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### The Internet Is Changing the Public International Legal System

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# The Internet is Changing the Public International Legal System

BY HENRY H. PERRITT, JR.\*

## I. INTRODUCTION

Public international law increasingly is called upon to provide a framework for private international law—treaties for recognition and enforcement of civil judgments and to limit the adjudicative jurisdiction of civil and criminal courts, to codify rules for choice of law, and to define safe harbors for private ordering or self-regulation. New legal institutions, resembling administrative agencies in the national context, are emerging under treaty-based public international law. These new international institutions are beginning to exercise limited quasi-legislative (rulemaking)<sup>1</sup> and quasi-judicial (adjudica-

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<sup>1</sup> See Convention Establishing the World Intellectual Property Organization, July 14, 1967, 6 I.L.M. 782. The Convention empowers the World Intellectual Property Organization ("WIPO") assembly to adopt measures relating to the "administration" of the treaties by a three-quarters vote. See *id.* art. 6, § 3(e), (g). Amendments to the WIPO convention, in contrast, can be adopted only through the usual treaty ratification process by each signatory. See *id.* art. 17; see also Harold M. White, Jr. & Rita Lauria, *The Impact of New Communication Technologies on International Telecommunication Law and Policy: Cyberspace and the Restructuring of the International Telecommunication Union*, 32 CAL. W. L. REV. 1 (1995) (discussing specific changes made by the 1992 Kyoto Plenipotentiary Conference to increase the rulemaking (policymaking) power of International Telecommunications Union ("ITU") bodies and to give standing to private companies and individuals); Krisna Jayakar, Comment, *Globalization and the Legitimacy of International Telecommunications Standard-Setting Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 711 (1998) (explaining reform of ITU standard-

tory)<sup>2</sup> powers. While most of these bodies allow only state parties to participate formally, there is increasing pressure to allow private standing, recognizing the growing de facto role of non-governmental organizations ("NGOs") in international affairs.

Information technology in the form of the Internet accelerates this process in three ways. First, the Internet facilitates the negotiation of treaty-based regimes and makes it possible for new international legal machinery to operate effectively and more quickly. Second, the Internet alters the balance of interests that shapes the political dynamics determining the content of international law. Third, the Internet's global character challenges traditional state-based precepts of private international law, increasing the pressure for public international law regimes to regulate Internet commerce and political activity, directly or indirectly, by providing frameworks for private ordering.

#### *A. What Makes the Internet Special?*

To evaluate the arguments presented in this Article, one must understand how the Internet differs from other information technologies. Technological innovations have always required adaptation by the international legal system. Information technologies directly affect international diplomacy. The telegraph changed the way wars were fought and the relations between diplomats and heads of state. Wireless telegraphy (radio) had similar profound impacts. Radio broadcasting in the 1930s helped bring the totalitarian regimes of Hitler and Mussolini to power. Television is credited for shaping American withdrawal from Vietnam and encouraging international intervention in Bosnia and Kosovo.

But the Internet is different. For one thing, it is inherently global. Anyone can set up a Web page on a \$2000 computer, connect the computer to the Internet for \$12.95 a month, and publish pages instantly visible everywhere in the world to anyone who has connected a computer to the Internet. That kind of global reach is not true with Morse telegraphy,

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setting procedures to facilitate rulemaking, including submission and publication of documents on the Internet).

<sup>2</sup> See Canada-United States: Free Trade, Jan. 2, 1988, 27 I.L.M. 281. See also *infra* notes 163-181 and accompanying text (summarizing the International Tribunal for the Law of the Sea ("ITLOS") jurisdiction and procedure); *NAFTA Secretariat: General Information* (visited May 11, 2000) <[www.nafta-sec-alena.org/english/index.htm](http://www.nafta-sec-alena.org/english/index.htm)> (summarizing NAFTA dispute resolution procedures).

wireless radio communication, television or radio broadcasting. While users of older information technologies had to make special arrangements to extend their coverage across national boundaries, users of the Internet must make special arrangements to localize their activities. Inherently, a Web page published on a server located in Tuscaloosa, Alabama is just as accessible in Tirana, Albania, as in Tuscaloosa.

The Internet has another important characteristic that distinguishes it from earlier information technologies. The price of entry is a \$2000 computer. That is all one needs to broadcast to the world through the Internet or to participate in political dialogue. That is several orders of magnitude less than it costs to set up a bricks-and-mortar store, a television broadcast transmitter, or to buy a printing press to publish a newspaper.

These remarkably low economic barriers to entry for the Internet, compared with older information technologies, empower historically weak groups within domestic political arenas. Such minimal barriers enable groups to form connections with each other across national boundaries and people to create or maintain NGOs.

#### *B. Is the Internet Really Ubiquitous?*

Unless the Internet has global scope—and is not a phenomenon limited to the industrialized West and especially the United States—it is unlikely to have the transformative effects described in this Article. The popular myth that the Internet and the World Wide Web (“Web”) are dividing the world into classes of “information haves” and “information have-nots” is false. On the contrary, its low barriers to entry and inherently international character reduce gaps between poor countries and rich countries.

Three examples illustrate the facts. Last summer, the popular press reported that the small Asian country of Bhutan, located in the Himalayas north of Bangladesh, which has no television service, is aggressively developing an Internet infrastructure and Internet service providers.<sup>3</sup>

In December 1999, this author was in Pristina, Kosovo, and Kharkov, Ukraine. In Ukraine, he found a desperately poor country enthusiastically embracing Internet networking and teaching thousands of college students to make Web sites to disseminate basic legal information more widely to domestic law enforcement and legal professionals, and to potential outside investors.

In Kosovo, I found ministerial level officers of the Interim Government of Kosova enthusiastic about the potential of Internet-based e-commerce

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<sup>3</sup> See Peter de Jonge, *Television's Final Frontier*, N.Y. TIMES, Aug. 22, 1999, § 6, at 42.

as a way of jump-starting Kosovar Albanian economic development. The Kosovar Albanians recognize that e-commerce can lower the barriers for starting up small businesses seeking to tap global markets and earn foreign exchange. At the same time, they recognize that an Internet infrastructure and Internet service providers can be established quickly and cheaply on top of existing telephone service, even before fundamental improvements are made in the technology of wireline telephone service and before comprehensive cellular telephone services are available.

To be sure, there are still large areas of the world lacking access to basic technology, but the Internet makes it easier, not harder, for these populations to plug into the rest of the world.

## II. PUBLIC AND PRIVATE INTERNATIONAL LAW

Public international law conventionally addresses relations between and among sovereign states,<sup>4</sup> while private international law conventionally addresses relations between or among private persons who are citizens of different states.<sup>5</sup> The boundary between public and private international law, though often treated as distinct, has always been indistinct.<sup>6</sup> Until the twentieth century, international law involved the personal relations of sovereigns, while the subject matter of today's private international law

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<sup>4</sup> The natural law view, abandoned in favor of positivism under the influence of John Austin and others, viewed sovereigns as administering a system of natural law, which bound all sovereigns. Positivism viewed all law as originating in some determinate source. Positivists could understand international law only as based on agreements between or among sovereigns. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV INT'L L.J. 9, 9-17 (1999) (describing the historical evolution of international law).

<sup>5</sup> See *id.*

<sup>6</sup> See Paul H. Brietzke, *Designing the Legal Frameworks for Markets in Eastern Europe*, 7 TRANSNAT'L LAW. 35, 41-51 (1994) (explaining how European scholars sought to unify public and private international law even as Americans were separating them; conflicts rules can be understood as species of public international law by treating them as limitations on state sovereignty); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2609 (1997) [hereinafter Koh, *Why Do Nations Obey International Law?*] (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)) (stating that a strong blending of public and private remained a key feature of legal system even after Bentham and Austin began to lay the intellectual foundations of dualism).

was covered by municipal law.<sup>7</sup> Erosion of natural law theories in preference for positivism in the late nineteenth century widened the gap.<sup>8</sup> This divide is reflected in the tension between monism and dualism in international law theory.<sup>9</sup> Dualists distinguished sharply between public international law as the law of relations between states and private international law as the law governing persons.<sup>10</sup> Monists sought unification.<sup>11</sup>

International commercial law straddles any gap between the two types of international law, because it “regulates both private persons and states.”<sup>12</sup> Admiralty law provides a strong example. Admiralty restricted the power of states against vessels belonging to nationals of other states. It also was a source of right by individuals against vessels belonging to other individuals.<sup>13</sup>

The growing importance of transnational business in the late decades of the twentieth century, and the increasing emphasis on international

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<sup>7</sup> See Mark W. Janis, *Should We Continue to Distinguish Between Public and Private International Law?*, Academic Workshop (Apr. 27, 1985), in 79 AM. SOC'Y INT'L L. PROC. 352 (1985).

<sup>8</sup> Positivism seeks a legislative source for law and one cannot find it in the international context because there is no international legislature. Natural law easily supplies the source for international law. See generally Anghie, *supra* note 4, at 10-18 (describing the shift from naturalism to positivism in theory of international law).

<sup>9</sup> See Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556, 561-62 (1996-97) (explaining monism and dualism).

<sup>10</sup> See Janis, *supra* note 7.

<sup>11</sup> See generally Bin Cheng, *Introduction to Subjects of International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 23 (Mohammed Bedjaoui ed., 1991) (writing that monists, “led by Hans Kelsen, believe that international and municipal law [form] a single normative system” because the ultimate subject of all law is the individual; dualists, led by H. Triepel and D. Anzilotti, believe they are distinct legal systems). Monism correlates with a natural law view. Dualism correlates with positivism. Monists believe national courts are obligated to apply international law; dualists believe they apply international law only when the national legislature has so provided. Thus, there is a correlation between direct effect and monism. See *id.*

<sup>12</sup> Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 35 (1996) [hereinafter Trachtman, *International Economic Law*].

<sup>13</sup> See United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 21 I.L.M. 2161 (“UNCLOS”) (establishing uniform law regarding admiralty).

human rights law in the same time period, stimulated a return to a more unified view,<sup>14</sup> albeit without an explicit abandonment of positivism as the theoretical foundation. The goal of international law is to create and maintain systemic stability and to reduce frictions among states.<sup>15</sup> Global commerce and international politics, accelerated by the Internet, threaten to increase interstate friction unless international law keeps pace. The goal of international law always has been universality—the result, politically, of harmonization and convergence.<sup>16</sup> The harmonization of international law, a result of Internet access proliferation, suggests a greater scope for international law

A. *What is Private Law?*

The terms “public” and “private” law are common in a variety of contexts and have also carried a variety of other meanings.

Because the public/private distinction emerged from the notion that there is a separate and distinct private order, private law was deemed law that protected “pre-political rights. Private law, then, was that part of the legal system protecting the private ordering; public law consisted of government compulsions restricting private freedom” Under that definition, property law, tort law, and contract law may be considered examples of private law, and labor law and constitutional law public law.<sup>17</sup>

According to Professors Philip Frickey and Daniel Farber, the distinction between public and private law has been blurred, in part because of the critique of legal realists, observing that private law reflects public policy choices, and the tendency of public law to grant new individual rights.<sup>18</sup> Joel P. Trachtman has observed that “private law is an oxy-

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<sup>14</sup> See Janis, *supra* note 7, at 353.

<sup>15</sup> See Trachtman, *International Economic Law*, *supra* note 12, at 45-46.

<sup>16</sup> See *id.*

<sup>17</sup> Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 841 n.2 (1999) (quoting Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 886-87 (1991)). Legal reform for transitional societies focuses on private law in the sense that it emphasizes developing the law of property, contracts, corporations, and financial markets. See Brietzke, *supra* note 6, at 41-51.

<sup>18</sup> See Farber & Frickey, *supra* note 17, at 886; see also Trachtman, *International Economic Law*, *supra* note 12, at 34.

moron.”<sup>19</sup> In fact, he points out, conflict of laws—the traditional category of private international law—relates to public law.<sup>20</sup> “All conflict of laws rules allocate power to government.”<sup>21</sup> Public interests in a market economy, therefore, include private interests.<sup>22</sup>

The end-goal of conflict of laws—as of law more generally—is the maximization of the welfare of the constituents of the relevant society. If international conflict of laws rules are analogous to constitutional law—describing the allocation of power horizontally within a unitary order—the relevant society whose welfare these rules must maximize is international society. Of course, there is nothing quite comparable to a world constitution, and world society is far more decentralized than, for example, the federal society of the United States.<sup>23</sup>

The private-public distinction is inappropriate in the context of conflict of laws, assuming it is valid in any context. From a law and economics perspective, the private sphere is the sphere normally left to market ordering. Thus, the private sphere, in theory, absent transaction costs or market failures, needs no law. However, it is generally agreed by even the most extreme law and economics theorists that in practice, the private sphere needs law to reduce transaction costs by facilitating the assignment of stable property rights and rules of tort liability and contractual responsibility. Thus, public-policy values at the state-level would be expected to incorporate certain values from the private level.<sup>24</sup>

### B. *The Role of Public Law*

Public international law circumscribes the legitimate exercise of state power to regulate private conduct and to decide private disputes, through

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<sup>19</sup> Trachtman, *International Economic Law*, *supra* note 12, at 34.

<sup>20</sup> See Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 985 (1994) [hereinafter Trachtman, *Conflict of Laws*].

<sup>21</sup> *Id.* Trachtman proposes allocation of prescriptive jurisdiction to government(s) whose constituents are affected by the subject matter, in proportion to the relative magnitude of such effects, as accurately as is merited given transaction costs in allocation of prescriptive jurisdiction. See *id.* at 987.

<sup>22</sup> See *id.* at 997.

<sup>23</sup> *Id.* at 1032 (footnotes omitted).

<sup>24</sup> *Id.* at 1035 (footnotes omitted).

rules of jurisdiction, choice of law and judgment recognition.<sup>25</sup> These rules, making up what American lawyers call conflict of laws,<sup>26</sup> link public and private international law. When private persons or entities resort to civil courts to resolve their disputes, they necessarily encounter conflict of laws rules, which determine the power of national lawmakers, adjudicators, and enforcement resources.

Although conflict of laws is considered to be but another name for private international law, its rules reflect public law limitations on the exercise of sovereign power, motivated by the reality that, when one sovereign oversteps its bounds, it encroaches upon the prerogatives of another. The rules therefore reflect a comity among sovereigns, seeking to preserve the essential attributes of sovereign power to each.<sup>27</sup>

Trachtman says that the "best solution to conflict of laws problems is negotiation and agreement on conflicts rules by governments"<sup>28</sup> through the treaty making process; in other words, using public international law mechanisms to change the content of private international law.<sup>29</sup> Vertical public law litigation involves the assertion by individuals of rights derived from public international law in regular courts. Harold Koh argues that vertical litigation is growing in importance.<sup>30</sup>

Because public law defines the contours of private law, the public law questions with respect to Internet regulation include the role of private ordering. Two kinds of hybrid legal systems can be envisioned. One kind

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<sup>25</sup> See *id.* at 978-84.

<sup>26</sup> Terminology is a problem in talking about private international law. Europeans often refer to "jurisdiction" when Americans refer to "adjudicative jurisdiction" or "personal jurisdiction." Europeans often refer to "conflict of laws" when Americans refer to "prescriptive jurisdiction" or "choice of law." Most Americans use the term "conflict of laws" to refer to the entire body of private international law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971).

<sup>27</sup> See Trachtman, *Conflict of Laws*, *supra* note 20, at 1035.

<sup>28</sup> *Id.* at 990-91.

<sup>29</sup> Trachtman acknowledges, however, that treaty negotiation often is impracticable because of levels of controversy. Failing treaty negotiation, he proposes application of his rule by courts adjudicating particular cases. *Id.* at 990-91.

<sup>30</sup> See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2347 (1991) [hereinafter Koh, *Transnational Public Law Litigation*]. Koh distinguishes vertical from horizontal transnational public law litigation. He marshals evidence in support of the proposition that vertical transnational public law litigation, common until the middle half of the nineteenth century, is important once again.

opens national courts to private litigation based on norms derived from public international law. The other kind uses public international law mechanisms to define structures for private ordering, much as American labor law defines structures for private ordering of the workplace.<sup>31</sup>

### C. *Public Law and Private Institutions*

Many private institutions enjoy power in international politics and law rivaling that exerted by traditional states.<sup>32</sup> Francois Rigaux's "Transnational Civil Society," involves three types of actors: the state acting through its domestic law, the community of states in the international order, and individuals acting through private initiatives including NGOs.<sup>33</sup> "It is through the non-governmental organizations and, more and more often, through the mass media that world public opinion makes its voice heard on the major problems requiring action at the international level."<sup>34</sup> Professor Koh's "transnationalist" school of international relations theory emphasizes the role of private actors in international law.<sup>35</sup> Professor Anne-Marie Slaughter agrees.<sup>36</sup> Private actors create purely private legal relationships by dealing with each other and create mixed relationships by dealing with states. As political actors, these same private actors coordinate their private self-interest across national boundaries, exerting pressure vertically through national interest groups and thereby shaping the policy of states.<sup>37</sup> The

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<sup>31</sup> See Farber & Frickey, *supra* note 17, at 886 n.53.

<sup>32</sup> See Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF. 50, 58 (1997) (arguing that states must compromise cherished sovereign roles, including cooperation with the private sector, to control international crime). NGOs create new constituencies for compliance with international law. See *id.* at 59.

<sup>33</sup> See Cheng, *supra* note 11, at 12.

<sup>34</sup> *Id.* See also Martin Wolf, *Uncivil Society*, FIN. TIMES (London), Sept. 1, 1999, at 14 (lamenting the role of NGOs in blocking negotiation of multilateral agreement on investment; "only elected governments can be properly responsible for the making of law, domestically and internationally . . . to grant any private interests a direct voice in negotiations over how coercion is to be applied is fundamentally subversive of constitutional democracy"). "If NGOs were indeed representative of the wishes and desires of the electorate those who embrace their ideas would be in power. Self evidently, they are not." *Id.*

<sup>35</sup> See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-85 (1996) [hereinafter Koh, *Transnational Legal Process*] (explaining the role of private actors in transnational legal processes).

<sup>36</sup> See Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997).

<sup>37</sup> See Koh, *Transnational Legal Process*, *supra* note 35, at 203-05.

Internet will strengthen all these phenomena by making the horizontal relationships easier despite distance and regardless of formal national borders.<sup>38</sup>

Just as domestic interest groups are an essential part of the political dynamics of domestic politics, NGOs are an essential part of international rulemaking and enforcement.<sup>39</sup> Indeed, because the institutional structure for international governmental functions is less complete than that for state governmental functions, NGOs play a proportionately greater role in the international context than in the domestic context.<sup>40</sup>

NGOs are not a new phenomenon. They were instrumental in the eighteenth and nineteenth centuries in stopping the slave trade, promoting peace through international arbitration, advocating worker solidarity, encouraging free trade, and harmonizing international law for maritime commerce.<sup>41</sup>

McDougal, Lasswell, and Reisman identified seven functions performed by NGOs: intelligence, promotion, prescription, invocation, application, termination, and appraisal.<sup>42</sup> Intelligence is gathering, analyzing, and disseminating information.<sup>43</sup> Promotion is advocacy of particular policy options.<sup>44</sup> Prescription is actual participation in rulemaking.<sup>45</sup> Invocation is an accusatory role when norm violations are detected.<sup>46</sup> Application is actual adjudication.<sup>47</sup> Termination extinguishes norms.<sup>48</sup> Appraisal is the evaluation of the performance of formal international institutions and norms.<sup>49</sup>

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<sup>38</sup> The principal limitation on the influence of the Internet will be language differences.

<sup>39</sup> See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 185 (1997).

<sup>40</sup> See generally *id.* at 189-90.

<sup>41</sup> See *id.* at 191-95.

<sup>42</sup> See *id.* at 271 (citing Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (Myres S. McDougal & W. Michael Reisman eds., 1981)).

<sup>43</sup> See McDougal et al., *supra* note 42, at 221.

<sup>44</sup> See Charnovitz, *supra* note 39, at 271 & n.797 (citing McDougal et al., *supra* note 42, at 221-22 (defining private associations as groups not seeking power)).

<sup>45</sup> See *id.* at 272.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 273.

<sup>49</sup> See *id.*

### III. THE INTERNET IMPROVES THE EFFECTIVENESS OF THE INTERNATIONAL LAW SYSTEM

International law affects human beings in two basic ways: it changes the way national law institutions govern them, and it may grant them rights and impose duties on them directly, which are then enforced by national or international courts and agencies. The Internet's influence is manifest in the increasing ease with which new international agreements are negotiated, in the impact such agreements have on state behavior, and in enforcement of international law norms directly against states and private persons. There are thus three branches to the argument that the Internet strengthens public international law: the Internet facilitates development of new law; the Internet promotes acceptance of international law by states; and the Internet aids in detecting violations and imposing sanctions.

The arguments are interrelated: the same groups that promote the writing of new treaties also engage in domestic political activities to induce states to conform their behavior to the treaties once they are adopted. The same groups are also active in investigating violations.

#### A. *The Internet Facilitates the Development of New Public International Law*

The Internet facilitates development of new public international law in two ways. First, it reduces the transaction costs and speeds up the process of negotiating new treaties. This effect is evident mostly in the preparatory work that precedes formal adoption of treaty language. Second, the Internet empowers groups advocating new treaty law—primarily NGOs—making it easier for them to form bonds across state boundaries and to participate in the preparatory work for treaties even though they lack substantial resources.

##### 1. *Enhancing Treaty Negotiation*

The Internet makes it easier to negotiate international agreements. Paul Szasz dissected the treaty making process into four major and some twenty subordinate tasks or "stages."<sup>50</sup> Many of these stages can be sped up and

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<sup>50</sup> See Paul C. Szasz, *General Law Making Processes*, in 1 UNITED NATIONS LEGAL ORDER 70-71 (Oscar Schachter & Christopher C. Joyner eds., 1995). The four stages named by Szasz are: (1) the introduction of a bill; (2) its assignment to a committee and the committee's report; (3) adoption by one house of the

made more effective by use of the Internet. In the initiation stage, virtual libraries and electronic surveys of participating governments enhance assessment of the likelihood of success and development of estimates of schedule and costs.<sup>51</sup> In the second stage, when the text of a multilateral treaty is being drafted, the Internet makes it easier to conduct preliminary studies of the state of law, and to distribute completed studies and analyses.<sup>52</sup> Drafting groups can deliberate through the Internet. When governmental consultations are necessary, drafts can be made available and comments received through the Web or e-mail. In the adoption stage, deliberation software can increase the options for consensus formation and voting. During the ratification ("entry into force") stage, virtual library functions can ease the burdens of smaller, less developed countries, and can organize reservations made by individual states.<sup>53</sup> Once the treaty enters into force, placing treaty depositories on the Internet improves compliance.<sup>54</sup>

The actual process of treaty negotiation begins with months or even years of preparatory work, usually originating in workshops or conferences in which experts in the field—typically professors, public officials from concerned national agencies, and lawyers from interested private and non-profit organizations—crystallize the issues and the alternatives which might eventually be expressed in the form of treaty language. As with any negotiation process, this preparatory work depends upon each participant's ability to perform several tasks. The participants must persuade others that their views of reality are accurate and legitimate, form alliances based on common perceptions and goals, and ultimately persuade opinion leaders in broader communities that their recommendations are worthy of acceptance because they relate to the political agenda of a complex array of public officials and interest groups usually focused on the national political process.

In this work leading up to the actual session in which the text of a treaty might be adopted, e-mail plays an important role in allowing

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legislature and then by the other; and finally (4) approval by the executive or return to the litigation.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> Szasz observes that the availability of treaties is "woefully fragmented." See Szasz, *supra* note 50, at 107. Dawson observed that legal publishing enhances legitimacy and development of legal norms. Cf. JOHN P. DAWSON, *THE ORACLES OF THE LAW* xi-xii (1968).

preparatory conferences to be organized. For example, this author recently participated in a workshop on Internet jurisdiction organized by The Hague Conference on Private International Law. All of the invitations, negotiations over format, arrangements, and distribution of background materials occurred via e-mail. There was only one telephone conversation and no letters or faxes.

Once a preparatory conference is organized, Web pages supplement exchange of documents by e-mail, making it more convenient and much quicker for participants to exchange draft language and other relevant pre-existing documents that they may wish to cite as precedent or from which to extract model language. After the face-to-face meetings are adjourned, at which participants develop personal bonds that can support trust and make further conversation more reliable, e-mail and specialized Web sites—often closed to the public—facilitate completion of follow-up work agreed to at the face-to-face conference.<sup>55</sup>

Eventually, the treaty-making process moves to another phase, in which advocates of a treaty must persuade their governments to support recommendations emerging from the preparatory conferences and to place actual treaty negotiation sufficiently high on their political agendas. At this point, the Web's publishing function becomes more important. Interest groups favoring preparatory recommendations use the Web to inform the public and mobilize their constituencies for action. The Web sites dealing with land mines are examples of this process at work, as were various Web sites supporting United States participation in the drafting of a statute for an international criminal court, preceding The Rome Conference of 1998.<sup>56</sup> While simply putting up a Web site does not mean that many people will read it, the way that various Internet search engines work enhances the likelihood that even the most obscure organizations can find an audience for their Web sites.<sup>57</sup> An ordinary member of the public or anyone else interested in the subject of landmines or international crimes is likely to find a Web site advocating a new treaty on those subjects.

Moreover, the political processes leading up to actual final agreement on treaty text rarely are as completely democratic as the foregoing

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<sup>55</sup> The same processes may result in a series of preparatory meetings involving different configurations of experts, public officials, and private interest groups.

<sup>56</sup> See *Amnesty International: International Crime Court—"Crippled at Birth"* (visited Apr. 17, 2000) <<http://www.amnesty.org/news/1998/118jul98.htm>>

<sup>57</sup> There is some delay before new Web pages appear on the major search engine sites—usually several weeks pass before search engine crawlers find new material.

discussion suggests. A variety of "regimes" exists in the international legal system that provide continuing frameworks for preparatory work in treaty negotiation. The Hague Conference on Private International Law, the ITU, the WTO, the WIPO, and other United Nations ("UN") organizations have permanent secretariats who maintain evolving agendas referring to possibilities for negotiation of new treaties. Now, all of these organizations have Web sites that make it easy for anyone interested in their general subject matter to access the work plans and determine the status of preparatory work on treaties. As the preparatory work proceeds, these Web sites provide forums for mobilizing political support (and opposition).

All of these possibilities facilitate rulemaking in international institutions, where distances otherwise would be a barrier. They also increase the role of NGOs because they represent channels for NGO participation additional to traditional state-controlled channels.

Facilitating the treaty negotiation process can reduce some of the disadvantages of reliance on customary international law.<sup>58</sup> One of the difficulties with customary international law always has been the difficulty in determining its content. Professor Jack Goldsmith asserts that the Internet will increase the incoherence of customary international law, making it even more perilous to incorporate into United States federal common law.<sup>59</sup> Notwithstanding Professor Goldsmith's argument, the Internet may actually improve the coherence of customary international

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<sup>58</sup> Public international law includes customary international law as well as treaty-based law. Customary international law emerges from state practice backed by *opinio juris*. *Opinio juris* signifies that state conduct is intended to express a legal norm. *Opinio juris* means that a state acts because it believes its actions are mandated by a norm, or that the conduct is intended to give rise to a new norm. In colloquial terms, *opinio juris* exists when a state acts in order to follow precedent set by other actions, or to set a new precedent which will be followed in the future. See Luigi Condorelli, *Custom, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS*, *supra* note 11, at 189.

<sup>59</sup> Compare Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) (stating that "CIL [customary international law] should not be treated as federal law in the absence of authorization from the federal political branches"), with Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 395-97 (1997) (criticizing the Bradley and Goldsmith view). Professor Goldsmith's attack points out that the "new" customary international law is developed more quickly, depends less on actual state practice, and is fragmented by the increased number of states. See generally Bradley & Goldsmith, *supra*.

law.<sup>60</sup> Even if it does not, the Internet's facilitation of treaty negotiation will make customary international law less important.

It is important, however, not to exaggerate the claims that the Internet facilitates development of new treaty law. Whether or not states agree to treaties depends on their underlying interests. As Part IV explains, the Internet may alter those interests, but the resulting interests balance may oppose, rather than favor, international agreement. It does, however, open up new channels of political interaction, domestically, and across national boundaries. These new channels make it easier for international political movements to be organized, and for those movements to affect the position of states. This phenomenon is discussed in the next section.

## 2. *Empowering Advocates*

The Internet's low economic barriers to entry provide a voice to political actors who otherwise would be denied effective access to the public arena. Because the Internet gives them access, and is inherently global, these actors can find like-minded people in other states, thus enabling them to build political movements across national lines.

Once political actors have organized, the Internet makes it easier for them to mobilize public opinion, thus altering the position of state actors. The movement for a treaty against landmines is a good example.<sup>61</sup> Web pages permitted the horrors of landmines to be dramatized to the general public and political activists likely to be sympathetic to the need for a new treaty. The Internet permitted these activists, once aroused, to coordinate their arguments across national lines, and to use political action and sympathetic governmental positions in one country to promote sympathetic positions in other countries.

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<sup>60</sup> The Internet makes it easier for advocates and decision makers to find examples of state practice and statements of public officials that may be evidence of *opinio juris*. Before the Internet improved the transparency of governmental decision making and scrutiny of governmental actions, research into customary international law either required tedious review of public documents in paper formats scattered over many repositories or reliance on commentators who may have conducted research or who may simply be expressing theoretical opinions with little support from real world conduct.

<sup>61</sup> See *Land Mine Info Center, TAKE ACTION: Urge the White House to Ban Land Mines December 3 is National Call-In Day. Pick up the Phone and be Heard!* (visited Feb. 4, 2000) <[http://www.care.org/info\\_center/land\\_mines/lm\\_news.html](http://www.care.org/info_center/land_mines/lm_news.html)>; *UNICEF, Land Mines: Hidden Killers* (visited Feb. 4, 2000) <<http://www.unicef.org/sowc96pk/hidekill.htm>>

Because the regular press and media increasingly consult the Web for sources of news,<sup>62</sup> growing use of the Web by political action groups also gives such groups a more effective voice than in traditional media. The Internet permits campaigns to be organized, funds to be raised, petitions to be signed, and public officials to be contacted, all more easily than could be done without the Internet.

Of course, the same channels can be used by opponents of any new treaty.<sup>63</sup> Thus, the availability of the Internet does not necessarily mean that treaties are more likely to be adopted; it simply opens up new avenues for political dialogue—avenues that are indifferent to national boundaries. The Internet has the effect of broadening the scope of political debate and making it more international in character.

NGOs, organizing and expressing themselves through the Internet, have had great influence on the treaty negotiation process for many years.<sup>64</sup> NGOs such as Amnesty International and the Lawyers' Committee on Civil Rights perform important intelligence and invocation functions. NGO activity has been especially influential in the environmental arena. At the Stockholm Conference in the early 1970s, NGOs outnumbered accredited governmental representatives, and by 1987 were allowed to address plenary sessions drafting environmental treaties.<sup>65</sup> Their role thus moved from promotion to prescription. Greenpeace typifies aggressive performance of the invocation function.<sup>66</sup> Many people think that the Rome treaty for the International Criminal Court would not have been concluded when it was without NGOs leading the charge. Human rights NGOs mobilized world opinion in favor of international intervention in Bosnia and Kosovo.

The Internet improves the operation and therefore the strength of NGOs. Internet use improves performance of three of the seven functions McDougal, Lasswell, and Reisman identify as performed by NGOs

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<sup>62</sup> See Allison Fass, *Media Talk: Journalists Among the Online Crowd*, N.Y. TIMES, Mar. 30, 2000, at C5.

<sup>63</sup> The demonstrations, rioting, and sabotage of WTO Web servers in Seattle, Washington in December, 1999, are illustrative. See Sam Howe Verhovek, *After Riots, Seattle is Chagrined Yet Cheerful*, N.Y. TIMES, Dec. 6, 1999, at A28.

<sup>64</sup> See Charnovitz, *supra* note 39, at 272 (providing examples of NGO influence in treaty negotiations).

<sup>65</sup> See *id.* at 262-64.

<sup>66</sup> See *id.* at 264.

—“intelligence,” “promotion,” and “prescription”<sup>67</sup>—thereby facilitating the organization and operation of NGOs and enhancing their influence.

Use of the Internet reduces the transaction costs for organizing, maintaining, and carrying out the functions of an NGO. Group organization and maintenance cost advantages from Internet use are greater when group members are widely dispersed. Thus, information technology makes it possible to contact potential NGO constituents dispersed around the world, while the cost of communicating with them and enlisting their support will likely be less than if they were forced to use non-Internet resources. This function of the Internet instantly replaces or supplements direct mail campaigns and newsletters. As credit card commerce on the Internet becomes increasingly common, more people will be equipped to contribute to NGOs directly through the Internet, thus expanding fundraising possibilities.

More than this kind of membership maintenance is possible. NGO activities can be directed and coordinated through e-mail and the Web. A communication associated with direction and coordination can either be public or private, depending on how e-mail and Web systems are set up. An NGO can create a Web page for each major project and allow project participants to post messages to discussion groups placed within that Web page. As soon as a project participant has something to report or a project leader has a new direction to give, that information instantly is available to other key members simply by copying a file from one directory to another on an Internet-connected computer.

*B. The Internet Promotes the Acceptance of Public International Law by States*

The Internet promotes national adoption of new public international law by empowering national interest groups who advocate ratification of new treaties.<sup>68</sup> This is one aspect of the interpenetration<sup>69</sup> process. (The

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<sup>67</sup> *Id.* at 271 and accompanying text. Intelligence is gathering, analyzing, and disseminating information. Promotion is advocacy of particular policy options. Prescription is actual participation in rulemaking. *See id.*

<sup>68</sup> This phenomenon involves many of the same effects of the Internet—and many of the same groups—as the phenomena relating to negotiation of treaties. It focuses, however, on the domestic political process, while the preceding section focused on international forums.

<sup>69</sup> Interpenetration refers to the mutual influence between national and international legal systems. *See Koh, Why Do Nations Obey International Law?*,

other aspect involves the adoption of international norms as domestic legislation is framed and international and domestic cases are decided by courts. The Internet also facilitates these post-ratification aspects of interpenetration.) In other words, the Internet makes traditional sovereign states more permeable, weakening many of their traditional powers, at the same time that it empowers NGOs in all three of their functions.

As the Internet further blurs the lines between domestic interest groups and international NGOs, it strengthens the ability of individuals and small-group interests—weak in domestic politics—to be expressed and given fulfillment through international institutions—NGOs. Then, the Internet makes it easier for NGOs to influence domestic politics. It is no accident that China's growing restrictions on political freedom in Hong Kong aimed to limit the role of international organizations in local politics. International organizations, especially in the human rights area, already play an active role in creating embarrassment for existing domestic political institutions.<sup>70</sup>

The Internet and the Web fundamentally change the possibilities for mobilizing these interest groups and focusing their power on political choices taken by individual states. NGO performance of promotion functions<sup>71</sup> was enhanced as NGOs developed "sophisticated information networks linking dissidents, sympathetic governments, and the media."<sup>72</sup>

No longer is the choice of intervention in East Timor, Kosovo or Bosnia solely the province of political elites and professionals in diplomacy; now, due to information technology, it is a mass political question. Because the Internet increases access to the channels of communication to these worldwide audiences, it fundamentally alters the balance of power between different political actors.

In his illuminating synthesis of competing and overlapping strands of international law, Harold Koh explores the process of "norm internaliza-

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*supra* note 6, at 2654.

<sup>70</sup> See *Human Rights Watch World Report 2000* (visited May 11, 2000) <<http://www.hrw.org/wr2k>> (providing a country-by-country report on human rights abuses).

<sup>71</sup> Promotion—advocacy of particular policy options—is one of the seven NGO functions identified by McDougal, Lasswell, and Reisman. See McDougal et al., *supra* note 42, at 221, see also Charnovitz, *supra* note 39, at 271.

<sup>72</sup> Charnovitz, *supra* note 39, at 264. The Internet enhances performance of the promotion function by NGOs. NGOs can use the Web (indeed, they already are using the Web in the United States for this purpose) to mobilize mass opinion in support of particular positions in rulemaking or enforcement proceedings. They can organize e-mail campaigns to decision makers, frame petitions, and collect signatures.

tion.”<sup>73</sup> He explains that transnational actors such as public officials, “norm entrepreneurs,” and NGOs mobilize domestic elites and popular constituencies and set in motion a domestic political process that internationalizes a norm of international law.<sup>74</sup> The process can be viewed at three overlapping and potentially reinforcing levels: (1) the level of the international system itself; (2) the level of individuals and groups who make up the state; and (3) the processes and institutions of domestic politics.<sup>75</sup>

International institutions make a difference in compliance because they clarify norms, provide a mechanism for detecting noncompliance, and commit the parties to interact repeatedly over a sustained period of time.<sup>76</sup> Gradually, the international norms interpenetrate the domestic legal system of the participants, ripening into “symbolic structures, standard operating procedures, and other internal mechanisms to maintain habitual compliance with the internalized norms.”<sup>77</sup> Democratization strengthens the effect of international law because international law as rhetoric influences masses more than it influences leadership cadres, who are more likely to set policy based on interests in the realist tradition.

Interpenetration refers to the mutual influence between national and international legal systems.<sup>78</sup> State-based law influences international law by providing models for judges applying international law. Already, state-based systems are reference points for international law under the doctrine of customary international law, which partially depends on the universal practice in national legal systems.<sup>79</sup> Working in the other direction, international law also influences state-based law. That process is hardly new. Early in the nineteenth century, concepts of private international law

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<sup>73</sup> Koh, *Why Do Nations Obey International Law?*, *supra* note 6, at 2645-46; Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, *The 1998 Frankel Lecture*] (offering examples of international law internalization: 12-mine territorial limit from the UNCLOS III, Landmines Treaty, European Human Rights Convention, and Torture Convention).

<sup>74</sup> See Koh, *Why Do Nations Obey International Law?*, *supra* note 6, at 2648 (analyzing the example of ABM Treaty Interpretation debate).

<sup>75</sup> See *id.* at 2649-50.

<sup>76</sup> See *id.* at 2653 (analyzing the example of domestic pressures to comply with Oslo Accords by Netanyahu government).

<sup>77</sup> *Id.* at 2654.

<sup>78</sup> See *id.*

<sup>79</sup> See generally *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985) (analysis by court demonstrates the principle of universality), *vacated by* 10 F.3d 338 (6th Cir. 1993).

often were the reference points for federal courts deciding American cases of first impression relating to personal jurisdiction and choice of law<sup>80</sup>

Interpenetration involves a shift from dualism to monism as a characterization of international law as it actually operates. The monism/dualism dichotomy is giving way in the international law literature to a more nuanced approach which recognizes both theoretical and practical problems confronting a judge who would directly apply international law<sup>81</sup> Increasingly, domestic courts in the United States are pressed to consider international legal norms along with purely domestic norms in deciding cases.<sup>82</sup> Although some American courts have declared international law to be part of domestic law,<sup>83</sup> the more usual approach is to presume that Congress intends for United States statutory law to be interpreted as consistent with international law<sup>84</sup> Well-recognized principles determine whether treaties to which the United States is a party have "direct effect" (i.e., can be applied directly as sources of law in domestic cases), reflecting some reticence in wholesale incorporation of international legal norms into the domestic legal order.<sup>85</sup> Some foreign states, however, directly and explicitly incorporate some or all of international law into their domestic

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<sup>80</sup> See *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850) (using international principles to invalidate a judgment).

<sup>81</sup> See Abdelkader Boye, *The Application of the Rules of International Public Law in Municipal Legal Systems*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS*, *supra* note 11, at 289.

<sup>82</sup> See *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (holding that the failure to assert a Vienna Convention claim in state court waived the claim); *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (holding that the Alien Tort Claims Act, 28 U.S.C. § 1350 (1789), incorporates international law violations).

<sup>83</sup> See *Banco Nacional De Cuba v. Sabbatino*, 193 F. Supp. 375, 381 (S.D.N.Y. 1961), *rev'd on other grounds*, 376 U.S. 398, 422 (1964) (holding that international law may be part of United States law in some circumstances).

<sup>84</sup> This follows the so-called "Charming Besty" canon. See Curtis A. Bradley, *The Charming Besty Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998) (exploring United States constitutional implications of the doctrine that United States statutes should be interpreted so as to be consistent with international law).

<sup>85</sup> See *Breard*, 523 U.S. at 375-76 (rejecting an international law claim to prevent the execution of a prisoner; claim was waived by failure to present it in state court); *In re Surrender of Elizaphan Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997) (denying extradition pursuant to an arrest warrant issued by an international tribunal); *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999) (denying habeas corpus writ).

legal systems.<sup>86</sup> The Chief Justice of the Wisconsin Supreme Court has urged state court judges to pay more attention to foreign law in deciding purely domestic cases:<sup>87</sup>

[W]e can cross the divide separating us from other jurisdictions around the world. And if we do so with the modest intent to borrow ideas on classifying, discussing, and solving a particular problem, we should not be deterred by unfamiliarity with foreign legal systems. We may fail to understand a particular system of law or even misinterpret some foreign decisions. Nevertheless, we may also find unexpected answers or new challenges to domestic legal issues.<sup>88</sup>

One barrier to the application of international law in domestic court systems is the difficulty of gaining knowledge of international law.<sup>89</sup> By some estimates, there are more than 15,000 treaties to which the United States is a party.<sup>90</sup> There are surely thousands of scholarly opinions about the content of customary international law scattered all over the world. The comprehensive scope of legal publishers in the United States with respect to domestic legal materials is not typical of other countries nor of international materials. Even an institution such as the Library of International Relations at Chicago-Kent College of Law, whose mission it is to organize international materials, must devote considerable efforts to locate them, obtain copies, and index them for feasible access.

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<sup>86</sup> See BULG. CONST. (adopted 1991) ch. 1, art. 5, cl. 4 (providing that international treaties ratified by Bulgaria have the force of domestic law and supersede contrary provisions of national law); CONST. OF RUSS. F. (approved 1993) ch. 1, art. 15, cl. 4 ("The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply").

<sup>87</sup> See Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997).

<sup>88</sup> *Id.* at 286.

<sup>89</sup> See Boye, *supra* note 81, at 291.

<sup>90</sup> By 1979, the United States was estimated to have become party to 8909 agreements, including 1281 treaties. Between 1980 and 1992, the United States became party to another 4728 agreements, including 218 treaties, for a total of 13,637 agreements and 1499 treaties. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 203-04 (2d ed. 1995).

The Internet facilitates interpenetration in both directions by making international law and state-based law more available to judges and legislators all around the world. Rigaux's "Transnational Civil Society"<sup>91</sup> is strengthened by the Internet. Because of improved accessibility to international norms, domestic judges and legislators are more likely to be influenced by them, thus increasing interpenetration. Improved communication and information exchange through the Internet strengthen the role of NGOs in domestic political processes as well, further increasing interpenetration.

Legal decision makers cannot use another body of law as a reference if they do not know its content. The Internet makes it easier for them to discover its content. No longer must litigants and judges rely upon cumbersome and expensive mechanisms of having expert witnesses present their opinions about the content of a foreign legal system; now, the litigants and judges simply may look up the law themselves.

The United States was an early leader in making its law visible to people outside the United States. The Federal Web Locator<sup>92</sup> provides a portal for accessing nearly one thousand federal agency-sponsored Web sites, and the Thomas system established by the Library of Congress in 1994 offers access to all major congressional materials.<sup>93</sup> Further, many state legislatures make bills and enacted laws available on the Internet.<sup>94</sup> A combination of direct action by federal appellate courts and a cooperative effort by several American law schools make the complete text of all federal appellate opinions available on the Web, and a rapidly growing fraction of state court systems are doing likewise.<sup>95</sup> The United States Department of State has begun to publish on the Web treaties to which the United States is a party, beginning with trade agreements.<sup>96</sup>

Many other nations are following suit. The decisions of the British House of Lords are on the Web.<sup>97</sup> International human rights treaties are

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<sup>91</sup> See Cheng, *supra* note 11.

<sup>92</sup> *The Federal Web Locator* (visited Mar. 28, 2000) <<http://www.infoctr.edu/fwl/>>

<sup>93</sup> See *Thomas: Legislative Information on the Internet* (visited Sept. 5, 1998) <<http://thomas.loc.gov>>

<sup>94</sup> See, e.g., *Illinois General Assembly Web site* (visited Feb. 4, 2000) <<http://www.legis.state.il.us/>>

<sup>95</sup> See, e.g., *Illinois Judicial System Online Office of the Reporter of Decisions Web site* (visited Feb. 4, 2000) <<http://www.state.il.us/court/default.htm>>

<sup>96</sup> See *Agreements Negotiated by the United States Trade Representative* (visited Sept. 23, 1998) <<http://www.ustr.gov/agreements/index.html>> (WTO and the North American Free Trade Agreement [hereinafter NAFTA]).

<sup>97</sup> See *House of Lords Home Page* (visited Feb. 21, 2000) <<http://www.publications.parliament.uk/pa/ld/ldhome.htm>>

available through the Council of Europe ("COE").<sup>98</sup> The UN is doing a good job of making scanned images of pages of all treaties in the UN series available on the Web.<sup>99</sup> The COE's Venice Commission<sup>100</sup> is moving its collection of constitutional court decisions to the Web. Aided by efforts of this author and many of his students, decisions in Croatia, Macedonia, Bosnia, Albania, and—soon—Kosovo will be available as well.<sup>101</sup> China is improving legal transparency in order to hasten economic development by making court decisions and legislative materials available on the Web.<sup>102</sup>

While mere availability of legal materials does not ensure interpenetration, it makes it easier to achieve. As noted above, there is a growing voice within the American judicial community for referencing materials outside the United States.<sup>103</sup> The kind of large scale Web publishing of international documents described in the preceding paragraphs results in the extension of the virtual law library already present on the Internet. Such an expanded library provides a rich source of models for interest groups and parliamentarians writing new law. No longer must the author of a new commercial law for Bosnia-Herzegovina take a stab in the dark; the author can begin with recently enacted commercial laws in Croatia and emerging models

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<sup>98</sup> See *European Court of Human Rights Home Page* (visited July 3, 1998) <<http://www.echr.coe.int>>

<sup>99</sup> See generally *Index of/Depts/Treaty/Collection/series* (visited July 3, 1998) <<http://www.un.org/Depts/Treaty/collection/series>>

<sup>100</sup> The European Commission for Democracy Through Law (the Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe ("COE"). The Venice Commission is the popular name of the European Commission for Democracy Through Law, an activity of the COE. See Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT'L LEGAL STUD. 155, 184 (1997) (discussing the Venice Commission and Web-based activities). The Commission specifically focuses on enhancing the functioning of new constitutional courts, through publishing their opinions and otherwise. The Venice Commission has collected and published the full text of significant constitutional court opinions in paper formats for several years. It moved these opinions to CD-ROM and Web media in 1997. The Council has developed a conceptual topology or thesaurus to index opinions according to their subject matter. See *id.*

<sup>101</sup> The author of this Article has worked with the Commission and with member constitutional courts to use the Internet to improve the efficiency of its decision-publishing operation.

<sup>102</sup> See Henry H. Perritt, Jr. & Randolph R. Clarke, *Chinese Economic Development, Rule of Law, and the Internet*, 15 GOV'T INFO. Q. 393 (1998).

<sup>103</sup> See *supra* note 87 and accompanying text.

from the European Commission, both available on the Internet.<sup>104</sup> No longer must the drafter of a new media law for Kosovo guess at what will be acceptable to the COE; she can look at the media law adopted by Croatia under COE pressure.

The availability of legislative models increases the likelihood of harmony among legislative enactments in different sovereign states, reinforcing economic pressures for such harmonization in order to reduce trade barriers.<sup>105</sup> Not only does the virtual library make harmonization of positive law more likely, it also makes harmonization of decisional law more likely. The constitutional courts connected through the Venice Commission must decide issues arising under the European Convention on Human Rights—a single source of positive human rights law, incorporated by reference into the constitutions of most states of Central and Eastern Europe.<sup>106</sup> Because the constitutional courts in these countries are applying the same document, and because the kinds of conduct likely to give rise to human rights claims do not vary substantially from state to state, it is logical that courts from different states would decide similarly the same issues under the same law. The Venice Commission Project makes it easier for courts to do this by giving them easy access to constitutional court decisions of all of the states confronted with the same questions.<sup>107</sup> Even

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<sup>104</sup> See, e.g., *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package* (visited Sept. 5, 1998) <<http://www.ispo.cec.be/infosoc/legreg/docs/97236.html>>; *Law on Telecommunications* (visited Sept. 5, 1998) <[http://www.croatia.net/law/z1\\_m.htm](http://www.croatia.net/law/z1_m.htm)>

<sup>105</sup> In December, 1999, for example, the author was repeatedly informed by senior governmental and judicial officials in Ukraine that Ukraine is changing the entire structure of its law enforcement and prosecutorial system, and the content of its paternity and child-support law to conform to Council of Europe standards, hopeful of membership in the Council, as an early precursor to membership in the European Union ("EU").

<sup>106</sup> See *The Constitutional Court of the Czech Republic* (visited Sept. 23, 1998) <[http://www.concourt.cz/angl\\_ver/decisions/doc/4-276-96.html](http://www.concourt.cz/angl_ver/decisions/doc/4-276-96.html)> See generally David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 CONN. J. INT'L L. 243, 243-44 (1993) (discussing a common European attitude towards human rights).

<sup>107</sup> The author has assisted this phenomenon by helping constitutional courts get connected to the Internet through a project called "ECEULNet." See *The Constitutional Court of the Czech Republic* (visited Sept. 20, 1998) <<http://www.concourt.cz/htm>> (acknowledging assistance from ECEULNet).

though stare decisis does not operate in a strong form in countries without a common law tradition, as a matter of practical politics, a judge will be pressed to explain deviations from precedent established elsewhere.<sup>108</sup>

Professor Goldsmith doubts the tendency for national and international institutions to harmonize substantive law and questions whether judges dealing with issues already decided by other judges relate their own decisions to the ones that have already been decided.<sup>109</sup> It would be interesting to test his view—and mine—by systematic analysis of constitutional court decisions, counting references to decisions in other countries. The point is not that more information about pertinent judicial decisions in other jurisdictions inexorably leads to agreement across jurisdictional lines, but rather that the easier availability of judicial decisions globally will force judges to articulate the connections between their decisions, even if deviant, and other decisions. The result is more reasoned decision making, and a tendency for greater harmony at the margins. There surely will be disagreement, but at least it will not be accidental.

### *C. The Internet Aids in Detecting Violations and Mobilizing Sanctions*

The Internet encourages compliance with public international law by making it easier to detect violations and deviations and to mobilize sanctions. More and more institutions concerned with implementation of treaties are using the Internet to publicize national decisions taken under treaties.<sup>110</sup> Moreover, Internet use by NGOs enhances their performance of the invocation and application functions,<sup>111</sup> building on “sophisticated

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<sup>108</sup> See, e.g., Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 689-93 (1998) (observing that law has moved from a regime of statutory interpretation to a regime of interpreting and applying international models, conventions, and treaties).

<sup>109</sup> See Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119 (1998).

<sup>110</sup> For example, The Hague Conference on private international law is working to organize a Web site that would publish opinions of national courts applying the various Hague conventions. Such a Web site would make it much easier for those interested in interpretation and application of the conventions to follow case law development. See Interview with Hans von Loon, Secretary General of the Hague Conference (Sept. 1999).

<sup>111</sup> These are two of the seven functions identified by McDougal, Lasswell, and Reisman as being performed by NGOs. Invocation is an accusatory role when norm violations are detected. Application is actual adjudication. The other five, discussed

information networks linking dissidents, sympathetic governments, and the media."<sup>112</sup> Other sections of this Article explain the growing influence of NGOs in negotiating and promoting adoption of international treaties.<sup>113</sup> When violations of international norms are detected by NGOs, they can focus attention, through Web pages and e-mail, on the violators through blacklists and organize secondary pressure against those maintaining relations with the violators. An example of this process at work is the Organization of Economic Boycott of Myanmar for Human Rights Violations.<sup>114</sup> The pressure for Pepsico and others to withdraw from Myanmar was organized almost entirely by NGOs and private persons rather than by governments. They used the Internet intensively to organize the boycott.<sup>115</sup>

Beyond communicating blacklists of rule violators, thereby facilitating informal enforcement, NGO rule enforcers can use specialized Web pages to post results of their investigations to solicit expressions of support and contribution for formal and informal enforcement actions. They can use the Web and e-mail to organize mass write-in campaigns to prod political actors and to commence formal enforcement proceedings.

The Internet empowers nationalities (ethnic interest groups) to accuse regimes of violating international norms in their treatment of national minorities. The Armenian Diaspora is generally perceived as largely determining United States policy toward Armenia, and the Croatian Diaspora is credited with shaping German policy toward Slovenia and Croatia after they seceded from Yugoslavia.<sup>116</sup> Public reaction to the siege of Sarajevo, to ethnic cleansing in Bosnia, to Serbian suppression of municipal election results, and to ethnic cleansing in Kosovo are clear examples. As Serb atrocities against the Albanian minority in Kosovo escalated during the spring and summer of 1998, the first color photographs

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in Part II are: intelligence, promotion, prescription, termination, and appraisal. See McDougal et al., *supra* note 42, at 271. See Charnovitz, *supra* note 39, at 271-74.

<sup>112</sup> Charnovitz, *supra* note 39, at 264.

<sup>113</sup> See generally *supra* notes 50-109 and accompanying text.

<sup>114</sup> See *Some Example: States Who Are Violate [sic] Basic Human Rights, and Firms / Company There Are Dealing with Them* (visited Mar. 3, 2000) <<http://www.geocities.com/CapitolHill/8929/tekst-gb.htm>>

<sup>115</sup> See *id.*

<sup>116</sup> See SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 184-85* (1995) (stating that the German position to recognize Slovenia and Croatia was driven by domestic political pressures, including those of Croat minority in Germany).

of murder victims usually were found on Web sites maintained by the Albanian Diaspora,<sup>117</sup> not on CNN.

An important part of the new international public law system involves peacekeeping by international institutions, ripening into international protectorates as in the case of Kosovo. The Internet facilitates construction and operation of the machinery necessary for these interventions. In the case of Kosovo, international legal documents, press releases, and reports pertaining to the establishment and operation of the Kosovo Force ("KFOR") military and the UN mission in Kosovo civilian authorities are available on the Internet, making it easier for multinational administration to function.<sup>118</sup>

Finally, in certain areas, the growing importance of the Internet as a political and legal forum and as a marketplace creates leverage for use against violators of international norms. One reason the debate over reform of Internet domain name administration is so interesting is that it has the seeds of a new private mechanism for enforcing private rules in an international arena. One cannot participate effectively on the Internet unless one has a domain name. The International Ad Hoc Committee recommendation envisioned a Web of contractual relationships among domain name registers pursuant to which all registers will obligate themselves to revoke the domain name of the Internet user violating the rules and decisions of institution created under the Committee's recommendations.<sup>119</sup>

#### *D. Technology is Not Enough*

Technology, on its own, never effects revolution. It is people, using technology for certain purposes, who alter international law. They must be able to use the Internet to publish law and legal reform proposals; they must be able to find the law; and they must be able to engage in political dialogue on the Internet.

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<sup>117</sup> See *Kosova Freedom* (visited May 11, 2000) <<http://www.kosovafreedom.com>>

<sup>118</sup> See *The United Nations Mission in Kosovo* (visited Feb. 4, 2000) <<http://www.un.org/kosovo/>> (containing a Web publication of legal documents, press releases, and reports pertaining to the U.N. mission in Kosovo).

<sup>119</sup> See *Internet International Ad Hoc Committee* (visited Apr. 18, 2000) <<http://www.iahc.org/>> The IAHC was dissolved on May 1, 1997. However, the International Ad Hoc Committee proposals for regulation of domain names have been continued by the Generic Top Level Domain Memorandum of Understanding. See *gTLD-MoU Website* (visited May 11, 2000) <<http://www.gtld-mou.org/>>

The Internet is a vast virtual library, but its virtual shelves will be empty unless individuals and institutions possessing relevant information place it on computers connected to the Internet. Moreover, other individuals and institutions must provide a value-added layer of bibliographic information pointing to primary documentation; the virtual library must have a classification system and a card catalog. For example, the full text of treaties must be placed on the Internet, and someone also must organize a list of treaty titles with pointers to the text of the treaties, which may be located on a multiplicity of servers. Many of those providing the bibliographic information may choose to standardize typologies or thesauri for indexing documents, but they need not do so. Others, and they need not be the designers or implementers of the classification systems, must translate foreign language documents.

The Internet facilitates both the publication of primary information and the organization of bibliographic aids. An Internet server can be established for as little as \$2000. All it takes to publish a document on the server is to save it in a particular format—Hypertext Markup Language—from either of the two most popular word processing programs (Microsoft Word or WordPerfect) and then to “publish it” to a particular directory on the server—a single step in either of the two most popular Internet Web browser programs (Netscape Navigator and Microsoft Internet Explorer). For an institution such as a court that regularly generates textual judgments or opinions, the process of Web publishing can be automated with a few simple scripts that take word processing files for opinions or judgments as soon as they are released and automatically formats them. Next, they are published to an appropriate directory on the Web server, automatically generating indexes and tables of contents as new opinions or judgments are added.

The preparation of bibliographic aids also is simple. All one needs is a concept for organizing the information. For simple content, one publishes treaty titles or subjects on a Web page and links the entries on the word processing documents to the Uniform Resource Locator (“URLs”) for the full documents. Typically, the linking can be done with one mouse click in popular word processing programs and Internet Web browsers. The Web server containing the bibliographic information may be anywhere in the world and need have no pre-established relationship with the Web server containing the primary documents.

Free text search engines are available at low cost. These software modules automatically index every word in a collection of Web files and permit users to perform a search against the full text of all the documents, without any human intervention to code the subject matter of new documents.

The actions necessary for conferencing on the Internet are somewhat more sophisticated. The initial step requires someone to set up an e-mail list for a discussion group on a Web page. For an experienced Webmaster or unique administrator, this is a five to ten-minute task. Once the list or discussion space is in place, anyone in the world can participate in a discussion.

Acceptance of this new reality is growing. In the fall of 1996, the author encountered many skeptics in Bosnia when he and his students proposed creating Internet-based libraries of legal materials to hasten development of rules of law. In the fall of 1999, no such skepticism was evident in Kosovo or Ukraine, where university and government officials were eager to get Internet connectivity established so access would be enhanced to Internet databases of legislative and judicial materials they already were building.

But the cheap printing press, virtual library, and political forum features of the Internet's Web cannot become realities unless the Internet is open. The qualities of openness in this sense means that every layer of the "stack"<sup>120</sup> of communications and content layers must be free from artificial restrictions. The Internet's universal, nonproprietary technical standards—Internet Protocol ("IP"), Transmission Control Protocol ("TCP"), Simple Mail Transfer Protocol ("SMTP"), Network News Transfer Protocol ("NNTP"), and Hypertext Transfer Protocol ("HTTP")—make it easier for the different pieces of an information infrastructure to fit together. Once connected to the Internet, anyone can send an e-mail message, post to a news group, or mount a Web page, safe in the assurance that anyone else connected to the Internet will be able to read them. An open Internet also means that those wishing to connect to the Internet, whether primarily to receive information or to establish Web servers and to publish information, must not be subjected to licensing and market entry restrictions developed for older technologies such as radio and television broadcasting and telephone and telegraph services.

The distributed, layered architecture of the Internet must be available to suppliers and consumers of information. That means two things. First, centralization of content or communications functions by operation of law as through exclusive franchises or monopolies, is unnecessary and harmful. The economies of scale for virtual libraries and electronic publishing are low. Therefore, there are no natural monopolies or efficiencies likely to

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<sup>120</sup> See *infra* notes 124-128, explaining the Open Systems Interconnection ("OSI") stack as a model for thinking about different elements of information and communications services.

result from state granted monopolies. Establishing such monopolies deprive public and private sectors of the efficiencies naturally available from the Internet.<sup>121</sup> Second, it means that competition laws should ensure that those with monopoly power, however obtained, do not extend it into adjacent layers of the stack of communications and content. Just as incumbent telephone companies in the United States and elsewhere must be forced to unbundle their services and offer connections at any feasible point,<sup>122</sup> so also must suppliers at content levels be prevented from limiting competition in adjacent markets. This is what the antitrust proceeding against Microsoft Corporation is all about.<sup>123</sup>

An open infrastructure, such as described in this section, ensures a diversity of sources and channels for public information. Equally important, it also ensures marginal cost pricing and rapid introduction of new technologies.

The open systems interconnection ("OSI") stack is familiar to computer scientists. Published by the International Standards Organization, OSI is an abstract concept of how different elements of computing systems, including networks of all kinds, fit together based on seven layers of function, ranging from electrical signals and hardware plug specifications at the bottom, or level one, up to the relationship between applications and operating systems at level seven. The seven layers of the OSI stack<sup>124</sup>

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<sup>121</sup> See Henry H. Perritt, Jr. & Christopher Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899 (1997); Henry H. Perritt, Jr., *Should Local Governments Sell Local Spatial Databases Through State Monopolies?*, 35 JURIMETRICS 449 (1995) [hereinafter Perritt, *Should Local Governments Sell Local Spatial Databases*]; Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL OF RIGHTS J. 179 (1995) [hereinafter Perritt, *Sources of Rights*].

<sup>122</sup> See FCC Promotes Local Telecommunications Competition, Report No. CC 99-41, available at 1999 WL 717251 (Sept. 15, 1999) (rules on unbundling of network elements); European Commission White Paper on Opening Up Telecommunications Networks (2000).

<sup>123</sup> See *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1, republished at 84 F. Supp. 2d 9 (D.D.C. Nov. 5, 1999).

<sup>124</sup> Layer 1, the physical layer, defines the electrical and mechanical interface, including number of pins, cable type, and electrical levels (voltage and current). It is a useful category for evaluating the physical communications infrastructure in any country.

Layer 2, the data link layer, covers link setup and error control. It deals with frames. This is a useful category for evaluating switching technology.

Layer 3, the network layer, deals with establishing virtual circuits. It defines

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how packets are assembled, disassembled, and routed. It is a useful category for reviewing data framing standards and facilities, and Internet backbone service.

Historically, "retail" Internet service providers leased point-to-point telephone lines from their points-of-presence to transit networks to which they were connected through routers. At their points of presence, they provided multiple dial-up telephone numbers backed up by modems and terminal servers to aggregate traffic. Transit providers leased higher-capacity point-to-point telephone lines to link routers to which "retail" Internet service providers were connected. The Internet thus was layered on top of the telephone system and constituted a combination of routers, leased telephone lines, dial-up telephone points-of-presence, and associated organizational and human infrastructure to provide training, service, and maintenance.

Now, the Internet conceptually is more complicated for several reasons. Dial-up lines often are virtual, constituting an entitlement to pass traffic through frame relay or SMDS connections with local exchange and interexchange telephone carriers. These connections often are digital and involve some packet switching. Thus, rather than sending IP packets over a simple electrical connection (in the case of a dedicated point-to-point line) or over an analog telephone circuit (as in the case of a dial-up line), IP packets often move over an underlying digital network using other kinds of packets or cells.

Second, the ways in which customers can access a "retail" [Internet Service Provider] ISP have become more complex. ISDN, DSL, and cable modem customers bypass modems and pass digital traffic directly into an ISDN switch DSLAM (for DSL), or telco/cable mode and from there into a router for the ISP. Increasingly, retail ISPs and telephone companies are arranging for the ISP to bypass the local office telephone switch for large customers, thereby giving the ISP the advantage of the unbundling of telephone service mandated by the 1996 Telecommunications Act, and reducing the likelihood of congestion in telephone company switches.

HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY § 1.2A (Supp. 2000).

Layer 3 (the network layer) includes standards for packetizing and depacketizing data in packet switched networks and also includes standards for routing packets. Layer 4 (the transport layer) includes information on reassembling packets and checking for errors. These two layers correspond roughly to the IP standard and TCP standard, respectively. TCP and IP are the two standards or protocols that define the Internet.

Layer 4, the transport layer, is concerned with defining quality of service and is closely integrated with layer 5. Layer 4 is a useful category for reviewing Internet service.

Layer 5, the session layer, relates the logical user interface to the com-

embody the idea that subsystems making up a computer network can be disaggregated from each other. Each layer is defined in terms of the services it requires from the layers below it, its internal operations (protocols), and the services it provides the layers above. If clear specifications exist for the functions to be performed by each subsystem or "layer" in the OSI stack, and if protocols exist defining the interface between layers, computer programmers and hardware manufacturers can focus their energies on one or more subsystems or layers without having to provide all of the layers.<sup>125</sup> This gives the benefits of specialization to participants the computer networks market.

The OSI stack has conceptual power beyond what is needed by network engineers. The same basic ideas can be extended beyond the computer programs and electrical connections making up the OSI stack itself. One can imagine the same kind of stack of layers in content and information access features.<sup>126</sup> The Web has raised consciousness about that kind of layering of information value.

The stack model expresses the idea instantiated by the Internet's Web, that the elements of an information infrastructure can be unbundled.

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munications layers; it establishes and manages communications paths or channels between two communicating applications processes; it establishes and releases connections.

Layer 6, the presentation layer, deals with data representation, data transformations on messages received from the application layer, compression, and data conversion and formatting, e.g., EBCDIC (Extended Binary-Coded Decimal Interchange Code, used by IBM instead of ASCII) to ASCII. This is a useful category for considering human language and character translation issues.

Layer 7, the application layer, serves applications programs through service calls, providing file transfer, document transfer, and electronic mail. The application layer usually passes an address in the form of a service request to layer 5, the session layer, which maps addresses into a form that is acceptable to lower layers. This is a useful category for considering the availability of Internet applications such as e-mail and Web services. See *Webopedia* (visited May 11, 2000) <<http://webopedia.internet.com/TERM/O/OSI.html>>

<sup>125</sup> See *Webopedia*, *supra* note 124.

<sup>126</sup> See Henry H. Perritt, Jr., *Federal Electronic Information Policy*, 63 TEMP L. REV. 201 (1990) (describing stack of added value features); Henry H. Perritt, Jr., *Format and Content Standards for the Electronic Exchange of Legal Information*, 33 JURIMETRICS 265 (1993); Henry H. Perritt, Jr., *Market Structures for Electronic Publishing and Electronic Contracting on a National Research and Education Network: Defining Added Value*, in BUILDING INFORMATION INFRASTRUCTURE: ISSUES IN THE DEVELOPMENT OF THE NATIONAL RESEARCH AND EDUCATION NETWORK (Brian Kahin ed., 1992).

Implementation of the OSI stack and the protocol stack ideas free up positive network externalities inherent in lower levels. Otherwise, those levels are locked into competing proprietary islands. The result of general adoption of the OSI conceptual model was a tipping—and then a stampede—to IP, TCP and then HTTP after the network externalities became apparent.<sup>127</sup>

But competitive access to the conduit is not enough. The Internet will do little if there is no relevant content on it. The same principles of competitive access and opposition to monopoly that are appropriate for the telecommunications infrastructure also are appropriate for the information infrastructure. While copyright and other forms of intellectual property have an important role to play in private creation of information, they are irrelevant for public information, which is created as a public duty imposed on lawmakers and judges.

Realization of the Internet's potential to affect development, acceptance, and enforcement of new public international law depends upon transparency. Preparatory work, actual drafting of treaty language, the political process of treaty ratification, and exposure of deviations and violations all depend upon the relevant information being freely available on the Web. When participants in any of these processes refuse to make information held by them freely available, seeking to extract revenue from those wishing access to the documents or seeking to prevent others from re-disseminating documents, the Internet's potential is thwarted. Almost anyone can frustrate transparency—governments, NGOs, universities. In many instances, the incentives to build support for one's position will overcome such rent-seeking behavior. In other instances, however, self-interested economic behavior by public institutions must be overcome by freedom of information legal principles which should not be trumped by exaggerated copyright interpretations protecting basic political documents.<sup>128</sup>

Unfortunately, not all governments make their information resources available for electronic access. The reluctance of some governments stems from the communist era in which public access to information about government activities either was unnecessary or was actively opposed. In other cases, the motivation is not to discourage public participation in government, but to make money. Many government institutions recognize

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<sup>127</sup> See generally JOHN LARMOUTH, UNDERSTANDING OSI (1994).

<sup>128</sup> See Romano Prodi, President of European Commission, Statement issued week of Dec. 6, 1999 (identifying Internet publication of legal documents as a major priority of European Commission, to improve transparency).

the economic value of government information in electronic form and also that monopolists can extract more revenue by maintaining their monopolies and discouraging competition. Accordingly, they set up government-run or government-sponsored monopolies to sell access to their information resources, blocking access by others.<sup>129</sup>

State-sponsored monopolies over government information are undesirable for a number of reasons. Monopolies make it easier for censorship to occur. Monopolies usually perpetuate older information technologies because monopolists have no economic incentive to introduce new technologies, thus depriving consumers of the benefits of new technology. Monopolies rarely serve the needs of particular consuming communities as well as a competitive market structure can serve them. This is because no monopolist can understand and cater to the needs of specialized communities as well as serve a designer and producer who specializes more narrowly.

Accordingly, information policy should commit to and encourage a diversity of sources and channels for government information.<sup>130</sup> This policy is best implemented by a legal framework that grants anyone a right of access to basic government information and also gives everyone a privilege to publish that information in electronic form or otherwise.<sup>131</sup> In

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<sup>129</sup> See Perritt, *Should Local Governments Sell Local Spatial Databases*, *supra* note 121, at 454-55; Perritt, *Sources of Rights*, *supra* note 121, at 184 (explaining and criticizing agency temptations to set up state monopolies over government information).

<sup>130</sup> A good example of a commitment to a policy of diversity is expressed in the Paperwork Reduction Act Amendments of 1996, Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), which was amended by 44 U.S.C. § 3506 (2000), to read as follows:

- (d) With respect to information dissemination, each agency shall—
  - (1) ensure that the public has timely and equitable access to the agency's public information, including ensuring such access through—
    - (A) encouraging a diversity of public and private sources for information based on government public information;
    - (B) in cases in which the agency provides public information maintained in electronic format, providing timely and equitable access to the underlying data (in whole or in part); and
    - (C) agency dissemination of public information in an efficient, effective, and economical manner

*Id.* at 174.

<sup>131</sup> The Paperwork Reduction Act amendments to 44 U.S.C. § 3506(d), appropriately continue:

some countries, such rights and privileges are deeply imbedded in current law<sup>132</sup>

In the United States, this entitlement is codified in the Freedom of Information Act,<sup>133</sup> and in many similar state statutes. In Sweden, the entitlement is guaranteed by the Constitution.<sup>134</sup> The European Commission recently published a Green Paper on public sector information, under a mandate of the Maastricht Treaty requiring that the functions of European governmental institutions become more transparent.<sup>135</sup>

The basic underpinnings of an international freedom of information act are visible in the guarantees of freedom of expression and freedom of access in the International Covenant of Civil and Political Rights.<sup>136</sup> They should be extended by decisional law and by national implementation of the core principles of the American Freedom of Information Act.<sup>137</sup>

Freedom of information and competitive access to the Internet are important new international human rights, and they should be added to the inventory of values promoted by United States foreign policy and by human rights organizations.

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With respect to information dissemination, each agency shall

(4) not, except where specifically authorized by statute—

(A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public;

(B) restrict or regulate the use, resale, or redissemination of public information by the public;

(C) charge fees or royalties for resale or redissemination of public information; or

(D) establish user fees for public information that exceed the cost of dissemination.

*Id.*

<sup>132</sup> See *infra* notes 133-134.

<sup>133</sup> Freedom of Information Act, 5 U.S.C. § 552 (1994 & Supp. 1998).

<sup>134</sup> See SWED. CONST. 1994, Instrument of Government, ch. 2 (Fundamental Rights and Freedoms), art. 1(2) (guaranteeing freedom of information); Freedom of the Press Act, ch. 2 (On the Public Nature of Official Documents), art. 2 (guaranteeing access to official documents).

<sup>135</sup> See *European Umbrella Organisation for Geographic Information* (visited June 7, 2000) <<http://www.eurogi.org/pubinfo>>

<sup>136</sup> See generally Perritt & Lhulier, *supra* note 121, at 906-11.

<sup>137</sup> See *id.* at 903-06, 911-13.

#### IV. THE INTERNET CHANGES THE BALANCE OF INTERESTS THAT DETERMINES THE OUTCOMES IN INTERNATIONAL LAW

Changing the machinery of international law without changing the underlying interests<sup>138</sup> does not necessarily change outcomes. Formulation of international law and imposing sanctions on its violators is determined as much by international politics as by the capacity of legal institutions. But the Internet also changes the balance of interests in international politics. Thomas L. Friedman's book, *The Lexus and the Olive Tree*, asserts that the benefits of global commerce will be difficult for nation-states to resist.<sup>139</sup> They must choose between maintaining border controls and all the traditional attributes of sovereignty, and allowing globalization to sweep their countries, reducing sovereignty. Pressure on governments to participate in global markets is intensifying because the information revolution makes the general public in every country far more likely to know about the benefits of globalization.<sup>140</sup>

The Internet intensifies this new mass interest in two ways: in the way Friedman emphasizes, as the channel through which mass pressure to reduce barriers and allow participation builds; and as a source of wealth itself, giving rise to a new interest group.<sup>141</sup> The Internet and the explosion in electronic commerce have spawned a new set of companies and entrepreneurs who exercise increasing political influence wherever they are active. They exert pressure on international institutions and on domestic governments to remove barriers to realization of the Internet's potential. They were not part of the political equation ten years ago, and the addition of their voices can change the outcomes in some debates over the content of international law, even as the voices of their customers are raised in Friedman's paradigm to make sure their countries are open to all forms of international commerce, including e-commerce.<sup>142</sup>

But the Internet also empowers interests related to the olive tree side of Friedman's vision.<sup>143</sup> Even as the Internet offers a new global market for

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<sup>138</sup> "Interests" is used in the sense of an advantage or benefit, as in a special interest.

<sup>139</sup> See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999).

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

<sup>143</sup> See *id.* The title of Friedman's book, *The Lexus and the Olive Tree*, signifies tension between the attractiveness of globalization, signified by the global demand for Lexus automobiles, and the forces of ethnic purity and nationalist sentiment,

learning about and acquiring goods and services produced outside one's own country, it also facilitates organization and expression by new nationalities and interest groups. For example, at one point in the Kosovo conflict, the Albanian Diaspora had organized more than 10,000 e-mail accounts for members of the Diaspora and refugees from Kosovo, enabling them to crystallize their sentiments in solidarity. In addition, most of the protest against the WTO in Seattle was organized through the Internet.

While the Internet changes the interest balance in favor of outcomes promoting the free flow of international commerce and political sentiment, it also empowers those who would oppose it. One cannot with confidence predict the outcomes of the new interplay of new interests in international politics. But it clearly would be a mistake to assume that only the machinery has changed and not the substantive determinants of international politics and therefore the ultimate content of international law.

## V THE INTERNET IS GIVING RISE TO NEW BODIES OF INTERNATIONAL LAW

The Internet not only improves the functioning of the public international legal system; it invites the extension of that system. There is growing recognition that traditional forms of regulation are unsuitable for many of the economic and political transactions that occur on the Internet.<sup>144</sup> In some cases, subjecting Internet activities to state-based regulation will raise transaction costs to the point that desirable activities will not occur; in other cases, important public policy interests cannot be enforced effectively over Internet content originating in other states. Erection of new public law frameworks, encouraging and channeling private ordering (self-regulation) can address some of these problems, and pressure grows to develop such frameworks.

### A. *The Battle Between Public and Private Ordering*

Why does the Internet encourage greater reliance on private ordering as part of the international legal system? Because of the differences between the Internet and older technologies, people have been thinking seriously about whether traditional jurisdictional rules are adequate for the Internet or whether new approaches are necessary. The Internet's inherently

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signified by battles over apparently worthless land with a few olive trees in the Middle East.

<sup>144</sup> See LAWRENCE LESSIG, CODE: AND OTHER LAWS FOR CYBERSPACE (1999).

global character makes it difficult to localize conduct and effects, and localization is the traditional lynchpin of private international law doctrines for determining prescriptive and adjudicative jurisdiction. The Internet's low barriers to entry encourage participation in transnational commerce and political affairs by millions of individuals and small enterprises which, before the Internet, were confined to national markets and forums. Statistics presented by the National Consumers League for 1997 show that Internet fraud complaints involving non-United States and Canada consumers ranked eighth, just after Illinois consumers and just ahead of Virginia consumers.<sup>145</sup>

David R. Johnson and David Post say

Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the *power* of local governments to assert control over online behavior; (2) the *effects* of online behavior on individuals or things; (3) the *legitimacy* of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give *notice* of which sets of rules apply. The Net thus radically subverts the system of rule-making based on borders between physical spaces, at least with respect to the claim that Cyberspace should naturally be governed by territorially defined rules.<sup>146</sup>

In other words, the international legal system's traditional rules for jurisdiction depend on localization of conduct or harm. The Internet challenges all three kinds of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction, because it is difficult to localize legally relevant conduct occurring on the Internet. Self-regulation can help with all three challenges because it lessens the pressure to localize behavior.

With respect to prescriptive jurisdiction, if a private group agrees on a code of good practice, that is a kind of legislative act. It is a form of

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<sup>145</sup> See *National Consumers League Internet Fraud Watch: Top 20 Consumer Locations 1997* (visited Feb. 4, 2000) <<http://www.fraud.org/graphics/1997cons.gif>>

<sup>146</sup> David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996). "Cyberspace" refers to the virtual space in which personal, political, and commercial relationships can be established. It is a superset of the Internet, including also private electronic networks using other protocols. See *id.*

prescription and it is inherently transnational, at least to the extent that the membership of the group is transnational.

With respect to adjudicative jurisdiction, private dispute resolution such as arbitration can be inherently transnational. International commercial arbitration under the New York Convention<sup>147</sup> is a prominent example. Moreover, private dispute resolution is not limited to arbitration or mediation. In fact, some new models for private dispute resolution being employed include credit card charge-back mechanisms, dispute prevention and resolution systems unilaterally adopted by private Internet intermediaries.<sup>148</sup> For example, eBay offers an escrow system, an insurance system, a dispute resolution system in the form of mediation, and a mechanism for a kind of consumer blacklisting of merchants who misbehave.

Domestic United States systems for patient care disputes with managed care companies also represent a model with potential application in the international context. There is a long history in health care delivery in the United States of a hybrid system of dispute resolution that begins within a private entity such as an insurance company and eventually ends up in an appeal process in a public entity. Such structures provide the simplicity of a private mechanism at the first level but also have some type of appellate review or control by public institutions.

To be credible, private self-regulatory schemes have to produce enforceable decisions. Enforceability implicates the concept of enforcement jurisdiction. Self-regulation works only to the extent that government permits it to work, as opposed to viewing private enforcement action as defamatory or violative of antitrust laws. Self-regulatory schemes must be linked to public law and to public authorities. When such linkage exists, there is the possibility for real protection because private groups can legislate and resolve disputes privately, and then to the extent that it seems appropriate, rely on the government apparatus for enforcement.

### *B. Models From Other Types of International Regulation*

The Internet's global characteristic causes it to be a target of international regulation similar in some respects to the targets of law of the sea and the subject matter of outer space regulation. Its low economic barriers

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<sup>147</sup> Convention on Enforcement of Commercial Arbitration Awards (1958) [hereinafter New York Convention].

<sup>148</sup> See *eBay: Your Personal Trading Community* (visited Feb. 4, 2000) <<http://www.ebay.com>>; see Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace*, OHIO ST. J. ON DISP. RESOL. (forthcoming 2000).

of entry, however, distinguish it sharply from outer space regulation and moderately from law of the sea.

The brief review of law of the sea and outer space regulation that follows offers some models for regulation when localization of activity within a state is difficult or impossible. These may be useful starting points for thinking about international Internet regulation. On the other hand, these regulatory regimes focus on state actors rather than private actors, and thus make them unsuitable conceptual models for Internet regulation of many thousands of private actors.

### 1. *Maritime Treaties as a Model*

In 1609, Hugo Grotius postulated that no state legitimately could exercise jurisdiction over the open sea.<sup>149</sup> Under customary international law, national jurisdiction was limited to territorial waters. Controversies concerned state jurisdiction over foreign vessels found within their territorial waters and state jurisdiction over natural resources such as fish found within the territorial waters. International law acknowledged state jurisdiction over fishing in territorial waters,<sup>150</sup> and developed principles for defining territorial waters.<sup>151</sup> As interstate ocean commerce increased, international law recognized that the law of the nationality of vessels governed activities on board,<sup>152</sup> “on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.”<sup>153</sup> Another pragmatic rule allowed free passage of warships in time of peace through straits used for international navigation between two parts of the high seas even though the passage occurred through territorial waters.<sup>154</sup>

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<sup>149</sup> See HUGO GROTIIUS, *MARE LIBERUM; SIVE, DE IURE QUOD BATAVIS COMPETIT AD INDICANA COMMERCIA DISSERTATIO* (1609).

<sup>150</sup> See UNCLOS, *supra* note 13, art. 2 (recognizing state jurisdiction over territorial waters).

<sup>151</sup> See *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18) (reviewing and upholding the Norwegian method for calculating the extent of territorial sea).

<sup>152</sup> See *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887) (“*Wildenhus’ Case*” territorial sea jurisdiction relinquished in favor of law of the flag of foreign vessels except as to activities that threaten “peace of the port” or “public peace”).

<sup>153</sup> *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953).

<sup>154</sup> See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 1 (Apr. 9) (finding Corfu Channel to constitute a strait through which free passage is permitted).

Controversy continued well into the twentieth century over the extent of territorial waters—and hence of state jurisdiction. One of the most illuminating alternative rules was the “cannon-shot” rule<sup>155</sup> which defined the extent of territorial waters by the range of a cannon fired from shore, thus clearly defining jurisdiction in terms of the practical extent of state power.<sup>156</sup>

Article 33 of the United Nations Convention on the Law of the Sea (“UNCLOS”) reconciles the competing interests by recognizing a “contiguous zone,” extending no further than twenty-four nautical miles from shore,<sup>157</sup> within which

the coastal state may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary law and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.<sup>158</sup>

Outside territorial, contiguous, and “exclusive economic zones,” the high seas are open and free to all states,<sup>159</sup> and in those seas warships and noncommercial ships are entitled to “complete immunity” from interference by any other state.<sup>160</sup> Private commercial ships are subject to boarding by warships and law-enforcement ships when authorized by the flag state or if there is reason to suspect the boarded ship of piracy,<sup>161</sup> slave trading, unauthorized broadcasting, reason to suspect that the boarded ship is without nationality, or reason to suspect that the boarded ship is of the same nationality as the boarding ship.<sup>162</sup>

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<sup>155</sup> See CARTER & TRIMBLE, *supra* note 90, at 1005.

<sup>156</sup> See Koh, *The 1998 Frankel Lecture*, *supra* note 73, at 636 (explaining the cannon-shot rule).

<sup>157</sup> See UNCLOS, *supra* note 13, art. 33(2).

<sup>158</sup> *Id.* art. 33(1).

<sup>159</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 521 (1987 & Supp. 1991) (recognizing freedom of navigation, overflight, fishing, laying submarine cables and pipelines, construction of artificial islands, installations, and structures, and of scientific research).

<sup>160</sup> See *id.* § 522(1).

<sup>161</sup> *Cf.* United States v. Romero-Galve, 757 F.2d 1147 (11th Cir. 1985) (allowing seizure by the United States Coast Guard of a vessel suspected of drug smuggling outside customs waters under the “protective principle” of prescriptive jurisdiction).

<sup>162</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522(2) (1987 & Supp. 1991).

UNCLOS recognizes the role of international dispute resolution machinery to the law of the sea.<sup>163</sup> Article 286 of UNCLOS provides:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.<sup>164</sup>

Article 287 of UNCLOS allows disputants to satisfy the requirements of article 286 through the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII<sup>165</sup> for one or more of the categories of disputes specified therein. The means of dispute resolution must be specified at the time of ratification of the Convention.<sup>166</sup> The general dispute resolution procedures contemplate the possibility of participation by non-state parties.<sup>167</sup>

Among other things, the ITLOS and the alternative dispute resolution bodies expressly have the power to order the release of vessels that have

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<sup>163</sup> See Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 L. & CONTEMP. PROBS. 195 (1983) (arguing that if parties to the convention retain power of unilateral interpretation, the text of convention would lack stability, certainty, and predictability).

<sup>164</sup> UNCLOS, *supra* note 13, art. 286. Article 297 of UNCLOS excepts disputes over sovereign rights to living resources (fish) within a state's exclusive economic zone, and article 298 allows signatories, at their option, to except from the dispute resolution obligation disputes concerning military and law enforcement activities. See *id.* art. 297(3)(b) and art. 298(1)(b).

<sup>165</sup> The United States opted for special arbitral tribunals. "In accordance with article 30 (4) of the Agreement, the Government of the United States of America declares that it chooses a special arbitral tribunal to be constituted in accordance with Annex VIII of the United Nations Convention on the Law of the Sea of 10 December 1982 for the settlement of disputes pursuant to Part VIII of the Agreement." *Id.*

<sup>166</sup> See *Oceans and Law of the Sea* (visited Mar. 30, 2000) <<http://www.un.org/Depts/los/unclos/closindx.htm>> The specified dispute resolution institutions have jurisdiction over "any dispute concerning the interpretation or application of this Convention." UNCLOS, *supra* note 13, art. 288.

<sup>167</sup> See UNCLOS, *supra* note 13, art. 291 (state parties and other parties as agreed); Statute for the International Tribunal for the Law of the Sea, art. 20(1) (state parties); art. 20(2) (other parties as agreed), Annex VI, Law of the Sea Convention.

been detained.<sup>168</sup> The rules of the tribunal evidence its formal, adjudicatory character.<sup>169</sup>

ITLOS requires that pleadings be submitted in electronic form,<sup>170</sup> and allows service of other papers to be made electronically.<sup>171</sup> ITLOS also publishes its judgments on the Web.<sup>172</sup>

The deep seabed regime of UNCLOS<sup>173</sup> is particularly significant in terms of its implications for Internet regulation. That regime includes an Authority<sup>174</sup> comprising an Assembly,<sup>175</sup> a Council,<sup>176</sup> and a Secretariat.<sup>177</sup> In addition, the regime includes an Enterprise<sup>178</sup> consisting of an international business organization empowered to directly undertake deep seabed resource development. Significantly, the dispute settlement machinery for deep seabed development extends standing to non-state entities,<sup>179</sup> and rulemaking does not require consensus or unanimity by signatories.<sup>180</sup> Adoption of UNCLOS is regarded as a watershed in the development of public international law because UNCLOS is viewed as evidence of the

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<sup>168</sup> See UNCLOS, *supra* note 13, art. 292.

<sup>169</sup> See International Tribunal for the Law of the Sea: Rules of the Tribunal (visited Feb. 4, 2000) <<http://www.un.org/Depts/los/ITLOS/Rules-Tribunal.htm>>

<sup>170</sup> See *International Tribunal for the Law of the Sea: Guidelines Concerning the Preparation and Presentation of Cases Before the Tribunal, Written Proceedings* para. 1 (visited Feb. 4, 2000) <<http://www.un.org/Depts/los/ITLOS/Guidelines.htm>>

<sup>171</sup> See *id.* at *Written Proceedings* para. 10.

<sup>172</sup> See *International Tribunal for the Law of the Sea: The M/V "Saiga" (No. 2) Case (July 1999)* (visited Feb. 4, 2000) <[http://www.un.org/Depts/los/ITLOS/Judg\\_E.htm](http://www.un.org/Depts/los/ITLOS/Judg_E.htm)>

<sup>173</sup> See UNCLOS, *supra* note 13, arts. 133-91.

<sup>174</sup> See *id.* arts. 156-85.

<sup>175</sup> See *id.* arts. 159-60.

<sup>176</sup> See *id.* arts. 161-65.

<sup>177</sup> See *id.* arts. 166-69.

<sup>178</sup> See *id.* art. 170.

<sup>179</sup> See *id.* art. 187(c) (extending the jurisdiction of The Sea-Bed Disputes Chamber of ITLOS to "natural or juridical persons" with nationality of signatories when sponsored by signatories). Article 190 of UNCLOS allows "sponsoring states" to participate in proceedings in which natural or juridical persons are parties. See *id.* art. 190.

<sup>180</sup> See *id.* art. 155, para. 4 (allowing adoption of amendments by three-to-four vote of Review Conference to be submitted to states parties for ratification; ratification by three-fourths of members).

content of customary international law,<sup>181</sup> thus making it binding—in a general sense—even on non-signatories.

## 2. *Space Law as a Model*

The law of outer space<sup>182</sup> includes, among other things, regulation of communications satellites, and the closely-associated law of international telecommunications. Like the Internet, international telecommunications constitutes an international resource—to be used for all of mankind,<sup>183</sup> and a scarce resource—to be preserved.<sup>184</sup>

The International Telecommunication Union (“ITU”) is intended to:

(a) effect allocation of the radio frequency spectrum and registration of radio frequency assignments in order to avoid harmful interference between radio stations of different countries;

(b) coordinate efforts to eliminate harmful interference between radio stations of different countries and to improve the use made of the radio frequency spectrum;

(c) coordinate efforts with a view to harmonizing the development of telecommunications facilities, notably those using space techniques, with a view to full advantage being taken of their possibilities;

(d) foster collaboration among its Members with a view to the establishment of rates at levels as low as possible consistent with an efficient service and taking into account the necessity for maintaining independent financial administration of telecommunication on a sound basis;

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<sup>181</sup> See Bernard H. Oxman, *Law of the Sea*, in THE UNITED NATIONS AND INTERNATIONAL LAW 309 (1997).

<sup>182</sup> The two pertinent international agreements are the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410 [hereinafter Outer Space Treaty], and Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, adopted by the General Assembly in GA Res. 3235 (XXIX) (*entered into force* Sept. 15, 1976) [hereinafter Outer Space Registration Convention].

<sup>183</sup> See International Telecommunication Union Convention, Oct. 25, 1973, 28 U.S.T. 2495, art. 1 [hereinafter ITU Convention].

<sup>184</sup> See *id.* art. 33. The Nairobi Convention was convened in an attempt to incorporate the desires of developing countries into article 33 of the ITU Convention. See *id.*

(e) foster the creation, development and improvement of telecommunication equipment and networks in developing countries by every means at its disposal, especially its participation in the appropriate programmes of the United Nations;

(f) promote the adoption of measures for ensuring the safety of life through the cooperation of telecommunication services;

(g) undertake studies, make regulations, adopt resolutions, formulate recommendations and opinions, and collect and publish information concerning telecommunication matters.<sup>185</sup>

These purposes are similar to the purposes of Internet domain name regulation in that they focus on technical issues, maximization of resource, and non-interference. An example of these purposes is the Outer Space Registration Convention<sup>186</sup> which provides that each signatory must maintain registry of objects launched into space,<sup>187</sup> and obligates launching states to register with UN objects launched into orbit or beyond.<sup>188</sup>

While some of the problems addressed by space law are similar to those presented by international Internet law, there also are important differences. Satellite communication, like the Internet, inherently transcends national boundaries. With both systems of law there is a need to recognize and allow the power of technology to be available, while at the same time respecting the prerogatives of traditional sovereignty

On the other hand, important differences may make it difficult to adapt space law concepts for international Internet regulation. For one thing, as earlier sections of this Article have noted, the economic barriers to entry on the Internet are much less than the economic barriers to entry for satellite communications. One need not procure satellite launch services from a country that has a satellite launch capability in order to establish a presence on the Internet. That means greater proliferation of sources of Internet content, making any form of international regulation more difficult than for satellite-based activities. Moreover, it is difficult to conceive how more than one or two sovereign states have the physical capability to exert power over satellite-based activities. That is not true with the Internet. While Internet border controls are not well understood, may be difficult to establish, and may serve to isolate a country by closing it down from the electronic commerce and political discourse of the Web, Internet border

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<sup>185</sup> ITU Convention, *supra* note 183, art. 4.

<sup>186</sup> Outer Space Registration Convention, *supra* note 182.

<sup>187</sup> *See id.* art. 2.

<sup>188</sup> *See id.* art. 3.

controls are not impossible. Government-based routers can be established as firewalls for Internet communications outside the country. Internet intermediaries may be threatened with strict punishment if they allow forbidden content to enter the country, thus inducing them to figure out their own border control systems. Further, criminal penalties focused on an individual citizen can be reinforced by the Internet tracking capabilities. If the citizen knows that his access of forbidden content will leave a certain trail that can be followed by law enforcement authorities, he is more likely to comply with domestic regulations prohibiting access to content at the individual user level.

None of these things are possible with satellite systems. Accordingly, the practical underpinnings of space law—the virtual impossibility of applying traditional coercive measures to enforce national law—are not characteristic of the Internet. Because of the greater practicability of enforcing traditional law through traditional coercive measures, there is less incentive for nation-states worried about the Internet to agree to an international treaty along the lines expressed by the space treaties.

### 3. *Limited Usefulness of Maritime and Space Law Models*

Both the law of the sea and the space law models are intergovernmental in character. They contemplate that most of the work of rulemaking, treaty interpretation, enforcement, and operations will be conducted by traditional international organizations. Relatively little role is contemplated for the private sector in these models, with the exception of state-designated entities in both regimes.

As the next section of this Article shows, other approaches are conceivable for the Internet, involving relatively thin intergovernmental (public law) frameworks within which private ordering can do most of the rulemaking, adjudication, enforcement, and operational work. These hybrid structures offer the advantages of greater flexibility and decentralization available through private ordering, while tying private ordering to public law to enhance legitimacy, political acceptability, and enforcement through state-based coercion when necessary.

#### C. *Matrices for Hybrid Regulation*

Changes in information technology, including but not limited to the Internet, are causing the development of new public law structures for public and private regulation of commercial and political activities making use of these technologies. Additionally, they also are causing the redesign

and streamlining of traditional public law institutions such as the ITU and the WIPO.

The Internet is encouraging exploration of new kinds of public international law matrices for private self-ordering because of the difficulties of regulating the Internet through conventional state-oriented means.<sup>189</sup> Redesign of existing institutions enlarges their limited rule-making power, and open them up to limited forms of participation by nongovernmental entities such as service providers.

The new institutional frameworks are more significant because they represent hybrid forms of international regulation, providing public law frameworks for private ordering. The three most advanced examples involve negotiation of a safe harbor for personal data moving from Europe to the United States, the establishment of an internationally controlled private corporation to regulate Internet domain names and addresses,<sup>190</sup> and rapidly spreading credit card charge-back mechanisms.

The new public international matrices for private ordering include choice of law rules and rules for adjudicative and prescriptive jurisdiction, treaties such as the New York Convention for enforcing arbitration awards and a proposed state convention on the enforcement of civil judgments. They also include immunities for actors in private ordering systems, such as immunities that shield members of a self-regulating organization from antitrust liability and immunities that shield accusers and decision makers in private adjudicatory mechanisms from defamation liability or liability for intentional interference with business relations.<sup>191</sup>

### 1. *Subsidiarity Will Receive Increasing Attention as a Way of Balancing Global and Local Concerns*

Much needs to be done intellectually to sort out those matters that cannot be dealt with effectively at a more local level from those that will drift to international, political, and legal institutions. In this regard, careful analysis of the federalism in the United States would be instructive, not so much from

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<sup>189</sup> Compare Johnson & Post, *supra* note 146, with Goldsmith, *supra* note 109, and Perritt, *Sources of Rights*, *supra* note 121.

<sup>190</sup> See *The Internet Corporation For Assigned Names and Numbers* (visited May 11, 2000) <<http://www.icann.org>>; see also *infra* notes 230-258 and accompanying text.

<sup>191</sup> See Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 469 (1997) [hereinafter Perritt, *Cyberspace Self-Government*].

the perspective of the Commerce Clause and preemption, as from the perspective of political will to act nationally as opposed to locally. Europeans refer to the preference for local resolution of issues as subsidiarity.<sup>192</sup>

The Internet not only reinforces other phenomena encouraging the development of international law; it facilitates government at the local level. One problem with earlier twentieth century information technologies, such as television and radio broadcasting, is that their economies of scale forced public affairs information to larger political units. The evening news covers Washington, D.C. more easily than it covers the state representative district. An ordinary citizen is more likely to see the President of the United States on television than the mayor. The greater visibility of higher levels of government encourages reliance on those higher levels to help solve problems. The Internet changes that. Its lower barriers to entry mean that an alderman can have a Web page that looks just as functional and just as accessible as the Web page of the President of the United States. As lower levels of government begin to take advantage of the Internet's potential, political underlings can become more relevant in the lives of their constituents even as power on certain issues is shifting upward from nation-states to international institutions, and from national political organizations to international ones.

Subsidiarity relieves political pressure to resist adherence to international norms. Greater possibilities for effective government at the local level mean that local concerns can be accommodated more completely, thus reducing alienation from more remote legal and political institutions. In other words, the Internet is likely to strengthen local and international law, probably at the expense of national, state-based law. Some early glimmers of this effect are evident from efforts at the state level in the United States to influence international developments.<sup>193</sup>

## 2. *Criteria for Self-Regulation—Privacy*

The European Union's ("EU") directive on data protection, effective on October 25, 1998,<sup>194</sup> prohibits transfer of personal data outside of the EU

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<sup>192</sup> See Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 322 n.82, 376 & n.324 (1998) (explaining the significance of subsidiarity in European law).

<sup>193</sup> See *National For. Trade Council v. Natsios*, 181 F.3d 38 (1st Cir.) (declaring the Massachusetts statute unconstitutional), *cert. granted*, 120 S. Ct. 525 (1999); David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands its Foreign Policy Expedition From Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021, 1022 (1997).

<sup>194</sup> Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 32, 1995 O.J. (L 281) 31, 49 [hereinafter European

except to countries that provide an “adequate” level of privacy protection.<sup>195</sup> Because the United States has a patchwork of industry-

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Privacy Directive] (requiring member states to adopt legislation conforming to terms of Directive).

<sup>195</sup> See *id.* art. 25(1). “In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.” *Id.* art. 1(1). “Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.” *Id.* art. 5.

The Directive imposes duties with respect to data quality (article 6). The Directive allows processing of data only when: (1) the data subject has unambiguously consented; (2) processing is necessary to protect vital interests of the data subject; (3) “processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority;” or (4) “processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).” *Id.* art. 7 The Directive permits information to be given to the data subject (articles 10-11), and allows the data subject a right of access to data (article 12) and a right to object to certain data contents (articles 14-15). It obligates data “controllers” to assure confidentiality and security of processing (articles 16-17), and obligates them to notify the supervisory authority when engaging in processing outside blanket authorization obtained through registration (articles 18-21).

It also establishes a Working Party on the Protection of Individuals (article 30) and a Committee (article 31) to assist member states and the European Commission on harmonization and adaptation of the Directive.

The geographic scope of the Directive is specified as follows:

Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member

specific, state, federal, and private self-regulatory approaches, it is not clear that transfers of data to the United States would be permitted by EU authorities.<sup>196</sup> The Directive establishes two administrative bodies to assist the Commission in implementing the directive: a Working Party<sup>197</sup> and a Committee.<sup>198</sup> The Working Party has only advisory powers, while the Committee can block Commission action. As a practical matter, the Working Party is more militant than the Committee in asserting the prerogatives of member state data protection authorities:

While prohibiting data transfers originating in Europe does not, in a formal sense, contravene international law principles of prescriptive, adjudicative, and enforcement jurisdiction,<sup>199</sup> the practical effect of such a prohibition is to disrupt international commerce. The European Commission ("EC") and the United States government have been engaged in developing a hybrid regulatory scheme to avoid this disruption.<sup>200</sup> The discussions resulted in the issuance, on April 19, 1999, of draft "International Safe Harbor Privacy Principles" by the United States Department of Commerce "under its statutory authority to foster, promote, and develop international commerce."<sup>201</sup> Under the safe harbor concept, qualifying

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State, unless such equipment is used only for purposes of transit through the territory of the Community.

*Id.* art. 4(1) (quoted in Henry H. Perritt, Jr. & Margaret G. Stewart, *False Alarm?*, 51 FED. COMM. L.J. 811, 811 n.2 (1999)).

<sup>196</sup> See European Commission [DG XV], *Opinion 2/99 on the Adequacy of the "International Safe Harbor Principles" issued by the U.S. Department of Commerce on 19th April 1999* (visited May 3, 1999) <<http://www.europa.eu.int/comm/dg15/en/media/dataprot/wpdocs/wp19en.htm>> [hereinafter *Opinion 2/99*].

<sup>197</sup> "The Working Party shall be composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission." European Privacy Directive, *supra* note 194, art. 29(2).

<sup>198</sup> "The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission." *Id.* art. 31(1).

<sup>199</sup> See Perritt & Stewart, *supra* note 195, at 811.

<sup>200</sup> Notably, both the Department of Commerce and the European Commission have comprehensive Web sites enabling interested parties to follow the negotiations. This reinforces the conclusions in Part III of this Article that the Internet facilitates the development of public international law.

<sup>201</sup> Department of Commerce, *International Safe Harbor Privacy Principles*, para. 3 (visited Apr. 19, 1999) <<http://www.ita.doc.gov/ecom/shprin.html>> [hereinafter *Safe Harbor Principles*].

United States organizations would be deemed to satisfy the “adequacy” principle of the European legislation and thus eligible to receive personal data transmitted from Europe. Under the principles, organizations could qualify for a safe harbor in several ways: (1) they can join a private-sector-developed privacy program that adheres to the safe harbor principles; (2) they can qualify to the extent that their activities are governed by United States statutory, regulatory, or administrative law (including rules issued by national securities exchanges, registered securities associations, registered clearing agencies, or municipal securities rulemaking boards) that effectively protects personal data privacy; or (3) they can incorporate the safe harbor principles into contracts entered into with parties transferring personal data from the EU.<sup>202</sup> Adoption of the safe harbor principles must be accompanied by a public declaration of acceptance.<sup>203</sup>

Separately, Directorate General XV of the European Commission, through its Data Protection Working Party, adopted the following criteria for judging self-regulatory regimes as components of an international legal order to protect privacy:

For a self-regulatory instrument to be considered as a valid ingredient of “adequate protection” it must be binding on all the members to whom personal data are transferred and provide with adequate safeguards if data are passed on to non-members.

The instrument must be transparent and include the basic content of core data protection principles.

The instrument must have mechanisms which effectively ensure a good level of general compliance. A system of dissuasive and punitive sanctions is one way of achieving this. Mandatory external audits are another.

The instrument must provide support and help to individual data subjects who are faced with a problem involving the processing of their personal data. An easily accessible, impartial and independent body to hear complaints from data subjects and adjudicate on breaches of the code must therefore be in place.

The instrument must guarantee appropriate redress in cases of non-compliance. A data subject must be able to obtain a remedy for his/her problem and compensation as appropriate.<sup>204</sup>

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<sup>202</sup> See *id.* at paras. 3-4.

<sup>203</sup> See *id.* at para. 6.

<sup>204</sup> European Commission [DG XV], *Judging Industry Self-Regulation: When Does it Make a Meaningful Contribution to the Level of Data Protection in a Third*

In early 2000, European authorities and the Department of Commerce agreed on draft principles,<sup>205</sup> despite earlier concerns by the Data Protection Working Party<sup>206</sup> that “reiterated its view that the patchwork of narrowly focused sectorial laws and self-regulatory rules presently existent in the United States cannot be relied upon to provide adequate protection in all cases for personal data transferred from the European Union.”<sup>207</sup> It expressed its support for the safe harbor approach and encouraged further discussions to provide an acceptable benchmark.<sup>208</sup> The Working Party comments identified a number of substantive protections in the April 19 safe harbor draft as to which it requested change or clarification. It also expressed concern about enforcement mechanisms, noting “that National supervisory authorities [in Europe] do not have jurisdiction in third countries and consequently lack any enforcement powers which would allow them to oversee effectively the implementation of the Principles by U.S. organisations.”<sup>209</sup>

Enforcement was considered in a joint draft paper on EU procedures, issued by the European Commission and the Department of Commerce on April 19, 1999.<sup>210</sup> It described procedures for handling complaints about noncompliance with safe harbor rules and challenges to Commission decisions under article 25.6 of the European Privacy Directive.<sup>211</sup>

The draft paper on EU procedures envisions three possible enforcement channels. The first, and preferred, channel begins with private and governmental complaint and dispute resolution procedures in the transferee country (the United States). If these procedures do not resolve the dispute, member states may entertain complaints. They must seek remedial measures from the data recipient and transferee country authorities,

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*Country?* (visited Jan. 14, 1998) <http://europa.eu.int/comm/dg15/en/media/dataprot/wpdocs/wp7en.htm>

<sup>205</sup> See *International Trade Administration Electronic Commerce Task Force* (visited May 11, 2000) <<http://www.ita.doc.gov/td/ecom>> (providing documents relating to Mar. 17, 2000 agreement); *Opinion 2/99*, *supra* note 196.

<sup>206</sup> European Privacy Directive, *supra* note 194, art. 29.

<sup>207</sup> *Opinion 2/99*, *supra* note 196, at para. 4.

<sup>208</sup> See *id.*

<sup>209</sup> *Id.* at cmt. 6.

<sup>210</sup> European Commission & Department of Commerce, *US/CEC Data Privacy Dialogue Draft Paper on EU Procedures* (visited Apr. 19, 1999) <<http://www.ita.doc.gov/ecom/procedur.html>> [hereinafter *EU Procedures*].

<sup>211</sup> Article 25.6 of the Directive authorizes findings that adequate protection is in place, preempting action by EU member states to block data transfers under article 25.3. See European Privacy Directive, *supra* note 194, art. 25(3)(6).

notifying the European Commission if such efforts are unsuccessful, and not blocking data transfers unless exceptional conditions set forth in the Directive exist. If the EC is notified, it must notify the data subject, the data recipient, and transferee country authorities, provide an adequate hearing in conjunction with the Article 31 Committee,<sup>212</sup> and ultimately it may revoke the finding of adequacy pertinent to the transfer.<sup>213</sup>

The second channel involves complaints filed directly with member state courts<sup>214</sup> which may result in a judgment which might be executed in the transferee country but could not block data transfers unless pursuant to provisional measures authorized in the Directive.<sup>215</sup> Lastly, the final channel is a review of the validity of a decision by the European Commission undertaken by the European Court of Justice under article 174.<sup>216</sup>

The draft paper on EU procedures is silent as to the criteria, procedures for, or effect of recognition of a member state judicial judgment by a United States court or agency. Presumably, recognition would be sought

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<sup>212</sup> Article 31(2) provides:

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter.

The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event:

- the Commission shall defer application of the measures which it has decided for a period of three months from the date of communication,
- the Council, acting by a qualified majority, may take a different decision within the time limit referred to in the first indent.

*Id.* art. 31(2).

<sup>213</sup> See *EU Procedures*, *supra* note 210.

<sup>214</sup> Under article 22 of the Directive, member states must provide “for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in Question.” European Privacy Directive, *supra* note 194, art. 22. Article 23 requires member states to provide for compensation for any damage suffered by violations. See *id.* art. 23.

<sup>215</sup> See *EU Procedures*, *supra* note 210.

<sup>216</sup> See *id.*

under the doctrine of comity<sup>217</sup> or under the Uniform Foreign Money-Judgments Recognition Act,<sup>218</sup> in those states adopting it. An obvious problem under either recognition mechanism is that the decision of an EU member state court might not be regarded as a civil money judgment entitled to recognition and enforcement,<sup>219</sup> but rather a penal measure.

The ultimate sanction, however, is a determination by the European Commission that the protections on the United States side no longer are adequate, thereby allowing a member state or the Commission itself to block further data transfer. This possibility presumably would provide sufficient incentives for the data recipient, under encouragement from the United States government, to reach agreement with the Commission on remedial measures, possibly including compensation. In this regard, the Working Party's review of the April 19th safe harbor principles observes that

[i]n an entirely voluntary scheme such as this [envisioned by the safe harbor principles] compliance with the rules must be at least guaranteed by an independent investigation mechanism for complaints and sanctions which must be, on the one hand dissuasive and, on the other hand give individuals compensation, where appropriate.<sup>220</sup>

In a Joint Report on Data Protection Dialogue to the EU/U.S. Summit,<sup>221</sup> the parties reported that "the Member States support in principle the proposed form of the arrangement, which will involve a decision on the basis of article 25.6 of the EU Directive<sup>222</sup> on Data Protec-

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<sup>217</sup> See *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>218</sup> UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1962).

<sup>219</sup> See RESTATEMENT (SECOND) OF JUDGMENTS ch. 2 intro. note (1980) (stating that judgments are not entitled to recognition).

<sup>220</sup> *Opinion 2/99*, *supra* note 196.

<sup>221</sup> *Joint Report on Data Protection Dialogue to the EU/US Summit, 21 June 1999* (visited Apr. 17, 2000) <<http://www.ita.doc.gov/ecom/jointreport2617.htm>> [hereinafter *Joint Report*].

<sup>222</sup> Art. 25.6 provides:

The Commission may find, in accordance with the procedure referred to in Article 31 (2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of

tion,”<sup>223</sup> creating a “presumption of adequate privacy protection for U.S.-based organisations that self-certify their adherence to the principles and frequently asked questions and are subject to the jurisdiction of the U.S. Federal Trade Commission or other body with similar statutory powers.”<sup>224</sup> It recited that the parties planned to finalize the safe harbor arrangement during the autumn of 1999.<sup>225</sup>

After considerable difficulty, the negotiations over a safe harbor for data privacy proved successful. One can learn certain lessons from the negotiations. First, hybrid public/private regulation can be politically acceptable in Europe and the United States. Second, any such hybrid scheme must reserve a role for public authorities in defining the basic parameters of regulatory requirement and in providing backup enforcement measures. Otherwise, self-regulatory initiatives are likely to be dismissed as shams in the political arena. Third, working out hybrid international regulatory regimes will succeed only when affected interests<sup>226</sup> perceive that the negotiations will produce a result superior to what can be obtained through other means, such as traditional state-based legislation and rulemaking. The jurisdictional uncertainties raised by the Internet create such perceptions and incentives with respect to the pro-regulatory<sup>227</sup> interests. Increasingly, they understand that relying on traditional legislatures, courts, and state-based administrative agencies will prove uninclusive, in that certain types of conduct they wish to regulate will escape control because it will occur outside the jurisdiction of these traditional legal and political institutions. Incentives also exist for market-oriented interests because they fear the over-inclusiveness of traditional state-based regulatory regimes, subjecting their activities to uncertain and conflicting requirements and hundreds of different jurisdictions. They also are likely to prefer hybrid regulatory regimes to an expansion of traditional international regimes because they perceive the traditional regimes as being inflexible and unduly influenced by states without a stake in the robust development of electronic commerce and political dialogue in the Internet

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individuals.

European Privacy Directive, *supra* note 194, art. 25(6).

<sup>223</sup> *Joint Report*, *supra* note 221.

<sup>224</sup> *Id.* at para. 3.

<sup>225</sup> *See id.* at introduction.

<sup>226</sup> One might say affected interests with sufficient political power to make a difference.

<sup>227</sup> In this context, “pro-regulatory” means those interests who are not satisfied by reliance on pure market forces and the unilateral actions of market participants.

and other new technologies. The existence of these incentives<sup>228</sup> does not however, ensure that hybrid regimes actually will be successful. Countervailing concerns exist. Pro-regulatory interests—at least with respect to certain regulatory subjects<sup>229</sup>—enjoy some measure of protection of their interests in traditional state-based regimes, however underinclusive. They will be reluctant to give these up in favor of untried hybrid approaches. They will prefer to work out new international regimes that layer new hybrid requirements on top of existing state-based requirements and enforcement mechanisms.

Conversely, pro-market interests have no desire to see regulatory requirements and enforcement measures multiply. They want to reduce rather than increase the complexity resulting from overlapping requirements and enforcement channels. They will never agree to international hybrid regimes unless they have certain preemptive or safe harbor effects, linking them to existing state-based requirements and enforcement institutions. Moreover, all interests understand how to play existing games. All know how to mobilize political influence in existing legislative and administrative bodies. They know how to litigate cases before existing adjudicative and enforcement bodies. Any new regime is more uncertain than existing ones. Accordingly, if new international hybrid regimes simply reiterate existing substantive requirements and offer the same or greater transaction costs of litigating in traditional fora, pro-market interests have little incentive to agree.

Accordingly, international hybrid regimes will gain agreement only if they offer new flexibility in rulemaking, permitting substantive duties to be closely tailored to the realities of rapidly changing technologies. They also must offer more flexibility and lower cost for complaint and dispute resolution, while at the same time being supported by effective state-based coercive measures to compel compensation and compliance.

### 3. *Domain Name Administration*

A different kind of international hybrid regulatory regime is overseeing Internet domain name administration.<sup>230</sup> The Internet Corporation for

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<sup>228</sup> See generally Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1636-38 (1986).

<sup>229</sup> Consumer and banking regulation are examples; privacy regulation in the United States and Internet domain name regulation are counter-examples.

<sup>230</sup> See *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389 (S.D.N.Y. 1999), *aff'd sub nom. Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573

Assigned Names and Numbers ("ICANN") is a non-profit corporation formed to assume responsibility for IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions formerly performed under United States government contract by IANA and other entities.<sup>231</sup>

In 1999, the Department of Commerce signed a Memorandum Of Understanding Between the United States Department of Commerce and Internet Corporation For Assigned Names and Numbers,<sup>232</sup> wherein the parties agreed to a "DNS Project," involving the joint design, development, and testing of new private mechanisms for DNS management.<sup>233</sup> Under the memorandum, ICANN was expected to: (a) Establish policy for, and allocate, IP number blocks; (b) Oversee "operation of the authoritative root server system;" (c) Oversee policy for adding new top level domains; and (d) Coordinate "assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet."<sup>234</sup>

The statement of policy<sup>235</sup> recited, among other things, that "[a]n increasing percentage of Internet users reside outside of the U.S., and those stakeholders want to participate in Internet coordination."<sup>236</sup> ICANN enjoys a kind of quasi-governmental status under United States law by virtue of its contract with the United States government.<sup>237</sup>

In meetings held in Berlin on May 25-27, 1999, the ICANN board of directors adopted a number of resolutions that illustrate the scope of its quasi-regulatory responsibilities. It defined certain "constituencies" responsible for electing representatives for ICANN governing bodies,

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(2d Cir. 2000) (describing the domain name system).

<sup>231</sup> See *id.* at 399.

<sup>232</sup> *Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation For Assigned Names and Numbers, June 10, 1998* (visited Apr. 17, 2000) <<http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>>

<sup>233</sup> See *id.*

<sup>234</sup> *Id.*

<sup>235</sup> See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (Dep't Commerce 1998) (statement of policy).

<sup>236</sup> *Id.* at 31,742.

<sup>237</sup> See *PGMedia, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389, 407 (S.D.N.Y. 1999), *aff'd sub nom. Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000) (finding that domain name registrar Network Solutions enjoyed federal instrumentality immunity from antitrust essential facilities liability, thereby suggesting that immunity would also extend to ICANN).

including country-code top-level domains ("ccTLD") registries, commercial and business entities, global top-level domain ("gTLD") registries, intellectual property, ISPs and connectivity providers, and registrars.<sup>238</sup> The ICANN board concluded that interests represented by a non-commercial domain name holders constituency should be involved in the organization process as early as possible, and urged the organizers of that constituency to submit a consensus application for provisional recognition.<sup>239</sup> It also agreed to consider proposals for a system to permit individuals to select geographically diverse, at-large directors. All of these actions pertain to the political (interest-representation) structure for policy setting and rule-making.

At the same meetings, ICANN concluded that gTLD .com, .org, and .net registrars should implement a uniform dispute resolution policy for coordinating domain name registration with trademark rights,<sup>240</sup> thus taking the first steps toward a private adjudicatory system. The proposed ICANN dispute resolution policy resulted from recommendations of WIPO.<sup>241</sup> In 1998, WIPO had undertaken extensive international consultations at the request of the United States government aimed at developing recommendations to ICANN on questions arising out of the interface between domain names and intellectual property rights.<sup>242</sup> Among other things, WIPO recommended that domain name registrars collect enough information from domain name applicants and holders to permit them to be contacted in the event of disputes, and the adoption of a uniform administrative procedure for resolving cybersquatting<sup>243</sup> disputes. It also recommended that owners

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<sup>238</sup> See *ICANN, Berlin Meetings* (visited Apr. 17, 2000) <<http://www.icann.org/berlin/berlin-resolutions.html>>

<sup>239</sup> See *id.*

<sup>240</sup> See *id.* For an example of such disputes, see *Washington Speakers Bureau, Inc. v. Leading Auth., Inc.*, 49 F. Supp. 2d 496 (E.D. Va. 1999) (ordering a domain name holder to cease using domain names infringing the trademark, but denying the trademark owner's claim to a property interest in the domain names).

<sup>241</sup> See *Final Report of the WIPO Internet Domain Name Process, Apr 30, 1999* (visited Feb. 19, 2000) <[http://ecommerce.wipo.int/domains/process/eng/final\\_report.html](http://ecommerce.wipo.int/domains/process/eng/final_report.html)> [hereinafter *WIPO Final Report*]. A hard copy of the report is available as official WIPI Publication No. 92-805-0779-6. See *id.*

<sup>242</sup> See *id.* at Executive Summary

<sup>243</sup> "Cybersquatting" is the term popularly used to describe "deliberate, bad faith abusive registration of a domain name." *Id.* ¶ 170. For an analysis of cybersquatting issues, see *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868 (9th Cir. 1999) (reversing a preliminary injunction prohibiting the use of a domain name that

of well-known trademarks be allowed to block issuance of domain names containing those marks or close equivalents.<sup>244</sup> In addition to providing guidelines for a dispute resolution procedure, the WIPO recommendation defined abusive domain name registration,<sup>245</sup> thus offering a substantive rule for application in the ICANN system.<sup>246</sup>

The proposal for a dispute resolution process was motivated in part by the multijurisdictional character of disputes over domain names that allegedly infringe trademarks.<sup>247</sup> The recommendation suggested online dispute resolution procedures for certain classes of cases,<sup>248</sup> and endorsed direct enforcement of decisions by registrars.<sup>249</sup> The recommendation, however, would not deny participants in the “administrative” process access to regular courts,<sup>250</sup> nor would the administrative process allow monetary damages or rulings concerning the validity of trademarks. Remedies would be limited to determinations of the status of the contested domain name registration, through appropriate changes to the domain name database.<sup>251</sup>

Notably, supporting the proposition that the Internet facilitates rulemaking by international bodies, ICANN, WIPO, and the Department

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allegedly diluted a famous trademark).

<sup>244</sup> See *WIPO Final Report*, *supra* note 241, ¶¶ 245-291 (recommendations regarding international protection for famous and well-known marks in cyberspace).

<sup>245</sup> See *id.* ¶ 171.

<sup>246</sup> See *id.* ¶¶ 170-177. The Report also notes that “[i]nsofar as international law is concerned, both the Paris Convention for the Protection of Industrial Property, and the TRIPS Agreement, establish obligations for the protection of trademarks.” *Id.* ¶ 174.

<sup>247</sup> See *id.* ¶ 132(i). A domain name’s “global presence may give rise to alleged infringements in several jurisdictions, with the consequence that several different national courts may assert jurisdiction, or that several independent actions must be brought because separate intellectual property titles in different jurisdictions are concerned.” *Id.*

<sup>248</sup> See *id.* ¶¶ 210-214. “Since the dispute concerns domain names, assumptions can be made about the parties to the dispute having the requisite technical facilities to participate in the on-line resolution of the dispute.” *Id.* ¶ 211(iv).

<sup>249</sup> See *id.* ¶¶ 215-220.

<sup>250</sup> See *id.* ¶ 140.

<sup>251</sup> See *id.* ¶ 150(vi). “In order to ensure the speedy resolution of disputes, the remedies available in the procedure should be restricted to the status of the domain name registration itself and should not, thus, include monetary damages or rulings concerning the validity of trademarks.” *Id.*

of Commerce all used the Web to publish proposals and to receive and publish comments on those proposals.

Private regulatory regimes (self-ordering mechanisms) must confront representation and consent problems not faced by state-based legal systems. Whenever a private regulatory regime is constituted, its scope must be defined. In other words, the universe of individuals and entities bound by its legislative acts (rules), adjudicatory decisions, and enforcement actions must be defined. The relationship between the private regime and state-based institutions must be determined as well. ICANN illustrates the difficulty of solving these problems when the subject matter of the private ordering involves diverse interests and wide geographic scope. ICANN's ongoing effort to define "constituencies" involves determining the scope of the regulated population. Affected interests want to be represented in ICANN's decision making bodies if they are to be bound by its rules and decisions. The difficulties are especially great with respect to representation of non-commercial domain name holders and the general class of Internet users, who are supposed to be represented through "at large" directors of ICANN.<sup>252</sup>

ICANN also struggles with the relationship between its rulemaking and dispute resolution bodies and state-based legal institutions. The final WIPO report devotes several paragraphs to this subject, concluding that ICANN, domain name registrar, and WIPO rules on cybersquatting do not displace national (state-based) rules, abjuring authority to decide the validity of trademarks, a question left to national courts, in preserving disputant access to state-based courts even when they consent to submit their disputes to private dispute resolution bodies.<sup>253</sup>

The "constitution" of private regulatory regimes comprises a web of contracts through which participants grant power to private rulemaking and adjudicatory bodies and consent to be bound by their decisions. The ICANN apparatus again is a good illustration.<sup>254</sup>

But the efficacy of these contractual arrangements is only as great as state-based legislation and adjudication allow. Contractually agreed-to

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<sup>252</sup> See *ICANN Website* (visited Apr. 18, 2000) <<http://www.icann.org/general/abouticann.htm>> (describing the system of representation and goals of ICANN).

<sup>253</sup> See *WIPO Final Report*, *supra* note 241.

<sup>254</sup> See *ICANN Website*, *supra* note 252.

adjudicatory decisions must be validated.<sup>255</sup> Individuals or entities excluded from a private regime may claim that the private regimes “constitution” violate state-based competition law.<sup>256</sup>

These interdependencies between public and private regulatory regimes are addressed by what this Article calls matrices for hybrid regulation. The matrices can be explicit and developed in advance, as is the aim of the Department of Commerce/EC negotiations over a data privacy safe harbor, or they can be the result of case-by-case adjudication of disputes arising out of the operation of a private regime, as has been the situation with United States self-ordering regimes such as technical standard-setting bodies<sup>257</sup> and private associations.<sup>258</sup>

#### 4. *Credit Card Charge-backs*

The explosion of e-commerce on the Internet has stimulated governmental interest in low-cost dispute resolution mechanisms for transnational consumer disputes. The most common form of alternative dispute resolution for consumer disputes in the United States is a credit card<sup>259</sup> charge-back. Under the Fair Credit Billing Act,<sup>260</sup> credit card issuers must “investigate”<sup>261</sup> cardholder claims<sup>262</sup> of “billing errors.” “Billing errors” are defined to include “[a] reflection on a statement of goods or services not

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<sup>255</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Federal Arbitration Act) ch. 2, 9 U.S.C. § 202 (2000).

<sup>256</sup> See *PG Media, Inc. v. Network Solutions, Inc.*, 51 F. Supp. 2d 389 (S.D.N.Y. 1999), *aff’d sub nom. Name.Space, Inc. v. Network Solution, Inc.*, 202 F.3d 573 (2d Cir. 2000).

<sup>257</sup> See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658 (1961) (finding that an arbitrary and capricious application of the standard by the trade association violated the Sherman Act).

<sup>258</sup> See Perritt, *Cyberspace Self-Government*, *supra* note 191, at 456 (discussing private associations).

<sup>259</sup> Debit card charge-backs are covered by Federal Reserve Regulation E, 12 C.F.R. § 205.11 (1998), rather than Regulation Z, 12 C.F.R. § 226.13(i) (1981), which governs credit card transactions. The definition of error in Regulation E omits claims of nondelivery or nonconforming goods or services. See *id.* § 205.11.

<sup>260</sup> Fair Credit Billing Act, 15 U.S.C. § 1666 (1994).

<sup>261</sup> See *id.* § 1666(a)(3)(B)(ii).

<sup>262</sup> The claim must be in writing. See *id.* § 1666; *Himelfarb v. American Exp. Co.*, 484 A.2d 1013 (Md. 1984) (holding oral notice insufficient).

accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.”<sup>263</sup> When cardholders allege such non-acceptance or non-delivery, the Issuer may not insist on the charge without determining “that such goods were actually delivered, mailed, or otherwise sent to the obligor and provid[ing] the obligor with a statement of such determination.”<sup>264</sup> Under Federal Reserve Board Regulation Z,<sup>265</sup> charge-backs extend only to consumer and not to business transactions.<sup>266</sup>

Card issuers typically retain only limited authority—defined by the merchant and cardholder agreements—to adjudicate the dispute, although repeated claims involving the same merchant may jeopardize the merchants’ membership in the credit card network.<sup>267</sup> In most cases, the cardholder protests the charge, a charge-back results, the merchant

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<sup>263</sup> 15 U.S.C. § 1666(b)(3). *See also* 12 C.F.R. § 226.13(a)(3) (Federal Reserve name registration itself and should not, thus, include monetary damages or rulings concerning the validity of trademarks.” *Id.* Regulation Z). The term also includes transactions as to which the cardholder requests documentation as to the validity of the charge. *See id.* § 226.13(a)(6).

<sup>264</sup> 15 U.S.C. § 1666(a)(3)(B)(ii). Regulation Z defines the required investigation to include such a determination:

If a consumer submits a billing error notice alleging either the nondelivery of property or services under paragraph (a)(3) of this section or that information appearing on a periodic statement is incorrect because a person honoring the consumer’s credit card has made an incorrect report to the card issuer, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed or that the information was correct.

12 C.F.R. § 226(13)(f) n.31.

<sup>265</sup> 15 U.S.C. § 1666(a)(c)(3)(B) (1988).

<sup>266</sup> *See* 12 C.F.R. § 226.3 (1999).

<sup>267</sup> *See FTC Expects Processors to Insulate Operations Against Consumer Fraud*, 11 No. 23 BANKING POL’Y REP. 6 (1992) (describing the settlement between FTC and Citicorp Credit Services, Inc., requiring the credit card processor to monitor charge-back rates and to stop processing charges from merchants with unusually high rates, as a protection against consumer fraud); Patrick E. Michela, “You May Have Already Won” *Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 PEPP. L. REV. 553, 571 & n.116 (1994) (reporting that consumer fraud operations often are denied access to credit card systems because of high charge-back rates).

substantiates the charge, informal negotiation directly between merchant and cardholder may ensue, and the charge is reinstated.

Major credit card networks extend charge-back protection internationally,<sup>268</sup> and have adopted special consumer protection charge-back rules for electronic commerce.<sup>269</sup>

Although good empirical data is lacking, it appears that the system satisfies both consumers and merchants. Almost no reported cases in the regular courts exist, suggesting that consumers rarely are motivated to go beyond the charge-back process to more formal forms of dispute resolution.

It is important to understand the apparent attractiveness of the charge-back mechanism. Several hypotheses can be offered as to why it works so well. Charge-backs give customers leverage with merchants against whom

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<sup>268</sup> See Letter from Broox W. Peterson, Senior Vice President and Assistant General Counsel, Visa International Service Association, to Secretary, Federal Trade Commission (Mar. 25, 1999), *available at* <<http://www.ftc.gov/bcp/icpw/comments/visa.htm>>

Visa's chargeback rules do not attempt to track all of the possible consumer protection laws around the world, although some chargeback rights do correspond with statutory rights granted to consumers in particular countries, such as the rights granted under Federal Reserve Board Regulation Z to dispute certain credit card transactions. The chargeback reasons permitted under Visa's rules for international transactions have been adopted to enable issuers of Visa Cards to address the fundamental consumer concerns of their cardholders, and incidentally to reinforce the reputation of Visa Cards as the best way to pay.

*Id.*

"While U.S. law requires us to institute these practices, as a card issuer, we have adopted a policy of applying them consistently outside the U.S. as well. If a cardmember outside the U.S. is afforded more protection under local law, we of course comply with that law." Letter from Sally Cowen, Group Counsel, American Exp. Travel Related Services, Incorporated, to Secretary, Federal Trade Commission (June 30, 1999), *available at* <<http://www.ftc.gov/bcp/icpw/comments/americanexpress.htm>>

<sup>269</sup> We will *immediately* chargeback a merchant selling goods or services *delivered electronically* (e.g., software, images) if a cardmember disputes the charge (for example, claiming it was unauthorized). There are several sound business and policy reasons underlying this rule: processing an inquiry is costly and not justified by the usually small dollar amount of these transactions. In addition, an immediate chargeback for these types of purchases provides an incentive for the merchant to exercise greater care in authorizing such transactions.

*Id.* (emphasis in original).

they have claims, thus equalizing to some extent otherwise disparate bargaining power. Psychological satisfaction results from triggering a charge-back, even if the customer eventually has to pay the full price. In at least some cases, triggering a charge-back gets the merchant's attention, allowing the merchant and consumer to work out a compromise. And, in extreme cases, there is the possibility that the consumer will not have to pay or that the merchant will be excluded from the credit card network, ending a pattern of consumer abuse. Moreover, the system is cheap, easily accessible, and quick. A consumer need not search for and find a lawyer or a third party dispute resolution forum. All that is necessary upon receipt of a monthly credit card statement is to call or write the card issuer and protest the charge. The card issuer and the merchant handle the rest. No dispute resolution fees are involved.

Merchants like the system compared to other possibilities such as accepting personal checks for a larger percentage of transactions because the merchant is in a better position with credit card charge-backs than with stop payment orders on checks. If a consumer buys merchandise or services with a personal check and then stops payment on the check to protest failure of the merchant to perform, the merchant has no attractive remedy. It must either sue the consumer or cut the consumer off from further check-payment privileges. Cutting the consumer off may be an effective remedy for the merchant when there is a continuing relationship between merchant and consumer, but not in the one-off stranger transactions increasingly important to electronic commerce. Lawsuits over small consumer transactions are no more attractive to merchants than to consumers. They are expensive, require lawyer involvement, and engender long delays.

Credit card charge-backs are a more common form of dispute resolution in the United States than in other prosperous nations.<sup>270</sup> One of

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<sup>270</sup> Charge-backs are required by law in the United Kingdom and not provided for in France, although Visa and Mastercard systems provide them throughout Europe to some extent. See *Consumer Redress in the Global Marketplace: Chargebacks*, 11, OECD Doc. OCDE/GD(96)142 (June 10, 1996) [hereinafter *Consumer Redress*], available at *Documents de 1996* (visited May 22, 2000) <[http://www.oecd.org//dsti/sti/it/consumer/prod/e\\_96-142.htm](http://www.oecd.org//dsti/sti/it/consumer/prod/e_96-142.htm)> In the United Kingdom, merchants have interpreted section 75 of the Consumer Credit Act of 1974, 22 & 23 Eliz. 2, § 75 (Eng.), which establishes a charge-back regime, as inapplicable to international transactions. U.K. credit card issuers have agreed to apply section 75's protections in certain limited categories of international transactions. See *Consumer Redress*, *supra*, at 70. The OECD's Committee on Consumer Policy has addressed the possibility of establishing an international charge-back regime that would overcome the domestic limitation of national legal

the reasons is the existence of Regulation E in the United States, which requires card issuers to make charge-backs available.<sup>271</sup> Canadian banks strongly oppose the institution of charge-backs because of concern about processing costs for card issuers.<sup>272</sup> This reluctance is reinforced by the perception of Canadian card issuers that the incidence of disputes is much higher in electronic commerce than in conventional face-to-face commerce.<sup>273</sup>

In Europe, charge-backs are not required, but they are nevertheless fairly common in credit card and debit card agreements.<sup>274</sup> Their availability in debit card agreements is much more important in Europe than in credit card agreements, because the proportion of consumer transactions accomplished through debit cards relative to credit cards in Europe is much higher than in the United States, although the total of credit and debit card transactions is a much smaller proportion of the total universe in Europe than in the United States.<sup>275</sup> The relatively wide availability of charge-backs in Europe despite the absence of any government compulsion to offer them, is strong testimony to their attractiveness as an alternative dispute resolution mechanism.

Credit card charge-backs put a private sector intermediary in the position of being the dispute resolver. Intermediaries are willing to do this because the availability of mutually acceptable dispute resolution facilitates consumer and merchant use of the intermediary's service. Intermediary-provided dispute resolution greatly reduces search and other costs because the intermediary already has a relationship with both disputants.<sup>276</sup>

The features of charge-backs encourage public international law to provide an appropriate framework. As the preliminary OECD Report stated

Financial intermediaries appear best suited to resolve individual transaction problems in the global marketplace through chargeback mechanisms. This involves reversing a transaction (charging it back to the seller) to settle various types of problems (e.g. non-delivery of goods,

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regimes. *See id.* at 7

<sup>271</sup> *See Consumer Redress, supra* note 270, at 70.

<sup>272</sup> *See id.* at 58.

<sup>273</sup> *See id.*

<sup>274</sup> *See id.* at 62-63, 65-68.

<sup>275</sup> *See id.*

<sup>276</sup> *See generally* John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 977 (1999) (proposing that credit card systems expand charge-back rights to facilitate electronic commerce).

non-conformance of goods, billing errors, etc.). Chargeback mechanisms encourage merchants to provide high levels of customer satisfaction, as card associations withdraw card privileges from merchants with excessive chargeback rates. Such mechanisms have long been available in the United States and are credited with helping to create consumer confidence in and widespread use of catalogue shopping in that country. During the several years of discussions on this project with card associates, the spread of such mechanisms internationally and to debit cards has been seen as an encouraging sign.<sup>277</sup>

### 5. *Regulatory Categories*

In assessing the prospects for success of different approaches to hybrid regulation, it is important to distinguish technical standard setting from other forms of regulation. When an organization like the Internet Engineering Task Force ("IETF") sets standards, such as by prescribing the Internet Protocol ("IP") or the Transport Control Protocol ("TCP"), compromises are necessary in the negotiation of the standard, but enforcement through coercion is unnecessary. Compromise is necessary because some participants in the standard setting process benefit from the selection of a particular standard, while others lose. For example, a vendor whose existing technology is consistent with an adopted standard can expect increased demand for its product, while a vendor whose existing technology is inconsistent with the adopted standard faces sharply reduced demand or else must incur costs to change its products to conform with the new standard. As with any negotiation, affected interests will participate in the negotiation and agree to a negotiated outcome only if they perceive that the benefits of standardization outweigh the benefits of alternatives to a negotiated agreement. The literature on the dynamics of standard setting concludes that some configurations of market share, beliefs about the direction of technology development, and transaction costs will produce voluntary agreement on standards, and other configurations will not.<sup>278</sup>

When standards are adopted voluntarily, separate enforcement measures are unnecessary. Users and sellers of affected technologies and products can decide for themselves whether to comply with the standard, and generally do so because of positive network externalities from

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<sup>277</sup> *Consumer Redress*, *supra* note 270.

<sup>278</sup> See generally Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479 (1998) (providing an economic analysis of standardization).

standards compliance. Moreover, a decision by a particular vendor or user not to follow the standard imposes no particular costs on any other vendor, user, or society.

In other forms of regulation, the incentives for widespread compliance are fewer, and the harms from noncompliance greater. For example, a seller may obtain large benefits from engaging in fraudulent transactions. That seller has strong economic incentives not to comply with rules against consumer fraud. Allowing noncompliance victimizes defrauded consumers. Accordingly, a legal regime aimed at reducing consumer fraud must have not only effective and efficient rulemaking mechanisms, it also must have effective enforcement mechanisms.

But enforcement involves depriving the targets of enforcement of property and/or business opportunity, occasionally backed by deprivations of liberty, as when incarceration results from criminal prosecution. Norms of political legitimacy and rule of law require some measure of due process before any legal system deprives persons of property or liberty interests.<sup>279</sup>

Other regulatory regimes fall somewhere between technical standard setting and rule adoption and enforcement. These intermediate regimes involve the allocation of rights to scarce resources, as when frequency spectrum is allocated, when imminent domain is used to force one property owner to allow another property owner to make joint use of property,<sup>280</sup> or when Internet domain names and the power to register them are allocated among competing contenders. As to these intermediate regimes, the concern is not so much with mobilizing coercive power to enforce rules (although coercion occasionally must be necessary to oust one property owner in favor of another) as it is with due process, to make sure that resources actually are allocated in accordance with previously articulated rules.

So what do these differences mean for the design of matrices for international hybrid regulatory systems? First, the same political forces that induce legislatures to make new laws will operate regardless of the type of regulation to shape the rulemaking process and—at least to some extent—the content of the rules regardless of whether they are made by public assemblies, government agencies, or private enterprises or coalitions. Requirements derived from antitrust law and imposed on private standard setting organizations decades ago under *Radiant Burners, Inc. v.*

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<sup>279</sup> See U.S. CONST. amends. V, XIV; International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368.

<sup>280</sup> See Telecommunications Act, 47 U.S.C. § 224 (1996).

*Peoples Gas Light & Coke Co.*<sup>281</sup> and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*<sup>282</sup> are examples of this public scrutiny at work.

It is with respect to decision making in individual cases and enforcement that the differences among the three types of regulatory regime matter. With respect to technical standard setting regimes, neither case-by-case adjudicatory procedures nor enforcement matters much. With respect to regimes that allocate scarce resources, the availability of fair adjudicative procedures matters, but not enforcement. With respect to regulatory regimes aimed at curbing harmful conduct, such as consumer protection or privacy regulation, the availability of effective coercive enforcement, as well as adjudicative due process and fair rulemaking, matters.

In societies honoring the rule of law, where the state has a monopoly on the use of coercive power because such power is necessary for effective enforcement regimes, the linkages between state-based institutions and private regulatory mechanisms must be strongest with respect to conduct-altering regulatory regimes. Conversely, when only technical standard setting is involved, linkages to state-based enforcement are least necessary and the greatest degree of privatization can be satisfactory. Both resource-allocating and conduct-altering regulatory regimes need adjudicative due process, and therefore public law matrices for those two types of regulation must include prescriptions for adjudication. But, as the long and successful history of private arbitration shows, adjudication need not be conducted by public bodies; it may be conducted by private entities subject to relatively permissive review when the power of the state is sought to back up decisions by the private adjudicative bodies.

#### 6. *The Limits of Legal Compulsion*

Understanding that conduct-altering regulatory regimes must be backed by coercive enforcement mechanisms does not mean that no attention is necessary to incentives. On the one hand, strong incentives for noncompliance can swamp almost any level of coercive enforcement resources. The prevalent drug trade and the failure of Prohibition are examples. Conversely, areas of commerce and political and social interaction exist in which the power of social norms or economic forces provides such strong

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<sup>281</sup> *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

<sup>282</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (holding that the exclusion of a product from the trade association code is subject to antitrust scrutiny for objective reasonableness).

incentives for rule compliance that resort to coercive enforcement rarely is necessary. Credit card charge-back mechanisms and—perhaps—eBay's<sup>283</sup> array of unilaterally adopted private complaint and dispute resolution procedures are examples.<sup>284</sup> Because merchants and their associated intermediaries conclude that customers will be satisfied only if they have access to effective complaint and dispute resolution procedures, they make such procedures available, and respect them without the need for much coercive backup by public bodies. Even when this is the case, however, an occasional lawsuit may be necessary to collect a debt or to defend against a claim of breach of contract for anti-competitive behavior.

## 7 Prospects

The EU/U.S. Data Privacy negotiations and domain name regulation involve two very different subjects for regulation. Domain name regulation is close to technical standard setting, while data privacy regulation involves imposing duties on one set of interests in order to benefit another set of interests. Few interests would prefer no domain name regulation at all, at least if they favor continued use and expansion of the Internet.<sup>285</sup> The controversy with respect to domain name regulation relates, not to whether there should be regulation at all or how much regulation, but to entitlements to perform economically in connection with operation of the domain name system. The controversy also relates to conflicting interests between trademark owners and users or applicants for Internet domain names that may resemble trademarks, in a period of transition between locally based trademark protection and the inherently global effect of Internet domain names.

Private regulation, on the other hand, is not as universally attractive.<sup>286</sup> Some important interests would be just as happy without any legally-

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<sup>283</sup> eBay (visited Apr. 18, 2000) <<http://www.eBay.com>>

<sup>284</sup> See *eBay User Agreement* (visited June 7, 2000) <<http://www.eBay.com/help/community/png-user.html>> (section 17 of the *User Agreement* states the rules relating to arbitration).

<sup>285</sup> Conceivably, some private network service providers would be just as happy to see the Internet go away so they could serve the demand for electronic commerce and political interaction through private networks with proprietary protocols.

<sup>286</sup> In addition to the questions of incentives raised in the text, important democratic values are at stake. See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CALIF. L. REV. 395 (2000).

imposed privacy protection. Thus controversies over international privacy protection regimes relate not only to the allocation of responsibility for managing the regime, but also to questions of the degree of protection and the robustness of enforcement regimes.

Other regulatory subjects present similarly different conflicts of interest. Certain forms of banking regulation, for example, involve standards for settlements.<sup>287</sup> Participants care little about the details of this system, as long as they know what those details are. Other aspects of banking regulation, however, involve interests in greater conflict, such as those relating to capital requirements and transparency which disadvantage borrowers including depository institutions (such as banks) and advantage lenders.<sup>288</sup> But state and private interests also exist who want to reform capital market regulation to improve stability.<sup>289</sup>

If the EU/U.S. Data Privacy negotiations are successful, and if the controversy over ICANN regulation of Internet domain names wanes, the world community will have two new, and strikingly different, models for international hybrid regulation. An attractive subject for adapting these models exists with respect to consumer protection in Internet-based electronic commerce. The basic norms of consumer protection differ little from state to state, although the details vary considerably.<sup>290</sup> Additionally, effective and aggressive consumer protection agencies already exist at various levels of government around the world.<sup>291</sup> Substantive harmony means that pro-regulatory interests could lose relatively little in a new international hybrid regime that embraces universally recognized norms of consumer protection. The existing traditional regulatory matrix creates incentives for pro market interests to move toward an international hybrid regime that would provide more flexibility in rulemaking, while reducing the problems of regulatory overlap and over-inclusiveness. The pro-regulatory interests have an incentive to work out a new international hybrid regime because of the marked underinclusiveness of traditional state-based regimes.

Public choice theory suggests, however, that negotiation of an international hybrid regime for consumer protection may be more difficult

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<sup>287</sup> See, e.g., 12 C.F.R. § 206.1.

<sup>288</sup> See, e.g., *id.* § 3.6; *id.* § 204.1.

<sup>289</sup> See *American Bankers Association* (visited May 11, 2000) <<http://www.aba.com>>

<sup>290</sup> See Frances E. Zellers et al., *Consumer Protection in the European Union*, 20 U. PA. J. INT'L ECON. LAW 97 (1999).

<sup>291</sup> See, e.g., *Illinois Attorney General* (visited May 11, 2000) <<http://www.ag.state.il.us/>>

than in the privacy arena because of the bureaucratic interests of the multiplicity of existing consumer protection agencies.<sup>292</sup> They want to preserve a role for themselves, and may have difficulty understanding just how an acceptable role can be retained in a new hybrid regime. This kind of bureaucratic interest already has proven difficult in the EU/U.S. Data Privacy negotiations, which have faced problems due to the different approaches taken by the European Commission, the Article 31 Committee and United States officials.<sup>293</sup> The problem would be more acute in the consumer protection arena because consumer protection agencies exist around the world, including at multiple levels in the United States, while data protection commissioners exist only in Europe.

## VI. CONCLUSION

The Internet is a vast new marketplace and arena for political discourse. Its inherently global character and low barriers to entry facilitate participation by many individuals, small enterprises, and political action groups effectively denied participation in traditional markets and political channels. The Internet's characteristics are changing the political dynamics of international law formation and enforcement, and these changes are likely to increase the influence of the international legal system.

The Internet also invites new forms of regulation, as state-based lawmakers and administrators struggle to extend their jurisdiction over conduct occurring through the Internet that has effects within their territories. This struggle to avoid threats to local values is giving rise to new models of regulation through the international legal system—especially to models that provide a public law framework for private, self-regulation.

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<sup>292</sup> See generally Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

<sup>293</sup> See *InfoWorld.com* (visited June 12, 2000) <<http://www.infoworld.com/articles/ic/xml/00/01/14/000114icprivacy.xml>>

