

Global Governance of E-commerce and Internet Trade: Recent Developments

by Stuart S. Malawer



We are still in the early stages in meeting the challenges to traditional territorially based political and legal systems posed by inherently borderless communications and Internet technologies. The challenge confronting the global trading system is to develop an international structure that supports growth of global electronic commerce for all. This critical effort involves creating a structure or regime that precludes dysfunctional international, national or regional actions that would create new trade barriers or keep old ones in place. Robert Zoellick, the new United States Trade Representative (USTR), said:

“To promote an effective international economic system, we should also strive for creativity in governance. In the modern, wired world, government will become increasingly ineffective if it fails to keep up. . . . This logic of governance should extend to the rules of our trading system. To enable businesses, economies, and societies to change to meet the challenges of new circumstances, our trading rules should be flexible enough to respect different national approaches while consistently challenging actions that discriminate against others and thwart openness with protectionist barriers.” (Speech, *The United States, Europe, and the World Trading System*, April 15, 2001).

This article reviews recent developments and highlights concerning global governance of e-commerce and Internet trade. In addition to identifying and examining recent actions of the United States and major global institutions, this article concludes that there is now a growing awareness that meaningful global action is required. Some preliminary actions have been taken, but much

work remains. Several suggestions will be made to ensure that the global structure that emerges fully supports sustaining dynamic growth of e-commerce and Internet trade. This global structure needs to protect and to build upon the entrepreneurial and innovative foundation of the Internet.

In particular, this article summarizes the actions and developments, from 1998 to early 2001, taken by the United States, the European Union, and major international institutions concerning global governance of e-commerce and Internet trade. It begins with a look at the United States and the European Union, and then addresses developments at the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU), the Organization for Economic Cooperation and Development (OECD), and the U.N. Commission for Trade and Development (UNCTAD).

United States

In January 2001, the Clinton Administration released the third annual report on e-commerce entitled *Leadership for the New Millennium, Delivering on Digital Progress and Prosperity*. While earlier reports focused on more general issues involving e-commerce and trade, this report explored the domestic and digital divide. In releasing the report, former President Clinton recognized that the information technology sector was responsible for almost one-third of recent U.S. economic growth. Furthermore, the IT sector was responsible for increasing U.S. productivity and

global competitiveness. The second annual report, *Towards Digital Equality* (1999), enumerated major policy challenges confronting the administration. These challenges included:

- Establishing meaningful consumer protection;
- Promoting broadband deployment;
- Engaging developing countries in e-commerce; and
- Recognizing that small and medium-sized enterprises are crucial to our continued economic success.

The United States, in continuing its diplomatic effort, concluded a number of bilateral or joint statements with individual countries concerning global e-commerce. This new and innovative approach attempts to further establish a common agreement with trading partners on basic U.S. policy positions and principles concerning the evolving global governance and development of the Internet. Agreements have been concluded with Chile (2000), Columbia (2000), the Philippines (2000), the European Union (2000, 1997), the United Kingdom (1999), Egypt (1999), Australia (1998), France (1998), Ireland (1998), Japan (1998) and the Netherlands (1997). As provided in the *U.S.-U.K. Joint Statement*, the provisions typically proclaim general principles that are the cornerstone of U.S. policy on global e-commerce. For example:

- The private sector should lead in the development of electronic commerce and in establishing business practices.
- Governments should ensure that business enjoys a clear, consistent and predictable legal environment to enable it to prosper, while avoiding unnecessary regulations or restrictions on electronic commerce.
- Governments should encourage the private sector to meet public interest goals through codes of conduct, model contracts, guidelines, and enforcement mechanisms developed by the private sector.
- Government actions, when needed, should be transparent, minimal, non-discriminatory, and predictable to the private sector.
- Cooperation among all countries, from all regions of the world and all levels of development, will assist in the construction of a seamless environment for electronic commerce.

As in the *U.S.-U.K. Joint Statement*, they often identify specific issues including: tariffs; taxes; electronic authentication/electronic signatures; privacy; open access; information security; electronic payments; intellectual property rights; and consumer protection. The United States issued a series of important annual reports concerning United States and global trade. The annual report on telecommunications is of particular importance, since telecommunications provides infrastructure for e-commerce transactions. The USTR performs an annual review of foreign compliance with telecommunications trade agreements under Section 1377 of the 1988 trade act. Zoellick has said:

“Telecommunications trade agreements, particularly in the World Trade Organization [Basic Telecommunications Agreement of 1998], have been a driving force in opening up world markets to high-technology trade and investment. These agreements have sparked increased competition and dramatic growth in global networks Vigorous monitoring and enforcement of these trade agreements is critical” (Press Release, April 2, 2001).

• **Note: Internet Corporation for Assigned Names and Numbers (ICANN).**

In attempting, in part, to formulate a governing structure for the Internet, the United States created a non-governmental structure. The U.S. government created the *Internet Corporation for Assigned Names and Numbers (ICANN)*, a non-profit, private sector corporation. ICANN has a diverse international representation involving government, private sector, and consumer interests. ICANN was established to assume responsibility for IP (Internet Protocol) space allocation and domain name system management, among other responsibilities. Recently, it authorized new top-level domain names (.biz and .info). ICANN is dedicated to preserving operational stability of the Internet by providing a formal structure for the inclusion of domestic and global interests as the technical coordinating body for the Internet. While conflict has surrounded the substantive decisions made and its organizational structure, ICANN's privatized approach is unique and somewhat successful, especially its adoption of rules concerning arbitration of domain name disputes (“The Uniform Dispute Resolution Policy”). ICANN's creation provides a hint of what direction the future governance of the Internet and e-commerce may take, one involving more private and government coordination.

The challenge confronting the global trading system is to develop an international structure that supports growth of global electronic commerce for all.

• **Practitioner's Research Note: U.S. Trade Law & Policy.**

Two annual reports of the USTR on global trade and the United States are of great usefulness: *2001 National Trade Estimate Report on Foreign Trade Barriers* (USTR, 2001) and *2001 Trade Policy Agenda & 2000 Annual Report of the President of the United States on the Trade Agreements Program* (USTR, 2001). In addition, the joint publication on trade law, *Overview & Compilation of U.S. Trade Statutes* (GPO 1997), by the House Ways and Means Committee and the Senate Finance Committee is invaluable. It provides an outstanding compilation of U.S. laws relating to U.S. trade.

European Union (EU)

The *U.S.-EU Statement on Data Privacy* was issued last year (May 31, 2000). This agreement continues the often-bitter dialogue concerning the safe harbor privacy arrangement. That agreement relates to U.S. firms complying with requirements of the *European Directive on Data Protection* for transfers of data from the EU to a third country (for example, the United States). While the safe harbor arrangement is to become effective this summer, only a few large American firms have agreed to its terms. This remains an important issue in U.S.-EU relations.

One of the most important bilateral statements on global e-commerce concluded by the United States is one with the European Union, *Building Consumer Confidence in E-Commerce and the Role of Alternative Dispute Resolution* (December 2000). Building on the *U.S.-EU Joint Statement on Electronic Commerce*, issued in December 1997, the U.S. and the EU focused concern more on the issue of the consumer. Specifically, it addressed developing self-regulatory codes of conduct and alternative means of dispute resolution to increase consumer confidence in e-commerce. This agreement relied on the work of the Organization for Economic Cooperation and Development (OECD) and its consumer guidelines issued in December 1999.

Several pieces of EU legislation relating to jurisdiction have raised concerns with the United States over Internet litigation. Most recently, *EC Regulation (No. 44/2001)*, dated Dec. 22, 2000, which governs jurisdiction and enforcement of judgments, raises significant concerns. While not an international action between the United States and the EU, this and other directives have a direct impact on the way the Internet develops and on U.S. firms. For the United States, these actions indicate a somewhat less cooperative effort that has the potential of raising barriers to greater electronic trade. However, the EU Commission appears most recently to be rethinking its position concerning Rome II (the EU's proposal relating to consumer protection and Internet commerce.)



Dr. Stuart Malawer, right, with Mike Moore, the Director-General of the World Trade Organization.

Specifically, the Commission is rethinking the issue of cross-border jurisdiction in litigation involving Internet transactions. The Commission appears to be moving away from the "principle of destination" (the consumer) to the "principle of country-of-origin" (the supplier or the server). There is a suggestion that e-commerce should have an arrangement separate from other international sales transactions. This approach would bring Rome II more in line with other existing European law. (Cross-border jurisdiction is also subject to protracted talks within the Hague Conference on International Law.)

The European Union has addressed e-commerce in a series of major reports over the last few years. For example, the EU issued

the *Bangemann Report of 1994* and the *Bangemann Charter* in 1998. Each report discussed the global information society and the needs to strengthen international coordination. In 1997, the EU issued a report, entitled "*European Initiative in E-Commerce*," which discussed some very basic and general topics including the e-commerce revolution, access to e-commerce (the telecommunications liberalization), and creating favorable regulatory and business environments.

World Trade Organization (WTO)

The *Declaration of Global E-Commerce*, issued in 1998, is the most important item to come from the WTO. This ministerial declaration proclaimed a need for the establishment of a work program and a moratorium on new Internet restrictions. Subsequently, in 1998, a work program was established. The Council on Services was requested to examine the treatment of e-commerce under the GATS, especially as to modes of supply. The Council on Goods was to examine e-commerce relating to GATT 1994, focusing on market access and valuation. The Council on Intellectual Property was to examine the intellectual property issues relating to e-commerce. In fact, various progress reports of the councils have been submitted recently to the General Council. The United States was particularly pleased by the strong support that the General Council gave to key principles of e-commerce in December 2000. However, the WTO is only now moving forward with its efforts concerning e-commerce and the Internet.

The initial effort by the WTO to understand the benefits and challenges concerning the use of the Internet for commercial purposes appeared in its 1998 special study, *Electronic Commerce and the World Trade Organization*. Various policy issues were identified including: the legal and regulatory framework for Internet transactions; security and privacy; taxation; access to the Internet; intellectual property questions; and regulation of content.

The main issues confronting the WTO are defining the types of e-commerce and Internet transactions that fall within its different trade agreements; choosing which agreements are applicable and determining what modifications or changes must be implemented. The key question facing the WTO is this: Should a specific trade agreement related to e-commerce be completed or should the existing ones be made to work? (The latter sentiment, favored by the United States, is known as "technology neutrality.") Many states support the use of the WTO to deal with trade issues generally because of its binding dispute resolution system.

It should be noted that the *International Trade Center*, a joint subsidiary organ of the WTO and the U.N. (UNCTAD), recently has been engaged in promoting e-commerce as part of its mandate to provide technical cooperation and trade promotion for developing countries. While not a policy organ, it has become a more important player in cooperating with the WTO and representing the interests of less developed countries.

World Intellectual Property Organization (WIPO)

Last year, the WIPO published *Primer on Electronic Commerce and Intellectual Property* (2000). This report assessed the impor-

E-commerce Sites of International Institutions

U.S. Government (e-commerce site)	http://www.ecommerce.gov/
... Bilateral Statements	http://www.ecommerce.gov/joint_statements.htm
... U.S.T.R. (E-commerce Site)	http://www.ustr.gov/sectors/e-commerce.shtml
U.S.T.R. (International Sites)	http://www.ecommerce.gov/internat.htm
... U.S.T.R. (Telecommunications)	http://www.ustr.gov/sectors/industry/telecom.shtml
... U.S.T.R. (U.S. Government Sites)	http://www.ecommerce.gov/governme.htm
Asia-Pacific Economic Cooperation (APEC)	http://www.apecsec.org.sg/
European Union	http://europa.eu.int/ISPO/ecommerce/
... Link to International Initiatives	http://europa.eu.int/ISPO/ecommerce/multilateral/organisations.html
Hague Conference on Private International Law	http://www.hcch.net
... E-Commerce	http://www.hcch.net/e/workprog/e-comm.html
International Trade Center (WTO / UNCTAD)	http://www.intracen.org
Internet Corporation for Assigned Names and Numbers (ICANN)	http://www.ICANN.org
International Telecommunications Union (ITU)	http://www.itu.int/ECDC/otherlinks.htm
Organization for Economic Cooperation & Development (OECD)	http://www.oecd.org/dsti/sti/it/ec/
... E-Commerce	http://www.oecd.org/dsti/sti/it/ec/index.htm
UN Commission on International Trade Law (UNCITRAL)	http://www.uncitral.org/
UN Conference on Trade & Development (UNCTAD)	http://www.unctad.org/ecommerce/
World Trade Organization (WTO)	http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm
World Intellectual Property Organization (WIPO)	http://ecommerce.wipo.int/

Additional Trade Sites

"Overview & Compilation of U.S. Trade Statutes." (GPO, 1997).	http://www.gpo.ucop.edu/catalog/blue_book.html
"WIPO Primer on Electronic Commerce & Intellectual Property." (2000)	http://ecommerce.wipo.int/primer/index.html
"2001 Trade Barriers Report." (2001, USTR)	http://www.ustr.gov/html/2001_contents.html
"2001 Trade Policy Agenda Report." (2001, USTR)	http://ustr.gov/reports/2001.html
"Global Business Dialogue for E-Commerce."	http://www.gbd.org
... Trade	http://gbd.org/ie/2000/trade.html
"International Trade Relations."	http://www.InternationalTradeRelations.com
"Legal Aspects of International Trade."	http://www.ita.doc.gov/legal/
"U.S. Law & Global Trade."	http://www.US-TradeLaw.com
"World Trade Online."	http://www.insidetrade.com/

tant issues of e-commerce and intellectual property rights (copyright, trademark and patents); further, it described the challenges facing developing countries. In 1999, in another early effort, Dr. Kamil Idris, the director-general of WIPO, suggested the adoption of the *WIPO Digital Agenda*, which was subsequently approved by the U.N. General Assembly. The main points were the following:

- The importance of broadening the participation of developing countries in e-commerce.
- The need to adjust the international legislative framework to foster e-commerce. In particular, adapting broadcasters' rights to the digital era and fostering international protection of databases.
- The implementation and further development of rules concerning domain names (*The Report on Domain Name Process*) and the resolution of conflicts between these names and intellectual property rights.
- The development of international rules concerning Online Service Providers (OSP).
- The adjustment of the international framework for serving the public interest in the global economy.

In 1999, WIPO finalized its first report on issues relating to Internet domain names and intellectual property rights (namely trademarks) and dispute resolution. The report was made available to the *Internet Corporation of Assigned Names and Numbers* (ICANN). A system was established and WIPO now assists in arbitrating domain name disputes under rules adopted by ICANN, based upon the recommendations made by WIPO in its report. *The WIPO Arbitration and Mediation Center* is a hugely successful system that assists in the resolution of domain name disputes. However, a number of issues were not discussed or addressed in the 1999 report, such as tradenames and geographical indications. A new series of consultations are being held and a second report is expected by late 2001. The center is currently working to develop a set of guidelines specifically tailored to meet the needs of the application service (ASP) industry. It is also conducting an assessment of "keyword" disputes.

Organization For Economic Cooperation And Development (OECD)

In December 2000, the OECD released *Guidelines for Consumer Protection in the Context of E-Commerce*, which sets out the core characteristics of effective consumer protection for online business-to-business transactions. In 1998, the OECD held a conference in Ottawa called, *A Borderless World—the Potential for Global E-Commerce*, which set the tone of its subsequent activities. The OECD agreed to move forward on studying the taxation of electronic commerce and is expected to publish a progress report in 2001. The earlier report, *The Economic and Social Impacts of Electronic Commerce* released in 1998, began the OECD's efforts on e-commerce. It was prepared as background for the Ottawa Conference. More recent conferences have been held in 1999 on e-commerce and in 2001 on emerging markets and e-commerce. The OECD conducts a huge amount of research on

numerous topics relating to e-commerce, information society and telecommunications. The OECD's aim, in part, is to produce agreements that can be accepted by trading countries.

International Telecommunications Union (ITU)

The ITU is the organization that coordinates global telecom networks and services. It is composed of governments and private sector members. In 1998 the ITU launched the *"Electronic Commerce—Developing Country Project"* (EC-DC) to assist developing countries in establishing the necessary infrastructure and pooling of resources to foster e-business transactions. In cooperation with the World Trade Center network's global infrastructure, this EC-DC effort is aimed at bridging the international digital divide and helping less developed countries to significantly enhance their communications and economic development. The ITU is active in the development of standards for electronic commerce and wireless communications. Recently, the ITU decided to proceed with the preparation of a "World Summit on Information Society" (WSIS), to be held in 2003. The activities of the ITU are essential in providing the infrastructure for global e-commerce.

U.N. Commission For Trade And Development (UNCTAD)

UNCTAD adopted an important resolution in January 2001 concerning the least developed countries (LDCs) and e-commerce. It recognizes that the LDC's have constraints keeping them from participating in e-commerce. It suggests several international policies to address this situation. The UNCTAD effort to address the international digital divide with a focus on the least developed countries is belated. Last year, UNCTAD published an important study entitled, *"Electronic Commerce and Development"* (2000). This report puts forward an important message that economic development must come through the participation of private sector interests in the LDC's, but the LDC's need to attract them by taking appropriate public policy actions.

• Note: Other International or Regional Institutions

Other international and regional institutions are active in various aspects of e-commerce and trade. For example, the *United Nations Commission on International Trade Law* (UNCITRAL) produced a model law, The UNCITRAL Model Law on Electronic Commerce, in 1996, with revisions in 1998. This model law is intended for adoption by developing countries in the interest of harmonizing national law in order to promote economic development. UNCITRAL's Working Group on Electronic Commerce is continuing its work. *Asia-Pacific Economic Cooperation* (APEC) established a working group of experts in 1999. In March 2001, APEC issued "A BLUEPRINT FOR ACTION ON ELECTRONIC COMMERCE." In May 2001, APEC announced its "BEIJING INITIATIVE ON HUMAN CAPACITY BUILDING." The *Hague Conference on Private International Law*, an intergovernmental organization whose purpose is to work for the progressive unification of the rules of private international law, is continuing its negotiations concerning adoption of *"The Convention on Jurisdiction and Foreign Judgments."* These negotiations cover important issues relating to litigating Internet transactions in foreign jurisdictions.

• Note: Research & Reference

On my Web site, <http://www.US-TradeLaw.com>, for my class, U.S. Law & Global Trade, at George Mason University, there are a series of PowerPoint presentations on various international institutions and global e-commerce. These presentations are by officials from those institutions. They may be found under "Global E-Commerce/PowerPoints" at <http://www.us-tradelaw.com/assignme.htm>.

Conclusions

In my last article for the *Virginia Lawyer* (June/July 1999), entitled *Internet Commerce and Trade Policy*, I offered several observations:

- The WTO should be the focus of global efforts to develop favorable trade law concerning e-commerce and Internet trade;
- The U.S. has general acceptance for its policy of less regulation is best;
- The international legal and institutional framework confronting Internet trade today needs to adapt quickly to ensure a market-driven approach and global growth.

In light of the recent developments in global trade relations noted above, I offer the following additional observations:

- The WTO should continue to be the focus of U.S. actions in fostering favorable trade laws concerning electronic commerce. However, the WTO's actions, since 1998, have been very minimal. There is still disagreement over which trade agreement(s) should be applicable to particular e-commerce transactions or if an entirely new one needs to be formulated.
- There seems to be a growing acceptance globally of the U.S. view that less regulation is best. (Witness the newer activities of U.S. bilateral statements relating to e-commerce with our trading partners and the newer activities of UNCTAD and the ITU concerning bridging the "international digital divide.")
- The international legal and institutional framework relating to the Internet needs to adapt quickly. Advances in global e-commerce are continuing while the legal-political structure is still groping for direction and coherence. (Witness the growing dispute between the United States and the EU dealing with litigating consumer actions over Internet transactions and the continuing debate over privacy of data.) If there is a significant delay in fashioning a global approach (which may very well be some form of greater coordination of regional and national legislation), then the threat of dysfunctional national and sub-national legislation may come to pass and negatively impact the development of global e-commerce.

Pascal Lamy, the EU Commissioner for Trade, said recently:

"Trade governance is but one aspect of global governance and the WTO is but one of the global actors. But as a relatively (and I underline relatively) strong and well functioning player, the WTO is often perceived as a broader governance tool, one that should take on board other issues, and become a central global governance machine It is not the right response to all global concerns. Globalization requires improved governance also in a range of other policy areas." (Speech, *Trade Policy and Governance in the Global Economy*, April 10, 2001).

But in the area of e-commerce and trade, the World Trade Organization is the obvious leader. The World Trade Organization's crucial mandate is to manage trade disputes and develop new trade rules. The Internet is having an historical impact on global trade. Such an impact will be even more dramatic in the future. The World Trade Organization must take the lead in addressing the trade issues relating to Internet trade. The WTO needs to be creative. However, parallel efforts and coordination with other institutions are required.

The efforts of WIPO concerning intellectual property and the ITU concerning telecommunication infrastructure are obviously of great importance, but must be fully coordinated with the WTO. It is up to the leaders of the trading nations to further the initial actions springing up. A network of entrepreneurs commercially developed the Internet. Creating a viable international institutional and legal structure to govern its activities and to protect and foster its founding spirit, will only further ensure its success and that of global e-commerce. This will be good for global trade, economic development—and peaceful relations. ☺



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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*.)