

Data surveillance and the Law: from Cuban cigars to data retention

Rule of Law: comes on foot and leaves on horseback

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TU / **e**

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Eindhoven
University of Technology

Where innovation starts

Overview

- Rule of Law
- Jurisdiction
- Every day life
 - Paying
 - Flying
 - Tweeting
 - Sensoring
- Data retention
- Reflection

Rule of Law = Rechtstaat

- John Locke on Rule of Law

Wherever law ends, tyranny begins

Or

- Hugo de Groot on Judges

When the courts fail, war begins

Ubi iudicia deficiunt, incipit bellum

Jurisdiction

Extra territoriality vs jurisdiction

- Jurisdiction
 - geographic area over which legal authority extends
 - legal authority: the authority to hear and determine causes of action
- Extra territoriality
 - operation of laws upon persons existing beyond the limits of the enacting state or nation but who are still receptive to its laws

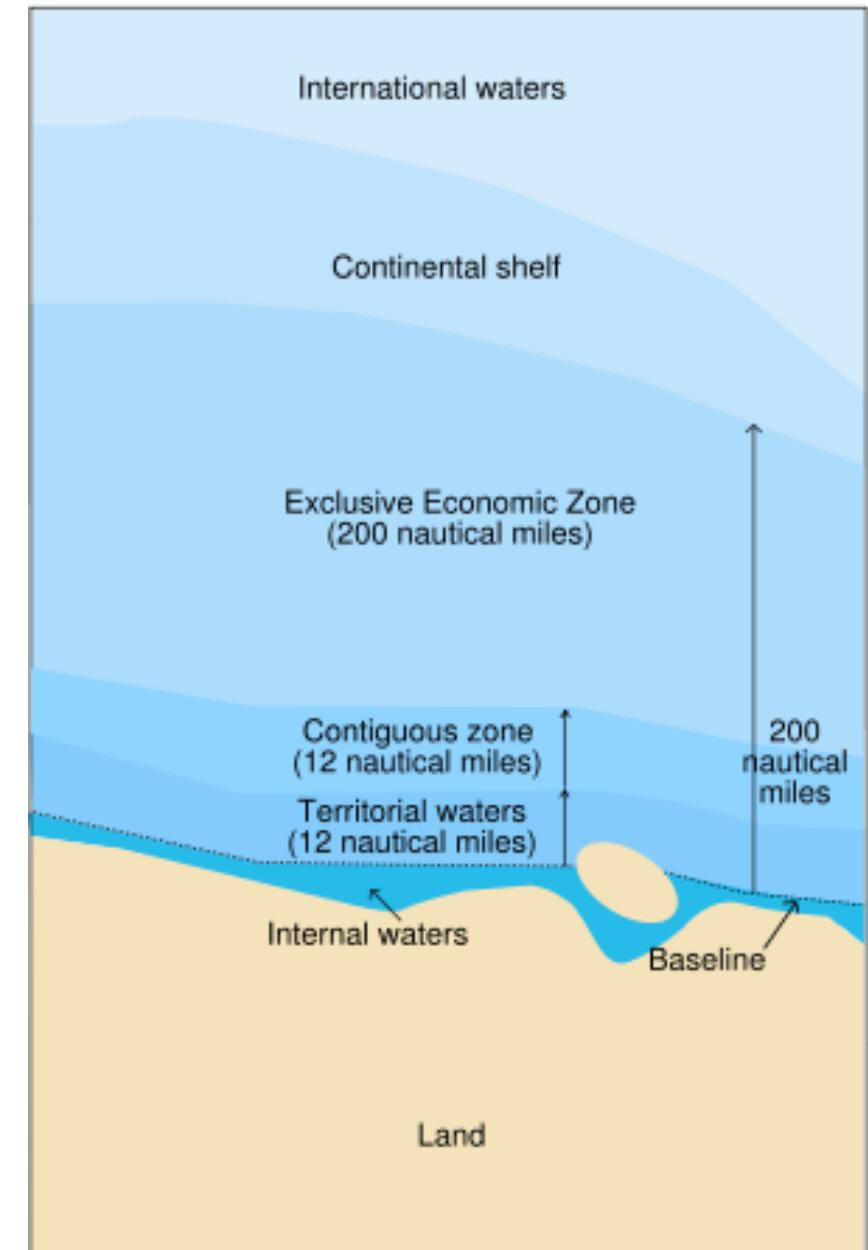
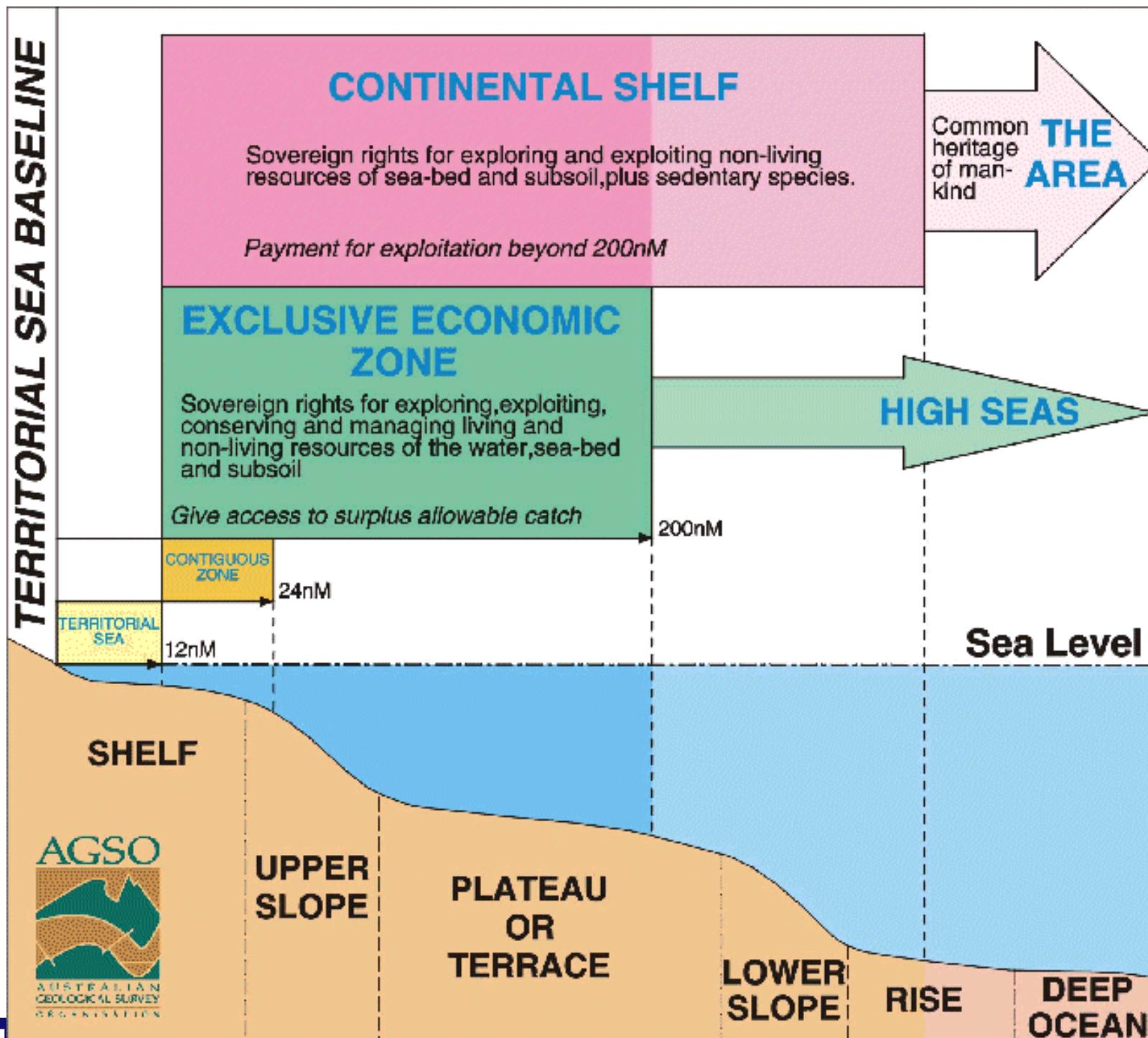
Mare Liberum!

From 1609 Hugo de Groot – Mare Liberum

until

1982 UNCLOS Montego Bay Convention

Mare Liberum: 5 jurisdiction zones



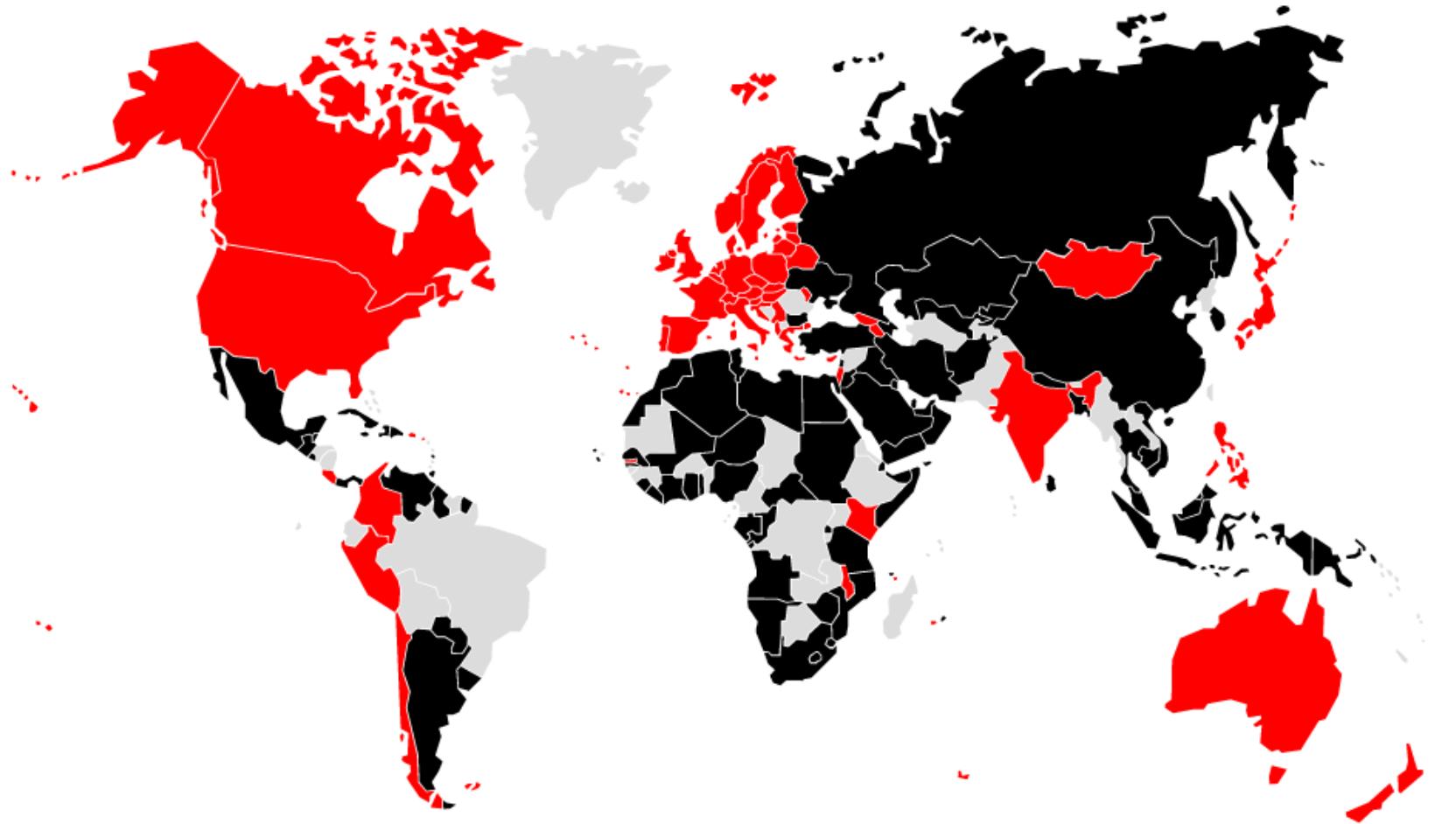
Mare Liberum:

Law of the Sea / Territoriality / Jurisdiction

- Territory on this side of the sea does not give jurisdiction on other side, not even in the case of submarine cables (half duplex)
- Recognition that (High) Seas are *common heritage of mankind*
- Only then state sovereignty
 - Protection of safety (as little as possible extra-territoriality)
 - Internal order

Free Internet?

Who Signed The ITU WCIT Treaty Dubai 2012

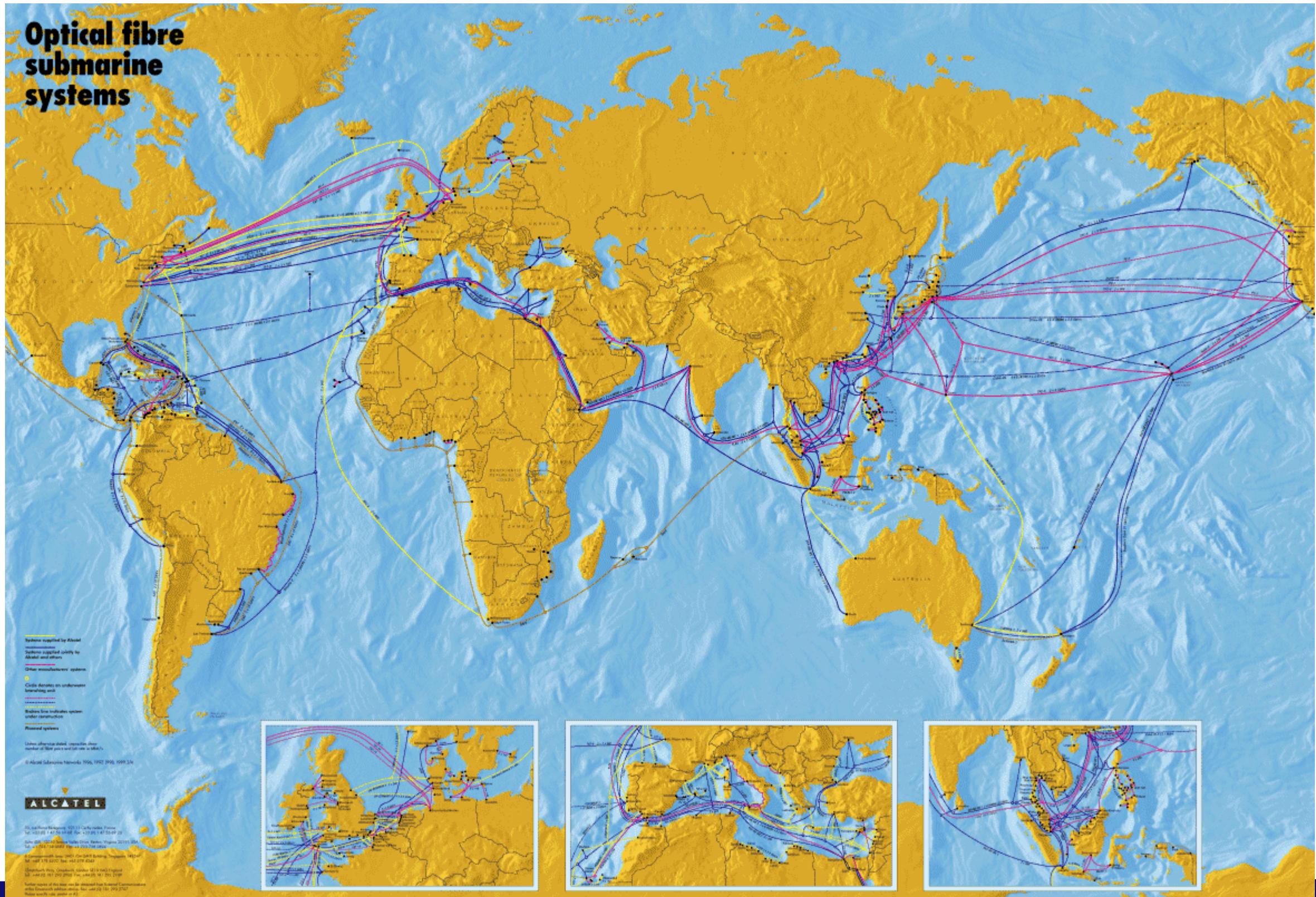


Did not sign = 55 countries = 2.6 billion
Did sign = 89 countries = 3.8 billion

“(...) all governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the existing Internet and its future development and of the future internet, and that the need for development of public policy by governments in consultation with all stakeholders is also recognized; (...)”
PLEN/3 WCIT Dubai 2012

<http://www.itu.int/en/wcit-12/Documents/final-acts-wcit-12.pdf>

Without Mare Liberum no Free Internet



Examples extra-territorial US laws

Examples extra-territorial US laws

- **Patriot Act** is not a separate act, it enacted new authorities in old laws, it is more like a framework regulation
- Foreign Intelligence Surveillance Act (**FISA**, adjusted 2011, dec 30, 2012 Obama extended it for 5 yrs, also known as FAA), original FISA 1978 created/allowed for interception of telecommunications of US outbound communication without court order
- Electronic Communications Privacy Act (**ECPA**) and Stored Communications Act (**SCA**) (see: 18 USC 2701-2711) regulate governmental access of electronic communication and data



Sources: <http://epic.org/privacy/ecpa/> and <http://www.aclu.org/national-security/fix-fisa-end-warrantless-wiretapping>

Every day life

First hour of a day at the University

April 28, 2014

- 07.23
- Checking email ([gmail/hotmail](#)) account
 - Ok on paper for conference in Atlanta September 17, 2014
 - Registering for conference, [paying](#) with private creditcard
 - Reserving [ticket](#) via London, Boston to Atlanta
- 07.54
 - Checking [dropbox](#) for latest version of an article writing together with Spanish collegae
- 07.57
 - Putting tweet on [Twitter](#) announcing my today's EIPSI contribution
- 08.02
 - Checking [blogspot](#) for latest student blogs on cyber crime, penal law and its application
- 08.17
 - Sheets class of last week on [slideshare](#)
- 08.24: Start finalizing slides for EIPSI conference

Paying

Paying: Terrorist Finance Tracking Program ("TFTP")

- **28 September 2005**

The Belgian parliamentary committee (*Comité I*), that deals with the workings of the Belgian State Security Service reported that SWIFT was indeed in violation with Belgian and European privacy laws

- **27 June 2006**

The central bank of Belgium, the National Bank of Belgium, was revealed on June 27, 2006, to have known about the U.S. government's access to the SWIFT databases since 2002

- **3 Oct. 2007**

The New York branch of the Dutch Rabobank is said to deliver information on its European customers to the U.S. government, in contempt of European privacy laws. The Dutch Data Protection Authority claims that Dutch banks could face monetary fines if they hand over data on their customers to the American government

- **8 April 2008**

Consequently the European Union (EU) has obtained the possibility to send a high rank magistrate as High Representative of EU to United States of America for the Financing of Terrorism, in order to monitor the TFTP activities. This magistrate, Jean-Louis Bruguière, has a permanent office in Washington DC at the US Department of Treasury

- **26 February 2012**

Danish newspaper *Berlingske* reports US control over SWIFT: US Treasury 'seized money' (26.000 dollar) while under way in SWIFT network between Denmark and Germany for paying Cuban cigars. Reason Dane violated US trade embargo against Cuba

http://www.asktheeu.org/es/request/intra_european_swift_seizures_by

http://en.wikipedia.org/wiki/Terrorist_Finance_Tracking_Program

Paying: Cuban Cigars



BERLINGSKE Søg B.dk

BUSINESS POLITIKO GLOBALT TECH VIDEN KULTUR AOK LIVSSTIL SPORT DEBAT FOTO TV PLUS

NATIONALT



Dansk politimand fanget i amerikansk terrornet

annonce
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SENESTE NYT PÅ B.DK

- 16:24 Rundspørge om erhvervsuddannelser
- 16:14 To skibe stød på grund i Randers Fjord
- 16:10 Tidligere hærchef bliver israelsk forsvarsminister

et
ark mandag - og
as højeste bjerg
1 det var det

[Flere nyheder](#)

NATIONALT

B

B.DK/NATIONALT

DEL ARTIKLEN



Den fynske politimand Torben Nødskouv, der driver den lille hobbyforretning Cognachuset, er kommet alvorligt i klemme i USAs årelange handelsembargo mod Cuba, efter at hans penge

Danish police officer caught in American terrorist networks



By [Simon Bendtsen](#) and [Peter Suppli Benson](#)

February 26, 2012, 06:01

The translations into Spanish and French are still ongoing and we are happy for anyone who can support us in order to make the site even more accessible. If you wish to help us, we are more than happy to hear from you.

Please get in touch: team@asktheeu.org

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Intra-European SWIFT Seizures by Foreign Parties

Walter Stanish hizo esta petición access to information a Supervisor Europeo de Protección de Datos

Supervisor Europeo de Protección de Datos has replied saying **you have to contact another public body.**

De: Walter Stanish

20 Octubre 2012

Dear European Data Protection Supervisor,

Thank you for your helpful responses to my recent requests. I would like to make one further request with regards to the SWIFT and TFTP domain.

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

(1.0) Information regarding the apparent US-led seizure of an intra-European financial transaction, presumably occurring over the SWIFT network, and outlined in the Danish 'Berlingske' publication of February 26, 2012 at <http://www.b.dk/nationalt/dansk-politima...>

(1.1) The legal and functional process under which this seizure took place, specifically whether European Union authorities provided pre-approval for the seizure and under which terms, were notified of the seizure, and any and all evidence furnished by the

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Peticiones similares

Information on PNR Agreements

Para Supervisor Europeo de Protección de Datos por Walter Stanish 5 Agosto 2012

European Data Retention Directive

Para Supervisor Europeo de Protección de Datos por Carolin 28 Febrero 2013

Information on Financial Information Sharing Agreements

Para Supervisor Europeo de Protección de Datos por Walter Stanish 5 Agosto 2012

Intra-European Financial Seizures by Foreign Parties

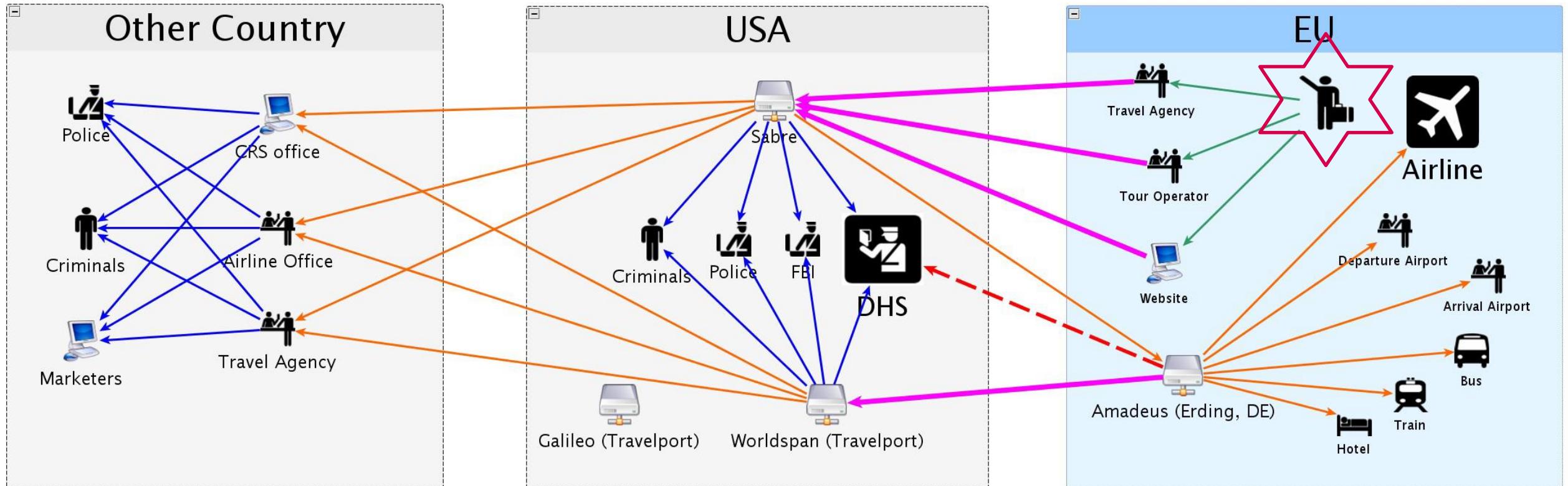
Para Interior por Walter Stanish 8 Noviembre 2012

Corporate influence on the work "towards a genuine

http://www.asktheeu.org/en/request/intra_european_financial_seizure#outgoing-608

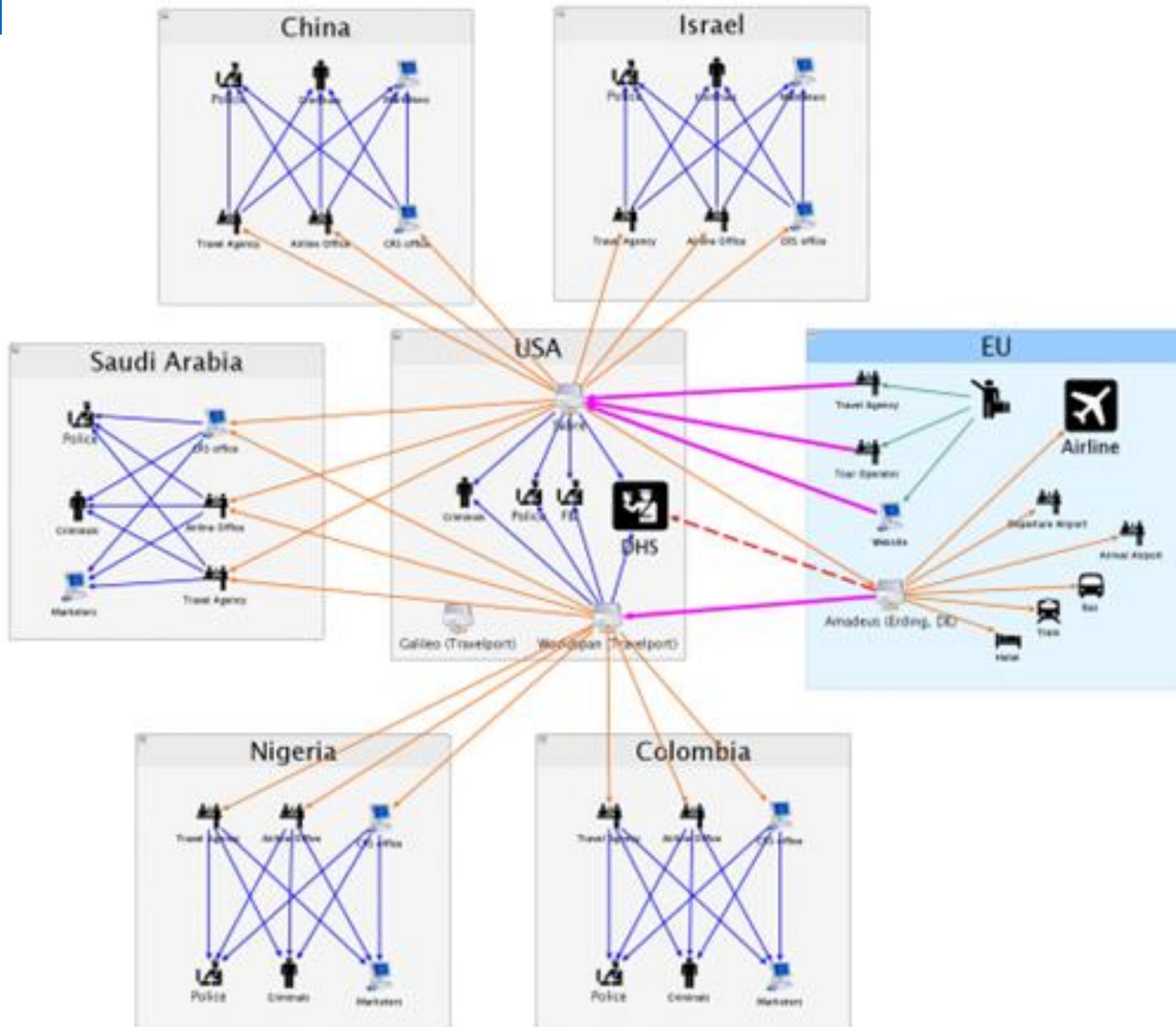
Flying

Flying



<http://hasbrouck.org/IDP/EU-PNR-FAQ.pdf>

Your flying data flows



	EU US PNR	EU PNR	Secure Flight	API	ESTA
categories of data	1. PNR record locator code 2. Date of reservation/issue of ticket 3. Date(s) of intended travel 4. Name(s) 5. Available frequent flier and benefit information (i.e. free tickets, upgrades, etc.) 6. Other names on PNR, including number of travellers on PNR 7. All available contact information (including originator information) 8. All available payment/billing information (not including other transaction details linked to a credit card or account and not connected to the	1. PNR record locator code 2. Date of reservation/issue of ticket 3. Date(s) of intended travel 4. Name(s) 5. Available frequent flier and benefit information (i.e. free tickets, upgrades, etc.) 6. Other names on PNR, including number of travellers on PNR 7. All available contact information (including originator information) 8. All available payment/billing information (not including other transaction details linked to a credit card or account and not connected to the	1. passenger's full name appearing on the passport 2. gender 3. date of birth 4. redress number <i>Check against Lists.</i> = API	1. Number and type of travel document used 2. Nationality 3. Full names 4. Date of birth 5. The border crossing point of entry into the territory of the Member States 6. Code of transport 7. Departure and Arrival time of the transportation 8. The initial point of embarkation <i>↓ geen rechtsgrondslag, kom uit ermee aan de slag of vertrek van E-Penland.</i>	1. Family name 2. First (given name) 3. Date of Birth 4. Sex 5. Country where you live 6. Email address 7. Passport Number 8. Passport Issuing Country 9. Passport Issuance Date 10. Passport Expiration Date 11. City where you are boarding 12. Carrier information 13. Flight Number 14. Address while in the US 15. Answer following questions a. Do you have a communicable disease; physical or mental disorder; or are you a drug abuser or addict?

http://www.asktheeu.org/es/request/information_on_pnr_agreements

(API= Advance Passenger Information)

EU Commission answer on PNR and TFTP (nov 2013)

"The TFTP and PNR agreements regulate the transfer and use of personal data, and provide effective safeguards to protect the fundamental rights of European citizens. **We have taken the allegations very seriously of possible US access to Swift financial data outside the scope of the TFTP agreement** and, as promised to the European Parliament and the European citizens, we have asked the US to **shed full light** on this issue. I welcome the **reassurances** that the US Government has made, including at my meeting at the White House on 18 November, that it has not breached the TFTP Agreement and will continue to respect it fully. But the Commission will continue to carefully monitor the implementation of the EU-US agreements on data transfers in order to uphold EU citizens' rights", said Cecilia Malmström, Commissioner for Home Affairs.

http://europa.eu/rapid/press-release_IP-13-1160_en.htm

Tweeting

Preventing data surveillance

Petitioners: Jacob Appelbaum, Rop Gonggrijp, and Brigitta Jonsdottir

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE APPLICATION OF THE
UNITED STATES OF AMERICA
FOR AN ORDER PURSUANT TO
18 U.S.C. § 2703(d)

)
) Misc. No. 1:11-DM-3
) No. 10-GJ-3793
) No. 1:11-EC-3
)
)

MEMORANDUM OPINION

This matter comes before the Court on Petitioners' Objections to rulings issued by United States Magistrate Judge Theresa Carroll Buchanan regarding an Order issued after application under Title II of the Electronic Communications Privacy Act, known as the Stored Communications Act (SCA), 18 U.S.C. § 2703 *et seq.* In their Motion to Vacate (Doc. 1) and Motion to Unseal (Doc. 3), Petitioners moved to quash the Order, unseal the application seeking the Order, and publicly docket other related information. Magistrate Judge Buchanan denied the motion to vacate and granted in part and denied in part the motion to unseal, and Petitioners objected. For the reasons stated in this opinion, Petitioners' objections are DENIED.

I. BACKGROUND

As part of an ongoing criminal investigation, Respondent United States of America obtained a court order to turn over information pertaining to Petitioners, who were subscribers and users of certain websites and services of interest to the government. Petitioners Jacob Appelbaum, Rop Gonggrijp, and Brigitta Jonsdottir challenge the order and other rulings as Respondent Parties in Interest. Mr. Appelbaum is a resident and citizen of the United States and is a

“Reasonable expectation of privacy”

ks/2012/01/inter-parliamentary-union-condemns-government-investigation-member-iceland's

CISPA is Back. This bill sacrifices privacy without improving security. We deserve both.

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JANUARY 17, 2012 | BY CINDY COHN AND TREVOR TIMM



Inter-Parliamentary Union Condemns Government Investigation into Member of Iceland's Parliament

For more than a year, Icelandic Member of Parliament and EFF client Birgitta Jonsdottir—along with security researchers Jacob Appelbaum and Rop Gonggrijp—has fought the efforts of the Department of Justice to force Twitter to give up information about their online activities. In December of 2010, the government obtained a court order requiring, among other things, Twitter to hand over their IP addresses at login (which can be used to trace their locations) along with a long list of other information. EFF, with the ACLU and a host of private attorneys, fought back, but the U.S. courts rebuffed our efforts.

The courts' analysis is troubling on many grounds. One such ground is the fact that the courts determined Ms. Jonsdottir's information could be seized despite the fact that Ms. Jonsdottir, whose actions on behalf of Wikileaks all seem to have occurred in Iceland, appears to have complete immunity against this investigation under Icelandic law as a member of the Icelandic Parliament.

While Ms. Jonsdottir's specific situation is unique, many non-U.S. users of Twitter are rightfully unnerved. At least according to the magistrate and judge in Virginia, all of a users' communications records can be subject to review by the U.S. government without a warrant because the users chose to use an online "cloud" service that stores data about them in the U.S.

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"If Big Brother is watching, he better look out for @EFF's Cindy Cohn." The 100 most influential lawyers in the US: <https://eff.org/r.3bMW>

MAR 24 @ 11:23AM

Microsoft's transparency report is great step but raises questions. For instance: why not you too, Yahoo and Facebook? <https://eff.org/r.b8MQ>

MAR 23 @ 5:11PM

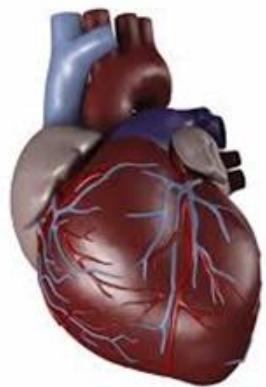
“Reasonable expectation of privacy”

- Cloud providers are third party
- “*You clicked OK! Did you not?*”
- For (non US) users of these services there is no ‘reasonable expectations of privacy’ (*Third Party doctrine*)
- US constitutional safeguards extend in any case not to foreigners (not on US soil)

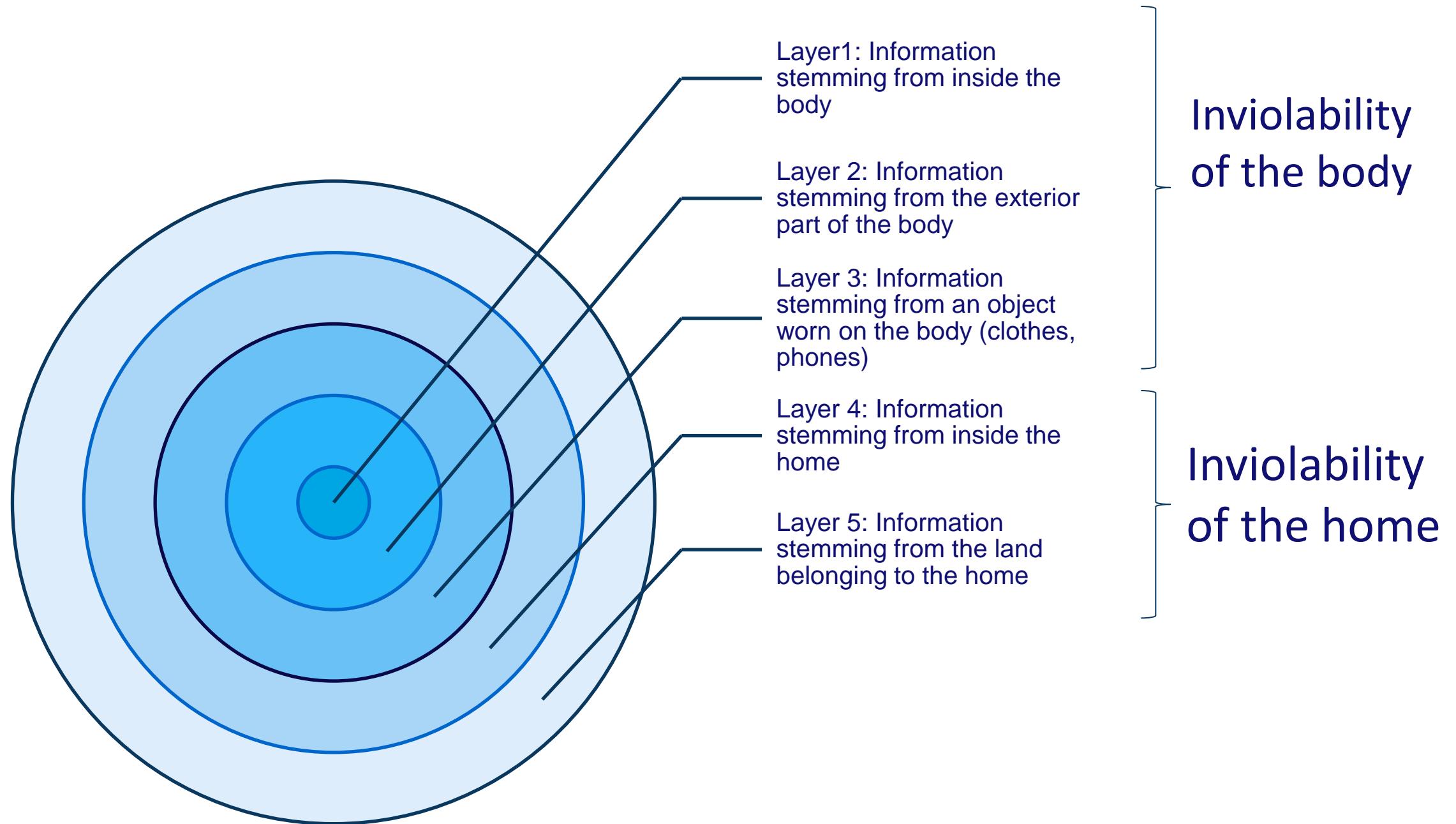
Sensing

Sensors

- Internet of Things
- All objects connected



Model taking the human body as a starting point



Rete Liberum

Rete Liberum?

- US holds jurisdiction (through **Patriot Act, FISA, ECPA & SCA**) on all of the above domains (but do not underestimate other (including EU) governments)
- Unfortunately nor European, nor Dutch **laws and/or contractual agreements** hinder extraterritorial exercise of foreign police and security agencies

To withstand this = desperately needed

- **Chilling effect**

Scientific research no longer fully independent due permanent threat of viewers

- **Function creep**

Especially transition to cloud computing provides new possibilities for (un)intentional foreign (but mostly U.S.) public, access to personal and academic information

- Loss of confidentiality

- Loss of data reliability

- Loss of individual personal integrity

- Loss of organisational but above all scientific/academic sovereignty

Data retention

Data retention Judgment in Joined Cases C-293/12 and C-594/12

Luxembourg, 8 April 2014

- On the basis of the retained data
 - 1 to know the **identity** of the person with whom a subscriber or registered user has communicated and by **what means**,
 - 2 to identify the **time** of the communication as well as the **place** from which that communication took place and
 - 3 to know the **frequency** of the communications of the subscriber or registered user with certain persons during a given period.
- Those data, **taken as a whole**, may provide very precise information on the private lives of the persons whose data are retained, such as the **habits** of everyday life, permanent or temporary **places of residence**, daily or other **movements, activities** carried out, social **relationships** and the social **environments** frequented.
- The Court takes the view that, by requiring the retention of those data and by allowing the competent national authorities to access those data, the **directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data**. Furthermore, the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the persons concerned a feeling that their private lives are the subject of constant surveillance

- This might be necessary, but the **wide-ranging and particularly serious interference of the directive with the fundamental rights at issue is not sufficiently circumscribed** to ensure that that interference is actually **limited to what is strictly necessary**.
- 1. all individuals, all means of electronic communication and all traffic data without **any differentiation, limitation or exception** being made in the light of the objective of fighting against serious crime.
- 2. the directive **fails to lay down any objective criterion** which would ensure that the competent national authorities **have access to the data** and can use them only for the purposes of prevention, detection or criminal
- 3. **the data retention period**, the directive imposes a period of at least six months, **without making any distinction** between the categories of data on the basis of the persons concerned or the possible usefulness of the data in relation to the objective pursued.
- 4. The Court also finds that the directive does not provide for **sufficient safeguards** to ensure effective protection of the data against the **risk of abuse** and against any unlawful access and use of the data.

Reflection

- Privacy not only an *intrinsic* value
- Also an *instrumental* value
 - Freedom, autonomy, relationships, democracy
- Autonomy (Kant)
 - To be able to make own choices



Important unresolved issues

Observation

- The Internet has made that Nation States have lost control, loss of sovereignty
- The internet has made that individuals have lost their control in the form of loss of jurisdiction (no court to turn to)

These two uncertainties mutually reinforce each other

Issues to resolve

1. There is no such a thing as 'data ownership'
Yet there is a huge need for a legal system that does justice to the economic wishes of companies and governments to share data and knowledge without immediately losing control over it
2. The writ of *habeas corpus* its purpose is to obtain the prompt release of one who is being unlawfully detained

We need an electronic/data *habeas corpus* : the prompt release/destruction of unlawfully held data on a person

*“Every person unlawfully imprisoned or restrained of liberty, under any pretense whatever, may request a writ of **habeas corpus to inquire into the cause of the imprisonment or restraint**. The person who believes that he or she is being unlawfully imprisoned, or someone in that person’s behalf, may petition the appropriate court to have a writ of habeas corpus issued.”*

**Thank you
for
your
Attention!!**

Contact

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