PRESCRIPTIVE AUTHORITY: GLOBAL MARKETS AS A CHALLENGE TO NATIONAL REGULATORY SYSTEMS[ϕ]

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I. INTRODUCTION

As economic activity becomes increasingly global, its normative context remains largely state-based. The resulting tension between private economic conduct and the normative claims of foreign states challenges both economic actors and national regulatory systems. With increasing numbers of states and institutions seeking to influence conduct on global markets, conflicts among jurisdictional claims increase. These conflicts, in turn, create uncertainties and costs for both private businesses and public institutions and often impede the effectiveness of both. Moreover, global markets present opportunities for jurisdictional law to play new roles in creating value on and from those markets. Understanding and responding to this challenge is thus fundamental to attaining both private and public goals.

The challenge centers on one question: Who can legitimately prescribe norms for economic conduct? The core issue is jurisdiction. Nevertheless, although the conflict between global markets and state claims is often noted, the role of international jurisdictional law in it is often neglected. Even among lawyers, that role is often misunderstood and its significance overlooked.

This paper explores that challenge. It has three main objectives. One is to identify the key components of international jurisdictional law. We need to know where we are in order to see more clearly where we want to go and how we might get there. A second is to identify some of the ways in which global markets challenge the effectiveness of current jurisdictional tools. There is much general discussion of global markets and economic globalization, but here we will look specifically at the characteristics of global markets as they impact international jurisdictional tools. The third is to assess the adequacy of those jurisdictional tools. Are they appropriate: i.e., are they likely to be effective in responding to the challenge of global markets? Where there are deficiencies, how might they be remedied?

The paper is presented as part of a conference that includes two main categories of participants, and it seeks to address the interests of both. One includes faculty with little experience in the area. For them, the paper includes some basic material about current jurisdictional tools, but it also sketches issues that face scholars in the area. A second group of participants is experienced—even expert—in the subject matter. For them, I can only hope that the paper brings some ideas and insights that they might find valuable—or at least worthy of thinking about.

An underlying theme in this analysis is that the current tools of international legislative jurisdiction are inadequate to meet the challenge of global markets. They were developed in response to economic and political circumstances that global markets have changed and are likely to continue to change. Their primary function has been to reduce the likelihood of state conflicts regarding jurisdiction, but that is no longer the only function for which jurisdictional guidance is needed. Global markets create or intensify economic and political pressures on the jurisdictional scheme, but they also create opportunities for jurisdictional law to perform new and potentially valuable functions.

I look first at the basic doctrines of international jurisdictional law and how they are used. These are the tools used to determine which polities are authorized to prescribe norms for economic conduct. I then explore the development of these tools, focusing on the role of the United States in that process. This provides a basis for both understanding the operation of the principles and assessing their appropriateness.

The section following identifies the challenges that global markets pose for current jurisdictional law. Finally, I offer some thoughts as to how these tools may be improved.

The scope of the paper is limited by its place in the conference of which it is a part. First, I refer here only to issues of prescriptive jurisdiction. Judicial and enforcement jurisdiction are often related to prescriptive jurisdiction in practice, but they present different issues, and these topics are treated elsewhere in the conference. Second, the paper looks at these issues only insofar as they relate to business regulation—the subject of this conference and the most prominent context in which they operate. Third, I focus on U.S. law and experience. These issues often have important comparative dimensions, particularly relating to the role of jurisdictional norms in domestic legal systems, but I do not treat them here.

II. THE CURRENT FRAMEWORK OF PRESCRIPTIVE JURISDICTION

The central idea of international prescriptive jurisdiction is that the international community distributes authority for states to make prescriptive claims on private conduct and thereby helps to maintain legal order among states. It assigns authority on the basis of norms created either through binding custom applicable to all states or by agreements among states.

A. *The Conceptual Framework*

The conceptual mechanism is simple enough. It permits a state to prescribe norms with respect to conduct where two conditions are met. The state must have a relationship to the conduct that international law recognizes as sufficient (a so-called "jurisdictional base"), and the claim must not violate legally-protected interests of one or more other states.

The concept of "jurisdictional base" refers to a nexus between a state and private conduct that justifies the state in prescribing norms relating to that conduct. Three bases of jurisdiction are relevant here.

One is territory. Where conduct occurs within a state's territory, the state is authorized to prescribe norms relating to it—with limited exceptions, such as for diplomatic personnel. The nexus here is close, obvious, and uncontested.

A second nexus is nationality. A state may prescribe norms for its nationals and for corporations organized under its laws. The nexus here is also obvious. A state that confers its nationality must be in a position to establish rules for those whom it supports. The principle is uncontested, although conflicts about its scope are not uncommon. In the business context, the most prominent example is conflicts over the circumstances under which State A may extend its prescriptive jurisdiction to a corporation that is organized under the laws of State B, but subject to control by a corporate national of State A.

The third principle relates to the effects of conduct. It is now generally accepted that a state may prescribe norms where conduct has particular kinds of effects within its territory, regardless of where the conduct takes place. There is no longer serious discussion of the legitimacy of the principle, but as we shall see, its scope remains a subject of much controversy.

Prescriptive authority is, however, constrained in two ways. The central constraint is territorial sovereignty: a state may not prescribe norms for conduct occurring within another state, except where authorized to do so. A second constraint is more vague: a state is required to consider the interests of other states in its assertion of jurisdiction. This is sometimes referred to as an obligation of "comity" or "reasonableness."

The traditional concept of sovereignty undergirds this system. Jurisdictional principles flow from traditional conceptions of the rights and duties of "sovereign" states in relation to each other. In this view, states are independent and unconstrained, except by the rights of other states.

B. The Function of the Jurisdictional System

The main function of this system has been to avoid conflicts among states and the potential harms—including war—that such conflicts may entail. It serves to maintain international order by specifying spheres of authority for states, thereby minimizing the likelihood that more than one state will seek to regulate the same conduct.

Three main factors impair its capacity to perform that function effectively. First, the principles are often too vague to provide effective guidance in specific situations. For example, the scope of the effects principle is a source of frequent controversy. Second, the effects principle and, to a lesser extent, the nationality principle create the possibility of concurrent jurisdiction. If more than one state has a jurisdictional basis relating to specific conduct, each may prescribe norms for that conduct. Third, business decision makers often doubt the practical impact of the system.

C. Legislative Jurisdiction and Private International Law

The focus here is on public international law, but that system is closely related to another set of norms and procedures referred to as private international law (in the United States, "conflict of laws"). Where a jurisdictional conflict is raised in a national court, the court must decide which law to apply, and national legal systems provide rules and procedures for making those decisions. These are not governed by customary international law, but national laws typically refer to public international principles in deciding which laws to apply.[1] The national and international systems are thus functionally related, and as we shall see, responding to the challenge of global markets may call for integrating them more effectively.

III. INTERNATIONAL JURISDICTION AND INTERNATIONAL BUSINESS: U.S. EXPERIENCE

Against this background, we can look more closely at international jurisdiction in the context of international business regulation. Here the focus is on U.S. law and its role. The section has two objectives: one is to understand more clearly where we are and how we got there, and the other is to provide a basis for assessing the challenges of global markets. Identifying the factors that have conditioned the evolution and operation of the current framework allows us to assess more effectively the challenges that global markets represent.

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1. *See generally*, Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, *in* 163 RECUEIL DES COURS 311 (1980) (discussing the relationship between national laws and public international principles).

A. Starting Point: Territoriality

The principle of territoriality has long been the central pillar in the jurisdictional system. It has much value as a conflict-avoidance mechanism because territory has well-defined and easily identifiable boundaries. Assuming that relevant conduct can be identified, the task of identifying the territory in which it occurred is easy enough, and thus it avoids jurisdictional overlaps. This principle anchored the international jurisdictional system until well into the twentieth century.

By the early twentieth century, however, and especially in the 1920s, pressures on it were mounting.[2] In particular, the international cartel movement after World War I created more complex business relationships across national borders, raising questions about which national laws could be applied to them.[3]

This resulted in increased international acceptance of the so-called "objective territorial principle," which establishes the jurisdiction of the state to prosecute and punish crimes commenced outside a state's territory but consummated within it.[4] This concept appeared as a logical and appropriate extension of the territoriality idea, and it created few difficulties, because as originally conceived, its scope was narrow: it applied only when the consequences of conduct could be "localized." Discussion of the issue generally focused on criminal acts, and since the consequences of traditional criminal acts are generally localizable, its use in relation to such violations did not undermine the territorial framework. In 1927, the *Lotus* case of the Permanent Court of International Justice affirmed the validity of the objective territoriality principle in language that encouraged further expansion of its scope.[5]

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2. *See* David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of International Laws*, 10 YALE J. INT'L L. 185, 193–202 (1984) (examining the development of jurisdictional principles).

3. *See generally* DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 115–64 (1998) (providing background on the spread of competition law ideas in Europe after World War I).

4. *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 487–88 (Supp. 1935) (discussing the application of the objective territoriality principle).

5. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., (ser. A.) No. 10 (Sept. 7).

B. The Effects Principle and Postwar Asymmetry

The *Lotus* case led to the development of the effects principle, which has fundamentally undermined the effectiveness of the system. The effects principle does not require that an element of the violation occur in a state's territory in order for the state to have jurisdiction. Effects are enough. Its advent dramatically expanded the potential for concurrent jurisdiction and its accompanying conflict potential.

Encouraged by the political and economic asymmetries of the postwar period, the United States championed the effects principle after the Second World War, and this association has played an important role in the development of the law of international jurisdiction. Assertion of the principle by the United States and resistance to it by others have framed much of the discussion of the subject ever since.

A central event in the development of the effects principle was issuance of the famous *Alcoa* opinion toward the end of the Second World War.[6] The *Alcoa* court claimed that "it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the state reprehends. . . ."[7] The court found the Sherman Act applicable to foreign conduct because it was "intended to affect imports and did affect them." The Sherman Act is the principal U.S. antitrust statute, and antitrust law has been the main arena for controversy regarding the effects principle.

Many foreign countries challenged the effects principle and U.S. assertion of it, particularly in the 1950s and 1960s. Both governments and scholars claimed that effects had not been accepted as a basis for jurisdiction under international law. Although seldom discussed openly, critics often have seen the effects principle as a means of expanding U.S. economic and political hegemony. This perception was supported initially by the prominence of antitrust law in conflicts over its use, because antitrust law was closely associated with U.S. economic ideology.

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6. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

7. *Id*. at 443.

Some foreign states have done more than object to effects jurisdiction. They have countered U.S. jurisdictional assertions by enacting so-called "blocking legislation." In this form of legislation, State A attaches legal consequences to private conduct within its territory that is required by or otherwise associated with jurisdictional claims of State B that are not considered legitimate by State A. Although such statutes do not mention the United States, U.S. claims have been their target. By the late 1980s there were dozens of such statutes, with varying degrees of severity and varying scope.[8]

Resistance to the effects principle outside the United States has weakened as increasing numbers of states have recognized the value of applying their laws to conduct they consider harmful, regardless of where it occurs. Acceptance has been gradual, however, and the conflicts have left their mark on thought, perceptions, and practice.

C. The Search for Limiting Principles: U.S. Self-Restraint

U.S. courts, legislatures, and scholars have responded to the conflicts and uncertainties concerning the effects principle in two main ways. Both are intended to constrain its use by U.S. courts. One is to define more narrowly the kinds of effects required for the assertion of jurisdiction. For example, in the Foreign Trade Antitrust Improvements Act of 1982, the Sherman Act was made applicable only where the effects are "direct, substantial, and reasonably foreseeable."[9]

A second strategy has been the use of "balancing" or "reasonableness" factors in assessing whether there is prescriptive authority over foreign conduct or whether such authority should be exercised.[10] The basic notion is that U.S. courts should consider the interests of other states in determining the legitimacy of regulatory claims. This idea was initially developed within the concept of comity, but it was

8. *See* 1 SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 4:16–:17 (3d ed. 1997) (providing an extended discussion on and examples of "blocking legislation" and "frustration of judgment statutes").

9. 15 U.S.C. § 6a (2000).

10. *See* Gerber, *supra* note 2, at 202–21 (providing an extended discussion on the use of "balancing" and "reasonableness" factors).

reformulated as a "reasonableness" requirement in the *Restatement (Third) of Foreign Relations Law* in 1987.[11]

D. Retrenchment: The Hartford Fire Case

The Supreme Court radically changed the course of the movement toward balancing jurisdictional interests in its 1993 decision in *Hartford Fire Insurance Corp.*[12] In a 5–4 opinion, the Court enunciated a new principle of prescriptive jurisdiction, according to which balancing issues are relevant, if at all, only where there is a "true conflict" between U.S. and foreign jurisdictional claims. Furthermore, a true conflict was defined to be one in which the U.S. jurisdictional claim would require a defendant to violate the law of a foreign state. Thus, the Court appeared to dispense with balancing considerations, at least for most cases.

The *Hartford Fire* decision has been highly controversial. Critics have argued that the decision misreads, or at a minimum misapplies, existing case law—and the *Restatement*—and that by severely reducing conceptual constraints on U.S. jurisdictional claims, the Court has undermined decades of efforts to develop a more effective and internationally acceptable jurisdictional mechanism.[13] Some lower courts have also interpreted the decision narrowly, insisting that reasonableness factors should be considered in a broader range of cases than seem to be indicated by the language of the *Hartford Fire* decision.[14]

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11. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

12. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

13. S*ee, e.g.,* Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness: General Course on Private International Law*, *in* 245 RECUEIL DES COURS 9, 49–58 (1995) (discussing developments away from internationally acceptable jurisdictional mechanisms); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 295–96 (1993).

14. S*ee, e.g.*, Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 166–68 (1999) (giving examples of lower court decisions interpreting the *Hartford Fire* decision narrowly).

E. International Jurisdiction and National Law

Discussions of these issues have often revolved around the relationship between international and domestic law. International law is addressed to foreign states, but it is applied by the institutions—mainly courts—of those states, and thus its influence depends on how those institutions interpret and apply it. This intertwines international law with purely domestic issues governing the law to be applied by national courts.

In the United States, a central component of the relationship between international and national law is the principle that Congress may determine the scope of its legislation. Given that Congress often does not specify the geographical scope of legislation, however, the courts must resort to presumptions regarding congressional intent. The most important of these for jurisdictional purposes states that Congress should not be presumed to violate international law. This should place the content of international law at the center of discussions of international jurisdiction (and it often has), but that content is often too vague to be of much value in resolving specific cases. As a result, those seeking answers to jurisdictional issues often turn to constitutional law and to theories of statutory interpretation—e.g., those based on the perspectives of law and economics—for guidance.

F. Themes in the Development of International Jurisdiction

Several themes in this development deserve note. One involves stability and change in framing the issues. The jurisdictional issue is still framed primarily in terms of the relations among states, the goal of conflict avoidance, and the traditional mechanisms of public international law. Within this framework, the concept of sovereignty and the logic of territoriality continue to play major roles, but there has been growing recognition of the importance of accommodating competing state interests (notwithstanding the *Hartford Fire* decision).

A second theme relates to the institutions that apply jurisdictional principles. *International* law principles have been developed and applied primarily by *national* institutions, and no mechanism coordinates these individual national responses or relates them to each other. In addition, those national institutions are typically courts, but since there are relatively few court cases, the mechanism for developing the law has been largely ad hoc and dependent on the vagaries of case law adjudication.

A third prominent feature of the development has been its geo-political context. U.S. institutions have played the central role, while institutions of other states have generally been in the position of reacting to U.S. jurisdictional assertions. The size and attractiveness of the U.S. market and the political power of the United States have combined to give special prominence to U.S. legal and policy decisions, and have created incentives for U.S. institutions to be expansive in asserting jurisdictional claims.

IV. GLOBAL MARKETS: ELEMENTS OF THE CHALLENGE

Global markets challenge the effectiveness of jurisdictional law in two ways. First, they enhance pressure on it by increasing the likelihood, intensity, and potential consequences of conflicts among states and, to a growing extent, among international and transnational institutions. Second, they create new interests, values, and opportunities that the current framework does not address.

For purposes of this analysis, a global market is one in which geographical location places minimal constraints on demand and supply.[15] Location-based constraints include distance itself as well as political, cultural, and legal boundaries related to location. These factors represent costs of operation. Advances in communication and transportation technology have lowered these costs dramatically for many markets, as have changes in the legal and institutional context of business. Where these cost reductions proceed far enough, the competitive process itself becomes "global" in the sense that markets represent points of interaction for firms located at distant points and across political, legal, and other boundaries. This is

15. The focus here is on the competitive process and its consequences rather than on the growth of international trade, which is often seen as the major factor in discussions of globalization.

obviously not a sharp-edged concept, but it is sufficient for our purposes. Where there is competitive interaction between firms that are located in geographically diverse parts of the globe, we can refer to global markets.

A. The Characteristics of Competition

Three aspects of global markets play central roles in the jurisdictional challenge: the decisional process; the trans-border interrelatedness of the competitive functions; and the relative size, power, and influence of the competitors. These factors themselves are not new, but their extent and their cumulative effect are new.[16]

In a global market, competitive strategies and the decisions that implement them must be based on information about competitors and competitive conditions in numerous countries. This means that information must be sought, acquired, and interpreted, expertise must be developed, and decisions must be made by reference to this data. The decisional process thus itself becomes global in scope.

A second factor is the transnational interdependence of economic functions. When competing, a firm performs production, financing, and other functions that are related to each other by the organization of the firm and by its competitive strategies. In global markets, these functional interrelationships tend to cross many borders. People are hired and fired, factories are built, loans are taken, and supplies are purchased in many countries in order to implement competitive strategies on one market. Those strategies may thus influence economic and political conditions within many states.

Finally, participants in global markets tend to be large, and their size often combines with other factors to give them significant political influence and increased capacity to secure political and financial support. This often allows such firms to influence the conduct of multiple governments on jurisdictional

16. For general discussions of economic globalization, see, e.g., THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (1999); ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY (2000).

and other issues.

Markets with these characteristics tend to intensify tensions between the interests of market participants and those of state governments. From the perspective of competitors, global markets represent a source of opportunity, but governments can impede competitors' capacity to take advantage of those opportunities. Firms seek to minimize costs of operation, but each state border that is crossed may create additional compliance costs. Firms also seek to reduce uncertainty and increase planning predictability, but encounters with numerous legal systems reduce predictability. For governments, global markets offer economic benefits such as employment and increased tax revenues, but they may also generate economic, political, and social harms. States generally prefer to have the capacity to control conduct that harms their interests or, at least, to appear to have that capacity.[17]

Together, these factors create a situation in which *private* economic decisions increasingly have numerous and significant *public* consequences in many states. Moreover, these consequences are often interrelated in complex ways that are difficult to identify, let alone predict. In particular, the consequences of winning and losing on a global market may also span many borders.

B. Consequences for International Jurisdiction

Global markets place new pressures on the international jurisdictional system, because they alter the relationships among states and between states and markets. They increase potential state conflicts and the consequences of such conflicts, enhance the value of avoiding such conflicts, and produce new kinds of relationships among states as well as new institutions for responding to them.

1. Increased Conflicts Potential

The traditional function of international rules of prescriptive

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17. This is not always the case, of course, as sometimes governments prefer to avoid responsibility for failing to take particular regulatory actions by claiming that they had no capacity or authority to take the action.

jurisdiction has been to minimize conflicts among states, but global markets make that more difficult. They tend to increase both the likelihood of such conflicts and their intensity.

The potential for conflicts increases for the obvious reason that as particular conduct impacts a greater number of states, more states have incentives to prescribe norms relating to it. Global markets also tend, however, to increase the intensity of such conflicts. Conflictual intensity depends on the willingness of states to expend resources to pursue their interests in the face of opposing positions. In the context of global markets, the incentives to expend resources to pursue conflictual positions tend to increase. One reason is that jurisdictional decisions tend to implicate more economic and political resources—i.e., they increase the stakes of the game. Moreover, larger participants have more resources with which to exert economic and political pressure on state decision makers.

A second reason relates to costs. The actual cost for business firms to litigate disputes in distant fora is reduced by technological developments, such as the increased effectiveness and speed of communication, and by the growth of transnational law firms and legal alliances. Moreover, the relative cost of such litigation tends to fall as the size of market participants increases—i.e., the cost in relation to the total assets and ability to pay of the participant. The relative cost of a $l million litigation is higher for a firm with $10 million in available assets than for one with $1 billion in available assets.

Yet the increased likelihood of conflict and potentially greater intensity of such conflicts also increase the value of conflict reduction and resolution. The more likely conflict becomes and the higher the costs associated with it, the greater are the incentives for participants to develop strategies, relationships, and institutions that reduce the likelihood and intensity of conflicts and resolve conflicts more effectively and efficiently.

2. *New Processes and Relationships*

This increased value has contributed to the development of relationships and governance processes that are playing increasingly significant roles in the global economy, particularly in the creation of norms for that economy. Two are particularly relevant for our purposes.

One is the growth of regulatory "networks." Particularly since the early 1990s, regulators in some areas have developed working relationships in which they exchange information and experience across borders.[18] Spurred by globalization pressures and facilitated by communications technology, this process of cooperation has developed rapidly. Competition law provides an example. The development of cooperative arrangements has led to regular contacts between competition authorities in the United States, Europe, and—to a lesser extent—Japan. Some of these arrangements take the form of formal agreements, while others remain less formal.

The other development is the convergence of national substantive rules. In some areas—such as competition law—the similarities among systems have markedly increased during the last ten years, and the differences have diminished significantly. This process of convergence should not be overdrawn, but it has been particularly prominent in those areas in which it reduces uncertainties and compliance costs for business—e.g., mergers.[19] The probability of jurisdictional conflicts in areas of law where there has been significant convergence is reduced for the obvious reason that where the applicable norms are similar, there is less to contest.

3. *A Changing Institutional Environment*

Finally, these economic and geo-political factors have not only generated new forms of interaction among political and normative systems, but they have also led to the creation of new institutions and changed the roles and importance of existing

18. *See, e.g.*, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 2–6, 23 (2002).

19. See JÜRGEN BASEDOW & STEFAN L. PANKOKE, LIMITS AND CONTROL OF COMPETITION WITH A VIEW TO INTERNATIONAL HARMONIZATION (Jürgen Basedow ed., 2002), a series of recent articles on the subject of convergence. Note, however, that even where there has been convergence in substantive principles, differences in the actual operation and application of norms often remain. Moreover, convergence does not necessarily reduce incentives to pursue those conflicts that do exist.

institutions.[20] In doing so, these institutions are changing the context within which the jurisdictional framework operates. The most obvious example is the World Trade Organization (WTO), but others such as the North American Free Trade Association (NAFTA) are also becoming increasingly important.

V. ASSESSING THE ADEQUACY OF THE JURISDICTIONAL MECHANISM

We can now assess the jurisdictional framework in light of the demands and opportunities of global markets. I submit that it is inadequate on at least three levels. First, it is not well suited to the task of reducing and mediating conflicts relating to global markets. Second, it barely—if at all—addresses the institutions and other arrangements that have developed in relation to global markets and with which states now share the normative stage. Third, it does not seek to improve either the conditions under which global markets operate or their political, social, or environmental impacts.

Conflict reduction has been the traditional and central function of the international jurisdictional system, but global markets create new conditions for performing that function. The system was developed in a context in which authoritative application of jurisdictional principles was relatively rare, but as the likelihood and intensity of jurisdictional conflicts increases, its effectiveness diminishes. Its principles are often too general and abstract to provide effective guidance for decisions on global markets. For example, the effects principle—the most important jurisdictional principle for business decision makers—has few conceptual contours. Concepts such as "direct" and "substantial" provide little guidance as to how the principle will be applied. In addition, as an increasing number and variety of courts and other institutions apply the principles, the likelihood of differences in interpretation and application increases.

The capacity of the system to resolve conflicts in this context is also limited. It relies on national courts, and the cost, delays, and uncertainties associated with international litigation make

20. *See generally* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000).

them poorly suited to solve global market conflicts. Diplomatic processes can sometimes be useful in resolving such conflicts, but they are notoriously uncertain and often vulnerable to political influence.

Another weakness is the virtual exclusion from the jurisdictional system of the new institutional players with which it must share the stage. These institutions are an increasingly important part of the normative context within which global markets operate, but existing jurisdictional principles pay little or no heed to them and the governance interests they represent. As their normative role in global markets grows, the value of developing principles that encompass their jurisdictional claims increases correspondingly.

Finally, the jurisdictional mechanism does not consider the potential value to be derived from global markets. In determining what law will be applied to conduct on global markets, jurisdictional principles structure the incentives of market participants and thereby influence the efficiency of those markets and the outcomes they produce. Nevertheless, the current jurisdictional mechanism does not take these effects into account, and thus it cannot maximize the potential benefits of such markets.

VI. ADJUSTING THE MECHANISM: SOME MODEST PROPOSALS

This analysis suggests several avenues to consider in fashioning more effective jurisdictional tools. These suggestions do not call for radical change in the current jurisdictional framework, but for adjusting some of its components and mechanisms.

A. *Reconceiving the Basics*

Three basic elements of international jurisdictional law deserve rethinking. One is the conception of an international community. International jurisdiction law is produced by "the international community," which in turn, is usually understood to consist of states and to be defined by relationships among states. As we have seen, however, this conception is too narrow. It does not reflect adequately the interests affected by global markets, and it does not include other institutions that participate in shaping global markets, particularly international economic institutions.

Another element involves the "voice" of that community. Jurisdictional principles are understood to represent the will of the international community as expressed by the interactions of its members. This voice is imaged as unitary—creating general principles of action that are applicable everywhere. Yet global markets call for a more complex conception of voice that permits variation and flexibility to adapt to specific normative situations—a "chorus," perhaps, rather than a unitary voice.

The third basic element that deserves rethinking is the function of jurisdictional law. Its traditional function of minimizing conflicts among states is inadequate in the context of global markets. Such markets create and distribute wealth, shape political agendas, and affect the development of societies and the environment. Jurisdictional law should be envisioned as a tool for supporting their development and influencing their transnational impacts.

B. Jurisdictional Principles: The Criteria

This rethinking suggests several criteria for developing jurisdictional principles. The guiding consideration is to increase the utility of jurisdictional law in performing its traditional function of conflict avoidance while developing its capacity to perform new functions, such as constructing and structuring markets.

First, the jurisdictional principles should be appropriately broad in scope, both in terms of the addressees of norms and the interests represented in them. They should not only govern relationships among states, but also those between states and international institutions and among international institutions. In addition, they should take into account the public interests in the construction and operation of such markets.

Second, they should provide reasonably clear guidance for business decision makers. Jurisdictional rules cannot be expected to provide high levels of predictability in all contexts, but firms that participate in global markets place high value on reducing the uncertainties of planning and, thus, its costs. Greater clarity would also tend to increase the propensity to trade and invest, and it is likely to lead to greater business support for—and cooperation in—the process of developing and enforcing jurisdictional norms.

Finally, international jurisdictional principles should be both more flexible and more nuanced, and thus more specifically useful in the situations in which firms need to use them. The current one-size-fits-all set of general principles does not serve these purposes effectively.

C. Modifying the Law Development Process

The current process of developing international jurisdictional law cannot be expected to produce principles that fulfill these criteria. If the interests and considerations just noted are to be taken into account in developing international jurisdictional law, the process is likely to have to be modified to represent those interests more effectively.

The traditional customary law mechanism will continue to play a role in regulating jurisdictional relationships, but its value may be enhanced by using it to develop norms for particular groups of states rather than all states. Suggestions that "liberal states" and regional groups of states develop specific norms for their particular relationships come into play here.[21]

Agreements represent a quicker, more direct, and more adaptable means of tailoring norms to specific relationships among states, as well as to relationships between states and international organizations. In particular, they permit the creation of norms for specific regulatory functions—such as merger law—that involve the operation of international regulatory networks and may involve international organizations as well as states. Agreements can thus increase both the predictability valued by market participants and the flexibility that can be critical to the success of regulatory efforts.

Adjudication will undoubtedly continue to play an important role within this jurisdictional architecture, but global markets

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21. *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 528 (1995); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 744 (2001).

call for changes in its role. Adjudication provides a means of clarifying and strengthening general principles, and thus increasing normative predictability. Moreover, depending on the fact development measures employed, it can also provide more detail regarding the factual contexts and the normative interests in which those principles operate.

National courts are likely to remain the primary fora for international jurisdictional disputes for the foreseeable future, but their contribution to developing a workable jurisdictional scheme will depend in large measure on the degree to which they coordinate their jurisdiction-related decisions—including international private law decisions. Frequent and sophisticated cross-system comparison among national courts of the methods, principles, and outcomes can generate much value in this context.

Adjudication by international and regional institutions represents a potentially valuable new element in this law development process. Supranational adjudication provides a transnational means of representing and coordinating the national and international interests involved in global markets. As such, it can more effectively and authoritatively include those interests and relate them to each other.[22] No single transnational institution is likely to be given exclusive authority in this area, but adjudication processes should be developed that incorporate the views and interests of several international institutions—including, e.g., regional, environmental, and health organizations. The WTO provides an example of an adjudicatory mechanism that could be adapted to these purposes.

Finally, an advisory commission of independent experts could be established to aid in identifying and analyzing patterns of jurisdictional response to global markets. As jurisdiction-related decisions involving global markets become increasingly common and more widely dispersed among national and international institutions, the task of recognizing patterns

22. *See, e.g.*, Anne-Marie Slaughter & Laurence Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 285–86 (1997). For a valuable recent analysis of these possibilities by a leading French economist, see ÉLIE COHEN, L'ORDRE ÉCONOMIQUE MONDIAL (2001).

within these regulatory responses and choice-of-law decisions will become increasingly difficult and costly. National courts seldom have the resources and expertise to acquire and organize data of this kind, and thus such a commission could be an important resource in the development of effective jurisdictional principles. It could, for example, be appended to the WTO or associated with the current International Law Commission of the United Nations.

VII. CONCLUDING COMMENTS

In this paper, I have reviewed some of the challenges that global markets present for the law of international prescriptive jurisdiction. The rapid and many-faceted changes that global markets entail render tentative any attempts at analysis of the challenge, but we can at least begin to discern its basic outlines and to fashion responses to it.

This review has revealed areas of weakness in the current system and identified new roles for international jurisdictional law. The mechanism for distributing authority to prescribe norms of economic conduct was developed to reduce conflicts among states, but global markets render it less effective in performing that function. Moreover, they create opportunities for international jurisdictional law—and related choice-of-law mechanisms—to provide new forms of value. Effective adaptation of current international jurisdictional mechanisms to these challenges can thus not only contribute to the development and effectiveness of global markets, but also to the political and economic relationships that distribute the wealth created by those markets.