated legal problems. The number of Internet connections can, at best, be an educated guess indicating a significant growth in the past few years. One offer by e.g., mail, fax or telephone, possibly confirming the terms or suggesting new ones. It is evident that such a transaction does not reflect the real problems. Here the location of the parties is easier to ascertain than in an Internet transaction. The parties have a better chance of finding out the identity of one another and, consequently, can have a higher degree of legal certainty as to the applicable law and jurisdiction. In case the trader is not familiar with, for example, the consumer laws of the country of the consumer, he or she may well decide not to enter into the contract. The point is that, unlike in Internet transactions, the trader has enough information at hand to make this decision, thereby not subjecting himself to the laws of possibly all States in the world. See also Secretariat General of the European Commission, The Task Force "Justice and Home Affairs", Electronic Commerce: Jurisdiction and Applicable Law, Written Comments (visited Oct. 29, 1999)<http://www.europa.eu.int/comm/sg/tfjai/events/index_en.htm> (providing more information on the trader-consumer juxtaposition). These are issues that touch upon legislative jurisdiction. It is the national legislator or the bodies entrusted by nations to prescribe common norms that have to determine how these issues should be tackled in light of the international law obligations of States.

12. See International Telecommunications Union, Challenges to the Network (1997), reproduced in WTO, supra note 7, at 13. A 1997 survey by the International Telecommunications Union shows that the transmission of a 42-page document from New York to Tokyo took 5 days by air mail, 24 hours by courier, 31 minutes by fax but only 2 minutes by Internet e-mail.
13. See id. The survey indicates that the transmission of the same document from New York to Tokyo cost US$ 7.40 by air mail, US$ 26.25 by courier, US$ 28.83 by fax and US$ 0.10 by Internet e-mail. Id.
14. See WTO, supra note 7, at 23, 25. In interpreting estimates and predictions concerning the development of e-commerce, the reader should be aware of two problems. First, the numbers are always highly speculative. Id. E-commerce is such a novel and diverse medium, the growth of which depends on several factors, such as the development of technology and whether a whole legal infrastructure is established for the medium or whether
estimate indicated in 1999 that in 1995, 26 million people were connected to the Internet, in 2000 this number would increase to 205 million, while a predicted 350 million persons will be online in 2005.\textsuperscript{15} A 1999 survey predicted that the increasing amount of currency involved in e-commerce would generate 95 billion United States dollars in revenue by the end of 1999 and 1.3 trillion United States dollars by 2003, at a growth rate of 150\% in 1999 and 138\% in 2000.\textsuperscript{16} The growth of the Internet will alter the structure of international and national commerce in the future.\textsuperscript{17}

The development and growth of e-commerce necessitates government examination of the extent the Internet should be regulated to promote e-commerce and protect consumers within their States. This article examines whether there are any limits to national legislation regulating e-commerce, whether laws resolving possible jurisdictional conflicts can be established, and whether there are potential solutions to these emerging problems. While this article will examine jurisdictional principles applied primarily in criminal matters, and often issues that arise in the

only certain safeguards are used to regulate transactions. Id. Secondly, reports usually look at the acceptance of an offer by electronic means as the key element in determining whether a transaction can be termed an e-commerce transaction. Id. Such restriction does not fully reflect the importance of e-commerce, since the Internet is used in conjunction with other media as well. Id. Transactions, which are partly aided by the Internet, but then concluded by fax, mail or telephone are, therefore, not included. Id. For example, in the United States and Canada 50\% of Internet users base their purchase decision on Internet-related information but only 14\% of them carry out transactions via the Internet. Id.


As impressive as the rocketing number of persons online has been the increase of hosts worldwide: from mere 213 host computers in August 1981 to more than 43 million Internet hosts by January 1999. See J.C., The Explosion of the Electronic Shopping Mall, International Herald Tribune, Sept. 21, 1999 at 20 (citing ITU as the source).


regulation of criminal conduct or tort law touch upon e-commerce, this paper will focus on commercial law. This article will analyze the measures that seek to regulate the function of the market, for both businesses and consumers in a business to consumer transaction.

In analyzing business to consumer commerce, some distinctions will be drawn. Consumer protection has been restricted almost exclusively to a local level, which has been a national law concern. Each State has its own peculiar notion of economic organization. New technology is beginning to internationalize consumer commerce, thereby challenging the national public sphere resulting in a collision of the national and international spheres. Both national and international law will be forced to address this conflict. The conflict cannot be neglected by looking at figures supposedly justifying that consumer commerce is only a fraction of the overall e-commerce trade. While consumer e-commerce has grown in a number of countries figures indicating the growth of global e-commerce have been impressive.\(^\text{18}\) Research estimates that global online consumer purchases will be worth 380 billion U.S. dollars in 2003, up from an estimated 31.2 billion U.S. dollars in 1999.\(^\text{19}\) While it is estimated that currently 25% of all online transactions, including business-to-business transactions, involve parties who are in different countries,\(^\text{20}\) the incentive of the Internet is to promote international consumer transactions as well. Consumer commerce is of low value, therefore, based on the amount of money and growth illustrated above, there are huge numbers of consumers utilizing e-commerce. Governments simply cannot neglect consumer e-commerce.

Secondly, the difficulty with consumer transactions in many countries concerns their higher degree of dependence on national law and authorities than business-to-business transactions. A number of national consumer laws provide that an arbitration clause in a consumer contract is not enforceable against the consumer, if the clause was agreed upon


\(^{20}\) See Global Internet Project, Statement on Jurisdiction (visited Oct. 29, 1999) <http://www.europa.eu.int/comm/sg/tj/fair/events/index_en.htm>. This is one of the very few estimates there are of the number of cross border transactions. For example, the WTO Report states that: “numbers for cross border transactions are unavailable.” See also WTO, supra note 7, at 23.
before the dispute arose. Arbitration clauses are frequently used in business-to-business transactions. The concern of the national legislature has been the high cost of arbitration. The weaker party to the contract, the consumer, must be given the opportunity to decide on such a path without pressure from the trader and a mandatory arbitration clause would deprive the consumer of effective legal redress. However, even the availability of post-contractual ad hoc arbitration would not remove the costs that prevent consumers from gaining redress, unless such arbitration could be done online. Such ad hoc arbitration is not a solution to mass transactions, where arbitration does not well serve business effectiveness.

An especially problematic situation arises for the consumer when two States have inconsistent legislation concerning arbitration of consumer-trader disputes. The result is that the consumer has three options: (i) let the case be (often happens with very low-value purchases); (ii) seek remedy from a national off-court mediation service (which in international transactions can often prove futile), or (iii) initiate normal

21. See e.g., The Finnish Consumer Law, Kuluttajansuoijalaki 20.1.1978/38, Ch. 12, Art. 1d (stating that an ad hoc agreement after the dispute has arisen is considered possible). HE 360/1992. See also the Consumer Arbitration Agreements Act (1988) (England, Wales and Northern Ireland) s. 1(1) (stating that: “Where a person (referred to in section 4 below as ‘the consumer’) enters into a contract as a consumer, an agreement that future differences arising between parties to the contract are to be referred to arbitration cannot be enforced against him in respect of any cause of action so arising to which this section applies except – (a) with his written consent signified after the differences in question have arisen. . .”).

22. See generally R.M. Cain, Preemption of State Arbitration Statutes: the Exaggerated Federal Policy Favoring Arbitration, 19 J. CONTEMP. L. 1, 1-19 (1993). Compare the Finnish approach to the United States, for example. R. M. Cain has written that “[i]n most recent arbitration preemption cases, the courts have held that all state rules limiting mandatory arbitration contracts conflict with the ‘federal policy favoring arbitration’ because the state rules single out and treat arbitration provisions different than other contractual provisions. Under this analysis, no state law that imposes regulatory discretion over arbitration provisions can survive. As a result, the federal policy favoring arbitration prevents states from protecting consumers against fraudulent, deceptive, illusory and unconscionable pre-dispute arbitration provisions.”

Id.

After having laid down her own critique on the basis of this approach and an examination of the intentions of the drafters of the Federal Arbitration Act (FAA), she concludes that: “Unfortunately, state attempts to regulate arbitration in the interests of its citizens may continue to meet with difficulties. Perhaps a federal court could be persuaded to analyze the original commercial intent of the FAA and refuse to preempt a state consumer protection statute. However, the federal courts apparently feel bound to preempt state statutes based on the overly broad federal policy favoring arbitration. In addition, despite occasional lip-service towards federalism and state autonomy, nothing in the Supreme Court’s recent opinion (Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)) suggests that the Court is likely to reverse its current course in this area.”

Id.
legal proceedings. The difficulties involved in the last point should be clear. The respective national courts must consider, inter alia, the extent of national consumer laws, that is, the legislative jurisdiction of the State. National courts only apply the law and are constrained by the policies of national legislatures. Consumer disputes provide a vivid example of the effects that inconsistent national legislative measures may have on transactions involving more than one State.

Thirdly, legal uncertainty arises from the clash between two or more national laws that do not serve the interests of governments, traders or consumers. Governments want their consumers and businesses to prosper, especially small and medium-sized firms ("SMEs") who can take enormous advantages from low-cost global consumer trade. On the other hand, traders want to make profits by expanding their market area and consumers want broader choices and lower prices.

This article will first examine whether international law principles governing the legislative jurisdiction of States can be applied to international e-commerce, bearing in mind that the principles were created to serve a legal environment based on geography and physical borders.

Secondly, while States involved in a jurisdictional dispute may use one or a number of principles to justify their respective position, international law allows concurrent jurisdiction. The question arises as to whether concurrent jurisdiction gives an adequate answer to how such principles, when concurrent, should be prioritized in a given case. As consumer transactions have acquired a global dimension through international e-commerce, the question that arises concerns the standard of consumer protection to be applied in international e-commerce. The absence of a satisfactory system for the allocation of legislative jurisdiction will result in adverse consequences. Consumer e-commerce will not be able to reach its full potential without certainty about the applicable law and whether both consumers and traders find the risks involved too high. Those entering the market may suffer injustice, since they have poor means of obtaining effective judicial relief. On the other hand, if international law gives little guidance to States on how existing jurisdictional principles constrain national legislatures, they are likely to pass inconsistent and conflicting jurisdictional laws, thereby resulting in international friction and controversy.


24. This was clearly voiced by consumer groups and the representatives of the industry in relation to jurisdiction and applicable law in the public hearing organized by the European Commission in Brussels, Public Hearings on Electronic Commerce: Jurisdiction and Applicable Law, on 4 and 5 Nov. 1999.

Thirdly, since international law does not determine how these jurisdictional principles should be prioritized, the viability of attempts that have been made to establish such criteria will be analyzed.

This article will suggest a solution as to how legislative jurisdiction should be allocated in international e-commerce, thereby giving a clear and comprehensive theory that will promote the legal certainty and predictability that international e-commerce needs to better fulfill its potential. This article will study these problems by first looking at jurisdiction and legislative jurisdiction in general (section 2); then examining how present jurisdictional principles are defined and work in international e-commerce (section 3); then determining whether there are rules on how concurrent assertions of jurisdiction can be resolved and the content of those rules (section 4); then suggesting how the traditional theory of jurisdiction should be applied to international e-commerce (section 5); and finally concluding this discussion with observations (section 6).

II. JURISDICTION IN GENERAL

In general, jurisdiction has been defined as the extent of a State's right to regulate conduct or the consequences of events, resolve disputes, and enforce its laws. This general definition connotes the hierarchy between municipal and international law in that it is the municipal law that defines the allocation of competence between the State organs and may in a given subject-matter grant them unlimited powers of jurisdiction, whereas international law prescribes the limits of those powers on an international level. Every sovereign State is entitled to exercise its jurisdictional rights under international law. Nevertheless, jurisdiction should be distinguished from sovereignty, which is often labeled as the general legal competence of a State. Jurisdiction, while not being coterminous with sovereignty, refers to the legislative, judicial and executive aspects of that competence. State sovereignty sets the limits for

26. See F. A. Mann, The Doctrine of Jurisdiction in International Law, 111 Recueil des Cours 9 (1964 I).
27. See The Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) [hereinafter Lotus Case] (stating that: “In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”). See also D.J. Harris, Cases and Materials on International Law 264 (5th ed. 1998). “State jurisdiction is the power of a state under international law to govern persons and property by its municipal law.” Id.; see also Mann, id., at 10-11, refers to the distinction between power and entitlement. Mann also states that “[t]he existence of the State’s right to exercise jurisdiction is exclusively determined by public international law.” Id. See also Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int’l L. Supp., 435, 467-69 (1935) [hereinafter Harvard Research].
28. See e.g., I. Brownlie, Principles of Public International Law, 301 (5th ed. 1998).
29. See id.
the exercise of jurisdiction, meaning that every State may exercise juris-
diction within the limits of its sovereignty but must respect and may not
encroach upon the sovereignty of other States.\textsuperscript{30}

Jurisdiction has been subject to several definitions and categoriza-
tions over time and scholars have used the term to refer to a variety of
different issues. Traditionally, jurisdiction was treated either as a single
concept in international law,\textsuperscript{31} or was divided into two categories: juris-
diction to prescribe and jurisdiction to enforce.\textsuperscript{32} This approach has re-
cently seen attempts at a more elaborate slicing of the concept. It is
common to draw a distinction between jurisdiction to prescribe (or legis-
late), jurisdiction to adjudicate, and jurisdiction to enforce.\textsuperscript{33} Jurisdiction
to prescribe (or legislate, as used throughout this article) has been de-
finied as the authority of a State “to make its law applicable to the activi-
ties, relations, or status of persons, or the interests of persons in things,
whether by legislation, by executive act or order, by administrative rule
or regulation, or by determination of a court.”\textsuperscript{34} Jurisdiction to adjudi-
cate is the authority of a State to “subject persons or things to the process
of its courts or administrative tribunals, whether in civil or in criminal

\textsuperscript{30} See F.A. Mann, \textit{The Doctrine of International Jurisdiction Revisited After Twenty
Years}, 186 Recueil des Cours 9, 29 (1984 III) (stating that “…this is a principle or, per-
haps one should say, an observation of universal application”). \textit{See also Brownlie, supra
note 28, at 289-99.}

\textsuperscript{31} See O. Schachter, \textit{International Law in Theory and Practice}, 253-54 (1991);
\textit{see also L. Henkin, International Law: Politics, Values and Functions, General Course on
Public International Law}, 216 Recueil des Cours 277 (1989 IV).

\textsuperscript{32} \textit{See Restatement (Third) of Foreign Relations Law, Introductory Note to Part
IV, at 230-1. See also Henkin, supra, note 31.}

\textsuperscript{33} But see Restatement (Second) of Foreign Relations Law. The Restatement Sec-
ond still employed two categories: jurisdiction to prescribe and to enforce. It considered the
judicial or adjudicatory jurisdiction of a State to be under the jurisdiction to enforce. But
\textit{see Restatement (Third) of Foreign Relations Law, at 230-31. The Restatement Third
notes the importance of the process of adjudication in the foreign relations of the United
States and comments on the fact that adjudication is often used, not for enforcement pur-
poses, but to declare rights and vindicate private interests. See M. Akehurst, \textit{Jurisdiction
in International Law}, 46 Brit. Y.B. Int’l L. 145 (1972-1973); see also M.N. Shaw, Interna-
tional Law, 456-57 (4\textsuperscript{th} ed. 1997). Others maintain the dual categorization, but divide en-
forcement jurisdiction into adjudicative and executive enforcement, see also Harris, supra
note 27, at 264; \textit{see also Henkin, supra note 31, at 313. See generally A. Bianchi, \textit{Jurisdic-
tional Rules in Customary International Law – Comment in Extraterritorial Jurisdic-
tion in Theory and Practice} 74, 77 (K.M. Meessen, ed., 1996) (criticizing the three-tier
approach used in the Restatement (Third)); K.M. Meessen, \textit{Conflicts of Jurisdiction under

\textsuperscript{34} \textit{Restatement (Third) of Foreign Relations Law § 401(a). For a wide interpreta-
tion of the term “legislation” to include acts which are also enumerated in the Restatement
(Third), see e.g., P. Weil, \textit{International Law Limitations on State Jurisdiction in, Extrat-
territorial Application of Laws and Responses Thereto} 32, 34 (C.J. Olmstead,
ed.,1984); Mann, supra note 30, at 21.
proceedings, whether or not the state is a party to the proceedings."\textsuperscript{35} Jurisdiction to enforce, refers to "induc[ing] or compell[ing] compliance or to punish[ing] noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."\textsuperscript{36}

International law, as it has developed from being part of the conflict of laws to its present standing, has not furnished the national legislature with a comprehensive set of norms defining, with reasonable precision, the permissible limits to State jurisdiction. The development of the international law on jurisdiction has mostly been performed by national courts, applying municipal law from a domestic perspective and being constrained by national policies. It has not been purposefully developed throughout the history of modern international law into a coherent and systematic set of norms.\textsuperscript{37} This does not mean that there are no norms (e.g., in bilateral treaties), but might partly explain why the law has developed into what it is now: a set of principles permitting a State to exercise jurisdiction if certain connecting factors are present. It is to these principles that we turn now.

III. INTERNATIONAL LAW BASES FOR THE EXERCISE OF LEGISLATIVE JURISDICTION APPLIED TO INTERNATIONAL ELECTRONIC COMMERCE

A. General Remarks

International e-commerce, like the more traditional commercial environments, is not only regulated by civil law (see, e.g., the EC Electronic Commerce Directive)\textsuperscript{38} but also by criminal law (e.g. online fraud).\textsuperscript{39} In-

\textsuperscript{35}. Restatement (Third) of Foreign Relations Law § 401(b).
\textsuperscript{36}. Id. at § 401(c).
\textsuperscript{37}. See Henkin, supra note 31, at 281. As Henkin has observed "Since [the categories that have developed] are customary law, resulting from the practice of States and opinio juris (not by multinational agreement), the law and its categories were not determined by deliberate, knowing, purposeful acts of assembled States at any one time. There is apparently no comprehensive study of the practice of States, and little diplomatic record of challenges by other States, that might explain and justify the exercise of jurisdiction in some cases but not in others. One can only speculate." See also Oppenheim's International Law 457 (R.Y. Jennings & A.D. Watts eds., 9th ed. 1992) [hereinafter Jennings & Watts].
ternational law principles governing jurisdiction, on the other hand, have evolved primarily to define the jurisdiction of States in criminal matters, where the application of international law is beyond serious doubt. Some scholars argue that international law limitations on legislative jurisdiction in civil matters are still in a stage of development. In spite of some assertions to the contrary, the predominant position is that these principles are not only applicable to criminal law matters, but also cover a State's overall legislative jurisdiction thereby being applicable

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40. See generally G.B. Born, INTERNATIONAL CIVIL Litigation in the United States Courts 512 (3d ed. 1996). It is recognized that in addition to international law, municipal law - usually in the form of constitutional law - may contain restrictions on legislative jurisdiction. Id. The US Constitution contains few restrictions on the legislative jurisdiction of Congress: the full faith and credit clause is not applicable to Congress and the due process clause has only seldom been applied to limit the extraterritorial reach of federal law. Id. See also U.S. Const. Art. 1 § 8. The constitution contains provisions granting Congress powers involving the extraterritorial application of US legislation. Id. See also Vermilya-Brown Co. v. Connell, 69 S.Ct. 140, 142 (1949). "We have no doubt that Congress has the power in certain situations, to regulate the actions of our citizens outside the territorial jurisdiction of the United States whether or not the act punished occurred within the territory of a foreign nation." Id. See also Steele v. Bulova Watch Co., 73 S.Ct. 252, 255 (1952). "This Court has often stated that the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears." Id. See also E.E.O.C. v. ARAMCO, 111 S.Ct. 1227, 1230 (1991). "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'... We assume that Congress legislates against the backdrop of the presumption against extraterritoriality." Id. See also Hartford Fire Insurance Co., et al. v. California et al., 509 U.S. 764, 813-14 (1993) (J. Scalia, dissenting).

41. See D.W. Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, 53 Brit. Y.B. Int'l L. 1, 3 (1982). Indeed, Bowett has correctly pointed out that the Permanent Court of International Justice had no hesitation in taking this general proposition in the Lotus Case. See also Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). See also Brownlie, supra note 28, at 303-309; see also Harvard Research, supra note 27, at 435-651.

42. See L. Henkin, R. Pugh, O. Schachter & H. Smit, INTERNATIONAL LAW: CASES AND MATERIALS 822 (2nd ed.1987) [hereinafter Henkin et al.].

43. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. f. The Restatement (Third) pronounces that the principles governing prescriptive jurisdiction set forth in its provisions apply to criminal as well as civil regulation. See also Brownlie, supra note 28, at 313.

"In the case of substantive or legislative jurisdiction (the power to make decisions or rules enforceable within state territory), there is no major distinction between the types of jurisdiction. The 'types' used by writers in presenting materials (principally the civil, criminal, fiscal, and monetary jurisdictions) are not the basis of significant distinctions in the principles limiting extra-territorial jurisdiction. Thus the exercise of civil jurisdiction in respect of aliens presents essentially the same problems as the exercise of criminal jurisdiction over them."

Id. See also id., at 312 (adding that this was a point that could be obscured by "the usual presentation of the different facets of jurisdiction in separate compartments."). See also Bianchi, supra note 33, at 75, n 191.
to the regulation of international e-commerce, as well.

It has been argued that an analysis of State practice reveals that international law imposes no limits on civil or private law legislation, and that the principles governing the permissible limits of criminal, or public laws would not apply. Excessive assertions of criminal jurisdiction by foreign States have raised considerably more diplomatic attention and protests from States than assertions of civil jurisdiction since the right to prescribe criminal law within a State’s territory has been a strictly guarded right.\textsuperscript{44} In 1974, Akehurst claimed that “[t]he overwhelming preponderance of the relevant State practice therefore suggests that there are no rules of international law limiting the legislative jurisdiction of States in questions of what might loosely be described as ‘private law’ (i.e. those areas of municipal law which are not concerned with crimes, the functioning of public bodies or the sovereign rights of the State).”\textsuperscript{45} Mann criticized this statement in 1984:

\ldots the principle [of territoriality] as defined is universal in the sense that \textit{prima facie} it applies to all legislation and all State intervention derived or sanctioned by the competent authority, i.e., the legislator himself as well as those judicial and executive authorities controlled and empowered by him. Accordingly there is no room for distinguishing between criminal, public and private laws. The suggestion that the doctrine applies to criminal and public law as well as the prerogative rights of the State such as taxation, but ‘that there are no rules of international law limiting the legislative jurisdiction of States in questions of what might loosely be described as private law’ is untenable: a legislator who were to invalidate all marriages not celebrated in church and declare the children of such marriages illegitimate would act \textit{ultra vires} (...). It may well be that ‘the cases in which the a State violates international law, e.g., by applying its own substantive law to a given situation must be extremely rare’. The point is that if such a rare case were to occur it would constitute an international wrong; the very absence of examples in the legislative, though not the judicial practice of States is likely to contribute to the proof of the rule.\textsuperscript{46}

Indeed, in the context of international e-commerce, such evidence may arguably not be conclusive to establish that international law does not limit the reach of national laws and rulings in civil or private law matters. When facing new technological innovations, States and their courts may well be guided by different interests than in previous cases where State practice has supposedly been scant. New laws regulating

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44. \textit{See} Henkin \textit{et al.}, \textit{supra} note 44, at 821-22. (stating that it may well be argued that international law limitations on the exercise of administrative and civil jurisdiction are still in a stage of development and that broad generalizations should be treated with circumspection).

45. Akehurst, \textit{supra} note 33, at 187.

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international e-commerce have and will be enacted and at this early stage of regulation, the primary focus will be on how State organs will interpret the reach of existing legal provisions. A coherent body of State practice and opinio juris is still lacking, but this does not mean that the eventual result will necessarily exclude civil and private laws. Rather, the opposite should be emphasized. The volume of international e-commerce is increasing at a considerable speed and conflicts in legislative jurisdiction are bound to follow unless clear rules are established. Civil and private law occupy an important place in the regulation of e-commerce alongside criminal and public law.

The rationale for a distinction between civil and criminal matters, Jennings has argued, is that questions arising in proceedings brought by private parties in civil matters are the concern of a State's own system of conflict of laws upon which international law has little to say.\(^47\) It would also seem otiose to use territorial principles limiting the application of civil laws, since a court can, and often applies a foreign system of law in accordance with its conflict-of-laws rules. The exercise of criminal jurisdiction, on the other hand, is a "direct emanation of State power," an assertion of a State's own peculiar notions of public order and the consequent penalties.\(^48\) Here, there can be no question of choice of law.\(^49\) However, a more convincing approach is that of Bowett, who emphasizes that the distinction overlooks a number of important factors. First, in litigation between private parties, the civil law of the forum still influences the outcome of the case. Second, the distinction may not accurately reflect the degree whereby a State exercises its prerogative power to control activities (e.g., United States anti-trust legislation). Therefore, it follows that what matters is not the labeling of two categories, but whether "the jurisdiction is a manifestation of State policy, designed to confer on the State control over activities or resources to the extent necessary to pursue that policy."\(^50\)

The reason for the distinction between civil and criminal law derives from the fact that criminal law is necessarily public law alongside other areas commonly placed inside the framework of manifestations of public


\(^{48}\) See Jennings, supra note 47, at 211.

\(^{49}\) See Id.

\(^{50}\) Bowett, supra note 41, at 2.
functions, administrative law, tax law, or constitutional law. Therefore, a similar reasoning should be applied to the distinction between public and private laws. Whether a law is termed public, and therefore within the reach of public international law limitations and negating the use of a choice of law analysis, or private and not within the reach of public international law, may indeed be misleading. Consumer law, for example, is public law since it expresses State policy. It may provide for the recognition of the needs of the weaker party to the contract and set protective mandatory rules that encroach upon the private law based freedom of contract. Consumer laws seek to forward a certain conception of how a market should function alongside with anti-trust or competition laws. Therefore, it is necessary to look at each normative instrument to discover its true character.

Moreover, international law is generally indifferent to how a State classifies its municipal laws, as long as the State fulfils its international obligations, whether by various forms of legislation, common law, or administrative acts. In some cases, States have undertaken an international obligation to classify certain acts as crimes, for example, torture or genocide. Nevertheless, it would not be desirable to promote a theory in which international obligations depended on national distinctions.

B. Territorial Jurisdiction

From the beginning of the “fruitful and effective history of public international law, which effectively began some four centuries later than private international law,” the premise to be developed was the territorial character of legislative jurisdiction. While the origins of the ideas underlying the principle of territoriality may in some form be traced to

51. See generally R.Y. Jennings, General Course of International Law, 121 Recueil des Cours 327, 515 (1967 II). “Questions of jurisdiction arise in all kinds of cases, both civil and criminal; but the kind of case where questions of public international law, in contrast to private international law, usually arise, is the kind that involves either criminal law, or some offense, not perhaps technically criminal but where the essence of the offense is a breach of general public law, and not only, though it may also be, a delict giving rise to claims to reparation between private persons.” Id.


53. See Jennings & Watts, supra note 37, at 82-83; see also Henkin et al., supra note 44, at 140.


56. Mann, supra note 26, at 24.
the 13th century, it was Ulricus Huber in the 17th and Joseph Story in the 19th century who expressed the theory in the form that international law today perceives it. In his “general maxims of international jurisprudence,” Story stated, that “every nation possesses an exclusive sovereignty and jurisdiction within its own territory” and that “no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others.” To the latter maxim he made the exception of “natural allegiance” which is where “every nation has a right to bind its own subjects by its own laws in every other place.”

The territorial principle is well-established and has been considered to be axiomatic in the sense that the right of States to regulate activities involving persons, property, and acts or interests within their own territory, is an essential characteristic of statehood. Unless authorized by international law, the legislative jurisdiction of a State is limited to its territory. Whereas the territorial principle is well-recognized, this does not mean that it is exclusive or that it is a complete justification excluding any other basis since territorial jurisdiction is limited by international law. Developments in the fields of human rights and the environment are prime examples of the gradually shrinking

57. See id. at 24-5.
59. Id. at 23. The exception nevertheless still retains a character of territoriality, since Story pointed out that “[s]uch laws may give rise to personal relations between the sovereign and subjects, to be enforced in his own domains; but they do not rightfully extend to other nations.” Id. at 24. See also Mann, supra note 26, at 28. These maxims, although made in a treatise concerned with the conflict of laws, are principles of public international law, flowing from sovereignty, equality and the independence of nations. Id. “Although Story’s maxims, if properly understood, do have a bearing upon private international law no less than on law in general, they express principles of public international law.” Id. at 33.
60. See Harvard Research, supra note 27, at 480.
61. See Henkin, supra note 31, at 282; see also Bowett, supra note 41, at 4.

[The first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention. Id.
63. See Advisory Opinion No. 4, Tunis-Morocco Nationality Decrees, 1923 P.C.I.J. (ser. B) No. 4, at 24. “The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.” Id. See also G. Schwarzenberger & E.D. Brown, A Manual of International Law 76 (6th ed. 1976) “Each sovereign State exercises unlimited territorial jurisdiction regarding all matters within its territory except those in relation to which limitations have been established by treaties, international customary law and the general
scope of the territorial principle. The balancing, whether successful or not, is between the needs of one State to protect its property, nationals, central state interests or universal values, and the sovereignty, with all that is included therein, of the other.

The international law of jurisdiction is part of the broader issue of the relationship and border between the international and the municipal sphere of domestic jurisdiction and international regulation. As a corollary of the independence and equality of States, and following from the nature of sovereignty, States have a duty not to intervene in the internal or external affairs of other States. Every State has a reserved domain of jurisdiction that is not regulated by international law; within this domain, a State may regulate matters that may closely concern the interests of several States. It is international law that dictates the limits of this domain, which may vary from time to time. However, limitations on sovereignty cannot be presumed, and a State contesting territorial legislative jurisdiction has to show that it is not sanctioned by international law.

In the context of international e-commerce, the territorial principle is sufficient to legitimize the State’s legislative activities where all the material elements of the Internet transaction are situated in the State, presuming that often very difficult evidentiary matters were resolved.

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65. See Brownlie, supra note 28, at 293; see also Shaw, supra note 33, at 454.

66. See Brownlie, supra note 28, at 293; see also Shaw, supra note 33, at 454.

67. See Shaw, supra note 33, at 454.

68. See id. at 24; see also Brownlie, supra note 28, at 293; R. Higgins, The Legal Bases of Jurisdiction, in Extra-Territorial Application of Laws and Responses Thereto, supra note 34, at 3-14; see also Shaw, supra note 33, at 454.

69. See lotus case, 1927 P.C.I.J. (ser. A) No. 10, at 8 (Sept. 7). See also V. Heiskanen, International Legal Topics 128 (1992); see also Schwarzenberger & Brown, supra note 63, at 76.
such as the identity of the parties or the location of their business.\textsuperscript{70} Even if one added a foreign element, such as foreign nationals, property resident, or located in the territory, the territorial premise of jurisdiction has not been open to doubt.\textsuperscript{71} Moreover, even if another State sought to exercise jurisdiction on some other ground, its ability to enforce its laws would be limited.\textsuperscript{72} The principle allows a State to regulate, for example, the operation of a computer situated in its territory or to prevent persons located in its territory from accessing certain Web sites.\textsuperscript{73}

Even before the advent of the Internet there were debates over whether the territorial principle is adequate to address all but the simplest cases. In 1964, Mann wrote that “[i]t should, indeed, be obvious that the principle of territorial jurisdiction has to be reconsidered for practical rather than doctrinal reasons . . . [p]erhaps the most striking example is the well-known problem where a contract made by correspondence, teleprinter or telephone is concluded. . . .”\textsuperscript{74} Rather, e-commerce has put more stress on this inadequacy.\textsuperscript{75} While the doctrine of territorial jurisdiction is based on the premise that transactions occurring within the territory of one State is the standard, and situations requiring resort to other bases of jurisdiction are more exceptional,\textsuperscript{76} international e-commerce inherently involves more than one State and the principle, if given this strict application, would \textit{prima facie} fall short of \textit{international} e-commerce and the reach of the present study.

\textsuperscript{70} For further discussion see Amy Harmon, \textit{Illegal Kidney Auction Pops Up on Ebay's Site}, \textit{N.Y. Times On The Web}, Sept 3, 1999 (visited Sept 10, 1999) <http://www.nytimes.com/library/tech/99/09/biztech/articles/03auct.html>. For example, Ebay, a company based in San Jose, California and hosting an Internet auction site ended a bidding for a human kidney on September 2, 1999. \textit{Id.} The seller was identified as "hchero" of Sunrise, Florida and offerees supposedly included also U.S. residents. \textit{Id.} The National Organ Transplant Act of 1984 makes the sale or purchase of human organs punishable by up to five years in prison or a fine of $50,000. \textit{Id.}

\textsuperscript{71} See Henkin, \textit{supra} note 31, at 282.

\textsuperscript{72} See \textit{Brownlie}, \textit{supra} note 28, at 301-24; see also \textit{Jennings & Watts}, \textit{supra} note 37, at 456-98; see also Mann, \textit{supra} note 26, at 10-13; see also Mann, \textit{supra} note 30, at 20.


\textsuperscript{74} Mann, \textit{supra} note 26, at 36-7.

\textsuperscript{75} Suppose a consumer (not necessary a national) in State A purchases defective merchandise from a .com Web site, the server containing the Web page being in State B, while the trader is established in State C. The laws of State B and/or State C may adhere to the \textit{caveat emptor} principle, while State A may have strict consumer laws. Which State has legislative jurisdiction over the transaction? Is concurrent jurisdiction inevitable? Where did the transaction take place?

\textsuperscript{76} See e.g., \textit{Schachter}, \textit{supra} note 31, at 254.
C. Extraterritorial Jurisdiction

The question of whether legislation has an extraterritorial effect, and if so, to what extent, has been pondered for centuries. In the 14th century Bartolus posed two questions that have not yet been resolved: "Primo, utrum statutum porrigatur intra territorium ad non subditos? Secundo, utrum effectus statuti porrigatur extra territorium statuentium?" While in previous centuries, the problem of the extraterritorial reach of national laws was more of a marginal question, at present, it affects the infrastructure of international commerce. In the face of modern developments, of which international e-commerce is a prime example, co-existence and tolerance are no longer sufficient for the favorable development of commerce.

States have not generally exercised civil or criminal jurisdiction over acts committed abroad by foreigners. However, an examination of national legislation will show that States have provisions for doing so in both civil and criminal cases. Under international law, a State is not allowed to exercise its jurisdiction in the territory of a foreign State in the absence of a permissive rule of international law. To that effect, the practice of States and judicial opinion have shown that in certain cases, a State may extend the application of its criminal laws to cover acts committed overseas by foreigners. Whereas the territoriality principle has primacy in all major legal systems and needs no special justification, a State wishing to exercise extraterritorial legislative jurisdiction within its own territory must invoke an accepted basis of international law in justification. Such legislation is an exception to or an extension of the

77. Mann, supra note 25, at 25, n.8 (translating the original text while noting the copy error when the original text was copied). "First, whether a statute extends [within, not beyond] its territory to those not subject; second, whether the effect of a statute extends beyond the territory of the legislator."

78. See Jennings & Watts, supra note 37, at 466. In their examination of international law, Jennings and Watts limit themselves to criminal law, but only because, generally, in their view the exercise of State authority is more evident and creates more serious problems in criminal cases.

79. See Heiskanen, supra note 69, at 130-131; see also Jennings, supra note 51, at 518. See also Mann, supra note 26, at 35. For the rejection of that portion of the opinion of the majority in the Lotus Case which conferred a wide discretion on States in this respect and limited only in certain cases by prohibitive rules. "These sentences seem to propagate the idea of the delimitation of jurisdiction by the State itself rather than international law or, in the words of Sir Hersch Lauterpacht, they proclaim the principle of presumptive freedom of State action, and may, therefore, have to be read as countenancing a most unfortunate and retrograde theory." Id. "It can be confidently asserted that they have been condemned by the majority of the immense number of writers who have discussed them, and today they probably cannot claim to be good law." Id. See also I. Cameron, The Protective Principle of International Criminal Jurisdiction at 316-20 (1994). But see B.H. Oxman, Jurisdiction of States, in 3 Encyclopedia of Public International Law 55, 56 (R. Bernhardt, ed., 1992).
It should be noted that, as far as the present state of international law is concerned, justifying an assertion of extraterritorial jurisdiction on one of the recognized bases is enough for complying with the said law. This fact does not deprive other States from lodging protests against such exercise, but in the absence of a breach of international law, such conduct would not entail international liability on the exercising State. It is important to establish the extent to which a jurisdictional principle is recognized by international law. To this effect, seven principles are examined: the subjective and objective territoriality principles, the nationality principle, the passive personality principle, the protective principle, the effects principle, and the universality principle.

1. Subjective and Objective Territoriality

The first justifications for extraterritorial jurisdiction to be considered are found in the territorial principles of jurisdiction. As a result of the ever-increasing complexity of acts or omissions in criminal law, and of the possibility that an agreement may be made in one country and performed in another, the territorial principle has been given a constructive interpretation by national legislation and jurisprudence. States have been concerned that transnational acts might escape regulation since it is perfectly possible that the whole act may not be performed completely in one State. As the Harvard Research Draft Convention of 1935 proposed, it is no longer necessary to establish that the crime be committed in whole, but only in part within the territory, that is, "when any essen-

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their jurisdiction, it leaves them in this respect a wide measure of discretion. . . . Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offenses committed outside the territory of the State which adopts them. . . . The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

Id.
See also 3 H. Lauterpacht, International Law, Being the Collected Papers of Hersch Lauterpacht 235-39 (1977); Jennings, supra note 47, at 210. "Each one of these principles of jurisdiction [the nationality, universality and protective principles], by implication confirms the primacy of the territorial principle: for they exist in the form of exceptions of this principle." Id. See also Council of Europe, Extraterritorial Criminal Jurisdiction 21, 25 (1990). "Making a distinction between the principle of territoriality, on the one hand, and other principles of jurisdiction, on the other, is in itself of significance, since it implies that other principles of jurisdiction are seen as exceptions or complements to the principle of territoriality and are therefore in need of justification and special regulation." Id.
tial constituent element is consummated there.” According to the subject interpretation, a State may claim jurisdiction over an offense if it was commenced within its territory but not completed there, while the objective interpretation connotes the situation where the crime was commenced abroad but consummated within its territory. Both extensions are accepted under international law.

These interpretations may be used in respect to contracts in international e-commerce where all the elements of the transaction cannot be linked to one State. But how could an intelligible analogy be made between such different spheres of law? What would be an essential constituent part of a transaction? One such part would no doubt be the offer, without which a contract could not be formed. A State could claim that it had jurisdiction, since the consumer within its territory made the offer that “commenced” the transaction (subjective application). The same may well be said of the territory where the offer has been accepted, that is, in the State where the Web trader is established or has its principal place of business. The transaction would be completed and consummated in that State (objective application). This interpretation is in line with statements made by scholars noting that the objective territoriality prin-

81. See Harvard Research, supra note 27, at 495. See also Harris, supra note 27, at 265. The Harvard Research is not binding international law, but its statements as to customary law and its de lege ferenda statements are of value due to the extensive study behind it. Id. Cf. Restatement (Third) of Foreign Relations Law § 402(1)(a) (conduct that, wholly or in substantial part, takes place within its territory); see also Brownlie, supra note 28, at 303-4; see also Jennings & Watts, supra note 37, at 460; see also Shaw, supra note 33, at 459.

82. See Harvard Research, supra note 27, at 484-503. The reason why these two interpretations of the territoriality principle are listed under the title “extraterritorial jurisdiction” is due to the fact that a part of the crime, whether the commencement or the consummation of the crime, has occurred outside the territory of the State. It seems illogical for a State to claim that it is exercising territorial jurisdiction over a crime that would not be a crime if only territorial facts were taken into account. Furthermore, the objective and subjective territoriality principles, if invoked, need to be justified under international law, as do all other principles justifying the exercise of extraterritorial jurisdiction. Cf. Jennings, supra note 51, at 518. Curiously, Jennings did not include the subjective territoriality in his list of principles of extraterritorial jurisdiction requiring justification. Due to the logical difficulties in making this distinction, it is doubted whether he intended his list to be exhaustive.

83. See Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7). On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there. Id.

See also Harvard Research, supra note 27, at 484-503; see also Jennings & Watts, supra note 37, at 459-60.
principle would allow the Commission of the European Communities to apply EC competition law to a contract made in a third country but substantially performed, at least on one side, within the Community.\textsuperscript{84}

There is a distinction in this context, between an invitation to treat and an offer. In case the trader's Web site is considered to be an invitation to treat, the communication by the consumer will be regarded as an offer instead of an acceptance of the trader's offer.\textsuperscript{85} In such case the transaction would have been commenced in the consumer's home State, which could base its jurisdiction on the subjective territoriality principle. If the same Web site were considered as an offer, the same State could have resort to the objective interpretation. While it is not clear which of

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\textsuperscript{84} See D. Wyatt & A. Dashwood, Wyatt and Dashwood's European Community Law 385 (1993) (stating that "it is generally accepted in international law that a state is entitled to jurisdiction where activity which was commenced abroad is brought to consummation on its territory."). See infra, section III C 5 a iii (providing more on the views of the European Court of Justice and the Commission).

\textsuperscript{85} See H.H. Perritt, Jr., Dispute Resolution in Electronic Network Communities 38 Vill. L. Rev. 350, 374-76 (1993). After an examination of the Restatement (Second) of Contracts (1981), § 24, § 26 Comment b., and § 29, Perritt concluded that the Restatement was consistent with the approach that a network service provider's Web page is a solicitation of offers. Id. At the European Commission public hearing on jurisdiction and applicable law in e-commerce on 4-5 November 1999 in Brussels, the representative of the Bar Council of England and Wales favored to treat Web pages as invitations to treat and the initial communication by the consumer as an offer. See also L. Davies, Contract Formation on the Internet, Shattering a Few Myths, in Law and the Internet - Regulating Cyberspace 97, 115 (L. Edwards & C. Waelde eds., 1997). "Offers for sale made to the world can prove to be somewhat inconvenient. Revoking them can also prove a little difficult. It is, however, generally accepted that most Web pages or electronic mail messages that inform users of the availability of goods or services are akin to advertisements and so constitute invitations to treat." Id. See also 1 M. Hemmo, Sopimusоikeus 78-9 (1997). In the relevant Finnish legislation (Laki varallisuusoikeudellisista oikeustoimista 13.6.1929/228), for example, the term "offer" has not been defined. Scholarly opinion, however, holds that in general advertisements on newspapers or parallel marketing do not amount to an offer. Id. Instead, even if an advertisement may be sufficiently detailed to satisfy the specificity of an offer, marketing that is directed to an unspecified audience is considered as an invitation to treat. Id. In both the Restatement and Finnish law the question seems to be still open.

It is interesting to note that the distinction between a one-to-one medium (e.g. the telephone) and that of a one-to-many medium (e.g. the radio or the television) is impossible to maintain in interactive computing. In the former case, the merchant may expect to receive a communication from the consumer via the same medium, while not in the latter. In interactive computing there can be active and passive recipients of the information provided by the merchant, but not necessarily either one. Therefore, any rules on offer, acceptance or invitation to treat established for one medium alone are not sufficient for interactive computing. See generally K.M. Doherty, WWW. Obscenity.com: an Analysis of Obscenity and Indecency Regulation, 32 Akron. L. Rev. 259 (1999) (providing analogies made between the Internet and the more traditional media). See also G.E. Simon, Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors, 88 J. Crim. L & Criminology, 1015, 1040-41 (1998).
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the two approaches should be preferred,\textsuperscript{86} the national legislator could \textit{prima facie} argue the basis of its legislation on both grounds, and, therefore, the distinction would not seem of acute importance: what is significant is that one of the constituent elements did occur on the State's territory.

2. \textit{The Nationality Principle}

Personal jurisdiction preceded territorial jurisdiction in the evolution of international law, but gradually had to give way to it despite not being entirely superseded by it.\textsuperscript{87} The exercise of jurisdiction over nationals, whether physically within the State or abroad,\textsuperscript{88} the "active personality" or "nationality principle," is an independent ground and an equally justifiable basis of jurisdiction as its territorial counterpart.\textsuperscript{89} Since international law recognizes that nationality is an aspect of Statehood, a national enjoys certain rights and duties that show a special bond between the State and the national, it is not difficult to see the reasoning behind legislative jurisdiction over nationals.\textsuperscript{90} States have passed laws regulating the conduct of their nationals abroad, in the form of criminal laws, tax laws, and legislation regulating their foreign property.\textsuperscript{91}

The application of both the nationality and territoriality principles to the same case has traditionally resulted in concurrent jurisdiction. The United States has claimed that the prescribing State may require its national abroad, whether a natural or a legal person contracting with

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86. See H.H. Perrit, \textit{supra} note 85, at 374-76. Perritt cites in support the underlying policy concern that network service providers would be held in breach of contract if they could not provide the requested service or the promised quality of service in cases of a large number of purchasers. \textit{See also} Heiskanen, \textit{supra} note 23, at 34-5.

87. See \textit{Schwarzenberger & Brown, supra} note 63, at 74. "This 'old notion' is indeed both older and newer than the territorial theory." \textit{See also} P.C. Jessup, \textit{Transnational Law} 41 (1956).


89. Henkin, \textit{supra} note 31, at 285-8. Henkin points out that "[i]nternational law has identified no basis for restricting the autonomy of either the territorial State or the State of nationality in this respect." \textit{Id.}

90. \textit{See id.} at 285.

91. \textit{See Jennings & Watts, supra note 37}, at 462. \textit{See also} J-G. Castel, \textit{Extraterritorial Effects of Antitrust Laws}, 179 \textit{Recueil des Cours} 21, 33 (1983 I). Civil law countries have used the nationality principle extensively, whereas common law countries have been more reticent in using the principle. \textit{Id. See also} Born, \textit{supra} note 42 at 506. For example, the U.S. may generally forbid its citizens from trading with nations hostile to the U.S., even if the trading occurs abroad. \textit{Id. See also Henkin et al, supra} note 44, at 835 (providing a comprehensive list of national provisions regulating the foreign conduct of nationals).}
anyone to comply with the United States law. Most States have taken
the approach whereby the regulatory authority of the territorial State is
paramount.\footnote{See D. Lange & G. Born, The Extraterritorial Application
of National Laws 38 (1989); see also European Community: Note and Comments
on the Amendments of 22 June 1982 to the Export Administration Act, Presented
to the United States Department of State on 12 August 1982, a Note on the Same Subject
Presented by the British Government on 18 October 1982; further Aide-Mémoire
Presented by the European Community on 14 March 1983, reprinted in A.V. Lowe, Extraterritorial Jurisdiction: An Annotated Collection of
Legal Materials 197-219 (1983).}

In the absence of customary international law principles governing such situations, States have resorted to treaties, most notably in the area of tax law, in an effort to protect their nationals from double or conflicting liability, whereas in international e-commerce the situation is largely unregulated.\footnote{See Commission of the European Communities, Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(99)348 final.}

The application of the nationality principle over e-commerce transactions comes into question when the national is abroad, that is, when the regulating State cannot resort to the territorial principle. The nationality principle offers the legislator a wide reach over its nationals, who are parties to an international electronic transaction. Information technology offers consumers effective means for purchasing goods or services while abroad from any trader whose site is available on the Internet. Networks for e-commerce are growing at a remarkable speed, and new developments have the ability to increase the number of purchases made by nationals while physically overseas.\footnote{See ITU, Challenges to the Network (1997), reprinted in WTO, supra note 7, at 8. The International Telecommunications Union stated in 1997 that in 1991 there were 16.3 million cellular subscribers, in 1996 135 million and a predicted 400 million in 2001. Id. For further discussion see WAP (Wireless Application Protocol) (visited Nov. 12, 1999) <http://whatis.com/wap.htm>. The recent development, the WAP (Wireless Application Protocol) is “a specification for a set of communications protocols to standardize the way that wireless devices, such as cellular telephones and radio transceivers, can be used for Internet access, including e-mail, the World Wide Web, newsgroups and IRC. Id. See generally also Wireless Application Protocol (visited July 4, 2000) <http://www.wapforum.org>.}

On one hand, there is the interest of the territorial State to prescribe rules applicable to conduct taking place within its territory, and on the other hand, there is the interest of the State of nationality to see to it that its consumers are not mistreated. A solution must be reached on how these two bases should be reconciled.

3. The Passive Personality Principle

The \textit{passive personality} or \textit{passive nationality}, principle is supported by those States whose legislation allows the assertion of jurisdiction over
crimes committed abroad against their nationals by foreigners. A focus shift from the person committing the act (the nationality principle) to the injured party has important consequences. The examination of the jurisdictional principles, so far, has shown a gradual extension of a State's legislative jurisdiction. The subjective and objective territoriality principles have conferred jurisdiction on a State over conduct, the constituent elements of which have not all been performed within its territory. The nationality principle has permitted States to exercise jurisdiction over their nationals in a foreign State. The conduct has no link to the State's territory, but is justified by the personal link. However, the passive personality principle would grant jurisdiction on a State over foreigners in foreign States by reason of the nationality of the victim. It is the tenuous character of this link that has caused criticism. The principle has not received general acceptance for ordinary torts and crimes, but is used in a number of international treaties concerning serious crimes, and by some national legislation regarding terrorist attacks against nationals. The principle did not find a place in the Harvard Draft, since it was “...the most difficult to justify in theory, ... unless circumscribed by important safeguards and limitations, it is unlikely that it can be made acceptable to an important group of States [and] ... without qualifications has been the more strongly contested than any other type of competence.” The principle has not been supported by doctrine either.

95. See Harvard Research, supra note 27, at 578. See also The Restatement (Third) of Foreign Relations Law, § 402, Cmt. g, maintains that the principle may be invoked “particularly” in cases of criminal law, thus leaving it open whether it could be applied to civil or private law as well. See I. Detter, The International Legal Order 409 (1994). The reference to passive nationality is made by I. Detter who states that “it would be more appropriate to rename [the passive personality principle] the passive nationality principle, since it is nationality, rather than any other connecting factor that has been decisive in the few cases where the principle has been allowed to operate.”

96. See Restatement (Third) of Foreign Relations Law at 240.

97. See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5(1)(c) (23 I.L.M. at 1027 et seq. and 24 I.L.M. at 535 et seq.) (1984). See also the Tokyo Convention on Offense and Certain Other Acts Committed on Board Aircraft 1963, 704 U.N.T.S. 219 et seq.

98. See 18 U.S.C.A. § 2332(a). Defining homicide as: “Whoever kills a national of the United States, while such national is outside the United States, shall— (1) if the killing is murder (as defined in § 1111(a)), be fined under this title, punished by death or imprisonment for any terms of years or for life, or both. . . .” However, paragraph (d) limits the prosecution to cases where the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions is of the opinion that such an offense was intended to coerce, intimidate, or retaliate against a government or a civilian population. Id.

99. Harvard Research, supra note 27, at 579; see also Brownlie, supra note 28, at 306. See also Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, at 22-3 (Sept. 7). The Court did not find it “necessary to consider the contention that a State cannot punish offense committed abroad by a foreigner simply by reason of the nationality of the victim.” Id. Furthermore, to claim
However, it cannot be said that general international law prohibits legislation based on the principle and a number of States have adopted the theory,\textsuperscript{101} although on many occasions, the application of the principle may be justified under the protective or the universality principles examined below.\textsuperscript{102}

Some scholars have stated that "so far, no realistic scenarios have arisen in the cyberspace context that would provoke use of the . . . principle."\textsuperscript{103} As applied to international e-commerce, the principle would justify the regulation of foreign business' Web sites accessible to nationals that the majority opinion in the case supports the principle is hardly convincing, since it is hard to see that ships be equated with 'national territory.' \textit{Id.} The dissenting opinion by Judge Moore illustrates the problems involved:

In substance, it means that the citizen of one country, when he visits another country, takes with him for his 'protection' the law of his own country and subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. . . . It is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of denial of justice, must look to that law for his protection.

\textit{Id.} at 92.

100. \textit{See} Akehurst, \textit{supra} note 33, at 162-66; \textit{see also} Brownlie, \textit{supra} note 28, at 306; \textit{see also} Mann, \textit{supra} note 26, at 39-41, 92-3; \textit{see also} Shaw, \textit{supra} note 33. “The overall opinion has been that the passive personality principle is rather a dubious ground upon which to base claims to jurisdiction under international law and it has been strenuously opposed by the US and the UK, although a number of states apply it.” \textit{Id.} \textit{See also} B.Stern, \textit{Quelques Observations sur les Regles Internationales Relatives a l'application Extraterritoriale du Droit}, 32 A.F.D.I. 7, 34 (1986). “. . . Il semble en effet que les règles tendant à étendre la compétence normative d’un Etat à toutes les situations extraterritoriales dont seraient victimes ou bénéficieres des nationaux sont contraires au droit international: ainsi ne sont sans doute pas conformes au droit international coutumier les règles du droit pénal s'appliquant à des actes commis à l'étranger par des étrangers du seul fait que la victime est nationale.” \textit{Id. See also} G.R. Watson, \textit{The Passive Personality Principle}, 28 Tex. Int'l L.J. 1, 14-15 (1993). The principle has been criticized for intruding too deeply into the sovereignty of other States, of depriving potential defendants of notice that their conduct is criminal and because the principle is impractical, in that, many extradition treaties will not permit rendition of a fugitive to the victim's home State and that the victim's home State will often not be able to prosecute for lack of fresh evidence and witnesses. \textit{Id.}

101. \textit{See} Watson, \textit{supra} note 100, at 39 n.180 (referring to the penal codes of France, Germany, Italy, Greece, Austria and Turkey).

102. \textit{See} Harvard Research, \textit{supra} note 27, at 579. “Since the essential safeguards and limitations are precisely those by which the principle of universality is circumscribed in the present article, and since universality thus circumscribed serves every legitimate purpose for which passive personality might be invoked in such circumstances, it seems clear that the recognition of the latter principle in the present Convention would only invite controversy without serving any useful objective.” \textit{Id.}

103. Wilske & Schiller, \textit{supra} note 73, at 127, n 55.
in foreign States. Bearing in mind the dubious status of the principle, it is unlikely that it would attract the approval of States in international e-commerce, although an assertion of jurisdiction based upon the principle cannot be rejected outright.

4. The Protective Principle

The rationale for the protective (or security) principle derives from the nature of the interest injured, as opposed to territory or natural and legal persons as jurisdictional links. The protective principle is defined broadly as connoting the authority of a State to grant extraterritorial effect to its criminal laws over foreigners in foreign States whose conduct is damaging national security and other central State interests. Although being a well-established concept, the exact scope of the principle has been subject to various definitions. The Harvard Draft includes crimes against “the security, territorial integrity or political independence of [the] State,” and a crime “consist[ing] of a falsification or counterfeiting . . . of the seals, currency, instruments of credit, stamps, passports, or public documents. . . .” The Restatement (Third) of the American Law Institute (“the Restatement (Third)”) is broader in scope and in a general provision includes certain conduct “directed against the security of the state or against a limited class of other state interests.”

The Harvard Draft stated that most, if not all, States use the principle to varying extents. It is, therefore, unclear to which acts the principle applies and how far it extends in practice. The question for present purposes is whether the protective principle could be applied to cases where the State wishes to extend its legislation to cover transactions in international e-commerce.

104. See Cameron, supra note 79, at 2.
105. Harvard Research, supra note 27, at 543-63 (Articles 7 and 8).
106. Restatement (Third) of Foreign Relations Law at 240. The principle has also been included in a number of treaties providing for multiple jurisdictional grounds in respect of specific offense. See also, the 1979 Convention against the Taking of Hostages, 18 I.L.M. 1456 et seq.; see also 1994 Convention on the Safety of United Nations and Associated Personnel, 34 I.L.M. 484 et seq. Both conventions impose a duty on a State to establish its jurisdiction over the specific crimes in a number of cases, including when the crime is committed “in an attempt to compel that State to do or to abstain from doing any act.” Id.
107. See Harvard Research, supra note 27, at 543-61. The protective principle is not universally recognized, but is generally accepted as a jurisdictional basis. Where most states in continental Europe and Latin America have given it as much emphasis as the territorial and nationality principles, the United States and the United Kingdom are among the small group of States which have generally refrained from invoking the principle, although accepting its legitimacy. See also Jessup, supra, note 87, at 50-1. See also M.B. Krizek, The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice, 6 B.U. Int’l L.J. 337 (1988) (treating the principle in a general manner).
Bearing in mind that Brownlie emphasizes that there is no significant distinction between the types of legislative jurisdiction (criminal and civil), his statement whereby “[i]n so far as the protective principle rests on the protection of concrete interests, it is sensible enough,”\textsuperscript{108} would lead us to consider the definition of a concrete interest for purposes of the principle. The opaqueness of the principle lies in the subjectivity involved in determining its sphere of application. One State may, of course, think it proper that State interests encompass the interests of its population (consumers) whereas such considerations would play no part in other countries. In order to resolve the conflict that arises between those relying more on the territorial principle and those giving a wide interpretation to the protective principle, significant developments should be made in customary international law or in international conventional law to one end or the other. It is submitted that it is quite impossible to reach an international consensus on what is a State interest or security for the purposes of the principle,\textsuperscript{109} since State interests have developed independently throughout history to reflect an extraordinarily wide field.

Yet it may be argued that the act must be directed at a limited class of State interests. In cyberspace, this might include crimes such as the spreading of viruses into governmental databases or trading in illegal substances that are intended to harm the population at large, where the protection of national consumer policy does not belong. Indeed, some commentators have interpreted the decision of the International Court of Justice (“ICJ”) in the Barcelona Traction case to indicate that the principle may not be invoked to avoid purely economic harm\textsuperscript{110} and others, backed by substantial State practice, have stated that those acts which offend against mere policies of a State do not fall within the ambit of the principle.\textsuperscript{111} As a research conducted by the Council of Europe on the practice of member States and international agreements pronounces:

\textsuperscript{108} Brownlie, supra note 28, at 307.

\textsuperscript{109} See M. Tupamaki, Valtion rikosoikeudellisen toimivallan ulottuvuus kansainvälisessä oikeudessa 264 (1999).

\textsuperscript{110} See L. Wildhaber, The Continental Experience, in Extra-Territorial Application of Laws and Responses Thereto, supra note 34, at 63-9. On the other hand, the Finnish Criminal Code, for example, provides in Section 1(3) that a crime is considered to have been directed at Finland in case by the act Finnish state, military, or economic rights or privileges have been endangered.

\textsuperscript{111} See Jennings & Watts, supra note 37, at 471. Especially the acts of the United States in seeking to implement Acts enacted to further the foreign policy objectives, such as the Export Administration Act 1985 and the range of Acts passed to implement an economic embargo on the republic of Cuba and sanctions against Iran and Libya have met with widespread opposition. See e.g., R.G. Alexander, Iran and Libya Sanctions of 1996: Congress Exceeds its Jurisdiction to Prescribe Law, 54 Wash. & Lee L. Rev. 1601 (1997); see also Jennings & Watts, supra note 37, at 471, n 32.
There seems to be a tendency in some countries to stretch the concept of 'essential' interests to include such interests as the capital market, national shipping and aviation, the environment and certain industrial and commercial interests, for instance industrial secrets, though this is not a general trend. (...) In publications, the view is commonly expressed that only 'essential' interests may be so considered, but it is far from clear what kind of interests are covered by this qualification. One may wonder whether it is really possible and even wise to try to enumerate such interests. To ensure that the application of this principle of jurisdiction is in conformity with the general objectives of public international law, it should be confined to interests that are considered to be vital for the existence of the state, its institutions and its constitutional and social order. Economic interests, which are essentially the interests of trade and industry, are thus in principle not covered. Perhaps only when economic interests transcend private concerns and are of national, public importance (for example, preventing the circulation of counterfeit currencies, or protecting national health) is it justifiable to resort to claims of jurisdiction on the basis of this principle under public international law.112

In light of the above quotation and the opinions of commentators in general, it is difficult to see clearly the limits of the protective principle. Are economic interests not vital for a State's social order? Would consumer interests be vital for the said order? At present, consumer interests may well be of national, public importance to some States but not to others. However, consumer transactions in international e-commerce are increasing rapidly. What might now seem to be insignificant to a State's interest may affect the economy of a State considerably in the future. State interests take another shape as technology alters the structure of transnational commerce. While international business has relied on private organizing, consumer commerce is increasing and States will have an interest to see that their mandatory laws are applied. The increasing importance of consumer protection may gradually elevate consumer interests to the category of public or national interests under public international law.

While the seriousness of the act usually entails that it is classified as criminal under national law, doubts have been raised against whether the principle might be extended to conduct which is not regarded as criminal at all.113 In this respect, there is substantial support for the argument that international law requires that such acts must be generally recognized as crimes by developed legal systems.114 The material conduct, for purposes of the present article, is eventually sanctioned by

112. COUNCIL OF EUROPE, supra note 80, at 14, 29-30.
113. See Bowett, supra note 41, at 10-11.
114. See Restatement (Third) of Foreign Relations Law § 402, Cmt f; see also Jennings & Watts, supra note 37, at 470 (noting "serious crimes"); see also Bowett, supra note
public law provisions in certain countries, but is neither a crime, nor a

tort. An example of such conduct is when a foreign trader applies an un-
reasonable contractual term on a national consumer. This distinction
suggests that the principle would not cover such situations. However, it
seems that the classification of an act into a crime is necessarily con-
ected to the subjective national process that allocates which acts are
deemed prejudicial to the interests of the State. Here we are again
warned about the easy abuse of the principle. Nevertheless, this is a
national classification and there is no guarantee that it will survive the
international law test, and the principle has been rarely invoked in civil
litigation. This, however, is not to say that an international tribunal
should not consider the principle, after all, it might well be accepted.

Some commentators have included a category to the protective prin-
ciple covering assertions of jurisdiction over acts which are committed
abroad by foreigners, but which offend the prescribing State's ideology or
religion. As far as such action is seen as an attack against the State in
that the ideology or religion is seen as a central State interest, such clas-
sification seems acceptable. However reprehensible such acts are from
the point of view of the prescribing State, international law has not ac-
cepted such a justification for a jurisdictional basis.

5. The Effects Doctrine

The prevalent rationale in several consumer laws is not only to en-
sure that the weaker party to the contract be given certain remedial
rights (i.e., that his or her rights are enforced in case the merchant vio-
lates the contract or the respective laws in general), but also to regulate
the conduct of the merchants, aiming at minimizing the likelihood of con-
sumer disputes. In the international context this is especially valua-
dle, due to the limits consumers have in transnational litigation. The aim
of this section is to look at how States could justify the assertion of their
legislative power over conduct that is performed outside their territory
(e.g., the maintenance of a Web page), but has effects on national
consumers.

While the subjective and objective territoriality principles have de-
developed significantly in the legislation and jurisprudence of both civil
and common law systems, the most fierce dispute has arisen over the

41, at 11. See also Harvard Research, supra note 27, at 549-52 (portraying types of offense
included in national legislation).
115. See Shaw, supra note 33, at 469.
116. See Born, supra note 40, at 506.
117. See Tupamäki, supra note 109, at 343-46.
existence and application of the so-called effects doctrine. The doctrine or principle arguably extends beyond the objective territorial principle and applies to conduct of foreigners overseas producing certain "effects" within national territory.

The controversy over the compatibility of the principle with international law arose from United States legislation and court decisions seeking to apply the principle mainly in the field of securities and antitrust regulation. Several countries, notably the United Kingdom, have challenged the validity of the measures while the position of the European Union ("EU") has been more vague. These three approaches on the limits of international law have markedly different set of criteria, each connoting different impacts on international e-commerce, not only to consumers but especially to traders.

The dispute surrounding the doctrine is conveniently established by illustrating its relationship to other jurisdictional principles, most pertinently to the objective territorial and the protective principles. After all, in practically every international dispute, States proclaim that they have acted in conformity with international law. In the same fashion, States will base their jurisdiction on the least controversial principle whenever possible, starting from the territorial principle and, depending on the case, referring then to either the protective or the nationality principle. Indeed, the three constituent units of jurisdictional rhetoric include (1) a State's territory where the objective territorial principle is relevant; (2) a State's membership (nationals, even if abroad); and (3) a State's national interest, as illustrated by the protective principle.


120. See e.g., Shaw, supra note 33, at 2.

121. See Note, Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norm, 103 HARV. L. REV. 1273, 1280 (1990).
a. The Effects Doctrine as an Interpretation of the Objective Territorial Principle

i. The British View

The most restrictive interpretation of the limits of the objective territorial principle is adhered to by the British and arguably supported by the reasoning of the Permanent Court of International Justice in the *Lotus* case.\(^{122}\) This approach restricts the reach of the principle to those effects which are "direct, if not immediate, and which form a part of the actus reus; where, in the language of the older cases, the crime was 'consummated,' viz. completed, in the territory claiming jurisdiction."\(^{123}\) The opinion of Professor Jennings was summarized in the *Dyestuffs* case:

"...in respect of penal offense which amount to 'common crimes' generally recognized as such, States have somewhat relaxed the principle of the territoriality of the penal law. On the other hand, restraint of trade laws belong not to that category where State practice permits a wide discretion but rather to the category of public law peculiar to a State or group of States, which should therefore be territorially confined unless there is a specific permissive rule. [. . .] This judgment [Aluminium Company of America (Alcoa) case] no longer requires that a part of the illegal conduct should take place within the territory of the State claiming jurisdiction and considers it enough that all that happens within the territory is an economic repercussion in terms of trade. Hence the judgment creates not a difference of degree but a difference of kind. The result is that essentially extra-territorial jurisdiction is being claimed on the strength of the territorial principle. This constitutes an inherent contradiction."\(^{124}\)

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122. *See Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, at 23, 27, 30 (Sept. 7).* The Court referred to "effects" in its decision in the Lotus Case: "...if one of the constituent elements of the offense, and more especially its effects, have taken place there." However, the Court stated later that the negligence on the French ship and the effects on the Turkish vessel were "legally and entirely inseparable, so much as their separation renders the offense nonexistent."


124. Case 48/69, Imperial Chem. Indus. v. Commission 1972 E.C.R. 619, 624-5 (the applicants view). *See also* Cases 89, 104, 114, 116, 117 &125-129/85, Ahlström Osakeyhtiö v. Commission 1988 E.C.R. 5193. [hereinafter the *Wood Pulp case*] This case was before the European Court of Justice. The United Kingdom appeared as an intervenor and submitted that the Court should hold that jurisdiction was based on territoriality and not on effect. *Id.* Arguing that jurisdiction should be linked to the actions of EC subsidiaries and agents whose activities were the means by which the prohibited practices had been implemented within the Community, the British sought to maintain their position as regards the U.S. *Id.* *See* Jennings, *supra* note 88 at 160. As Professor Jennings has also stated: "[a]nd, indeed, the same conclusion is required by the reason of the thing, for a different conclusion would permit a practically unlimited extension of the [objective application of the territorial] principle to cover almost any conceivable situation. It would be absurd, indeed, if an almost unlimited extra-territorial jurisdiction could be ostensibly based upon a territorial principle of jurisdiction." *Id.*
According to the British view, it is the localization of the actus reus within the territory that justifies an assertion of jurisdiction, and if the act cannot be so linked, then jurisdiction has to be justified by resort to one of the more doubtful bases of extraterritorial jurisdiction: the effect must be the necessary legal effect and not the "ulterior effect economically or socially." The U.K. government has stated that:

[on general principles, substantive jurisdiction in anti-trust matters should only be taken on the basis of either (a) the territorial principle, or (b) the nationality principle. There is nothing in the nature of anti-trust proceedings which justifies a wider application of these principles than is generally accepted in other matters; on the contrary there is much which calls for a narrower application. [...] The territorial principle justifies proceedings against foreigners and foreign companies only in respect of conduct that consists in whole or in part of some activity by them in the territory of the State claiming jurisdiction. A State should not exercise jurisdiction against a foreigner who has committed no act within its territory or a foreign company that has not committed an act within its territory.]

The British view claims that the "effects" jurisdiction is not accepted in international law, or at least that it is not objectionable to Britain. There is not enough evidence to show that international law permits such a wide application of the objective territorial principle or recognizes

125. See Lowe, supra note 119, at 262-67.

126. Mann, supra note 26, at 87. See also Jennings, supra note 88 at 159-60; see also Higgins, supra note 68, at 7 (stating the English view).

127. See Statement of Principles According to Which, in The View of The United Kingdom Government, Jurisdiction May Be Exercised Over Foreign Corporations in Anti-Trust Matters, reprinted in Brownlie, supra note 28, at 316-17. See also UKMIL, 55 Brit. Y.B. Int'l L. 540 (1984); see also UKMIL, 60 Brit. Y.B. Int'l L. 650, 651 (1989). See also Mann, supra note 26, at 104. "The type of 'effect' which the Alcoa [see note 130] ruling has in mind has nothing in common with the effect which by virtue of established principles of international jurisdiction confers the right of regulation. The 'effect' within the meaning of the Alcoa ruling does not amount to an essential constituent part of the restraint of trade, but is an indirect and remote repercussion of a restraint carried out, completed and, in the legally relevant sense, exhausted in the foreign country." Id. But see Brownlie, supra note 28, at 312 (referring to the Attorney-General Sir John Hodson, July 15, 1964; British Practice, 146, 153 (1964)). "The view of the United Kingdom appears to be that a state acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction." Id. But see Jennings & Watts, supra note 37, at 475. "The U.K. has generally been opposed to the 'effects' principle... notwithstanding the occasional suggestion to the contrary, at least if the effects are substantial. Id. (referring to the statement by the Attorney-General during debates on the Shipping Contracts and Commercial Documents Bill). See also Parliamentary Debates (Commons), Vol. 698, col. 1280 (1964)).

128. Lowe, supra note 119, at 267; see also Jennings & Watts, supra note 37, at 474-75. See also Mann, supra note 26, at 100-08.
such an assertion as an independent and valid principle of extraterritorial jurisdiction.

ii. The U.S. Approach

A strict territorial view has proved to be too restrictive for the United States. Departing from its earlier approach, the U.S. began to assert in the 1940's that jurisdiction could be claimed over acts which, although committed by foreigners wholly overseas, were intended and did affect U.S. imports thereby producing effects within U.S. territory. It has been argued that the Permanent Court of International Justice sanctioned the principle in the Lotus case, where it referred to the effects of an offense. While the Court did not explain what effects were essential constituent elements, it did point out that it did “not know of any cases in which governments [had] protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense.”

This approach has since been modified by U.S. courts in several cases with respect to the nature of the effects by first introducing and later placing doubt on the existence of a jurisdictional rule that takes into account elements of international comity. The comity approach

129. See American Banana Company v. United Fruit Company, 213 U.S. 347, 356 (1909). “The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” Id.

130. See United States v. Aluminium Co. of America, 148 F.2d 416, 443-44 (1945). (pronouncing that “it is settled law [. . .] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends. . . . Both agreements would clearly have been unlawful, had they been made between the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.”).


133. See Hartford Fire Insurance Co., et al. v. California et al., 509 U.S. 764 (1993). Whereas the comity approach requires that the judge considered and balanced the interests of the different governments involved in anti-trust cases when jurisdiction was under issue, the Supreme Court in Hartford Fire, required that comity be considered only once the court had established its jurisdiction. Even in such a case it would only influence the outcome if there existed a true conflict between U.S. law and foreign law, that is, when it was impossible for the defendant to comply with both laws. The majority opinion in the case has been heavily criticized in that it is contrary to both the previous line of Supreme Court cases and the Restatement (Third). See also P. Torremans, Extraterritorial Application of E.C. and U.S. Competition Law, 21 EUR. L. REV. 280, 282-83 (1996); see also R.C. Reuland, Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United
will be addressed in detail later in this study. For present purposes, it should be enough to note that relevant U.S. legislation applies to conduct of foreign nationals outside U.S. territory that has or is intended to have direct, substantial, and foreseeable effect within its territory.

United States practice views the effects doctrine as an aspect of jurisdiction based on territoriality, although the principle has sometimes been viewed as a distinct category, as has been the case with the objective territorial principle. At times the effects doctrine and the objective territorial principle have been referred to interchangeably. Accordingly, U.S. commentators have claimed that it is not accurate to say that public international law imposes strict territorial limits on national jurisdiction and that the disagreement concerns when precisely extraterritorial assertions of national jurisdiction are permissible under contemporary international law. These assertions, mainly within the area of antitrust regulation, have been justified by the effective appli-


134. See infra, section IV C 1.

135. See *Restatement (Third) of Foreign Relations Law* § 402(1)(c); see also A.F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case,* 89 Am. J. Int’l L. 42,47 (1992). "...[C]ertainly direct, substantial and foreseeable effect coupled with intent or presumed intent is no longer contestable in the United States as a basis for jurisdiction, and was in fact not contested in the [Hartford Fire case]." Id. See also *Restatement (Third) of Foreign Relations Law* § 402 (1)(a), Cmt. d.

136. See id.

137. See U.S. v. Smith, 680 F.2d 255 (1st Cir. Mass 1982.). "Our courts have also developed a sixth basis for prescriptive jurisdiction which is referred to as the objective territorial principle." Id. "This principle has been defined as including acts done outside a geographic jurisdiction, but which produce detrimental effects within it." Id. "Those circumstances support the prescription and punishment of the cause of the harm as if it had been physically present where the effect takes place." Id.

138. Compare *Note: Extraterritorial Application of the Export Administration Act of 1979 under International and American Law,* 81 Mich. L. Rev. 1308, 1327 (1983) with M.F. Kelley, *The Prescriptive Jurisdictional Reach of U.S. Antitrust Law: Judge Learned Hand’s Requirement of a ‘Substantive Anticompetitive Effect,’* 23 U. Miami Inter-Am. L. Rev. 195, 204 (1991) (stating the view whereby the effects doctrine “emanates” from the objective territorial principle). See also C.L. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction in Legal Responses to International Terrorism* 131, 159 (M.C. Bassioumi ed., 1988) “Closely related to offenses, an element of which occurs within the territory (the basis of assertion of the subjective territorial theory), are those offenses in which the acts or omissions that comprise the offense take place or are committed wholly beyond the territorial boundaries of the forum state, but whose effect or result occurs within that state. Those latter offenses provide jurisdiction on the basis of the ‘objective territoriality’ theory.” Id.


140. But see, supra section III C 4.
cation of U.S. antitrust laws over domestic commerce. There is a need to protect U.S. producers and consumers from overseas antitrust conspiracies and also from the prospect that U.S. citizens might control actions through foreign subsidiaries, thereby having an adverse impact on U.S. businesses and consumers.141 Assertions of extraterritorial legislative jurisdiction have also been justified by the increase in transnational trade, the development of technology in general, and by the enormous consequences that foreign conduct has domestically.142

iii. Developments within the European Union

The U.S. approach has lead to the adoption, especially by the United Kingdom, of legislation aiming at protecting national trading interests threatened by extraterritorial measures.143 However, while the European Union has also opposed U.S. assertions of extraterritoriality, it has not itself remained indifferent towards restrictive practices, especially in the field of competition law. In discussing the extraterritorial reach of Community competition law, several theories and interpretations have emerged.

In the Dyestuffs case the European Court of Justice (“ECJ”) was confronted with a dispute concerning the applicability of the effects doctrine. However, the ECJ failed to give guidance as to whether the British view or the U.S. effects doctrine was applicable, but instead formulated the entity theory. According to this theory, a business or at least one of its subsidiaries must be present (i.e., registered within the prescribing State’s territory) for it to have legislative jurisdiction. The ECJ employed a group economic unity approach and held that the fact that a subsidiary had a separate legal personality did not prevent the imputing of the activities to the parent company, the latter being neither directly present in, nor trading with the Community.144 This was a way of giving effect to an application of the effects doctrine.

Whereas the ECJ has not explicitly accepted the effects doctrine in the field of competition law, it seemed to approve the doctrine in the field

141. See Lowe, supra note 92, at 4-5 (quoting the Address by the United States Attorney General Griffen Bell to the Law Council of Australia (1978)).
142. See generally, Born, supra note 139, at 61-71.
143. See Protection of Trading Interests Act (1980). See also Lowe, supra note 119, at 262-67 (noting the British Government’s view on the effects doctrine). See also Lowe, supra note 92, at 79-225 (examining the legislative measures taken by numerous countries in objection to the U.S. assertions of extraterritorial jurisdiction).
144. See Imperial Chem. Indus. v. Commission, supra note 124, at 661-663. Advocate-General Mayras laid a restrictive interpretation of the effects doctrine in his opinion whereby the relevant test to determine the jurisdictional limits of EC competition law was whether the effect was direct and immediate, reasonably foreseeable and substantial. Id. at 693-94.
of employment discrimination\textsuperscript{145} and arguments have been made that there was no logical basis for the distinction between these two areas of law.\textsuperscript{146}

The ECJ had an ample opportunity to establish its opinion on the effects doctrine in the \textit{Wood Pulp} case.\textsuperscript{147} Advocate General Darmon stated that the approach taken by the ECJ in the \textit{Dyestuffs} case did not mean that the location of the effects would not constitute a sufficient basis for jurisdiction, nor that conclusive arguments were put in support of the doctrine. He approved of the \textit{qualified effects doctrine} suggested by Advocate General Mayras in the \textit{Dyestuffs} case requiring that the effect be direct and immediate, reasonably foreseeable, and substantial.\textsuperscript{148} Mr. Mayras had opined that whether one put more stress on the effects or on constituent elements, competition law is not a creature of traditional criminal law, and in competition law, the effect of the offense is in fact one of its constituent elements and probably even the essential element.\textsuperscript{149}

In the \textit{Wood Pulp} case the European Court of Justice developed yet another interpretation of the jurisdictional test, namely the \textit{implementation doctrine}.\textsuperscript{150} Competition rules of the Community applied to produ-

\textsuperscript{145}. See Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405. The case concerned articles and a Regulation covering the freedom of movement of workers and services and “the extent to which the rule of non-discrimination may be applied to legal relationships established in the context of the activities of a sporting federation of worldwide proportions.” \textit{Id}. at 1420. The ECJ opined that “[b]y reason of the fact that it is imperative, the rule of non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community.” \textit{Id}. at 1420 (cited in the opinion of Advocate General Darmon in \textit{The Wood Pulp Case}, Ahlström Osakeyhtio v. Commission 1988 E.C.R. 5193, 5216-217.


\textsuperscript{148}. \textit{Id}. at 5226.

\textsuperscript{149}. Imperial Chem. Indus. v. Commission, \textit{supra} note 124, at 694.

\textsuperscript{150}. \textit{The Wood Pulp Case, Ahlström Osakeyhtio v. Commission} 1988 E.C.R. at 5243. “It should be observed that an infringement of Article 85 [present Article 81], such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.” \textit{Id}. \textit{See also} Torremans, \textit{supra} note 133 at 284. It is noteworthy that the entity-theory could not be applied in this case, because depending on the pulp company in question, there were either no subsidiaries within the Community or the control exercised over them was not substantial enough. \textit{Id}. 
cers, which implemented their pricing agreements within the common market, and it was immaterial whether or not they had recourse to subsidiaries, agents, subagents, or branches within the Community in order to make their contacts with purchasers within the Community. The ECJ then stated that this test "is covered by the territoriality principle as universally recognized in public international law." In its surprisingly short decision, the Court was unclear as to how the implementation test differed from the effects doctrine.

Some limitations that distinguish the Court's approach from an unrestricted application of the effects doctrine can be read from the judgment. The Court pointed out that economic effects must directly affect competition within the Common market. By this directness, it has been suggested that the Court meant that a defendant must, in some way, take part in actual sales to a Community purchaser, and/or that with respect to a recommendation on price levels, a company's acts must be "distinguishable" from those of others defendants. Indeed, the Court required that the wood pulp producers "sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers," which constituted competition within the common market. Furthermore, by stating that an agreement be implemented within the Common Market, the Court seems to say that it should concern the price, quantity, or quality of a product sold by a non-Community seller to a buyer in the Common Market, and that the seller should have some direct involvement with the restrictive agreement.

However, it is unclear what the jurisprudential basis of the Court was, since the borderline between conduct and effect was blurred. Some commentators have equated the implementation test with the effects test, while others have tried to distinguish them. P. Torremans

152. Lange & Sandage, supra note 146, at 159-60.
154. See Lange & Sandage, supra note 146, at 160-62.

The fact that one of the undertakings participating in an agreement is established in a third country does not prevent the applicability of Article 85 [present Article 81] if the agreement has effects within the territory of the common market. This means that the effect doctrine applies, even if the Court does not itself use that term, so that it makes no difference to the applicability of Article 85 [present Article 81] EC where the parties to an agreement are situated, or where the agreement is concluded: if an agreement has effects within the common market it falls within Community jurisdiction, assuming that it satisfies the trade between Member States test.

Id.
See also Case 56/65, Société Technique Minière v. Maschinenbau Ulm, 1966 E.C.R. 235, 249 (examining the test mentioned above). "...[I]t must be possible to foresee with a suffi-
has argued that the implementation doctrine closely resembles the effects doctrine, but the crucial element is the additional implementation requirement. In his opinion, the Court built in an element of self-restraint not seen in U.S. antitrust laws, especially after Hartford Fire.\textsuperscript{157} A slightly artificial territorial link is drawn. Implementation within the Community affects competition within the same, and in this respect trading into the Community is no different from trading on the Common Market.\textsuperscript{158}

It is also uncertain how this test could be applied to commerce on the Internet, but it is doubted, especially by Van Gerven A.G., that jurisdiction could be validly claimed in the absence of any kind of marketing organization within the community in case of direct sales by companies to customers within the Community. The ECJ could have better referred to the “place of constituent effect,” meaning, where the agreement or practice had a specific effect on competitive conditions.\textsuperscript{159}

In a recent decision of the Court of First Instance (“CFI”),\textsuperscript{160} the dividing line, if any, between the implementation test and the U.S. effects doctrine in Hartford Fire,\textsuperscript{161} has arguably disappeared. The CFI held that “[a]pplication of the [Merger] Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”\textsuperscript{162} The applicant argued that the concentration originated and was implemented not within the Community but in the Republic of South Africa, whereto the Court responded that “[a]ccording to Woodpulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant.”\textsuperscript{163} If a merged firm satisfies the implementation test by selling its products within the Community, then implementation is effects, since the anti-competitive nature of a merger is shown by such sales.\textsuperscript{164}
iv. The Three Approaches and International Electronic Commerce

The various approaches to the effects doctrine illustrate the difficulty of placing the doctrine within the existing framework of jurisdictional principles. To be sure, the territorial principle must be kept apart from the extraterritorial principles, which include the objective and subjective territorial principles, the protective, nationality, passive personality, effects, and universal principles. Therefore, the line between the objective territorial principle and the effects doctrine is not one of territoriality and extraterritoriality in the strict sense. The effects principle justifies jurisdiction over extraterritorial conduct, but this is also true of the objective territorial principle. When Jennings wrote his widely-cited article on the limits of jurisdiction, he stated that the objective test of territoriality is not and cannot be a principle, such as the nationality or the protective principle, by which a State may claim in certain respects truly extraterritorial jurisdiction. This statement is fine, but it must be pointed out, that part of the offense will occur outside the jurisdiction of the claimant State, and therefore, as with the truly extraterritorial claims, that State will have to justify such an assertion.

165. The distinction between territoriality and extraterritoriality and the definition of the two is by no means a simple task. See A. Bianchi, Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches, 35 GER. Y.B. INT’L L. 366, 373 (1992). Bianchi has defined ‘extraterritoriality’ broadly as: “the enactment and enforcement... of laws, regulations, court judgments, or orders or administrative decisions aimed at controlling the conduct of entities abroad, thus overriding the power of the foreign territorial sovereign to regulate the same course of conduct.” Id. Such a definition reflects the context of the discussion where it was presented: no doubt ‘entities’ could include businesses operating a Web page, but would the term encompass transactions in e-commerce? See Nerep, supra note 119, at XX-XXI. Nerep has stated the problem succinctly: “The reason for the sparse use of the concept [extraterritorial application] herein is, rather, that although the concept serves a function of a general indicator of a particular area of problems, it is of less or no value when attempting exact legal definitions; for the purposes of exact legal definitions the concept is much too vague. That laws are ‘extraterritorially applied’ could either imply that the laws of state A are applied by the courts (or other authorities) of state B, within B, or that these laws are applied by the courts (or other authorities) of state A, within state B, or finally that the same laws are applied by the courts (or other authorities) of state A, within A, but somehow affecting persons or property outside A. Even if we choose the latter situation as a basis for the definition of the concept – and this is commonly done – we would still not know much about the term ‘extraterritoriality’. The best definition that can be offered, it seems, is that laws are ‘extraterritorially applied’ in the specific case when that case contains foreign elements. But here again, the concept ‘foreign elements’ defies a general definition. All that can be supplied is examples: acts wholly or partly performed, contracts wholly or partly concluded, enterprises wholly or partly seated (or doing business), persons residing or domiciled, property wholly or partly situated, etc., outside the forum state. Still not defined would be the term ‘outside’; when is, for instance, an act performed outside the forum state.” Id.

166. Jennings, supra note 47, at 214.
In the context of international e-commerce, the British view indicates that the objective territorial principle could be used in transactions already concluded between a consumer and a trader, whereas marketing on the Internet would probably not fall within the principle. The U.S. view would suggest that transactions and marketing fell within the principle, the latter on grounds of their extension of the objective territorial principle or on the effects doctrine as a separate principle. The EU view, on the other hand, is less clear, since we do not know the limits of the implementation test or whether the trader needs to be present directly, by imputation, or at all within the Community. In line with the above reasoning, whether an interpretation of the objective territoriality principle or a separate principle, the application of the effects doctrine to overseas marketing must be proved to be valid international law by the claiming party. That party cannot shift this obligation to the other side by claiming that the effects doctrine is an application of the objective territorial principle, an application of the territorial principle that requires no justification.

b. The Effects Doctrine as an Interpretation of the Protective Principle

States will also try to justify the effects doctrine as being based on the protective principle, thus benefiting from the wide reach of the former and the high degree of acceptance of the latter. One such attempt may perhaps be illustrated by the wording of the Restatement (Third), where the protective principle is seen as a special application of the effects principle.\textsuperscript{167} The Restatement (Third) requires that there be a nexus between the conduct and the State, either materializing if a final component part occurs in the territory or if a direct and substantial consequence of the conduct occurs in the territory. The protective principle does not require a nexus between the conduct and the territory, but between the conduct and the State. To extend the effects doctrine to intended, but unrealized effects on the territory would render the protective principle otiose. Such effects may undoubtedly damage essential State interests and blur the required territorial connection of the effects doctrine. It is misleading to define the protective principle in terms of actual or potential ‘effects’ on the territory of the claiming State.\textsuperscript{168}

In international e-commerce the fading distinction between the two principles or the conglomeration of the two into one, would result in excessive claims being held justifiable under international law. To relax the territorial nexus of the effects principle and broaden the class of admissible State interests under the protective principle would result in consumer interests being invoked as a basis of regulation over virtually

\textsuperscript{167} See Restatement (Third) of Foreign Relations Law § 402, Cmt. f.

\textsuperscript{168} See Cameron, supra note 79, at 64-7.
any e-commerce activity in any location. Nevertheless, it is doubtful whether State practice confirmed the legal validity of any such assertion since such claims would prove to be highly controversial.

5. The Universality Principle

The last principle to be considered is the universality principle. It provides that any State may exercise jurisdiction to define and prescribe punishment for an offense of international concern even though the State has no territorial links with the offense or with the nationality of the offender or the victim. The rationale behind the principle is to prosecute and punish crimes that are deemed to be offensive to the international community as a whole. Such offenses include common crimes, such as murder, in case the State where the offense occurred has refused to try the case and has also refused to extradite the offender. Crimes by stateless persons in a res nullius or a res communis, an area subject to the jurisdiction of no State and piracy are also covered by the universality principle. Other offenses where the principle has been said to be applicable have been war crimes, crimes against peace, crimes against humanity, and offense contained in a number of other instruments. Although the principle may be relevant in a civil action relating to a human rights issue, it is of scant use in international commercial litigation.

In spite of its limited significance in international e-commerce at present, the universality principle may have wider application, at least in theory. An agreement on a universal minimum level of consumer protection would give each State the authority to regulate transnational contracts or the non-contractual conduct of Internet traders. Such an approach would give consumers and traders legal certainty, since the

169. See Restatement (Third) of Foreign Relations Law § 404 at 254.
170. See Brownlie, supra note 28, at 307-8.
171. See id.
norms applicable would be universal. However, given the various approaches States have to consumer protection, the basis of such an application, a universal agreement, is unlikely to materialize in the near future.\footnote{176}

IV. RESOLUTION OF CONFLICTS INVOLVING THE EXERCISE OF LEGISLATIVE JURISDICTION

A. Introduction: Concurrency and Hierarchy

The principles previously examined, apart from the territoriality principle, have mainly developed in the context of infrequent assertions of jurisdiction. A number of such cases have included antitrust laws extending the economic policies to overseas conduct, conviction of nationals for overseas crimes, the utilization of the protective principle to combat crime that is especially heinous crimes against the State, and convictions on the basis of the universality principle covering egregious crimes against the world community. The development of the international law on jurisdiction has consisted of responsive measures of national policy and has not been purposefully developed throughout the history of modern international law\footnote{177} into a coherent and systematic set of rules. This lack of design is blatant when one moves from criminal law to civil law, and from the intercourse among States to private contracts involving the public law of a State, where such legal principles of international law are explicitly less frequently asserted.

Consumer transactions in international e-commerce is an area where the importance of a clearly designed, coherent, and transparent law is clearly shown. Private interests of consumers merge into the interest of the State to protect its inhabitants from adverse transnational consequences, without resorting to criminal or tort law. Such an application of the jurisdictional principles in relation to one another is vital to inform consumers of the scope of their domestic laws. Businesses also suffer from the lack of transparency since they may be subject to the laws of several States.

The unclear state of international law may provoke States to enact excessive measures in an attempt to protect their consumers in interna-

\footnote{176. See M.S. Yeo \& M. Berliri, Conflict Looms Over Choice of Law in Internet Transactions, 4 Electronic Commerce \& Law Report 85, 89 (1998).}

\footnote{177. See Henkin, supra note 31, at 281. "Since [the categories that have developed] are customary law, resulting from the practice of States and \textit{opinio juris} (not by multinational agreement), the law and its categories were not determined by deliberate, knowing, purposeful acts of assembled States at any one time." \textit{Id.} "There is apparently no comprehensive study of the practice of States, and little diplomatic record of challenges by other States, that might explain and justify the exercise of jurisdiction in some cases but not in others. One can only speculate. . ." \textit{Id.}}
tional e-commerce.\textsuperscript{178} It may come as no surprise that international law has failed to develop jurisdictional rules that are as comprehensive and precise as those nationally developed. A review of State practice relating to jurisdictional claims in general, shows that there are no uniform standards on which the previously enumerated jurisdictional principles are applied.\textsuperscript{179} Interested States may turn to State practice to justify the exercise of jurisdiction in quite extreme cases.\textsuperscript{180} If a trader or a consumer, knowing the unsettled state of international law, wishes to trade on the Internet, he will find it impossible to predict State behavior. The number of prescribing States can potentially be very high.

The tenets of the traditional method of analysis have shown that international law does not prohibit concurrent jurisdiction over transnational commercial transactions.\textsuperscript{181} Rather, concurrency has been considered a normal phenomenon in international criminal jurisdiction\textsuperscript{182} and civil matters.\textsuperscript{183} While concurrent jurisdiction may work in marginal cases, such as in criminal law, where it is seen as an assurance that a villain does not escape punishment, it cannot be an adequate basis for a

\textsuperscript{178} See Memorandum of the Attorney General's Office of the State of Minnesota, Warning to All Internet Users and Providers (visited July 6, 1999) <http://www.ag.state.mn.us/home/consumer/consumernews/OnlineScams/memo.html>. This notorious example was provided by the Minnesota Attorney General's office, by which a notice was published, stating the relevant provisions of Minnesota's criminal jurisdiction statute (Minnesota Statute Section 609.025 (1994)) and how Minnesota courts have applied similar jurisdictional principles in civil cases. Furthermore, it was stated that: “[t]he above principles of Minnesota law apply equally to activities on the Internet. Individuals and organizations outside of Minnesota who disseminate information in Minnesota via the Internet and thereby cause a result to occur in Minnesota are subject to state criminal and civil laws.” Id.

\textsuperscript{179} See Bowett, \textit{supra} note 41, at 15.

\textsuperscript{180} See \textit{id}.

\textsuperscript{181} See e.g., Brownlie, \textit{supra} note 28, at 314; see also Bowett, \textit{supra} note 41, at 14; see also Heiskanen, \textit{supra} note 23, at 35; see also H.G. Maier, Extraterritorial Jurisdiction and the Cuban Democracy Act, 8 FLA. J. INT'L. L. 391, 393 (1993). See generally S. Hoffer, \textit{World Cyberspace Law} (2000) (giving a general treatment of the issue of concurrency seen from an American perspective).

\textsuperscript{182} See Lotus Case, 1927 P.C.I.J. (ser. A) No. 10, at 30-1 (Sept. 7). The PCIJ was dealing with the collision of ships on the High Seas and opined that: “Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States.” Id. “It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.” Id. See also Akehurst, \textit{supra} note 33 at 207-08. “The general rule of international law relating to criminal jurisdiction is that the existence of concurrent jurisdiction does not, by itself, oblige one State to give way to the other, even when the act forbidden by one State’s law is permitted or even required by the other’s.” Id. See also Tupamäki, \textit{supra} note 109, at 30.

\textsuperscript{183} See Brownlie, \textit{supra} note 28, at 314 (referring to jurisdiction in general). “Jurisdiction is not based upon a principle of exclusiveness: the same acts may be within the lawful ambit of one or more jurisdictions.” Id.
legal infrastructure in international e-commerce. If such a structure is to work effectively, consumers and businesses must be informed, prior to the business transaction, which State has prescriptive jurisdiction. In many cases the mere existence of concurrent jurisdiction creates few practical difficulties.184 In international e-commerce even the threat of exercise of concurrent jurisdiction by States may significantly deter consumers and businesses from utilizing the medium.

Concurrency does not meet the needs of international electronic commerce since there are no general rules in a concrete case establishing that one jurisdictional base has priority over another.185 There is no general treaty establishing a hierarchy among competing claims186 and the ICJ has not provided any definitive exposition on the matter.187 While some commentators have given preference to the territorial principle,188 others have maintained that "...la difficulté vient de ce que le droit international ne donne pas de préférence générale à un chef de compétence plutôt qu'à un autre, c'est-à-dire qu'il n'y a pas de règle générale certaine du droit internationale permettant de résoudre tous les conflits de souveraineté."189 This does not mean, however, that a State is without

184. See Maier, supra note 181, at 393-94 (admitting that the threat of the exercise of concurrent jurisdiction to order conflicting acts by the same party necessarily has some practical consequences).


186. See A. Lowenfeld, Extraterritorial Application of Criminal Law, 85 AM. SOC'Y INT'L L. PROC. 383, 399 (1991). Specific multilateral and bilateral treaties have at times settled jurisdictional conflicts. Id. The NATO Status of Forces Agreements, for example, provides for the allocation of jurisdiction between the host country and sending country in cases where stationed soldiers commit crimes off base, the dividing line being the seriousness of the crime. Id.


188. See Jennings & Watts, supra note 37, at 458-66. See also Cameron, supra note 79, at 326. "The fact that a distinction can be drawn between territorality and the other principles is significant, because, as the ECE [European Committee on Crime Problems, Select Committee of Experts on Extraterritorial Jurisdiction, see note 80, at p. 21] puts it 'it implies that other principles of jurisdiction are seen as exceptions or complements to the principle of territoriality and therefore in need of justification and special regulation'. But it is not possible to go so far as to derive a formal hierarchy of jurisdiction from this fact. In other words, one cannot argue that state B, which has custody of the offender and jurisdiction on the basis of the protective principle, must cede jurisdiction to state A, the locus delictus, even where A is able and willing to punish the offender. B’s jurisdiction is as ‘primary’ as A’s." Id.

189. Stern, supra note 100, at 43 (translating from French to English explaining that there is no unquestioning general rule of the international law making it possible to solve all the conflicts of sovereignty).
limits. Some principles (territoriality, subjective and objective territoriality, nationality, protective, and universality) are recognized, while others are still controversial (passive personality, and effects). Yet, while it is important to find out whether the State has overstepped its jurisdiction or merely moved into the area of concurrent jurisdiction, this exercise will not provide a solution to the problem.

A number of suggestions have been made on the international level to resolve the adverse consequences of concurrent jurisdiction. These approaches have resorted to the balancing of State interests and added a requirement of reasonableness or have sought to find a center of gravity for the commercial activity. Before turning to them, it is essential to examine why the problems presented cannot be resolved on the national level.

B. THE NATIONAL LEVEL

There are substantial obstacles to the ability of a national court to adjudicate a jurisdictional dispute between the forum and a foreign State. The relationship between national laws and international law before national courts is different from the relationship between national and international law before an international tribunal. First, in most States, national courts may not apply international law that runs counter to the constitution or ordinary statutory law. In the United States, for example, it is well-settled that if Congress passes a law that is contrary to international law, the courts must disregard the international law and apply national law. This applies, for example, to federal statutes exceeding the limits of international law on legislative jurisdiction.

190. See Schwarzenberger & Brown supra note 63, at 30 (referring to the practice of States other than Great Britain and the United States). See also Starke's International Law 76-7 (I.A. Shearer ed., 11th ed. 1994).

Only a minority of states follow a practice whereby, without the necessity for any specific act of incorporation, their municipal courts apply customary rules of international law to the extent of allowing these to prevail in case of conflict with a municipal statute or municipal judge-made law. As to conflicts between the provisions of treaties and earlier or later statutes, it is in only relatively few countries that the superiority of the treaty in this regard is established. In most countries, treaties do not per se operate to supersede state legislation or judge-made law. In general, there is discernible a considerable weight of state practice requiring that in a municipal court, primary regard be paid to municipal law, irrespective of the applicability of rules of international law, and hence relegating the question of any breach of international law to the diplomatic domain.

191. In a long line of cases the U.S. Supreme Court has held that a federal statute overrides prior treaties ratified by the U.S. See U.S. v. Dion, 476 U.S. 734, 738 (1986). "It is long settled that 'the provisions of an act of Congress, passed in the exercise of its constitutional authority, ... if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty' with a foreign power." Id. This applies to
not wish to violate international law only where the federal provision is not explicit.\textsuperscript{192} The rule of consistent interpretation is also adhered to by the ECJ,\textsuperscript{193} but in cases of explicit conflict between national law and EC law, the matter remains controversial and unresolved.\textsuperscript{194} National courts will be constrained by the wishes of the legislature and cannot resolve a matter concerning the extent of legislative jurisdiction of the State under international law.

Second, national courts may treat acts of the executive branch and the legislature as non-justiciable by relying on the doctrine of separation of powers.\textsuperscript{195} The conduct of foreign relations, therefore, is within the

\textsuperscript{192} See Alexander Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804); see also Born, supra note 40, at 511; see also \textit{Restatement (Third) of Foreign Relations Law} § 114.

\textsuperscript{193} See Case C-61/94, Commission v. Federal Republic of Germany, 1996 E.C.R. I-3989, 4020-4021, para 52. "When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the [EC] Treaty. Likewise, an implementing regulation must, if possible, be given the interpretation consistent with the basic regulation (see C-90/92 Dr Tretter v Hauptzollamt Stuttgart-Ost (cases 90/92)[1993] E.C.R. I-3569 paragraph 11). Similarly, the primacy of international agreements concluded by the Community over provisions of secondary community legislation means that such provision must, so far as possible, be interpreted in a manner that is consistent with those agreements." Id. See also T. Cottier & K. N. Schefer, \textit{The Relationship between World Trade Organization Law, National and Regional Law,} 1 J. INT’L ECO\- N. L. 83, 88-9 (1998) (relying on the reasoning of the Court on the primacy of international law it has been submitted that the rule of consistent interpretation should apply to the rules of the EC Treaty and not be limited to secondary legislation).


domain of the political branches of the State, and is not subject to judicial inquiry or decision.

Third, the principle of *nemo judex in propria sua causa*, dictates that no one is to be a judge in his own case. *Nemo judex* is a fundamental principle in municipal law, and a significant body of case law has been found to support its application in international law. 196 A national court would most probably violate the principle given the restrictions imposed on it by the legislature. For these reasons, attention should be shifted to the international level.

C. THE INTERNATIONAL LEVEL

In searching for a solution to a jurisdictional problem the ICJ applies the list of sources in its Statute. Of the primary sources, there are no general international treaties nor any settled general customary international law, to assist the Court in prioritizing various jurisdictional claims. 197 The opinions of certain governments, mainly those of the

heavily imbued with political questions and potential institutional complications. Under the separation of powers principle, such decisions are considered to be outside the judiciary's legitimate institutional domain." Id. See also Shaw, supra note 33, at 129; see also Schwarzenberger and Brown, supra note 63, at 30-1.

196. See Black's Law Dictionary 1037 (6th ed. 1990). *Nemo debet esse judex in propria causa*: no man ought to be a judge in his own cause. Id. See also B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, 279 (1987). See also Advisory Opinion No. 12, Mosul Case, 1925 P.C.I.J. (ser B) No. 12. The issue in the case was whether the representatives of the interested parties were allowed to take part in the vote of a decision by the Council of the League of Nations concerning certain frontier disputes, where the PCIJ held that their votes would not be counted in determining unanimity. Id. "The well-known rule that no one can be judge in his own suit holds good" Id. at 32. See also J.W. Smagula, Redirecting Focus: Justifying the U.S. Embargo against Cuba and Resolving the Stalemate, 21 N.C. J. INT'L L. COM. REG. 65, 91 (1995). "Moreover, a country that claims it may pay partial compensation to those it has financially injured also violates the international legal principle of *nemo judex in re sua*." Id. See also K. Harper, Does the United Nations Security Council have the Competence to Act as Court and Legislature?, 27 N.Y.U. J. INT'L L. & POL. 103, 140 (1994). "Furthermore, if the Council is to act in a judicial capacity, it must not allow its members to adjudicate matters in which its members are interested parties." Id. "To do so is inconsistent with the long-standing principle of *nemo debet esse judex in sua propria causa*. This doctrine has been accepted by many international tribunals as a general principle of international law." Id. But see W.M. Reisman, The Constitutional Crisis in the United Nations, 87 Am. J. INT'L L. 83, 93 (1993). "Moreover, there are compelling systemic reasons for this assignment of broad discretion under Charter Article 27(3) in chapter V, a member of the Council, whether or not a permanent, that is a party to a dispute before the Council may not vote on resolutions taken under chapter VI." Id. "While the nemo judex principle underlying this prohibition expresses a fundamental principle of municipal law, it is not certain that it has been carried over into general international law." Id.

197. A number of international law commentators have suggested that resort be made to some of the more basic principles of international law; that of equality of States and its corollary, non-intervention and territorial integrity to establish the propriety of a jurisdic-
United States, will be reviewed insofar as they shed light on the resolution of jurisdictional conflicts. Legal scholarship and a number of national judicial decisions have recognized the troubling state of international law in respect to disputes over legislative jurisdiction. They have suggested and declared solutions that, not only are subsidiary means for the determination of international law in terms of Article 38(1)(d) of the Statute of the ICJ, but have also not been received with equal approval by all legal commentators.

These views should be contrasted to the approach that denies the existence of conflict resolution principles applicable to jurisdictional disputes, and points at ordinary international law rules concerning the peaceful settlement of disputes. In the sphere of international e-commerce the latter approach is clearly insufficient. E-commerce cannot effectively function by an unpredictable system, which seeks to resolve international disputes retroactively in an ad hoc manner. E-commerce can effectively function if international disputes are preempted by allocating legislative jurisdiction in a transparent manner. An attempt should be made to review the propriety of the proposed alternative methods and their application to e-commerce before returning to traditional methods of conflict resolution.

1. Reasonableness and the Balancing of Interests

The issue of the extraterritorial reach of national laws has troubled international relations since before the Second World War. It was not until after the War that claims for such jurisdiction have become more extensive. The U.S. has been the most prominent State, although not the only one, to assert extraterritorial jurisdiction. Whereby international law requires no more than the presence of a jurisdictional basis for a State to have a valid claim, it is then up to the State to decide whether it would be unreasonable to enforce the claim. This decision would not affect the status of the claim under international law.

In the late 1970s, U.S. scholars and courts began to look at the application of private international law techniques to resolve jurisdictional conflicts. In the late 1970s, U.S. scholars and courts began to look at the application of private international law techniques to resolve jurisdictional conflicts. In the late 1970s, U.S. scholars and courts began to look at the application of private international law techniques to resolve jurisdictional conflicts. The United States faced mounting pressure from a number of States and the international claim. See Bowett, supra note 41, at 15. See also Brownlie, supra note 28, at 18-19, 313. These principles "may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies." Id. However, these principles have proven to be either not directly applicable or too abstract and vague to provide us with a single test for the resolution of the present problem.


199. See Bianchi, supra note 165, at 379. See also A.F. Lowenfeld, Public Law in the International Arena: Conflict of Laws, International Law, and some Suggestions for their Interaction, 163 Recueil des Cours 313 (1979 II).
national business community as regarding its use of the effects doctrine, especially in the field of anti-trust law. This opposition prompted U.S. courts to modify their approach in *Timberlane Lumber Co. v. Bank of America*,200 and *Mannington Mills v. Congoleum Corporation.*201 In the former case, the court sought to determine at which “point the interests of the United States were too weak and the foreign harmony incentive too strong to justify an extraterritorial assertion of jurisdiction.”202 The Court rejected that the effects test was sufficient on its own, and added to it an evaluation balancing the relevant considerations, a jurisdictional rule of reason.203 Both cases included a list of factors that should be taken into account in the balancing process.204 The approach of *Timberlane* and *Mannington Mills* was adopted by the drafters of the Restatement (Third) and applied to the question of the legislative jurisdiction of States. Section 403(1) and (2) provide:

§ 403. Limitations on Jurisdiction to Prescribe
(1) Even if one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

200. 549 F.2d 597 (9th Cir. 1976).
201. 595 F.2d 1287 (3d Cir. 1979).
203. *See id.* at 613.

A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be some effect actual or intended on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.

*Id.*


1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue.

*Id.*
THE LEGISLATIVE JURISDICTION OF STATES

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Subsection 3 then addresses instances where the measures of two or more States are not unreasonable:

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

As several commentators have emphasized, this provision is not a principle of international law as the Restatement (Third) claims it to be.205 Furthermore, international law does not contain any meaningful


While the Restatement Second identified ‘international law’ as being the ALI's view of rules that an ‘international tribunal’ would apply in deciding a controversy in accordance with international law, the Restatement Third altered this standard
common standard of reasonableness.\textsuperscript{206} Consequently, the text of § 403 should be considered as a statement of U.S. policy.

The provisions of § 403 are claimed to be principles of international comity.\textsuperscript{207} They require that States must have based their jurisdiction on at least one of the links listed in § 402, \textit{viz}., on the territorial principle, the effects doctrine, and on the nationality and protective principles. An exercise of prescriptive jurisdiction must be reasonable. The list of relevant considerations is illustrative and does not rank any priority between the points. If the exercise of jurisdiction by two or more States is not unreasonable, each State has an \textit{obligation} to evaluate its own as well as the other State's interests. If the other State's interest is clearly greater, the State \textit{should} defer to the other State. Because the reasonableness test is part of comity, it cannot affect whether international law permits a State to legislate for certain persons or situations.\textsuperscript{208} Whether a State may base its assertion of jurisdiction on one of the recognized bases does not depend on the interests of other States, but on international law obligations.

The standard of reasonableness applicable to the exercise of executive, legislative, or judicial power has a number of shortcomings containing underpinnings on consumers and businesses in e-commerce. These

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\textsuperscript{206} See also Meessen, \textit{supra} note 33, at 84.

\textsuperscript{207} See e.g., S.L. Snell, \textit{Controlling Restrictive Business Practices In Global Markets: Reflections of the Concept of Sovereignty, Fairness and Comity}, 33 \textit{Stanford J. Int'l L.} 215, 241 (1997). See also Jennings & Watts, \textit{supra} note 37, at 50-1. These are rules of politeness, convenience, and goodwill which are not sources of international law, but which may in the future become rules of international law. The term 'comity' is also used to a varying degree and courts sometimes do not observe this terminological distinction between binding and non-binding rules. \textit{Id.} See also Brownlie, \textit{supra}, note 28, 29. “[T]he term is used in four other ways: (1) as a synonym for international law; (2) as equivalent to private international law (conflict of laws); (3) as a policy basis for, and source of, particular rules of conflict of laws; and (4) as the reason for and source of a rule of international law. \textit{Id.} See also The \textit{Restatement (Third) of Foreign Relations Law} § 101, Cmt e. “Comity has been variously conceived and defined. A well-known definition is: ‘Comity, in the legal sense, is neither a matter of absolute legal obligation, on the one hand, nor of mere courtesy or good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.’ Hilton v. Guyot, 159 U.S. 113, 163-4, 16 S Ct. 139, 143, 40 L.Ed. 95 (1895).” \textit{Id.}

\textsuperscript{208} See Reuland, \textit{supra} note 133, at 193-94.
problems have provoked substantial discussion in legal scholarship. A significant part of these reflections predate the advent of the Internet.

First, the approach of the Restatement (Third) views the reasonableness test as a principle of international law. This categorization means that the test has an equivalent normative status to the jurisdictional bases set out in § 402. National courts, the legislature and the executive, have severe difficulties in applying the reasonableness test. For instance, a legislature will have trouble in determining the interests of other States in a new environment, where little State practice exists. Similarly, it is hard to see how the importance of the measure to the international political, legal, or economic system is measured when there is no consensus on how international e-commerce should be developed. The determination of justified expectations creates problems as well. Should such expectations be restricted to those of States or should those of the so-called transnational solidarities, including consumers or Internet users as a community, be taken into account?

Secondly, although “reasonableness” may have become a term of art in the Anglo-American jurisdictions, other States have no historical or theoretical background against which to reflect the concept. Indeed, American court decisions may seem unreasonable from a foreign State perspective. In the absence of an international understanding on the concept of reasonableness and its application to consumer commerce on the Internet, a legislature is bound to apply its own notion. These per-

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209. See e.g., H.G. Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579 (1983); see also Bianchi, supra note 33, at 86.

210. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 and § 403, Comment a. “Legislatures and administrative agencies, in the United States and in other states, have generally refrained from exercising jurisdiction where it would be unreasonable to do so, and courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable.” Id. See also Hixson, supra note 205, at 149.

211. See Note, Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norm, 103 HARV. L. REV. 1273, 1297-1301 (1990).

212. Blakesley, supra note 138, at 142.

213. See Hixson, supra note 205, at 149-50. Hixson has stated, commenting on § 403, that:

The executive and legislative branches, on the other hand, often operate solely to the benefit of their own constituency in a politically sensitive (and often emotionally charged) climate. When given the task of balancing U.S. and foreign interests, these branches will be less likely to favor the greater interest than the more popular one. While criticism abroad has indeed focused on the need for moderation by U.S. lawmakers, the real problem is not so much moderation within the boundaries of the United State’s subjective interpretation of its own jurisdiction, but rather a clearer understanding of the limits of U.S. jurisdiction under international law. A clearer statement of extraterritorial jurisdiction under international law would have met this need.

Id.
ceptions are likely to differ among States, as illustrated by the different
approach national laws have taken to the protection of consumers. It is
difficult to determine which of these diverging interpretations should be
more acceptable than others, since reasonableness is not an objectively
applicable concept.

Thirdly, the concept is dependent on subjectivity and this fact ren-
ders it unpredictable. It would be of little aid to a trader to maintain that
his or her e-commerce business may be subject to the regulatory author-
ity of one or numerous States, depending on what each State determines
to be a reasonable exercise of legislative jurisdiction. As far as the
favorable development of e-commerce is concerned, such a situation is
untenable.

Fourthly, and probably most importantly, the reasonableness test
may well work for one-off cases, but becomes too incomprehensible for a
legislature. Reasonableness is a notion that cannot be concretely evalu-
ated in advance. The legislature cannot determine what is reasonable
and determine the interests of other States in each case where the law
becomes relevant. A judge is more suited to perform this task upon re-
ceipt of all the facts of the case.

Lastly, the approach of the Restatement (Third) is not to set rules on
which States have exclusive jurisdiction in a given case. § 403(1) re-
quires that States do not prescribe unreasonable laws and such an exer-
cise may restrict the number of potential parties to a jurisdictional
dispute. However, § 403(3), in requiring that States evaluate their own
and other States' interests, accepts that there may be several States
whose jurisdiction is reasonable. After an evaluation, a State has no obli-
gation to defer to a State whose interest is not clearly greater, but also no
such obligation even if the interest is clearly greater. Furthermore,
§ 403(3) applies only to cases where "one state requires what another
prohibits, or where compliance with the regulations of two states exercis-
ing jurisdiction consistently with [the] section is otherwise impossi-
ble."214 If there is no such conflict, a State has no obligation to evaluate
the interests of other States under § 403(3). The Restatement (Third)
does not offer a scheme that solves the problem of concurrent jurisdic-
tion. It merely narrows the problem, since there is no obligation to defer
to the State having a clearly greater interest.

The Internet defies physical borders. The lack of physical boarders
makes an interest analysis in international e-commerce an especially dif-
ficult task. A Web page that pays little respect to consumer protection by
misleading advertising, will simultaneously offend the consumer protec-
tion laws of numerous States where the site is accessible. A number of
States may base their assertion of jurisdiction on a recognized base. The

214. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3).
regulating activities of a number of States will be reasonable and it will be hard for one State to claim that its interest is clearly greater. This argument is valid especially for Web sites that do not indicate any targeted State. However, as hard as it is to determine the interests of a State, specifically targeted sites will provoke the interests of only a few States. A Chinese site selling typewriters utilizing Chinese letters would probably give the Taiwanese legislator a greater interest to prescribe for the site than the Finnish authorities. These cases are only marginal and the bulk of Web sites do not contain such clear targeting.

In contractual cases the dispute over regulatory authority shifts from trading practices to specific transactions. This focus will normally limit the number of States capable of grounding their claims on one of the principles. The problem of concurrent jurisdiction remains even though the dispute is among fewer States. Furthermore, the problems inherent in interest balancing are not disposed of.

2. Weighing Legally Relevant Facts

In his celebrated lectures of 1964 Dr. Mann questioned the adequacy of the Huber-Storyan maxims of international jurisdiction in present times. After having made substantial attacks against the territorial doctrine, he suggested a new approach:

The problem, properly defined, involves the search for the State or States whose contact with the facts is such as to make the allocation of legislative jurisdiction just and reasonable. It is, accordingly, not the character and scope inherent in national legislation or attributed to it by its authors, but it is the legally relevant contact between such legislation and the given set of international facts that decides upon the existence of jurisdiction. . . . The conclusion, then, is that a State has (legislative) jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not in itself constitute a specific connection.  

215. Mann, supra note 26, at 44, 49. Furthermore, he stated that:

Perhaps public international lawyers should now discard the question whether the nature of territorial jurisdiction allows certain facts to be made subject to a State's legislation. Rather, should they ask whether the legally relevant facts are such that they 'belong' to this or that jurisdiction. As soon as attention is directed to the connection of facts with certain States, it becomes the foremost task, for purposes of international jurisdiction no less than for purposes of the choice of law in private international law, to identify the relevant points of contact, to localize the legal relationships. In pursuing this search private international lawyers employ as their tools various formulae such as 'the seat of a legal relationship', 'the nature of the thing', 'the centre of gravity', 'the most (or closest) connection'. All of them have, in practice, the same meaning and effect.
In 1984 Mann continued on his thesis and opined that the analysis is legal in character and rejected a balancing of interests analysis as being nothing more than a political consideration.\textsuperscript{216} The main difference between the reasonableness (balancing of interests) test and that of weighing legally relevant facts (or the genuine link or meaningful contact theory) is that the former requires a balancing of the interests of the prescribing State and others involved, while the latter excludes such considerations.\textsuperscript{217}

Both § 403(2) and (3) of the Restatement (Third) may well require an interests analysis. "For purposes of Subsections § (2)(g) and (h) and in particular of Subsection (3), it may be necessary to identify and weigh the respective interests of the concerned States in regulating (or refraining from regulating) a given activity or transaction."\textsuperscript{218} Therefore, it seems that an analysis on the lines of Mann would not be similar to the reasonableness test in § 403(2) of the Restatement (Third).

Without one jurisdictional basis conferring exclusive jurisdiction on one State, a test of weighing the legally relevant points of contact seems necessary. Being applicable to all fields of law, this method does not start by requiring that one of the jurisdictional principles must be present, as the Restatement (Third) does, but "abstract[s] the normative content of the principles, and regarding this, not the principles themselves, as binding upon states."\textsuperscript{219} The method does not seek to alter the content of

\textsuperscript{216} See Mann, supra note 30, at 31. See also Jennings & Watts, supra note 37, at 468.

\textsuperscript{217} See also Brownlie, supra note 28, at 313 (stating that "...[e]xtra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed (i) that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction. . . .") \textit{Id.}

\textsuperscript{218} See Mann, supra note 30, at 12-13 "In the Tentative Draft No 2 of the Revised Foreign Relations Law of the United States adopted the principle of reasonableness – a suggestion which appears unobjectionable, so long as it is understood that mere political, economic, commercial or social interests are to be disregarded when it comes to the weighing which every test of reasonableness implies." \textit{Id.}

\textsuperscript{219} See Restatement (Third) of Foreign Relations Law § 403, Reporters' note 6.

\textsuperscript{219} Cameron, supra note 79, at 327 (referring to the theory of meaningful contact). See also 2 Nerep, supra note 119, at 491. "The genuine link theory is a typical Conflict of Laws approach and, as such, applies not only to criminal law but to all other fields of law as well." \textit{Id.}
international law, but merely looks at the issue of jurisdiction from another angle.\textsuperscript{220} This approach should be preferred to that of interest balancing, especially in the context of consumer transactions in international e-commerce. The test seems to circumvent the requirement that, political, economic, commercial, and social interests be taken into account. This is reflected in a State's consumer protection laws. However, even this test does not resolve the problem of concurrent jurisdiction since the test suggested is not premised on the \textit{exclusivity} of jurisdiction. States may perform a proper weighing of legally relevant facts and still end up with concurrent jurisdiction. Rather, it is an attempt to moderate the consequences of the somewhat unfortunate state of international law.\textsuperscript{221} This test is seen by many as being likely to promote the emergence of a test aiming at exclusivity.

The test fits uncomfortably into international e-commerce, since transactions lack a geographical center of gravity. This means that legislators are left with very little in the weighing process and would probably resort to a policy argument. It is also unlikely that States would apply the legally relevant facts in the same, disinterested, objective way as an international tribunal. Therefore, it seems that even the test suggested in the present section would involve an interests analysis. Indeed, the present test suffers from the same deficiencies as the reasonableness/interest analysis test. It is a retroactive \textit{ad-hoc} procedure, ill-suited to serve the purposes of a clear and workable set of instructions for the legislator.

It is unlikely that State action will develop into a coherent doctrine of legislative jurisdiction in international e-commerce without the aid of international co-ordination or a new jurisdictional basis. The suggestions in the present section, therefore, do not provide an answer to the problem of subjectivity and unpredictability of the exercise of legislative jurisdiction over international e-commerce.

3. \textit{Methods of Conflict Resolution}

International law has not produced an answer to the issue of concurrency and the laws of States will often conflict. A solution to such conflicts would be to agree on the allocation of competence, either bilaterally

\textsuperscript{220} See id. See also Mann, \textit{supra} note 26, at 88. "To treat them [the personality, passive personality, protective and universality principles] as exceptions to territoriality rather than as distinct aspects of a much wider principle is probably theoretically wrong, but does no harm." \textit{Id.}

\textsuperscript{221} Mann, \textit{supra} note 26, at 50-1. As Professor Mann has put it: "...from the point of view of the progressive evolution of international law it would no doubt be desirable if the principle of exclusivity would come to be accepted for the purpose of jurisdiction, if, in other words, by common consent jurisdiction in respect of a given set of acts were exercised by one State only." \textit{Id.}
or multilaterally. The multilateral approach would understandably be
the more suitable option for the regulation of international e-commerce.
Bowett has argued that a balancing of competing interests cannot be
achieved by municipal legislation or treaty. The inapplicability of
these mechanisms is due to the fact that neither the principles of juris-
diction nor general principles of international law, can, in themselves,
provide the necessary balance of interests. They can only provide the
legal context within which an extensive and non-exhaustive list of fac-
tors is assessed. Relying on customary international law as the
source of a solution will prove futile. For international e-commerce,
where technical developments shape the problems at a rapid pace, the
words of Professor Friedman pronounced in 1964 seem more appropriate
than ever: "...custom is too clumsy and slow moving a criterion to ac-
commodate the evolution of international law in our time...[m]ore im-
portantly, custom is an unsuitable vehicle for international 'welfare' or
'co-operative' law."

In the absence of an agreement on the state of international law,
techniques of conflict management, consisting of diplomatic procedures
and adjudication, may be resorted to. Diplomatic procedures include ne-
negotiation, good offices and mediation, inquiry, and conciliation, whereas
adjudication refers to the determination of the case by a disinterested
third party, either by arbitration or by judicial decision. These meth-
ods are ex post facto remedies to specific situations. They do not provide a
suitable solution if the aim is to develop a predictable international legal
infrastructure which gives international e-commerce a chance to show its
true potential.

V. SUGGESTIONS FOR THE ALLOCATION OF LEGISLATIVE
JURISDICTION OVER TRANSACTIONS IN
INTERNATIONAL ELECTRONIC COMMERCE

An adequately functioning market infrastructure needs the support of
a normative system that is transparent, predictable, and stabilizes rela-
tionships among States, neutralizes possible conflicts, and provides justi-
fiable grounds for ruling on competing claims. The present state of
international law on the legislative jurisdiction of States does not well
serve the interests of States, traders, nor consumers, in that it falls short
of providing such a normative structure. The traditional approach of in-
ternational law focuses on the relationship between the alleged culprit

222. See Bowett, supra note 41, at 25.
223. See id. at 24. See also supra note 197.
224. See id.
225. FRIEDMAN, supra note 64, at 122.
and the victim posing significant problems in the context of international e-commerce. To take the trader-consumer relationship as the focus of legislative jurisdiction will not provide a viable solution to the present problem, especially due to the volume of the transactions compared to the number of transnational crimes, the relative irrelevance of location, and the anonymity of the transacting parties. Bearing in mind the shortcomings of international law and the unprecedented growth of e-commerce, a number of suggestions seem appropriate.

An effective way to resolve the problem of concurrency is to promote an international consensus on the conferment of jurisdiction on the State where an Internet operator is registered to conduct business. This approach has several advantages.

Ironically, the proposal returns to the most fundamental basis that was considered inadequate to address the allocation of jurisdiction as international transactions became more frequent. Indeed, the theory of international jurisdiction is primarily based on territoriality, being the

227. The term “Internet operator” is used here in a broad, non-technical sense, to cover various technical operators as well as service providers, including content providers. However, the present paper does not attempt to define which types of businesses should be included in any given definition and consequently, the type and the extent of regulation that should be channeled through any particular category of business. This question is one of policy for each State to consider. An answer would require a comprehensive and functional policy analysis that is beyond the purview of the present article and is not material for the resolution of the international law problem this paper is addressing. For a discussion on the various definitions and classifications of Internet businesses, see e.g., T. CARLEN-WENDELS, NATJURIDIK - LAG OCH RATT PA INTERNET 22-3 (1998) (pointing out that in the English language there is no settled usage of the terms and that a business often performs acts typical to several given categories). See also C. Koenig, E. Röder & S. Loetz, The Liability of Access Providers – A Proposal for Regulation Based on the Rules Concerning Access Providers in Germany, 3 I.J.C.L.P. 1 (visited Jan. 26, 2000), available at <http://www.digitallaw.net/IJCLP/3_1999/index.html>. (attempting to define a number of terms used for classification).

"The most basic services are rendered by Network Providers. Network Providers are those providing infrastructure or data transmission capacity (bandwidth). Primarily this can be offered in the form of traditional telephony, e.g. the Public Switched Telephone Network (PSTN). Furthermore, the infrastructure offered might be a specific network for data transfer, e.g. routers connected by dial-up lines or permanent lines... The term Access Provider refers to those service providers who additionally provide special dial-up points. In contrast to Network Providers, Access Providers do not only offer the general means to transfer data, but a specific means for data transfer. An Internet Access Provider, currently the most common form of these services, not merely offers the dial-up point, but also the protocols necessary to establish connections (in the case of the Internet e.g. IP-address, Name-Service, Routing) and frequently the billing of the service. Thus the service offered is not mere data transfer, but on top of that and more specifically the integration of the user's computer into the communications network... Content Providers are those who offer their own content on the Internet. Internet Service Providers and Online Service Providers provide access plus further services, i.e. e.g. News or e-mail.

Id. at 2-3.
least controversial of the various bases. Therefore, it is of significant merit that the proposal is established on the said principle. In addition to being an application of the essential territoriality of the sovereignty, the principle has a number of practical advantages, including the convenience of the forum, and the presumed involvement of the interests of the State where the conduct has taken place. An international consensus on the exclusivity of territorial jurisdiction would ensure that only one State had legislative jurisdiction over a given conduct.

Conversely, States would have to be persuaded that any assertion of extraterritorial jurisdiction in international e-commerce is detrimental to the market and its players. International e-commerce exacerbates the defects of current international law. The expansion, integration, and sophistication of information technology and communications have changed the nature of transnational business and diminished the significance of territory and distance. It would seem that these developments attracted States to exercise extraterritorial jurisdiction, but so far States have been rather moderate.\textsuperscript{228} However, the consequences of such conduct is damaging: it is impossible for businesses to comply with several concurrent, often conflicting laws and frustrating for States to attempt to protect the interests of their consumers, especially since international law has not been violated. Such measures severely threaten the development of a functioning market structure.

It is unlikely that States accepted the exclusivity of the traditional theory of territoriality as applied to international e-commerce. The basic concerns of States are the same irrespective of whether consumers buy their goods on the Internet, by mail order, or whether two overseas firms establish a monopoly that adversely affects the choice of their consumers. The State concerned will probably contemplate regulatory measures in all cases. States must be persuaded that one is offering something new that is capable of protecting their basic interests.

The main innovation of this approach lies in the indirect regulation of the market structure. The traditional theories of extraterritorial jurisdiction applicable to international e-commerce focus on the regulation of conduct between a domestic and a foreign actor,\textsuperscript{229} and of overseas conduct.\textsuperscript{230} The regulation of domestic Internet operators affects such transactions or conduct indirectly, through the adoption of territorial measures. This approach maintains an infrastructure that corresponds to the purpose of regulation. In early 1999, there were over 3,000 ISPs in

\textsuperscript{228} See J. Rothchild, Protecting the Digital Consumer: The Limits of Cyberspace Utopianism, 74 Indiana L.J. 895, 934-37 (1999) (explaining the different measures adopted by the U.S. Congress and by a number of U.S. states).

\textsuperscript{229} See supra section III C 1 (explaining Subjective and objective territoriality).

\textsuperscript{230} See supra section III C 2-5. (explaining Nationality, passive personality, protective, effects and universality principles).
Western Europe, and an estimated 6,500 in the U.S. Channeling regulatory power through Internet operators is attractive considering the number of consumers and businesses involved, transactions completed online, Web sites, and the undesirability of States exercising extraterritorial jurisdiction. Regulation of transnational trade has been possible, because in general, businesses have resorted to Alternative Dispute Resolution procedures in cases of dispute and transactions have been subject to a broad range of customary norms and widely-adopted treaties. The internationalization of consumer trade, however, is a product of the development of information technology. There are no such established procedures or rules applicable to international consumer trade. International consumer commerce, in essence, is geographically more bound than business-to-business commerce, and attracts the interests of States more easily due to the sensitive attitude of many States towards consumer protection. The regulation of international e-commerce is not manageable by traditional approaches. It is far more viable to require Internet operators to maintain a properly regulated market than to focus on the numerous transactions or Web sites.

The strength of this path is its capability of providing a framework for an effective normative structure for international e-commerce. Internet traders will know that their Web sites and business activities will be governed exclusively by the laws of the State where the Internet operator with whom they have contracted has established its business. For consumers, the proposal signifies increasing legal certainty as well. In


234. See Inktomi, *Inktomi WebMap* (visited Feb. 3, 2000) <http://www.inktomi.com/webmap/> (providing for the survey methods and for specifications). The estimated number of Web sites vary, but, for example, a survey completed in January 2000 by Inktomi and NEC Research Institute Inc states that number of sites reached almost five million. Id.

235. See H. Van Houtte, *The Law of International Trade* 26 (1995). The *lex mercatoria* is founded on “usages developed in international trade, on standard clauses, on uniform laws, on general principles of law and on the contract negotiated by parties.” Authors are in dispute over whether the *lex mercatoria* exists as a substantive and procedurally autonomous legal system, but it is nevertheless considered as an alternative for complementary rules of an otherwise applicable law. Id.

accessing a Web site they will know that the law governing its activities will be established accordingly. In addition, the scheme will also provide more security for consumers, because Internet operators will be better positioned to oversee that possible e-commerce regulations concerning Web pages are complied with. Such rules may include that the trader, when registering his or her business, includes a mandatory sign on the Web site indicating the State where the Internet operator is established. The jurisdictional rules would then be clear. If there is no indication of the location of the Web site operator on a Web site, there will be no security of the applicable law. This is only one example of possible future action that could be further elaborated and is not to suggest that after such registration is completed, Internet operators be required to police the Web sites that they are hosting. In any event, the suggested scheme starkly contrasts the present state of affairs where consumers look at their respective governments to take action over overseas operators, servers, or businesses.

To suggest that States only exercise territorial jurisdiction over Internet operators established in their respective territory raises two additional issues. First, is the question of whether the location of servers should support a jurisdictional claim for any State. In a discussion on the relevance of the location of servers as a criterion for the choice of law, Mr. Carln-Wendels has explained the technical issues involved.

A Web site is 'composed' of several elements, text, pictures, advertising banners etc., which can be situated in various servers. Web sites that have many pictures may have them in a Web hotel in the United States simply because the storage costs are lower in that country. An English firm having its big server in Germany may administer the advertisement banners. When a surfer visits a Web site - i.e. fetches the Web site's html-code from a server in Stockholm, for example - the elements are fetched and set up by the surfer's browser into what the viewer sees as a 'page'. In this perspective it is almost illusory to try to determine the applicable law out of a particular server's location. (...) Even the time-factor must be noticed. The fact that certain material is located on a particular server today does not mean that it has been there yesterday, or that it will be there tomorrow.237

These matters are persuasive enough to indicate that the location of servers should not determine the question of legislative jurisdiction. In the above example, Sweden, Germany, and the U.S. could claim that on basis of the territorial principle they had a legitimate right to regulate the Web site. The EU, for example, has affirmed in its recent Directive, that "the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its

237. See CARLN-WENDELS, supra note 227, at 46. The present author has translated the cited text from the Swedish original.
website is located". Some commentators have favored this approach as well. Nevertheless, as has been the case with other areas subject to the regulatory interests of a number of States, the elimination of servers as factors in determining regulatory jurisdiction will not resolve the issue of concurrency. The ideas concerning the significance of servers should be applied to Internet operators as part of the suggested solution. The location where the Internet operator is established is what is important, not the location of its servers. One is seeking to regulate behavior and servers do not behave.

A second question concerns the place where the Internet operator is established, that is, which State may claim exclusive jurisdiction over it. This question is not particular to Internet operators, but is a general issue of private international law concerning corporations, and will not be addressed in the present article.

VI. CONCLUSION

The current proposal has left unanswered a number of questions. For example, content should be kept separate from the allocation of regulatory jurisdiction. This article examines jurisdiction and not whether substantive harmonization will follow the suggested scheme or whether international law prescribes any limits to the substance of State regulation. Furthermore, an analysis of the methods each State employs in ex-


The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service[.]

Id. See also L. Krosch & A.M. Crisp, The Proposed Electronic Commerce, 10 EUR. BUS. L. REV. 243, 244 (1999). The proposal does not refer to ISPs as generally understood as organizations that provide computer or networking services to customers, but to 'any natural or legal person providing information society services', including, for example, content providers. Id.
ercising its regulative competence is beyond the scope of this article, nor is it necessary for resolving conflicts concerning legislative jurisdiction under international law. A State has a number of options when deciding how to proceed. First, it may choose to put weight on self-regulation as advocated by the U.S. Self-regulation emphasizes the importance of minimal State interference and private sector autonomy. Second, a State may acknowledge the positive sides of self-regulation, but still wish to resort to direct regulation in providing a clear and predictable framework for e-commerce. The third option balances direct regulation and self-regulation and is termed "co-regulation." An example of this approach is the EC Electronic Commerce Directive. A directive is defined by Article 249 [ex Article 189] EC as "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." The Electronic Commerce Directive envisages "the drawing-up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15", which provide general obligations that Member States must include in their national legislation. The implementation of the general obligations should be achieved by a dialogue in which these associations or organizations, the Commission, and the Member States take part.

241. See The White House, A Framework for Global Electronic Commerce (visited Jan. 28, 2000) <http://www.ecommerce.gov/framewrk.htm>. The basic principles underlying U.S. policy on e-commerce are that (1) the private sector should lead; (2) governments should avoid undue restrictions on e-commerce; (3) where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple environment for commerce; (4) governments should recognize the unique features of the Internet and (5) that e-commerce over the internet should be facilitated on a global basis. See also Joint E.U.-U.S. Statement on Electronic Commerce (visited Jan. 28, 2000) <http://www.qlinks.net/comdocs/eu-us.htm>. It was agreed that the expansion of global e-commerce will be essentially market-led and driven by private initiative, where the role of government is to provide a clear, consistent and predictable legal framework and to ensure adequate protection of public interest, among others and where unnecessary existing legal and regulatory barriers should be eliminated and where industry self-regulation is important. Id. See U.S.-Japan Statement on Electronic Commerce (visited Jan. 31, 2000) <http://www.ecommerce.gov/usjapan.htm> (providing a similar approach).


243. Id. art 16.

244. For further discussion see Council and Parliament Directive 1999/93/EC on a Community Framework for Electronic Signatures, 2000 O.J. (L13) 12. The Directive on electronic signatures envisages an Electronic-Signature Committee, which has the task of clarifying the requirements laid down in the Annexes to the Directive (Articles 9 & 10). Annex II includes, among others, a requirement that certification-service-providers must "use trustworthy systems and products which are protected against modification and ensure the technical and cryptographic security of the process supported by them" (Annex II, point (f)). The task of the Committee is to determine the generally recognized standards for
Internet operators may be left unregulated or regulated to a varying extent. This article does not imply that any one of these approaches be preferred over others. It is suggested that any State regulations should preferably be channeled through Internet operators, or if self-regulation is preferred, that they should carry the responsibility of implementing such regulation. Internet operators are a vital component in a structure that seeks to allocate legislative jurisdiction among various States.