

Internet Commerce and Trade Policy



by Stuart S. Malawer

Recent advances in three areas—computer technology, telecommunications technology, and software and information technology—are changing lives in ways scarcely imagined less than two decades ago.... There were only some 4.5 million Internet users in 1991, and estimates suggest that there will be as many as 300 million or more by the turn of the century.

— Electronic Commerce and the Role of the World Trade Organization 1 (1998)

I. INTRODUCTION

Global trade institutions are only beginning now to address the dramatic challenges of Internet trade and electronic commerce. The framing of these policy issues and contending principles by multilateral, bilateral and regional organizations is only now in its infancy. With inconsistent national legislation posing an obvious threat to such commerce, the goal of developing global trade law and global governance for Internet commerce has become more crucial. Suitable laws and structures are needed if the private sector and governments are to ensure market-driven Internet trade as an engine of global commerce.

The debate over the rules of the “New Economy” is shaking long established notions of economics, business and finance. New paradigms and models of business and trade transactions are emerging. In early 1999, seventeen Internet, media and telecommunications companies joined forces to launch a new initiative,

through the *Global Business Dialogue*, designed to tackle a myriad of issues transnationally. Members of this global coalition include American, Japanese, German and French firms. Its mandate is to lobby globally against intrusive regulation of electronic commerce and the Internet.

A growing awareness exists among corporate executives and policy makers that, along with new business and economic paradigms, a cutting-edge notion of trade regulation is emerging — one that ought to be accepted and crystallized as a new principle of global trade law and then implemented in specific sectors and agreements. The new rule should state that inconsistent national regulation of E-commerce, on either a closed computer network or on the open architecture of the Internet, is a non-tariff barrier. As such, it violates the disciplines of the World Trade Organization (WTO), especially those concerning trade in services as contained in the General Agreements on Trade in Services (GATS).

An examination of domestic and international developments also discloses a growing consensus, fragile as it is, related to major policy choices that favors self-regulation and reliance upon market forces. Yet, significant skepticism remains with nations that have traditionally favored a regulatory approach and are leery of U.S. dominance. This emerging consensus is critical, but it only describes the latest stage of Internet development. This stage involves—as the Internet matures from primarily a medium for communications to a commercial marketplace—a shift of concern from matters of technology and economics to law and regulation. This is the battleground for the future of Internet transactions.

The Internet is a global matrix of interconnected computer networks using an Internet Protocol (TCP/IP) to communicate with each other. While significant electronic commerce activities take place over proprietary or other networks, most analysts consider them with the Internet when discussing legal

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and political issues. This article assesses the most recent developments relating to global governance of Internet trade and commerce,

which involves business-to-business and business-to-consumer transactions. In particular, it identifies the issues and principles involved as they are being considered by the United States and a range of international institutions with a primary focus on the European Union and the WTO. There is a dire need to resolve these critical issues at the earliest possible moment, before inconsistent and dysfunctional policies and regulations are enacted. It concludes with general observations and specific suggestions concerning developing appropriate global law and approaches to global governance.

II. U.S. DEVELOPMENTS

In July 1997, the Clinton Administration released the report entitled *A Framework for Global Electronic Commerce*.¹ In addressing the administration's views on Internet commerce, the report proposed five general policy principles:

- The private sector should lead.
- Governments should avoid undue restrictions on electronic commerce.
- Where government involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and *simple legal environment* for commerce.
- Governments should recognize the unique qualities of the Internet.
- Electronic Commerce over the Internet should be *facilitated on a global basis*.

In essence, the report argued that Internet trade should not face unnecessary government regulation and that Internet governance should be approached from a global perspective. It recognized that a legal environment needs to be constructed to ensure private sector activity.

The report highlighted the following nine issue areas involving financial, legal and market-access:

- Customs and Taxation
- Electronic Payment Systems
- Uniform Commercial Code for Electronic Commerce
- Intellectual Property Protection
- Privacy
- Security
- Telecommunication Infrastructure and Information Technology
- Content
- Technical Standards

The report contends that these general issues should be addressed by international agreements with the intent to preserve the Internet as a non-regulated medium.

In November 1998, the Clinton Administration released the *First Annual Report of the U.S. Government Working Group on Electronic Commerce*.² This report reviews various actions

implementing the principles and policies enunciated in the *Framework Report*. It concludes by stating:

“The U.S. Government will continue to pursue the creation of a market-driven policy architecture for this new digital economy that will allow it to flourish while at the same time protecting citizens from potential negative side effects.”³

The report highlights the following actions last year:

- The United States Trade Representative succeeded in having the World Trade Organization (WTO) adopt a declaration committing member governments from not imposing custom duties on electronic commerce when information and services are delivered electronically.
- Two treaties negotiated with the World Intellectual Property Organization (WIPO)⁴ were transmitted to the Senate, and the Congress implemented them by enacting the *Millennium Copyright Act*, in October 1998, which modified U.S. law to conform to the new treaties. The European Union (EU) has agreed to ratify these treaties in the near future.
- The *Internet Tax Freedom Act* was signed and went into effect on October 21, 1998. It places a three-year moratorium on local taxation of Internet transactions.
- The Administration has continued to work with various international institutions that are addressing specific aspects of Internet commerce. For example, it is working with the Organization for Economic Cooperation and Development (OECD) on the issue of Internet taxation and with the United Nations Commission on International Trade Law (UNCITRAL) on promoting the *Convention on Electronic Transactions*.

These policy options and actions of the White House are bolstered by the conclusion of the Department of Commerce's seminal report entitled, *The Emerging Digital Economy* (1998).⁵ The report concluded:

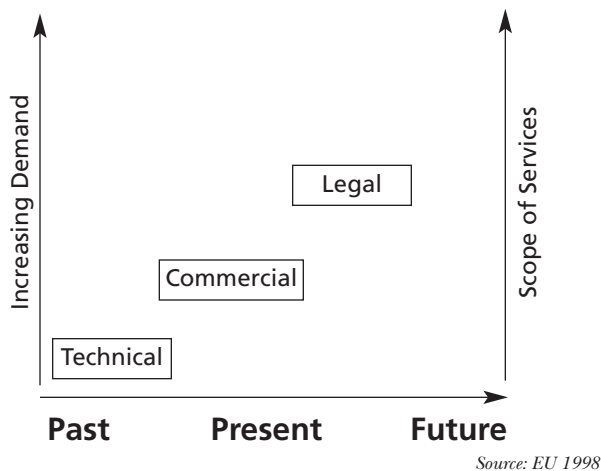
“The pace of technological development and the borderless environment created by the Internet drives a new paradigm for government and private sector responsibilities. Creating the optimal conditions for the new digital economy to flourish requires a new, much less restrictive approach to the setting of rules.”

The report contends that when the public policy issues regarding electronic commerce are resolved, then the digital economy can further accelerate world economic growth.⁶

III. THE EUROPEAN UNION

The European Union has been active in considering Internet commerce. Some of its proposals and actions have raised significant concerns in the United States. The European Union's most comprehensive document concerning Internet trade, released in 1998, came from the Directorate for Telecommunications, Information Market and Exploitation of Research of the European Commission.

Entitled *The Need for Strengthened International Coordination*,⁷ it is informally referred to as the “Bangemann Charter,” after the head of the directorate issuing the report.



It acknowledges that there are numerous regulatory actions at national and regional levels that reveal divergent approaches. It states, “Ill-adapted or fragmented regulation, however, will hinder the development of the ‘on-line’ economy.” It further states, “The wide range of activities possible can only be fully exploited if an international enabling framework emerges.”

The report makes the point that issues concerning the Internet have progressed from the technical (interconnection and interoperability) to the present commercial issues (market access and a competitive framework) as well as the future legal issues (jurisdiction, liability, taxation, copyright, authentication, encryption, data protection, content, consumer protection). Yet, the report notes, “The technical possibilities of open networks like the Internet are already beginning to put legal structures to the test in various fields of existing law.”

While U.S. firms have opposed significant EU action, the *EU Data Protection Directive*, it is crucial to note this report acknowledges the problem of inconsistent national and regional legislation. The report concludes that “the global electronic marketplace requires an appropriate framework ... It does not need to consist of detailed and harmonized rules on all relevant aspects.” The report ends with a warning that “a global uncertainty surrounding different national and regional responses to these challenges will hamper the further development of the electronic marketplace.” While this report frames the contending issues and principles admirably, the underlying tension between the United States and Europe remains—that many European governments, when they have the opportunity, choose regulatory solutions rather than relying upon market forces.

The European Union, in early 1999, called for comprehensive consideration on all trade related aspects of electronic commerce by the World Trade Organization.⁸ It suggested the codification of a set of basic principles. These would

treat such specific issues as charges on electronic transmissions across borders, data protections systems (concerning privacy of individuals), and possible competition issues. It would leave to the World Intellectual Property Organization (WIPO), at this time, related intellectual property issues.

IV. WORLD TRADE ORGANIZATION (WTO)

The WTO has only recently begun to consider Internet trade as a global trade issue. In March 1998, it released the Secretariat’s study, *Electronic Commerce and the Role of the WTO*.⁹ The study was written to provide background information for the WTO members. It notes that WTO members have now only begun to explore how the WTO should deal with questions of electronic commerce. Among the policy issues identified are the legal and regulatory frameworks necessary for Internet transactions, security and privacy questions, taxation, access to the Internet, market access for suppliers over the Internet, trade facilitation, public procurement, intellectual property questions, and regulation of content. This study lays out the issues without prejudging the outcomes. “The aim is to set out in a systematic fashion the main issues that seem relevant to the interface between electronic commerce and the WTO.”¹⁰ It asserts that “Electronic commerce could be characterized as trade in goods, trade in services, or as something different from either of these.”¹¹

The WTO Ministerial Conference in May 1998 adopted the *Declaration on Global Electronic Commerce*,¹² which requested that the General Council establish a work program to examine all trade-related issues concerning global electronic commerce and to report to the Third Ministerial Conference in late 1999.¹³ It also declared the continuation of the member states’ current practice of not imposing custom duties on electronic transmissions. In September, the General Council mandated that reports were to be drafted by the Council for Trade in Services, the Council for Trade in Goods, and the Council for TRIPS (intellectual property).¹⁴

Of particular note is Director-General Renato Ruggiero’s address, *Building the Framework for a Global Electronic Marketplace*, given in Berlin in September 1998.¹⁵ He views electronic commerce as a crucial new way of buying and selling goods and services in either of two forms. First, the entire transaction is carried out electronically and the end product is delivered to the buyer in the form of digitized information flows. Trade of this kind is trade in services—such as a vast range of professional, advisory and financial services. This form of trade, he contends, is covered by the multilateral trade rules and specifically by GATS. Second, electronic commerce is a kind of distribution service; goods are paid for electronically, but are delivered in tangible form. This form of commerce has been utilized successfully in business-to-business transactions. Most recently, business-to-consumer transactions are taking off. Ruggiero also contends that distribution services are covered by the GATS.

However, it is extremely important to note that GATS is an incomplete system. It requires new negotiations to extend it

to newer sectors and to schedule specific commitments, which allow exceptions to the *Most Favored Nation* principle. This extension is something that should be done in a forthcoming Millennium Round of trade negotiations, which President Clinton in the recent State of the Union address has promised to request at the forthcoming ministerial meeting of the WTO. The great significance of the GATS, as a part of the WTO, is that it provides binding and compulsory dispute settlement over trade disputes.

Rules concerning the physical infrastructure of the Internet, namely telecommunications services have been addressed by the *Basic Telecommunications Agreement*.¹⁶ Telecommunication products have been addressed by the *Information Technology Agreement*. Both of these agreements were concluded under the auspices of the WTO and have recently entered into effect. The *Annex on Telecommunications* and the subsequent *Basic Telecommunications Agreement* guarantees access and use of public networks and services. The *Information Technology Agreement* reduces tariff barriers on a broad range of infrastructure products critical to electronic commerce. The new round of negotiations concerning ITA2 hopes to expand the scope of products included for tariff reduction and elimination.

Ruggiero's conclusion concerning Internet commerce and global trade regulation is particularly instructive:

“(B)uilding a framework for the electronic marketplace is really one part of the larger challenge of building a stronger foundation for our ever-more interdependent global economy. The reality of an increasingly borderless global economy means that the economic reach of nation-states is being challenged, and the ground rules of international relations are changing. Almost more than any development, it is pushing governments to work together, plan together, and pool their efforts as never before.”

V. REGIONAL AND INTERNATIONAL FORA

Other regional and international institutions have begun to address various aspects of electronic commerce. Such institutions include the Organization for Economic Cooperation and Development (OECD) and Asia-Pacific Economic Cooperation (APEC).

In 1997, the OECD adopted *Guidelines on Cryptography*. In October 1998, the OECD held a seminal conference in Ottawa on global electronic commerce¹⁷ and issued a declaration opposing discriminatory taxation on Internet and electronic commerce. It subsequently issued a comprehensive report, in early 1999, addressing the economic and social impact of electronic commerce.¹⁸ The report contends that “The force that drives e-commerce will require a re-examination of the framework for conducting business and a questioning both of the efficacy of government policies pertaining to commerce and of traditional commercial practices and procedures.”¹⁹ It boldly asserts that “The ‘death of distance’ that is intrinsic to information network-

ing is probably the single most important economic force shaping society at the dawn of the 21st Century.”²⁰

In 1997, at its Vancouver Conference,²¹ the leaders of APEC issued a declaration reiterating the importance of electronic commerce to trade and economic development and their commitment to foster its growth through support of the private sector.

The International Telecommunications Union²² and the World Intellectual Property Organization²³ are concerned with infrastructure and intellectual property aspects of Internet trade.²⁴ The WIPO holds significant promise of providing dispute settlement when domain names are disputed. A final report was released in April 1999 on the domain name process. It incisively states, “Intellectual property has become a central element in economic and cultural policy in a world in which the source of wealth is increasingly intellectual . . . capital and in which markets are distributed across the globe.”²⁵ The International Bureau of WIPO and the Secretariat of the International Telecommunications Union (ITU) are coordinating efforts and proposals, among others, concerning dispute resolution procedures relating to domain names under the WIPO Arbitration and Mediation Center.²⁶

The United Nations Commission on International Trade Law (UNCITRAL) has drafted significant international agreements addressing electronic contracts. For example, it recently completed the “1996 Model Law on Electronic Commerce,” which provides a model of legislation that can be adopted by nations in an effort to harmonize national treatment of specific issues of electronic commerce.²⁷ In addition, a number of bilateral negotiations, during 1997 and 1998, have proven fruitful. Those have involved the United States and Japan, France and the EU (through the Transatlantic Economic Partnership). For example, both the United States and Japan agreed, in May 1998, that the private sector should take the lead in developing electronic commerce and that both governments should avoid imposition of unnecessary restrictions on it.²⁸ Nevertheless, it is the WTO, as the premier global trade organization with a binding dispute resolution system, that holds the greatest responsibility in promoting the development of new rules of law concerning Internet trade.

VI. OBSERVATIONS & SUGGESTIONS

The preceding review leads to several observations and suggestions concerning Internet trade and global law and governance. They include the following points:

- A number of international institutions are now dealing with electronic commerce and Internet trade.
- The U.S. government, Internet and Internet-related companies should focus their attention on developing favorable global trade law on the WTO.
- The GATS (services agreement) relates most specifically to Internet trade.

- General acceptance now exists for the U.S. policy that less regulation is best and inconsistent national regulation is to be avoided.
- While there is no explicit trade rule that inconsistent and contradictory national legislation is a non-tariff barrier, the formulation of such an explicit rule for Internet transactions should be clearly enunciated as a provision of general applicability. (This raises the issue of an obligation to harmonize national regulation.²⁹)
- The need for global governance is obvious. However, it may be best to consider in addition to the WTO, a regime (private and / or public) to help coordinate a host of international institutions with responsibilities for Internet-related activities.
- The international legal and institutional framework confronting Internet trade today.
- Need to adapt quickly to ensure a market-driven approach and global growth.

In conclusion, the inherently transnational nature of global computer networks and the Internet must lead to greater and more creative international cooperation. Existing mechanisms may be used, but as Internet trade enters a more legalistic era, newer rules need to be clearly enunciated. Those rules should follow and reflect market forces. Certainty and predictability are needed in Internet trade to ensure that it becomes a powerful force for transnational economic growth and global commerce. Clear and more specific rules can only be good for democratizing a connected world. This is especially true since a new model of

computing is evolving into what is being called “the post-PC era.” Where there is a proliferation of information appliances linked by the Internet to server farms and software becomes more of a service business.³⁰ 📌

Although primarily an economic phenomenon, electronic commerce forms part of a broader process of social change, characterized by the globalization of markets, the shift towards an economy based on knowledge and information, and the growing prominence of all forms of technology in everyday life.

— The Economic and Social Impact of Electronic Commerce 143 (OECD Report, 1999)

Endnotes

- 1 *A Framework for Global Electronic Commerce*, (White House, July 1, 1997) at <http://www.ecommerce.gov/framework.htm>
- 2 *First Annual Report of the U.S. Government Working Group on Electronic Commerce*, (Dept. of Commerce, November 1998) at <http://www.doc.gov/ecommerce/E-comm.pdf>
- 3 *Id.* at 30.
- 4 *WTO Copyright Treaty*, (1996) at <http://www.wipo.org/eng/diplconf/distrib/94dc.htm> and *WTO Performances and Phonograms Treaty*, (1996) at <http://www.wipo.org/eng/diplconf/distrib/95dc.htm>
- 5 *The Emerging Digital Economy*, (Dept. of Commerce, April 1998) <http://www.ecommerce.gov/viewhtml.htm>
- 6 Various other reports have begun to emerge addressing the economic and social impacts of information technology generally. For example, *Fostering Research on the Economic and Social Impacts of Information Technology*, (National Resource Council, 1998) at <http://www.nap.edu/readingroom/records/030906032X.html> and *Economic and Social Significance of Information Technologies*, in [Social and Economic Indicators, 1998](#) (National Science Foundation, 1998).

WEBSITES FOR INTERNET COMMERCE & TRADE POLICY

U.S. Government Electronic Commerce Policy	http://www.ecommerce.gov
U.S. Government Sites on Electronic Commerce	http://www.ecommerce.gov/governme.htm
“U.S. Government Working Group On Electronic Commerce” (First Annual Report, 1998)	http://www.doc.gov/ecommerce/review.htm
“Emerging Digital Economy (Dept. of Commerce 1998)	http://www.ecommerce.gov/emerging.htm
“EU Bangemann Charter” (1998)	http://www.ispo.cec.be/eif/policy/com9850en.html
“EU 1st Electronic Commerce Communication” (1999)	http://www.europa.eu.int/comm/dg01/ecom2.htm
International Sites on Electronic Commerce Policy	http://www.ecommerce.gov/internat.htm
International Telecommunications Union (ITU): Electronic Commerce & Developing Countries	http://www.itu.int/ECDC/
OECD Report: “The Economic and Social Impacts of Electronic Commerce” (1998)	http://www.oecd.org/subject/e_commerce/summary.htm
USTR E-Commerce Links	http://www.ustr.gov/reports/index.html
World Intellectual Property Organization (WIPO): Electronic Commerce & Intellectual Property	http://ecommerce.wipo.int/index-eng.html
World Intellectual Property Organization (WIPO): Domain Name Memorandum (Dispute Resolution)	http://www.gtld-mou.org/
WTO Report: “Electronic Commerce and the Role of the WTO” (1998)	http://www.wto.org/wto/new/press96.htm
Final Report of the WIPO Internet Domain Name Process (1999)	http://wipo2.wipo.int/process/eng/processhome.html

- 7 *The Need for Strengthened International Cooperation*, (Communication from the EU Commission Directorate on Telecommunications and Information Markets, 1998) at <http://www.ispo.cec.be/eif/policy/com9850en.html>
- 8 *Electronic Commerce — 1st Communication from the European Communities and their Member States*, (DG1 March 1999) at <http://europa.eu.int/comm/dg01/ecom2.htm>
- 9 *Electronic Commerce and the Role of the WTO* (WTO Special Studies 2, 1998) and *WTO Press Release 96*, (March 13, 1998) at <http://www.wto.org/wto/new/press96.htm>
- 10 *Id.* at 42.
- 11 *Id.* at 50.
- 12 *Declaration on Global Electronic Commerce*, (WTO, March 20, 1998) at http://www.ustr.gov/agreements/gec/gec_en.pdf
- 13 The United States supported this request concerning *Trade-Related Electronic Commerce* (TREC). *Organization of the WTO Work Program*, (July 8, 1998) at <http://www.ustr.gov/reports/shorts.pdf>
For background on electronic commerce issues generally, the USTR office prepared a short statement. *Electronic Commerce Issues*, (June 29, 1998) at <http://www.ustr.gov/reports/mtgcover.pdf>
- 14 *WTO Electronic Commerce Work Program*, (September 25, 1998) at http://www.ustr.gov/reports/gec_work.pdf
- 15 Ruggiero, *Building the Framework for a Global Electronic Marketplace*, (WTO, Speech given September 17, 1998) at <http://www.wto.org/wto/speeches/berlin2.htm>
- 16 To limited extent Internet services provided in electronic form is covered by various members' schedules to this agreement concerning market access and national treatment commitments.
- 17 The conference was entitled "A Borderless World and Global Electronic Commerce" at <http://www.oecd.org/dsti/sti/it/ec/>
- 18 *The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Research Agenda*, (OECD, 1999) at http://www.oecd.org/subject/e_commerce/summary.htm. "Electronic commerce over the Internet is a new way of conducting business. Though only three years old, it has the potential to radically alter economic activities and the social environment." *Id.* at 9.
- 19 *Id.* at 11.
- 20 *Id.* at 143.
- 21 *APEC Leaders' Declaration*, (Vancouver Conference, November 25, 1997) at <http://www.ecommerce.gov/apec.htm>
- 22 *Telecommunications in the Era of Global Electronic Commerce*, (Speech by Pekka Tarjanne, Secretary-General of the International Telecommunication Union, March 20, 1996) at <http://www.itu.int/plweb/cgi/fastweb?getdoc+view1+itudo+4625+1++electronic%20commerce>
- 23 A conference sponsored by WIPO on electronic commerce and intellectual property will take place in Geneva in September 1999 at <http://ecommerce.wipo.int/index-eng.html>
- 24 In 1996 WIPO concluded the new treaties concerning copyright and performances / phonograms. These agreements build, in part, on the *WTO Trade Related Intellectual Property Rights Agreement* (TRIPS). A WIPO conference on Electronic Commerce and intellectual property rights will take place in Geneva on September 1999.
- 25 *Final Report of the WIPO Internet Domain Name Process*, (April 30, 1999) at <http://wipo2.wipo.int/process/eng/processhome.html>
- 26 See generally, the *Memorandum of Understanding on the Generic Top-Level Domain Space of the Internet Domain System*, signed in Geneva on May 1, 1997, at <http://www.gtld-mou.org/docs/faq.html#1.0>
A recent development in the United States concerning domain names is the establishment of *The Internet Corporation for Assigned Names and Numbers* (ICANN). This is the new non-profit corporation that was formed to take over responsibility for the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management under authority of the U.S. Department of Commerce. <http://www.icann.org/>
- 27 *UNCITRAL Model Law on Electronic Commerce*, (1996 as amended 1998) at <http://www.un.or.at/uncitral/en-index.htm> The Web site of the International Trade Law Branch of the United Nations Office of Legal Affairs is particularly informative at <http://www.un.or.at/uncitral/en-index.htm>
- 28 *U.S./Japan Joint Statement on Electronic Commerce* (May 15, 1998), at <http://www.ecommerce.gov/usjapan.htm>
- 29 *The International Institute for the Unification of Private Law* (UNIDROIT), with its headquarters in Rome, develops model national legislation. It ought to consider contract rules governing Internet commerce as part of its ongoing activities concerning transnational commercial contracts. Its Web site is <http://www.unidroit.org/>



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(Editor's note: Dr. Malawer served as the special editor of the International Practice Section's contributions to this issue of the *Virginia Lawyer*).

- 30 Lohr & Markoff, *Computing Centers Become the Keeper of Web's Future*. *NEW YORK TIMES* at A1:2 (May 19, 1999).