



CCL@BO
ND

CENTRE FOR COMMERCIAL
LAW

WORKSHOP 9 – CRIME AND JURISDICTION IN CYBERSPACE: ACCESS TO ELECTRONIC EVIDENCE

PROFESSOR DAN JERKER B. SVANTESSON
DASVANTE@BOND.EDU.AU



THE CLICHÉ:

“[W]ITH FEW EXCEPTIONS GOVERNMENTS CAN USE THEIR COERCIVE POWERS ONLY WITHIN THEIR BORDERS AND CONTROL OFFSHORE INTERNET COMMUNICATIONS ONLY BY CONTROLLING LOCAL INTERMEDIARIES, LOCAL ASSETS, AND LOCAL PERSONS.” (GOLDSMITH & WU)

A DOCTRINE OF “MARKET SOVEREIGNTY” BASED ON “MARKET DESTROYING MEASURES”:

“[W]ITH FEW EXCEPTIONS GOVERNMENTS CAN USE THEIR COERCIVE POWERS ONLY WITHIN THEIR BORDERS AND CONTROL OFFSHORE INTERNET COMMUNICATIONS ONLY BY CONTROLLING LOCAL INTERMEDIARIES, LOCAL ASSETS, AND LOCAL PERSONS.” (GOLDSMITH & WU - MODIFIED)

JURISDICTION (PUBLIC INT. LAW):

- **THE TRADITIONAL CATEGORISATION:**
 - 1. PRESCRIPTIVE (OR LEGISLATIVE) JURISDICTION;**
 - 2. JUDICIAL (OR ADJUDICATIVE) JURISDICTION;**
 - AND**
 - 3. ENFORCEMENT JURISDICTION.**

JURISDICTION (PUBLIC INT. LAW):

- **A BETTER CATEGORISATION:**
 1. **PRESCRIPTIVE (OR LEGISLATIVE) JURISDICTION;**
 2. **INVESTIGATIVE JURISDICTION;**
 3. **JUDICIAL (OR ADJUDICATIVE) JURISDICTION; AND**
 4. **ENFORCEMENT JURISDICTION.**

INTERNATIONAL LAW PRINCIPLES: *THE HARVARD DRAFT 1935* :

- 1. THE TERRITORIALITY PRINCIPLE [SUBJECTIVE AND OBJECTIVE];**
- 2. THE NATIONALITY PRINCIPLE;**
- 3. THE PROTECTIVE PRINCIPLE;**
- 4. THE UNIVERSALITY PRINCIPLE; AND**
- 5. THE PASSIVE PERSONALITY PRINCIPLE.**



- 'EFFECTS DOCTRINE'

- DUTY OF NON-INTERVENTION
- COMITY
- (TERRITORIAL) SOVEREIGNTY

A NEW (JURISPRUDENTIAL) FRAMEWORK FOR JURISDICTION :

IN THE ABSENCE OF AN OBLIGATION UNDER INTERNATIONAL LAW TO EXERCISE JURISDICTION, A STATE MAY ONLY EXERCISE JURISDICTION WHERE:

- (1) THERE IS A **SUBSTANTIAL CONNECTION** BETWEEN THE MATTER AND THE STATE SEEKING TO EXERCISE JURISDICTION;
- (2) THE STATE SEEKING TO EXERCISE JURISDICTION HAS A **LEGITIMATE INTEREST** IN THE MATTER; AND
- (3) THE EXERCISE OF JURISDICTION IS REASONABLE GIVEN THE **BALANCE** BETWEEN THE STATE'S LEGITIMATE INTERESTS AND OTHER INTERESTS.