REGULATING NON-TERRITORIAL COMMERCIAL ENVIRONMENTS IN TERRITORIAL-BASED LEGAL SYSTEMS

A JURISDICTIONAL FRAMEWORK FOR THE REGULATION OF TRANSNATIONAL ELECTRONIC COMMERCE

by

PEDRO LESS ANDRADE

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

The purpose of the following work is the identification and analysis of the legal and technological challenges that transnational electronic commerce carried out over open computer-mediated networks presents to legal systems based on territorial principles in order to delineate global and systematic solutions to this new non-territorial commercial environment. A possible global, systematic and technologically oriented legal solution will create a new commercial environment safer for consumers, more predictable for businesses and with equal opportunities of access and growth for all countries.

INDEX WORDS: Applicable Law, Borderless Technologies, Business, Computer-mediated Networks, Consumer Protection, Cyberspace, E-business, E-commerce, Electronic Commerce, Enforcement of Judgments, Gathering of Evidence, Internet, Jurisdiction, Jurisdictional Framework, Non-territorial Commercial Environments, Registration, Telematics, Territorial-Based Legal Systems, Transnational Businesses.

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DEDICATION

El presente trabajo esta dedicado a aquellas personas que a lo largo de mi vida me han apoyado, guiado, formado y querido, y sin las cuáles hubiera sido imposible haber obtenido mi formación tanto académica como personal.

Quiero dedicar muy especialmente este trabajo a mi madre Liliana Luisa Andrade, quien a lo largo de mi vida con su amor y su ejemplo, me ha demostrado que todos los sueños son alcanzables en la medida en que se trabaje duro en ellos y se ponga lo mejor de uno. También quiero dedicarle este trabajo a mi padre Walter Martín Less quien siempre me ha apoyado incondicionalmente en todas mis decisiones.

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INTRODUCTION

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1. Nature of Technological Change

Now, technology generates problems that have an impact on the life of individuals, legal entities and legal communities. These problems necessitate time-accurate legal solutions. Technology changes the way individuals interact, communicate, learn, amuse themselves or shop. These changes in individual behavior impact directly the way that legal entities conduct their business.

Legal systems constantly need to give responses to the new problems of developing societies. Usually these responses take time to be analyzed, elaborated, become accepted by consensus and be applied within a given legal community. This gap between the appearance of a specific problem and the finding of its legal solution is deeply intensified by technology's speed.

Technology has its own speed - the digital speed. This speed allows the processing of millions of operations in the blink of an eye. As light, it is able to cover the globe in nanoseconds. This speed was the key to set the stage for commercial globalization; no globalization is possible without technology's speed. For the last 25 years, we have witnessed a process of economic expansion and technological development that has been named the "third industrial revolution",[1] and "Internet is at the heart"[2] of this revolution. This revolution rests over three technology mainstays – hardware, computer power based on the integrated circuits;

[1] Bradford L. Smith, *The Third Industrial Revolution – Law and Policy for the Internet*, 282 Recueil des Cours 229, 242 (2000).

software developments that empower the hardware, that make the interfaces user-friendly and more affordable; and high-speed bandwidth telecommunication networks that allow the global interconnection of the first and second mainstays.[3] The synergy of these three elements creates the computer-mediated networks, where Internet[4] is its quintessential example.

The gap between legal problems generated by technological developments and legal adequate solutions is increasing exponentially. This *post post-industrial* era needs a flexible and fast legal system able to bridge this legal gap.

2. Particular Problems in Technology Change

a) Dichotomy between Non-territorial Commercial Environments and Territorial-based Legal Principles

Computer-mediated networks, like the Internet, are borderless technologies[5], which do not respect any political or geographical boundary. They can go through national territories by different means such as wires, radio frequencies, microwaves, infrared signals and other wireless technologies. Frequently national governments are not able to track, block or control the operations carried out through these networks. In today's market, transactions between individuals, corporations and even governments are carried out by computer-mediated networks, therefore, they have acquired technology's speed. Commercial activities carried out over these networks create non-territorial commercial environments while traditional concepts of

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[2] *Id.*
[3] *Id.*
[4] *See* Internet Tax Freedom Act. of 1998, Title XI of P.L. 105-277, the Omnibus Appropriations Act of 1998, 115 Stat. 703, 47 USCS § 151 note, § 1101 (e) (3) (C). *(*Where Internet defined as "…collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio"*)*[hereinafter Internet Tax Freedom Act].

jurisdiction and applicable law are based on territorial principles that are inadequate to non-territorial environments.

b) The New Role of Consumers in the Transnational Business Arena

Commercial activities over computer-mediated networks began with business-to-business transactions, commonly denominated E-business. This medium of commerce was reserved to large companies or transnational corporations that were able to afford expensive computer systems. Electronic Data Interchange (EDI) [6] and Electronic Fund Transfers (EFT),[7] developed in the 1970's, was the first step in the electronic transaction field with developments in the retail, chemical, automotive, banking and finance sectors. The affordable access to computers, software and telecommunications networks allows consumers to search and purchase innumerable goods and services all over the globe, without the aid of middle-men or other commercial agents.

The starting point of this process began in March, 1991 when the National Science Foundation (NSF)[8] lifted the restrictions on commercial use of the Internet, and the world faced a new environment to carry out business - "the World Wide Web"[9], most well known as "www".

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[5] RICHARD DOERNBERG & LUC HINNEKENS, ELECTRONIC COMMERCE AND INTERNATIONAL TAXATION 7 (1999).

[6] Antonio A. Martino et all, *Presentation of the Recognition of the "Electronic Document"- EDIFORUM (Italia)*, 1 The EDI Law Review 125 (1994) *(*Stating that"[t]he term Electronic Data Interchange (EDI) means the electronic transfer of "structured" messages from computer to computer or in other words the interchange, via telematics of orders, delivery notes, customs declarations or more generally, any "document" between two or more parties.").

[7] "Early practical EDI applications were carried out in the banking system for electronic funds transfers by using a world-wide network called SWIFT (Society for Worldwide Interbank Financial Telecommunications)." *See id.* *See also*, SWIFT, SWIFT in figures — FIN traffic December 2003 YTD, at http://www.swift.com/index.cfm?item_id=4329 (Last visit 02/26/2004) (stating that after 30 years, this network is still operating supplying secure, standardized messaging services and interface software to 7,500 financial institutions in 200 countries, with an average daily traffic of 8,177,174 messages and reaching in December 2003 the yearly financial message mark of more than 2 billions messages)

[8] An US Governmental Organization that was in charge of the Internet's administration http://www.nsf.gov.

[9] *"*The term 'by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol, file transfer protocol, or other similar protocols.*"* Internet Tax Freedom Act. of 1998, Title XI of P.L. 105-277, the Omnibus Appropriations Act of 1998, 115 Stat. 703, 47 USCS § 151 note, § 1101 (e) (3) (A).

However, it was only after 1995, with the development of graphic Internet browsers (First Mosaic, then Netscape) and the expansion of Internet Service Providers (ISPs), that the use of Internet for commercial transactions started to gain prominence and the "e-commerce" era begun.

By the use of Internet and the World Wide Web, consumers became worldwide purchasers within a period of less than ten years. The World Wide Web gives consumers timely and accurate information about products, provides them with the ability of price comparison, cost-saving avoidance of intermediaries and digital delivery without leaving their home or office.

Consumers' new role in the transnational business arena, generates new problems to national governments and international organizations. This owns to the fact that governments and international organizations were accustomed to deal with traders, merchants and corporations involved in transnational businesses and consumer commercial transactions were predominantly domestic.

c) Equal Opportunities of Access and Growth to all Countries

Markets are especially sensitive to electronic commerce due to the lack of control that national administration have over their territorial borders in the context of electronic transactions, specifically in its full-digital feature. Currently, the traditional control over international trade is not possible when it is carried out by computer-mediated networks.

See also "A system of Internet servers that support specially formatted documents. The documents are formatted in a markup language called HTML (HyperText Markup Language) that supports links to other documents, as well as graphics, audio, and video files. This means you can jump from one document to another simply by clicking on hot spots. Not all Internet servers are part of the World Wide Web." Webopedia Online Dictionary, available at http://www.pcwebopedia.com/TERM/W/World_Wide_Web.html.

Therefore, national administrations are not able to regulate and protect commercial activities from and to its territory.

B. The Challenge

The major challenge is to find solutions to legal issues that require a determination under such territorial-based concepts as jurisdiction, applicable law, gathering of evidence and enforcement of judgments in the context of non-territorial commercial environments generated by borderless technologies. These concepts, instead of having an internationally agreed regulation, are regulated individually at the national or state levels. The aim of this work is to find a systematic solution to the problem of non-territorial commercial environments generated by borderless technologies, like computer-mediated networks, without the need to change every single national regulation.

In order to address issues problems I have generated four interrelated hypotheses:

1. Hypothesis 1:

Transnational electronic commerce carried out by computer-mediated networks generates non-territorial commercial environments incompatible with traditional territorial-based legal concepts.

2. Hypothesis 2:

The solution to this problem requires a merge between legal solutions and technological solutions in order to create a jurisdictional framework for non-territorial commercial environments.

3. Hypothesis 3:

The jurisdictional framework will provide a link between non-territorial commercial environments and territorial-based regulations.

4. Hypothesis 4:

The implementation of this jurisdictional framework needs an international multilateral convention on transnational electronic commerce that will promote the development of an electronic marketplace with equal opportunities of access and growth to all countries.

CHAPTER II

WHAT IS ELECTRONIC COMMERCE?

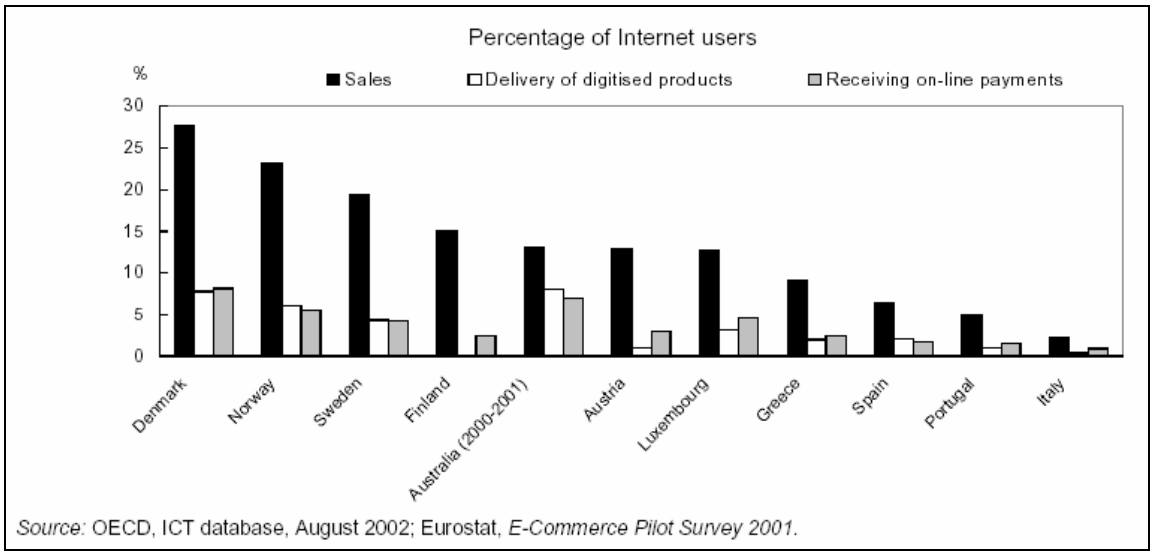
A. Phases of an Electronic Commerce Transaction

Electronic commerce transactions repeat the same traditional phases of traditional commercial transactions. These phases are: search, order, payment and delivery of the products. Depending on the goods or services involved and the means used to carry out these electronic commercial transactions, the phases might be concluded partially or totally in a digital way. For example, an electronic commerce transaction involving the purchase of software via the Internet can be performed totally digitally; an individual can search and select software from the web site of a software developer, complete an order form with a few clicks, pay for it with his or her credit card and, once the payment is confirmed, download the software into his or her computer. All the goods or services or activities subjected to digitalization, such as software, music, movies, games, images, advertising, professional services, on-line information (e.g., legal databases), financial services, or education can be transacted in this way. These kinds of transactions present the most difficult challenges in order to apply traditional concepts of jurisdiction and applicable law to electronic commerce transactions. Not only are the places where the contract is signed or performed, traditionally used in private international law analysis, no longer pertinent, [10] but also the lack of knowledge of the physical location of the parties is not an obstacle to the performance of these transactions. Commercial transactions concluded in a fully digital basis generate the non-territorial commercial environments are going to be analyzed

[10] UNCTAD Secretariat, E-commerce and Development Report 2001, at 100, U.N. Doc. UNCTAD/SDTE/ECB/1, U.N. Sales No.E.01.II.D.30 (2001) [hereinafter E-commerce and Development Report 2001].

in this work. Other transactions that involve, for example, a non-digital phase - like delivery of tangible goods will provide a point of connection for conflict of law rules. Figure 1 gives an overview of the Internet users involved in different phases of digital commercial transactions in several European countries.

Figure 1: Selling, Delivering and Paying over the Internet, 2000.

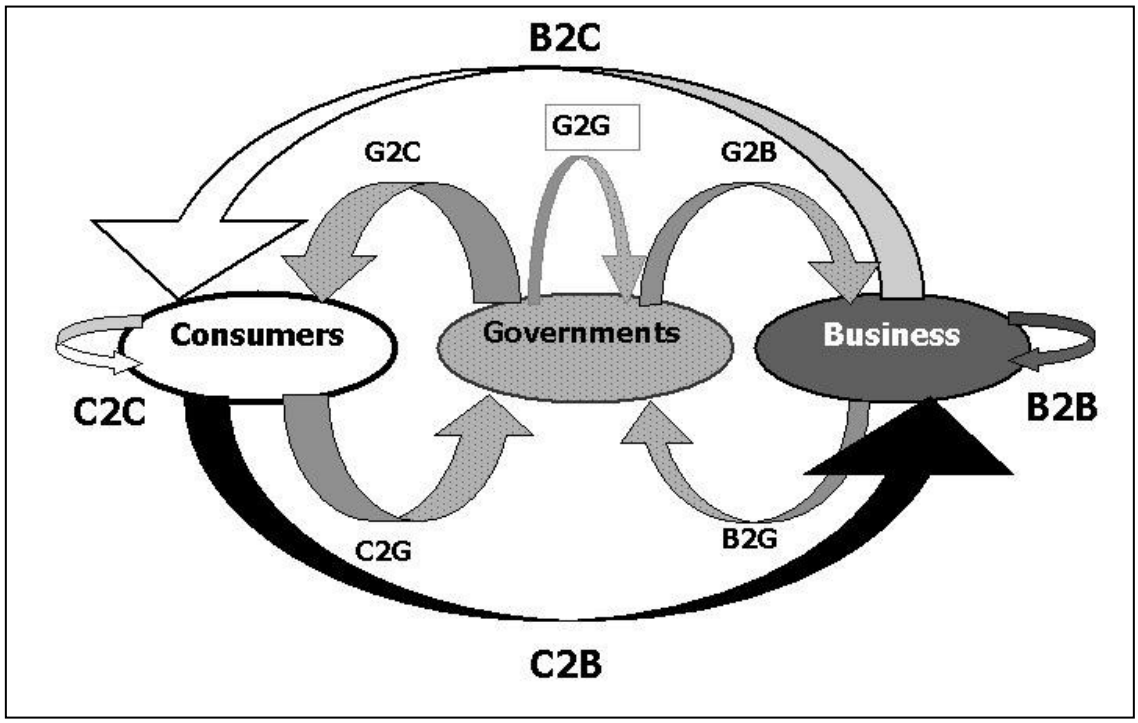


B. Relationship Among Different Actors

Electronic commerce creates myriad of relationships among different actors. Basically, all relationships can be deduced from the possible interactions of three actors: consumers, business and governments. Figure 2 illustrates the possible relationships among these actors.[11]

[11] The acronyms of figure 2 correspond to the definitions of the different possible relationships among businesses, consumers and governments: B2B "Business to Business"; B2C "Business to Consumer"; C2C "Consumer to Consumer"; C2B "Consumer to Business"; C2G “Consumer to Government”; B2G “Business to Government” G2C “Government to Consumer”; G2B “Government to Business”; G2G “Government to Government”.

Figure 2: Relations among Different Actors of Electronic Commerce



Nowadays, business-to-business electronic commerce dominates the electronic market. The UNCTAD E-commerce and Development Report 2003[12] supports this affirmation showing the trends that electronic commerce followed in different regions.[13]

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[12] UNCTAD Secretariat, E-commerce and Development Report 2003, at 4, U.N. Doc. UNCTAD/SDTE/ECB/2003/1, U.N. Sales No. E.03.II.D.30, at 17-23, (2003) [hereinafter E-commerce and Development Report 2003].

[13] B2B electronic commerce shows the following trends:

(1) United States: official statistics show that in 2001, annual B2B online sales in the United States amounted to $995 billion (93.3 per cent of all US e-commerce).
(2) European Union: The value of B2B trade was close to $185 billion and $200 billion for the year 2002.
(3) Central and Eastern Europe: several projections show that B2B e-commerce will amount to around $4 billion in 2003.
(4) Asia-Pacific region: growing increasingly rapidly, from about $120 billion in 2002 to around $200 billion in 2003 and $300 billion by 2004.
(5) Latin America: The forecast for 2002 was $6.5 billion worth of online B2B transactions and $12.5 billion for 2003.
(6) Africa: The forecast for 2002 B2B e-commerce was $0.5 billion and $0.9 billion in 2003, with South Africa accounting for 80 to 85 per cent of these amounts.

B2C electronic commerce shows the following trends:

(1) United States: official statistics show that online retail sales in 2002 amounted to $43.47 billion, 25.64 per cent more than in 2001.
(2) European Union: In 2002 the value of B2C trade was estimated at €30 billion ($28.29 billion at the average exchange rate of 2002).

C. Towards an International Agreed Definition of Electronic Commerce.

The diverse definitions of electronic commerce provided by different international organizations and individuals have hampered the ability of researchers and policy makers to fully understand the ramifications of electronic commerce.[14] In order to regulate transnational electronic commerce an internationally agreed definition is necessary to determine the spectrum of the regulated activities.

1. OECD Definitions

The work performed by OECD[15] in electronic commerce is very instructive. The OECD divided the definition of electronic commerce into three dimensions: networks, the means by the activities are carried out; processes and activities that ought to be included within the spectrum of electronic commerce; and actors involved in the transactions. With respect to the Network dimension, the OECD member countries have agreed to different definitions for electronic commerce transactions based on the communication infrastructure utilized. Table 1 contains the narrow and broad OECD definitions[16] in one column and examples of the regulated activities proposed by the guidelines for the interpretation of the definitions[17]. With respect to the process dimension, both definitions deal with transactions that only involve sale or purchase of goods or

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(3) Central and Eastern Europe: several estimations showed that B2C e-commerce sales, could reach $400 million in 2003.
(4) Asia-Pacific region: estimations showed that B2C revenues amounted to some $15 billion in 2002 and will total about $26 billion in 2003.
(5) Latin America: market research sources estimated the total of B2C e-commerce sales at $2.3 billion in 2002 and $4.5 billion in 2003.
(6) Africa: market research forecasts of 2001, estimated B2C e-commerce sales at $4 million in 2002, growing to $70.6 million in 2003 (Forrester Research 2001).

[14] E-commerce and Development Report 2001, *supra* note 10, at 6.
[15] *Id.*
[16] OECD, Measuring the Information Economy 2002, Annex 4 table A.4.1 at 89, OECD Publications, No. 81855 2002 (2002), available at http://www.oecd.org/document/5/0,2340,en_2649_34449_2765701_119699_1_1_1,00.html

services. All other business processes that take place electronically, such as advertising or marketing, among others, have been excluded.[18]

With respect to the actors' dimension, the definition is very broad and covers all possible kinds of electronic commerce relationships described before.

Table 1: OECD Definitions for E-commerce Transactions

E-commerce transactions	OECD definitions	Guidelines for the interpretation f the definitions (WPIIS proposal April 2001)
BROAD definition	An **electronic transaction** is the sale or purchase of goods or services, w hether betw een businesses, households, individuals, governments, and other public or private organisations, conducted over **computer-mediated netw orks**. The goods and services are ordered over those netw orks, but the payment and the ultimate delivery of the good or setrvice may be conducted on or off-line.	**Include**: orders received or placed on any online application used in automated transactions such as Internet applications, EDI, Minitel or interactive telephone systems.
NARROW definition	An **Internet transaction** is the sale or purchase of goods or services, w hether betw een businesses, households, individuals, governments, and other public or private organisations, conducted over the **Internet**.The goods and services are ordered over those netw orks, but the payment and the ultimate delivery of the good or setrvice may be conducted on or off-line.	**Include**: orders received or placed on any Internet application used in automated transactions such as Web pages, Extranets and other applications that run over the Internet, such as EDI over the Internet, Minitel over the Internet, or over any other Web enable application regardless of how the Web is accessed (e.g. through a mobile or a TV set, etc.). **Exclude**: orders received or placed by telephone, facsimile or conventional e-mail.

Source: OECD

2. The UNCITRAL Approach to Electronic Commerce

The definition given in the UNCITRAL Model Law on Electronic Commerce[19] is one of the most influential among the policy makers due to the broad application of this model law in

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[17] OECD, WPIIS Proposal (April 2001).
[18] E-commerce and Development Report 2001, *supra* note 10 at 6-7.
[19] G.A. Res. 162 U.N. GAOR, 51st Sess., 85th plen. Mtg, U.N. Doc. A/RES/51/162 (1996) [hereinafter UNCITRAL Model Law on Electronic Commerce].

numerous countries. To understand this definition it is necessary to interpret jointly article 1 and article 2 of the model law and its guide of enactment.[20]

Article 1 sets the sphere of application stating that the model law "applies to any kind of information in the form of a data message used in the context of commercial activities".[21] Article 2 defines data message as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy".[22]

The definition of a data message gives a very broad spectrum of means for electronic commerce (e.g., telegram fax and electronic mail) without any specific reference to computer-mediated networks. The Guide for Enactment specifies the term "commercial" in article 1, giving to it a wide interpretation in order to cover all matters arising from relationships of a commercial nature, whether contractual or not. It also gives a non-exhaustive list of transactions of commercial nature including among others:

> "[A]ny trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road"[23]

This definition does not refer to the actors involved in the exchange of data messages.

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[20] UNCITRAL, Model Law on Electronic Commerce with Guide to Enactment, 1996: with additional article 5bis as adopted in 1998, available at http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm [hereinafter Guide to Enactment UNCITRAL Model Law on Electronic Commerce].
[21] UNCITRAL Model Law on Electronic Commerce, *supra* note 19, art. 1.
[22] *Id.* art. 2.

3. WTO and the Problem of Characterization.

One of the main problems of the World Trade Organization is how it characterizes electronic commerce. This characterization is very important in order to regulate electronic commerce within the framework of the GATT[24] or the GATS.[25] WTO has initially characterized transnational electronic commerce as cross-border trade of services falling within the regulatory framework of the GATS. In a note[26] that had been prepared by the Secretariat to assist Members in their deliberations on the Ministerial Declaration on Global Electronic Commerce;[27] they defined electronic commerce as comprising three different types of transaction:

> "(a) the provision of Internet access services themselves – meaning the provision of access to the net for businesses and consumers;
> (b) the electronic delivery of services, meaning transactions in which services products are delivered to the customer in the form of [digitized] information flows;
> (c) the use of the Internet as a channel for distribution services, by which goods and services are purchased over the net but delivered to the consumer subsequently in non-electronic form."[28]

In September of 1998, the General Council, following the mandate of the Geneva declaration,[29] established the Work Programme on Electronic Commerce[30] and gave the first "official" definition of electronic commerce: "the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic

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[23] Guide to Enactment UNCITRAL Model Law on Electronic Commerce, *supra* note 20, art. 1.
[24] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S 194 [Hereinafter GATT].
[25] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [Hereinafter WTO Agreements], Annex 1B, 33 I.L.M. 46 (1994) [Hereinafter GATS].
[26] WTO General Council, *WTO Agreements and Electronic Commerce*, WT/GC/W/90 (Jul. 14,1998).
[27] WTO Ministerial Conference, *The Geneva Ministerial Declaration on global electronic commerce*, WT/MIN(98)/DEC/2, (May 25, 1998) [hereinafter Geneva Ministerial Declaration].
[28] WTO General Council, *supra* note 26, at 1.
[29] *See* Geneva Ministerial Declaration, *supra* note 27.
[30] WTO General Council, W*ork Programme on Electronic Commerce*, (25 Sep. 1998), at http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm [hereinafter WTO Work Programme on Electronic Commerce].

means."[31] In addition, several members of the WTO Secretariat have defined electronic commerce in a very simple and narrower way as "the production, advertising, sale and distribution of products via telecommunication networks." [32]

Five years later, the member delegations continued this discussion at the "Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council."[33] The center of the discussion is how to deal with digitized products that can be delivered electronically. The analysis of the discussion allows for the identification of three different positions. First, a number of delegations, like the European Community,[34] believe that only services were involved in electronic deliveries and hence the GATS rules and commitments applied to these activities. Second, other delegations argued that there exist a number of digitized products that should be treated as goods and therefore should be covered by the GATT, the United States[35] was among these delegations. Lastly, another delegation raised the question of whether electronically supplied products could exist as a separate entity.

Among the arguments in favor of the position that electronic commerce constitutes only trade of services, the European Community made the following arguments:

(1) The GATT was designed for address trade of physical products. This argument is endorsed by the fact that the Harmonized Commodity Description and Coding System (HS), created under the auspices of the World Customs Organization (WCO) and used to classify goods for international trade purposes, generally distinguish products according to their physical

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[31] *Id.* at sec. 1.3.
[32] BACCHETTA, LOW, MATTOO, SCHUKNECHT, WAGER AND WEHRENS, ELECTRONIC COMMERCE AND THE ROLE OF WTO - SPECIAL STUDIES 2 1 (1998).
[33] WTO General Council, *Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council*, WT/GC/W/509 (Jul. 31, 2003).
[34] *See* WTO Work Programme on Electronic Commerce, *Classification Issue - Submission from the European Communities*, WT/GC/W/497 (May 9, 2003).
[35] *See* WTO Work Programme on Electronic Commerce, *Submission from the United States - Revision*, WT/GC/W/493/Rev.1 (Jul. 8, 2003).

characteristics. The lack of physical characteristics of digitized products makes them difficult to classify as goods under the HS.[36]

(2) The notion of "digitized products" is confusing, and its interpretation has led to ideas that would cause chaos in the WTO architecture.[37]

(3) The GATS already applies to the electronic delivery of services, including so-called "digitized products".[38] GATS already applies to digitized health check reports or bank account reports and also to the category "software implementation services" (CPC 842). GATS rules and Members' commitments apply to the supply of services, as defined by Article XXVIII of the GATS as the "production, distribution, marketing, sale and delivery of a service"[39] the delivery of digitized products should be subjected to the GATS.

Other delegations met each of the three arguments. With respect to the first argument these member delegations questioned the lack of an entry for defining digitalized products in the Harmonized System as sufficient to apply the service classification regime and therefore the GATS. The CPC-842 does not define software itself as Service.[40] However, the HS treat electricity as a good, despite the lack of a physical description. The European response to this counter-argument was that this is the exception that confirms the rule.

Why is it so important to characterize electronic commerce itself as trade of services, goods, both or something else? The answer to this question lies in the restriction to trade applied by the two sets of regulations. Under the GATT, most favored nation treatment and national treatment are general obligations, quantitative restrictions are prohibited, and subsidies are

[36] WTO Work Programme on Electronic Commerce, *supra* note 30, at 1-2.
[37] *Id.* at 2-3.
[38] *Id.* at 3.
[39] GATS, *supra* note 25, at 65.
[40] WT/GC/W/509, *supra* note 33, at 7.

disciplined. Under the GATS, most favored nation treatment is applicable to trade in services in any sector whether specific commitments have been made or not, but exemptions to this principle could be sought at the time of the acceptance of the agreement. These exemptions are enclosed in country-specific lists and Member States can chose which sectors are going to enjoy national treatment and which sectors are going to suffer limitation to this principle. Member states can incorporate limitations to access to markets in their lists of specific commitments. Subsidies, if applied, would be in a non-discriminatory basis, and tariffs are not applied. The characterization under the GATS of digitized products that can be delivered electronically, gives to the Member States more control over these transactions and more possibilities for limitation of access to markets and national treatment.

Using the approach of the European Union, if a product, like a software application in physical form such as diskette or CD-ROM, goes across a border in that form, the GATT would apply, including the principle of national treatment. Nevertheless, if this product was digitized, i.e., downloadable, and for this reason became a service, it would fall under the GATS commitments. Similar reclassification occurs if a Member State's schedule of service commitments limits national treatment and access to market on software services. As a result of this standpoint, the same product will be treated in a different ways, lacking the benefits of national treatment and access to market.

The fact that electricity is characterized as a good by the HS, despite its lacks of physical description, is the key of the problem. Not only are electricity and the flow of information that is delivered over computer-mediated networks composed by the same matter, electrons, but also the electrons are “tangible” despite their being one of the smallest parts in nature. The atom and its parts, electrons, protons and neutrons are susceptible to manipulation in several ways. It is

not proper to say that digitized products lack tangibility, perhaps they lack a physical description, but not tangibility.

Concurring with the standpoint of United States and Venezuela that "the means of delivery of such products may change but the downloadable products' functional characteristics do not change merely by a difference in delivery",[41] the type of carrier chosen to deliver the product should not change its nature. For example, a book delivered by ship, that was considered a good and hence falls under the GATT regulations, does not change its nature if the seller decides to change the carrier and send it electronically through a computer-mediated network. The book is still a book, since its underlying functions do not change, and the purchaser is able to download it, store it in his computer and read it as many times as he wants. Unfortunately, after more than 5 years of debate the Member delegations have not reached an agreement about an international and accorded definition on electronic commerce.

4. An Alternative Definition of Electronic Commerce

An alternative definition of electronic commerce would allow the international community to handle the different aspects of electronic commerce in a comprehensive way and with technological neutrality. First of all, the definition should address electronic commerce as a means to carry commercial activities. I believe that the debate within the WTO to define electronic commerce itself as trade of services, goods or something else is superfluous. In accordance with the three-dimensions definition of OECD (processes, actors and networks), the processes dimension should be as broad as possible, not only to cover as much commercial

[41] *See Id.* at 3.
See also WTO Work Programme on Electronic Commerce, Submission from Venezuela, - Revision, WT/GC/W/493/Rev.1 (Jul. 8, 2003). (Venezuela made a similar observation in its July 2001 submission to the Work Program. JOB (01)(120),July 2001.)

activities as possible, but also to encompass future developments. Most of the definitions refer only to sale or purchase of goods and services excluding a wide array of commercial activities like leasing, renting, advertising and marketing, among others. The term "*Commercial Activities*" as is stated in the article 1 of the UNCITRAL Model Law on Electronic Commerce with the interpretation given by the Guide for Enactment[42] is an excellent example to follow because it covers all matters arising from relationships of a commercial nature, whether contractual or not.

The definition of the actors involved in electronic commerce also should be as broad as possible and the OECD approach to this issue is comprehensive, concerning all possible kinds of electronic commerce relationships.

The network dimension is important in determining the means used to carry out electronic commerce activities. The essential, what is the differential feature that makes electronic commerce so special? The answer to this question is *"telematics"*,[43] defined as the blend between "TELE(COMMUNICATIONS + INFOR)MATICS".[44] Considering telecommunications as "Communications over long distances, esp.[ecially] by electrical means such as by telegraphy, telephony or broadcasting"[45] and informatics as"[t]he branch of technology concerned with the dissemination, processing, and store of information, esp.[ecially] by means of computers".[46] Telematics allows the data communications between systems and devices far apart. Following the teachings of Professor Josué Fernández Escudero,[47] the

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[42] UNCITRAL Model Law on Electronic Commerce, *Supra* note 19.

[43] Telematics is the English language version of the French word *télématique* - coined for the first time in SIMON NORA AND ALAIN MINC, *L'INFORMATISATION DE LA SOCIÉTÉ*, LA DOCUMENTATION FRANCAISE, Paris (1978).
See also, English Translation, SIMON NORA AND ALAIN MINC, THE COMPUTERIZATION OF SOCIETY: A REPORT TO THE PRESIDENT OF FRANCE 4 (1980).

[44] *Cf. F. Télématique. (The Science of) the long-distance transmission of computerized information.* The Oxford English Dictionary, Second Edition Vol. XVII, at 727 (1989).

[45] *Id.* at 723.

[46] *Id.* Vol. VI at 944-945.

[47] Josué Fernández Escudero, Adjunct Professor, Curso Comercio Electronico y Negocios, School of Law University of Buenos Aires, (Mar. 28, 2003).

computer element is the differential feature of electronic commerce, because it allows processing of thousands of transactions simultaneously, at a speed that any human can reach among different systems and devices far apart. The approach given by UNCITRAL in article 2 of the Model Law in Electronic Commerce is extremely broad, and includes in its definition such means as the telegram, telex, or telecopy. Even a radio, a television or a telephone send or receive information by electronic means and the FAX is a mix between electronic an optical means, able to send and receive information. Commercial activities concluded by these means should not be characterized as electronic commerce. They have the telecommunication element but they lack of the computer element. Other definitions talk about communications networks that, when similarly considered alone, lack the computer element. Other definitions are too narrow and consider as electronic commerce only the commercial activities carried out through the Internet. For this reason, I consider that in the network dimension the broad definition given by the OECD is the most appropriate to handle telematic messages: "…over computer-mediated networks". For example a telephone network itself is a communications network, but if this network is combined with the right equipment, such modems, routers, bridges and information servers, it becomes a computer-mediated network. The computer mediation of the network is what makes the difference.

Taking into account the above mentioned three different dimensions, an international standard definition of electronic commerce could be the following: *Commercial activities whether between businesses, households, individuals, governments, and other public or private organizations carried out over computer-mediated networks.* This definition brings a broader scope for the commercial transactions involved, the actors are clearly defined and the network dimension is more accurate given the nature of electronic commerce.

D. Devices for Electronic Commerce:

Taking into account the electronic commerce definition presented above, the devices utilized to carry out electronic commerce could be, among others, the followings: computers or personal digital assistants (PDAs) attached to communications networks, cellular phones, digital phones, digital television, electronic data interchange (EDI), electronic mail, automatic teller machines (ATMs), payment systems such as point of sale (POS) or any other device with computing and telecommunications capabilities.

1. Description of a Transnational Electronic Commerce Transaction with a Legal Analysis of Actors and Players.

A description of an electronic commerce transaction will be helpful for a better understanding of the electronic commerce phenomenon. Taking into account the different actors mentioned in the definition of electronic commerce and the myriad possible relationships among them, it is necessary to choose a relationship that presents the most challenging problems to regulation of electronic commerce. For this purpose, the description of a business-to-consumer relationship, whether each actor is situated in a different state, will be the best example to describe the complexity of this issue.

Besides the two main actors in a business-to-consumer relationship, a number of other necessary players are required in order to carry out an electronic commerce transaction. Assuming that the relationship takes place over the Internet at the web site of the seller, the seller needs the service of and Internet Service Provider (ISP)[48] to host his web site on a web-server

[48] "Internet Service Provider, a company that provides access to the Internet. For a monthly fee, the service provider gives you a software package, username, password and access phone number. Equipped with a modem, you can then log on to the Internet and browse the World Wide Web and USENET, and send and receive e-mail. In addition to serving individuals, ISPs also serve large companies, providing a direct connection from the company's networks to

and get a domain name from an accredited domain name registrar[49] in order to make its content accessible to the public over the network. A consumer also needs the service of an ISP to get access to the Internet via different means such as dial-up, cable, DSL, wireless networks or institutional networks, e.g., universities or workplaces.

Once the communication channel is established, the consumer is able to start the first phase of the transaction - the search of the desired product or services on the web site of the seller. At this point, it is necessary to highlight the involvement of consumer associations that have a very important role in the policy-making, education and buying-decision of consumers[50]. Due to, the seller's proposal contained in his web site is not addressed to one or more specific persons, it is considered, merely, an invitation to make offers by the eventual purchasers.[51]

The second phase – the order – begins right after the consumer has found the desired good or service. The consumer, placing the order with several clicks and keystrokes entries, following the instructions of the seller's web site, is going to send an offer to the seller. The fact that the offer was made by electronic means does not change its nature,[52] but in order to be

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the Internet. ISPs themselves are connected to one another through Network Access Points (NAPs). ISPs are also called IAPs (Internet Access Providers)." Webopedia Online Dictionary, at http://www.pcwebopedia.com/TERM/I/ISP.html (last visited Apr. 24, 2004).

[49] Until 02/26/2004 there are 191 accredited domain name registrars from 27 different countries (Australia, Austria, Barbados, Canada, People's Republic of China, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, Jordan, Korea, Republic of, Kuwait, Latvia, Malaysia, Monaco, New Zealand, Norway, Russian Federation, Spain, Sweden, Switzerland, United Kingdom and United States), these registrars are accredited by the Internet Corporation for Assigned Names and Numbers (ICANN) and they are the only entities authorized to modify the master database of domain names maintained by InterNIC which contains all the documentation of the domain names registered to date. *See* InterNIC at http://www.internic.net/regist.html (last visited Apr. 24, 2004).

[50] E.g., Consumers International, Program on E-commerce, at http://www.consumersinternational.org/documents_asp/ViewACategory_levelBelowOnly.asp?regid=135&CategoryID=434 (last visited Apr. 24, 2004).

[51] *Cf.* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, Art.14, 19 I.L.M. 668, 1489 U.N.T.S. 3 [Hereinafter CISG] (invitation to make offers).

But cf. id, Art.2, (expressly excluding commercial relations with consumers; however, is broadly accepted, by the international commercial practices, that the principle of the art. 14 is applicable to B2C relationships).

[52] *See* Directive 2000/31/EC, art. 9, O.J. (L 178) 11 [hereinafter Directive on Electronic Commerce] (Contracts concluded by electronic means).

See also UNCITRAL Model Law on Electronic Commerce, *supra* note 19 Art. 5 (legal recognition of data messages).

considered a valid offer, it should effectively reach the seller.[53] Subsequently, the seller should accept the costumer's offer, usually happening automatically due to the seller employing "[a]utomated computer systems sometimes called "electronic agents".[54] If the offer matches the parameters preset by the seller, an automatic acceptance should be sent.[55] Not only does this acceptance contain a description of the transaction and the final price, but also sometimes requires an additional confirmation from the consumer by clicking over an icon labeled "Accept", "Buy" or "Purchase", that is the expression of consent by a given conduct. However this phase could be finished without this requirement and the consent is considered already given with the placement of the order.

The seller, with the aim of protecting the flow of information to and from his server, might offer consumers protected channels, like SSL or S-HTTP,[56] hence they have to contract the service of a provider of internet security.[57] In addition, if they want to provide additional confidence to their potential clients, they might adhere to quality certifications,[58] such as privacy

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See also UNCITRAL, Status of Conventions and Model Laws, Section 13, at http://www.uncitral.org/english/status/status-e.htm#UNCITRAL Model Law on Electronic Commerce (1996) (showing countries and States of U.S. who implement provisions of the model law) (last visited Apr. 24, 2004).

[53] *See* Directive on Electronic Commerce, *supra* note 52 art. 11, at 12 (placing an order).
Cf. CISG, *supra* note 51, art.24 (formation of the contract).
But cf. id., Art.2.

[54] U.N. GAOR 9th Comm., 42nd Sess., UNCITRAL Working Group IV (Electronic Commerce), at 2, U.N. Doc. A/CN.9/WG.IV/WP.104/Add.4 (2003), (Issues related to the use of Automated information systems in international contracts), also available at
http://www.uncitral.org/english/workinggroups/wg_ec/wp-104e.pdf (last visited Apr. 24, 2004).

[55] *Cf.* CISG, *supra* note 51, art.18 (1), (Acceptance of an offer).
But cf. id., art.2.

[56] "Short for Secure Sockets Layer, a protocol developed by Netscape for transmitting private documents via the Internet. SSL works by using a private key to encrypt data that's transferred over the SSL connection. Both Netscape Navigator and Internet Explorer support SSL, and many Web sites use the protocol to obtain confidential user information, such as credit card numbers. By convention, URLs that require an SSL connection start with https: instead of http:. Another protocol for transmitting data securely over the World Wide Web is Secure HTTP (S-HTTP). Whereas SSL creates a secure connection between a client and a server, over which any amount of data can be sent securely, S-HTTP is designed to transmit individual messages securely. SSL and S-HTTP, therefore, can be seen as complementary rather than competing technologies", Webopedia Online Dictionary, at http://www.pcwebopedia.com/TERM/S/SSL.html (last visited Apr. 24, 2004).

[57] E.g., Verisign Inc., About Verisign, at http://www.verisign.com/corporate/index.html (last visited Apr. 24, 2004).

[58] E.g., Web Trust, at http://www.webtrust.org (last visited Apr. 24, 2004).

principles[59] or other industry related codes of practice;[60] usually displayed as an online branded graphic seals, commonly known as *"Trustmarks"*[61] on members' or affiliates web sites (seller's web site) linked to the respective organization. Assuming that the payment method selected by the consumer is susceptible to electronic processing by the seller, e.g., credit cards, debit card or a wire transfer, another player will enter in this scheme – the financial agent. The financial agent is an intermediary between seller and purchaser, e.g., banks, credit cards companies or other new special financial intermediates for the electronic market.[62] Then the consumer will type the payment information required and send it to the seller, usually by a secure channel.

The last phase of the transactions is the delivery. Depending on the kind of product selected by the consumer, the delivery can take place electronically and the goods or services can be sent directly to the consumer without an intermediate to facilitate delivery. However, if the goods to be delivered are tangible, then another player gets into the game. The shipping and logistic management companies[63] will be in charge of the delivery of the goods to the specific destination. Usually, the seller has agreements with several shipping companies or the local post office to deliver the goods.

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[59] E.g., Truste, at http://www.truste.org.

[60] *See* Directive on Electronic Commerce, *supra* note 52, Art.16, at 13 (Codes of conduct).
E.g., HON Code of Conduct (HONcode) for medical and health Web sites, Health on the Net Foundation (NGO status by the Economic and Social Council of the United Nations), at http://www.hon.ch/HONcode/Conduct.html (last visited Apr. 24, 2004).
See also American Counseling Association, Standards for the Use of Electronic Communications over the Internet to Provide on-line Counseling Services (1998), at
http://www.counseling.org/site/PageServer?pagename=resources_internet (last visited Apr. 24, 2004).

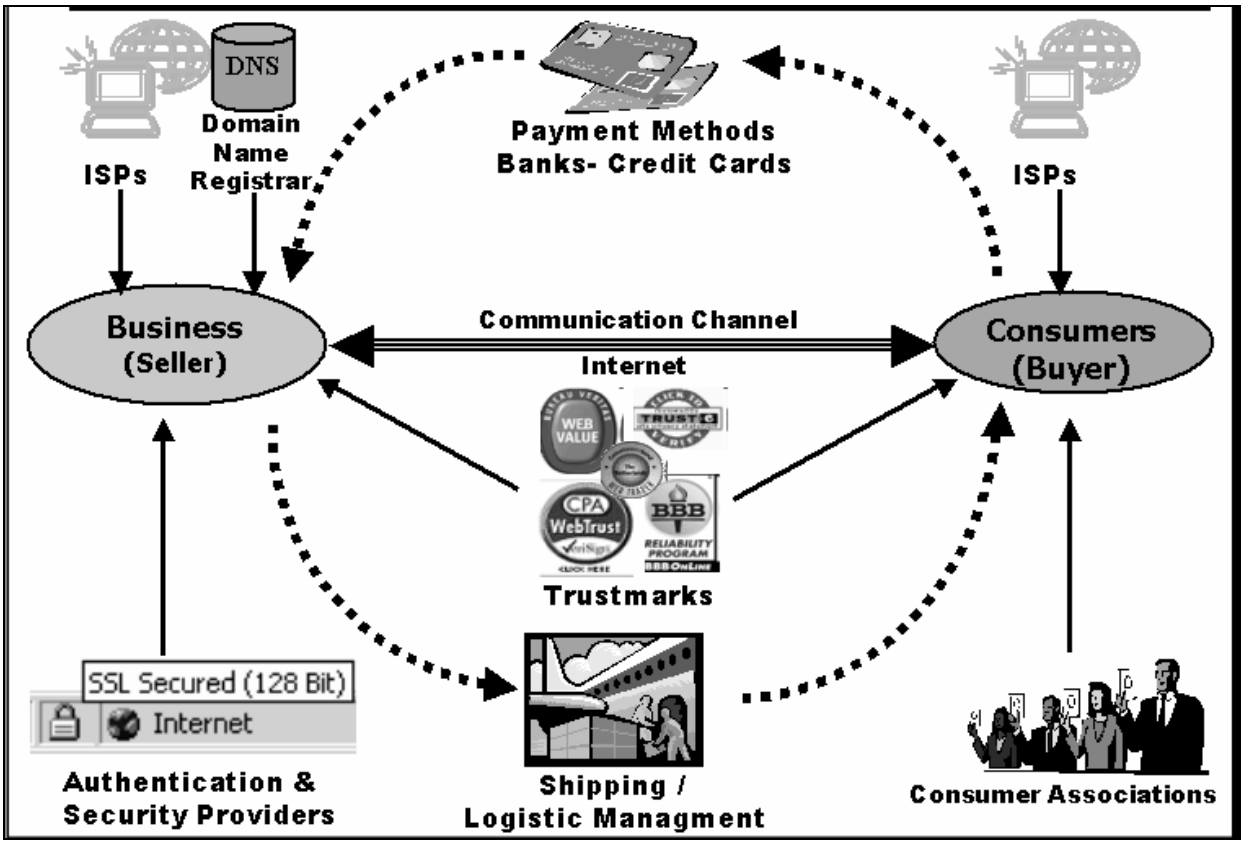
[61] *See* Global Business Dialogue on Electronic Commerce, Trustmarks Inventory, 2003, at http://www.gbde.org/trustmarksinv.html, (for a comprehensive trustmark listing) (last visited Apr. 24, 2004).

[62] E.g., Paypal, "an eBay Company, [that] enables any individual or business with an email address to securely, easily and quickly send and receive payments online. PayPal's service builds on the existing financial infrastructure of bank accounts and credit cards and utilizes the world's most advanced proprietary fraud prevention systems to create a safe, global, real-time payment solution", *See* Paypal, Inc., About us, available at http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/about-outside (last visited Apr. 24, 2004).

[63] E.g., Federal Express available at www.fedex.com, UPS available at www.ups.com or DHL available at www.dhl.com (among others).

The following graphic shows the interactions of these different players with the main actors in an electronic commerce transnational relationship.

Figure 3: Players of a Business-to-Consumer (B2C) Electronic Commerce Relationship



2. The New Intermediaries in Electronic Commerce.

Why are the activities of the new intermediaries so important? The answer is related to the fact that one of the most important consequences of electronic commerce is the process of disintermediation.[64] The commercial activities carried out through the Internet do not only eliminate or substantially reduce the need for the traditional middlemen in the sale and delivery

[64]Walter Hellerstein, *Electronic Commerce and The Challenge for Tax Administration,* U.N. ST, 10th Meeting, Ad Hoc Group of Experts on International Cooperation In Tax Matters, U.N. Doc. ST/SG/AC.8/2001/L.4 (2001).
See also, Jeffrey Owens, The Tax Man Cometh to Cyberspace, 14 Tax Notes International 1883 (1997), paper presented at the Harvard Law School International Tax Program Symposium on Multi jurisdictional Taxation of Electronic Commerce, April 5, 1997.

of goods and services, but also the provision of information to national administrations in order to trace and control the commercial activities within their borders.

Electronic commerce carried out in non-territorial environments requires a small number of distributors, sales representative, brokers, agents and other professional intermediaries[65] that usually gather information from the main actors in transnational operations. These "players" are the new intermediaries in this novel scheme of non-territorial commercial environments. On one hand, businesses and consumers are linked to these players by contracts of services through the provision of Internet, security and authentication, quality certification, financial and shipping services, and on the other these players are linked to the governments by licenses, authorizations, concessions and audits.[66] Therefore, governments and administrations can obtain information and regulate the activities of the main actors in a roundabout way through information inquiries to these players.[67] They will be the new sources of information for national administration and a key element that will allow to the international community to develop a jurisdictional framework for transnational electronic commerce.

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[65] *Id.*

[66] *See* Directive on Electronic Commerce, *supra* note 52, art.3 at 9 (Member State shall ensure that the information provided by a service provider established on its territory comply with the national provisions).

[67] *See id.* art.14 paragraph 3, art.15 paragraph 2 at 13 (Right of the courts or administrative authorities to stop the provision of information services or to get information from the service providers in certain circumstances).

CHAPTER III

TECHNOLOGICAL OBSTACLES OF OPEN COMPUTER-MEDIATED NETWORKS AS A FACTOR OF THE LEGAL REGULATION OF ELECTRONIC COMMERCE

Electronic commerce is carried out over computer-mediated networks. The diverse architecture and configuration of these networks have a direct impact on electronic commerce and might present obstacles in areas such as identification and physical location of users, network governance, control over the flow of data, trace of transactions and equal access to communication technologies. These technological obstacles have legal repercussions, which generate legal obstacles towards the regulation of global electronic commerce.

A. Distinction Between Open and Closed Computer-Mediated Networks

Computer-mediated networks can be classified as the following:

(1) Closed computer-mediated networks where the actors are predetermined and the access to the network is restricted to those actors. These networks, also known as proprietary networks, are centralized and the different actors should comply with certain rules of conducts and technological requirements. The most common examples of these networks are in the financial area. The S.W.I.F.T network[68] or ATM networks such as Cirrus (MasterCard)[69] or Plus (VISA),[70] that connect ATMs around the world are very good examples. In addition, these kinds of networks are very common in business-to-business activities, specifically in EDI

[68] *See supra* note 7.
[69] That connects over 900.000 ATMs in 120 countries, source: http://www.mastercard.com/atmlocator/index.jsp.
[70] That connects 855.000 ATMs in 149 countries, source: http://www.visadps.com/prod-plusatm.html

transactions,[71] where the parties establish their own networks or contract the services of third parties, like value-added network (VAN) providers, in order to trade electronically.

(2) Open computer-mediated networks where networks are not centralized, the actors are non-predetermined, everyone can connect to the network without previous agreement with any network administrator, and the users are able to remain relatively anonymous. The Internet, "the network of networks", is the archetypical network of this type, with a 591 million global users at the end of 2002, and with an annual rate of growth, of 27.3 percent from 2000 to 2001and 20 percent form 2001 to 2002.[72] Table 2[73] provides a global perspective of the distribution of Internet users:

Table 2: Internet Users by Region 2000-2002

Internet users (thousands) by region, 2000-2002

	2002	2001	2000	% change 2001-2002	% change 2000-2001
Africa	7 943	6 510	4 559	22.0	42.8
Asia	201 079	150 472	109 257	33.6	37.7
Europe	166 387	143 915	110 824	15.6	29.9
Latin America & Caribbean	35 459	26 163	17 673	35.5	48.0
North America	170 200	156 823	136 971	8.5	14.5
Oceania	10 500	9 141	8 248	14.9	10.8
Developing countries	189 882	135 717	93 161	39.9	45.7
Developed countries	401 686	357 307	294 371	12.4	21.4
World	591 567	493 024	387 531	20.0	27.2

Source: ITU (2003a) and UNCTAD calculations.

[71] *See* E-commerce and Development Report 2001, at 10.
[72] E-commerce and Development Report 2003, *supra* note 12, at 4.
[73] *Id.* at 2 (Table 1.1).

Table 3[74] provides a perspective of the penetration of Internet in the global population.

Table 3: Internet Users per 10,000 People, by Region, 2000-2002.

	2002	2001	2000	% change 2001-2002
Africa	100	83	59	20.61
Asia	558	416	307	33.88
Europe	2 079	1 799	1 391	15.59
Latin America & Caribbean	669	499	342	34.06
North America	5 322	4 982	4 401	6.84
Oceania	3 330	2 939	2 694	13.32
Developing countries	391	280	195	39.67
Developed countries	3 262	2 914	2 416	11.94
World	972	812	647	19.70

Source: ITU (2003a) and UNCTAD calculations.

B. Narrowing the Field of Study

Since proprietary computer-mediated networks are in a controlled environment, centralized control, network administration and predetermined actors and most of the business-to-business transactions are turning to Internet based systems,[75] the present work is focused on obstacles introduced by the use of open computer-mediated networks in commercial transactions, along with a special focus on the Internet because of the large number of users involved and the most challenging issues presented in the field of international regulation of commercial transactions.

[74] *Id,* at 5 (Table 1.3).
[75] E.g., XML (extensible markup language) /EDI Standard.

C. Technical Obstacles Presented by Open Computer-Mediated Networks

The architecture of open computer-mediated networks like the Internet presents several technological obstacles that have a direct impact in the legal regulations of the commercial activities.

A major such obstacle is the lack of central registration. The Internet lacks a central register. The almost 600 million global user are not registered into a single unified database. However, this statement is not completely true because an ISP should assign a unique IP address[76] to each user in order to let him gain access to the network. The ISPs obtain the IP addresses from four Regional Internet Registries (RIRs)[77] that administer its distribution in order to avoid duplications. Only ISPs can request IP addresses in order to assign them to each user. Thus, all the IP addresses are registered and each ISP has a log of the IP addresses assigned to each user. The problem is that sometimes the ISPs do not have enough information about the users that use its IP addresses.

A second obstacle posed is the difficulty in tracing transactions. This problem is a consequence of the lack of any central registration. Each IP address leaves footprints, and they

[76] "An identifier for a computer or device on a TCP/IP network. Networks using the TCP/IP protocol route messages based on the IP address of the destination. The format of an IP address is a 32-bit numeric address written as four numbers separated by periods. Each number can be zero to 255. For example, 1.160.10.240 could be an IP address. Within an isolated network, you can assign IP addresses at random as long as each one is unique. The four numbers in an IP address are used in different ways to identify a particular network and a host on that network", Webopedia Online Dictionary, at http://www.pcwebopedia.com/TERM/I/IP_address.html (last visited Apr. 24, 2004).

[77] The four RIRs are the following:
(1) APNIC, the Asia Pacific Network Information Centre, allocates IP Addresses for the entire Asia Pacific region, comprising sixty-two economies in Asia and Oceania, more information available at http://www.apnic.net.
(2) ARIN, the American Registry for Internet Numbers, allocates IP Addresses for North America, a portion of the Caribbean, and sub-equatorial Africa, more information available at http://www.arin.net.
(3) LACNIC, the Latin American and Caribbean IP address Regional Registry, allocates IP Addresses for the Latin American and Caribbean region, more information available at http://www.lacnic.net.
(4) RIPE NCC, the RIPE Network Coordination Centre, allocates IP Addresses for European countries, the Middle East, northern Africa, and parts of Asia, more information available at http://www.ripe.net.

are traceable. Every time a user visits a website its IP address is recorded by the server where the website is hosted and usually is kept in a log. In addition, the use of this IP address is recorded in the log of the ISP. Nevertheless, the access to this information is very difficult when one is dealing with transnational commercial activities because each country has different regulation, if any, on how and for how long ISPs should keep this information and, in addition, the method for disclosure to the national authorities. Further, experimented users are able to utilize different tools to hide or mask[78] its IP address, only making the tracing process more complex. Nevertheless it is still possible to trace the transaction. For example, products such as Anonymizer,[79] which are designed to protect user's privacy, can be used to cover the footprints of a transaction. However, these companies still keep records of the IP address originally used by users, and if an illegal activity takes place using its services, the particular company is able to disclose the information.[80] Once again, the location of these companies is very important because if they are located in places were there are no regulations on this matter, often called "Cyber-paradises", it could be impossible to trace them.

The third major obstacle is the development of encrypted technology. While it is possible to detect and trace a message sent over the Internet, the use of cryptography[81] precludes understanding the content of that message.[82] Powerful encryption technology is available,

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In addition, an emerging RIR is the AfriNIC, the African Network Information Center, which will administer Internet number resources for the continent of Africa, more information available at http://www.afrinic.org.

[78] For an explanation of IP Masking see IP Masking, at http://www.encryptednewsgroups.com/masking-ip-address.html (last visited Apr. 24, 2004); see also Masking IP Address, at http://www.encryptednewsgroups.com/masking-ip-address.html (last visited Apr. 24, 2004).

[79] See http://www.anonymizer.com (last visited Apr. 24, 2004).

[80] See http://www.anonymizer.com/docs/legal/agreement.shtml (last visited Apr. 24, 2004).

[81] "The practice and study of encryption and decryption - encoding data so that it can only be decoded by specific individuals. A system for encrypting and decrypting data is a cryptosystem. These usually involve an algorithm for combining the original data ("plaintext") with one or more "keys" - numbers or strings of characters known only to the sender and/or recipient. The resulting output is known as "ciphertext"". Hyperdictionary.com, Computer Dictionary, available at http://www.hyperdictionary.com/dictionary/cryptography.

[82] *See* Hellerstein *supra* note 64.

making it almost impossible to access the content of certain communication.[83] Few countries have regulations concerning the use of encryption technology. For example, the United States has incorporated encryption to its Munitions List[84] in order to control the development, the import and the export of this technology. This technology precludes national authorities from tracking the content of digital commercial operations. On the other hand, encryption technology is at the core of electronic signatures that allow a trusted identification of contracting parties to an electronic transaction.

A fourth obstacle is the weak correspondence between domain names and reality (domicile / *siège*). The Domain Name System (DNS) translates IP addresses, numerical network address like: 117.105.232.4, into domain names, alphanumeric names, for example "www.uncitral.org", because the latter are easier to remember. There are two types of top-level domains (TLDs), generic (gTLDs)[85] and country code (ccTLDs),[86] plus a special top-level domain (.arpa) for Internet infrastructure. Generic domains were created for the Internet public use, while country code domains were created to be used by individual countries, as they deemed necessary.[87] "Most [ccTLDs] have been delegated to individual country managers, whose codes are assigned from a table known as ISO-3166-1,[88] which is maintained by an agency of the

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[83] "*The security of a cryptosystem usually depends on the secrecy of (some of) the keys rather than with the supposed secrecy of the algorithm. A strong cryptosystem has a large range of possible keys so that it is not possible to just try all possible keys (a "brute force" approach). A strong cryptosystem will produce ciphertext, which appears random to all standard statistical tests. A strong cryptosystem will resist all known previous methods for breaking codes ("cryptanalysis")*" *Id. supra* note 81.

[84] *See* International Traffic in Arms Regulations (ITAR), 22 CFR § 121.1, Category XIII (B). (Military Information Security Systems and equipment, cryptographic devices, software, and components specifically designed or modified therefore).

[85] E.g., .aero, .biz, .com, .coop, .edu, .gov, .info, .int, .mil, .museum, .name, .net, .org, and .pro.

[86] E.g., .ar (Argentina), .uk (United Kingdom), .de (Germany), .jp (Japan), .us (United States), etc.

[87] *See* Internet Assigned Numbers Authority, Domain Names Services, available at http://www.iana.org/domain-names.htm.

[88] IANA & ICANN, ICP-1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation), May 1999 at http://www.icann.org/icp/icp-1.htm (last visited Apr. 24, 2004).

United Nations."[89] A manager for each country, who performs a public service on behalf of the Internet community, organizes country code domains.[90] These managers are also responsible for the adoption of procedures and policies for the assignment of Second Level Domain Names (SLDs),[91] and for lower level hierarchies of names.

The Domain Name System was not created in order to create a territorial presence in the network. Each individual country manager is free to set the policy for assigning ccTLDs. Some countries restrict the domain adjudication to nationals or residents, while others countries not. Furthermore, the gTLDs have no connection with any given country, and most of the registrars[92] only validate the credit card payment information. The fact that a domain name ends with the country code top level domain (ccTLD) of a given country, for example ".ar", does not mean that the host associated with this domain name is located in Argentina or belongs to an Argentinean entity. However, countries like France requires legal persons or entities within the territory to register a domain name with the ccTLD ".fr" and "[f]rom 11th May 2004, anyone who can be identified on-line in official national databases (companies, the self-employed, associations listed in the INSEE directory, trademark owners...), may register the domain name of one's choice, without compliance anymore with the terms of any legal document…"[93] Domain names are network addresses without a parallel territorial domicile. Sometimes, depending on each country's regulations, it is possible to associate a domain name with a given person or entity.

A fifth obstacle is the anonymity / identification of parties. How does one know who is at the other side of the screen? How does a consumer know if the website where they are about to

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[89] *See* Maintenance Agency for ISO 3166 country codes, available at http://www.iso.org/iso/en/prods-services/iso3166ma/02iso-3166-code-lists/list-en1.html (last visited Apr. 24, 2004).

[90] A list of current TLD assignments and names of the delegated managers can be accessed at http://www.iana.org/cctld/cctld.htm (last visited Apr. 24, 2004).

[91] E.g., .com.ar, .co.uk, .org.br..

[92] *See supra* note 49 (for a list of accredited registrars).

buy a DVD is a real company? It may be that behind a fancy web site, that looks very serious, is a 14-year-old boy operating his notebook computer, using a free wireless connection from a coffee store, with the only intention to gather personal and credit card information to subsequently buy on-line products or services. On the other hand, how does a company know if it is dealing with a customer who is old enough to engage on commercial activities? Today, identification over the Internet mostly resides in the validation of payment method, from the purchase of a domain name to the access to an adult entertainment web site. The need for more secure ways of identification to carryout commercial activities is evident.

A sixth obstacle is the physical location of the parties. When one is dealing with open computer-mediated networks, the physical location of the parties is something very difficult to determine. Transnational electronic commerce carried out by computer-mediated networks generates non-territorial commercial environments. In this network, "[s]ervers can be located anywhere in the world without affecting the substance of an Internet-based business transaction",[94] and the hosting of a commercial web site could be moved in an instant from a server located in the United States to another in Iceland or some other nation. Consumers have not only become global purchasers, they also are moving purchasers. With the new wireless, 3G (third-generation) mobile telephony, satellite, or microwave technologies customers can be closing transactions on an airplane in international airspace, on a ship in the open sea, or crossing borders by land transportation. Some technologies can only give the customer an IP address, a specific location in the network, but not territorial locations. Sometimes, technologies such as

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[93] AFNIC, Press release: Liberalization of .fr and .re domain name registrations from 11th May 2004, (1/20/2004) at http://www.afnic.fr/actu/nouvelles/nommage/CP20040120 (last visited Apr. 24, 2004).
[94] *See* Hellerstein, *supra* note 64, at 7.

Wi-Fi,[95] cable, DSL,[96] cellular networks, LANs[97], WANs[98]or MANs[99] can give a specific physical location or at least a range within a geographical area. However, the trend shows that e-commerce with the use of Wi-Fi[100] technologies is moving towards what is known as "m-commerce."[101]

A seventh obstacle is the impossibility to control the flow of digital goods and services to or from a given territory. The use of open mediated networks implies the reduction of transaction costs and the access to a worldwide market without regard to geographic boundaries. Moreover, the digitalization of goods and services such as publications, photographs or images, music, films, games, education or professional counseling also cut off the cost of delivering or traveling to almost zero. Consequently, businesses, no matter the size, previously limited to local markets

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[95] UNCTAD E-commerce and Development Report 2003, *supra* note 12, Box 1.1 at 26. *(*Pointing that "[w]i-Fi, or "wireless fidelity", is a technology that uses radio frequencies to provide high-speed Internet connections for devices such as laptop computers and personal digital assistants (PDAs), whose defining feature is mobility. Wi-Fi "hot spots" (places where Wi-Fi-enabled computers can connect to the Internet) are proliferating in airports, railway stations, hotels, cafes and other public spaces, mainly in the United States and Western Europe. Besides its applications for private users, the technology can be useful for people who work on the move and need to connect to their offices.").

[96] Digital Subscriber Line: A family of digital telecommunications protocols designed to allow high speed data communication over the existing copper telephone lines between end-users and telephone companies, Hyperdictionary Computer Dictionary, at http://www.hyperdictionary.com/dictionary/Digital+Subscriber+Line (last visited April 29, 2004).

[97] Local Area Networks: A data communications network, which is geographically limited (typically to a 1 km radius) allowing easy interconnection of terminals, microprocessors and computers within adjacent buildings. Ethernet and FDDI are examples of standard LANs, Hyperdictionary Computer Dictionary, at http://www.hyperdictionary.com/dictionary/local+area+network (last visited April 29, 2004).

[98] Wide Area Network: A network, usually constructed with serial lines, extending over distances greater than one kilometer, Hyperdictionary Computer Dictionary, at http://www.hyperdictionary.com/dictionary/wide+area+network (last visited April 29, 2004).

[99] Metropolitan Area Networks: A data network intended to serve an area the size of a large city. Such networks are being implemented by innovative techniques, such as running optical fiber through subway tunnels. A popular example of a MAN is SMDS. Hyperdictionary Computer Dictionary, at http://www.hyperdictionary.com/dictionary/metropolitan+area+network (last visited April 29, 2004).

[100] *Id*. (Pointing that "[A]lmost one in five laptops sold in the United States in 2003 are said to be already equipped for Wi-Fi communications, and this is expected to be a standard feature within two years. If this happens, Wi-Fi could become the preferred technology for mobile e-business applications.").

[101] Elöıse Gratton, *M-commerce: The Notion of Consumer Consent in Receiving Location-Based Advertising*, 1 Can. J.L. & Tech 59, 59 (Nov. 2002), available at http://cjlt.dal.ca/vol1_no3/pdfarticles/gratton.pdf. (Stating that "[m]obile commerce (''m-commerce'') has been defined as the facilitation of monetary transactions, including the purchase of products or services, using wireless devices, like digital wireless phones or a personal digital assistant (PDA), to access the Internet using a wireless data connection or a private network").

for selling their goods and services are now able to do it globally. Suddenly, everybody is doing transnational business not only at a low cost but also without paying any tax or customs duty. The resulting increase in cross-border transactions by itself will put greater demands on tax administrations, and "the principal challenge is to determine how to implement geographically limited taxing systems in a technological environment that renders geographical borders essentially irrelevant."[102] Currently it is not possible for national administrations to trace or block cross-border electronic transaction in non-territorial commercial environments. This situation causes revenue loses, impediments in import or export controls (e.g. encryption software in U.S.) and problems protecting internal markets.

An eighth obstacle is the lack of access to communicational infrastructure. Electronic commerce is only possible through a telecommunications infrastructure. Congestion in the Internet has become a problem, but the lack of infrastructure is often a more common problem in developing countries, while more essential requirements, such as telephone connections or electricity are the most important problems in the least developed countries.[103] Furthermore, poor telecommunications pricing policies usually discourage electronic commerce developments in different regions due to the high operating cost.[104] It is impossible to reach a global electronic marketplace with half of the world in a disadvantaged position.

There is no question that non-territorial commercial environments created by commercial transactions carried out over computer-mediated networks generate great challenges to policy makers. Nevertheless, it is not always possible to find only legal solutions to these issues. Sometimes the same technology that generates the problem also brings us the solutions. As was

[102] Hellerstein, *supra* note 64, at 7-8.
[103] BACCHETTA, *supra* note 32, 16.
[104] *Id.*

explained previously, many of the problems will be solved by technological solutions, but it is still necessary to have a legal framework to analyze these solutions through harmonized methods.

CHAPTER IV

LEGAL CHALLENGES GENERATED BY NON-TERRITORIAL COMMERCIAL ENVIRONMENTS

Time-accurate legal solutions are required for the problems generated by electronic commerce carried out by open computer-mediated networks. Electronic commerce radically challenges the relationship between legally on-line commercial activities and physical location. Open computer-mediated networks, like the Internet, are a flow of information in the form of electrons sometimes traveling at the speed of light. As well, these networks have a specific architecture and organization that make traditional obstacles of time and distance almost irrelevant to their operation. For the same cost and speed, one is able to send e-mail either to a friend located in another continent or to your next-door neighbor.[105] These reasons render political and territorial borders or physical locations meaningless in computer-mediated network environments[106]. Moreover, the openness of the network and the non-predetermination of the users enable transactions between users who are unknown to each other and are unable to determine each others' physical location.[107]

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[105] *See* David G. Post, *Governing Cyberspace*, 43 Wayne L. Rev. 155, 160 (1995).
[106] *Cf. id.* at 159 (the author point out that cyberspace "not merely weaken the significance of physical location, it destroys it").

A. Approaches towards the Regulations of Cyberspace and Hypothetical Scenario

How do states, individuals and entities deal with borderless non-territorial commercial environments in a world ruled by territorial principles? The answer to this question generates different lines of thought.

Certain authors have argued that this non-territorial environment is in fact a new place[108]: "*Cyberspace*",[109] "a region just beyond the real space"[110] and seeing that it is distinctive place it should have its own rules. Others standpoints go even further suggesting that cyberspace also needs its own sovereignty[111]. Some authors attach to the metaphor of cyberspace as the Wild West",[112] "a place, albeit an abstract place, where land was free for the taking, explorers".[113]

Furthermore, John Perry Barlow,[114] with a more radical view, affirms that cyberspace, as a "*global social space*",[115] or as a "civilization of the mind"[116] that should be naturally independent and not subjected to any real world rule. Barlow points out that legal concepts of property, expression, identity, movement, and context do not apply to cyberspace because they are all based on matter, and there is no matter in cyberspace.[117] In addition, he calls to attention

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[107] *See id.* at 161 (Pointing that "…the net enables simultaneous transactions between large numbers of people who do not and cannot know the physical location of the other party").
[108] David R. Johnson & David Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1378 (1996).
[109] WILLIAM GIBSON, NEUROMANCER, at 5 (1984) (William Gibson coined, for the first time, the term "Cyberspace" in his book Neuromancer, referred as "a graphical representation of data abstracted from the banks of every computer in the human system").
[110] Raymond Ku, *Foreword: A Brave New Cyberworld*, 22 T. Jefferson L. Rev. 126, 126 (1999-2000).
[111] *See* Johnson & Post, *supra* note 108, at 1379.
[112] Jonathan J. Rusch, *Cyberspace and the "Devil's Hatband"*, 24 Seattle Univ. L. R. 577 (2000).
[113] Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 Calif. L. Rev. 439, 442 (2003).
[114] John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Davos, Switzerland (1996), at: http://www.eff.org/~barlow/Declaration-Final.html (last visited Apr. 24, 2004).
[115] *Id.*
[116] *Id.*
[117] *Id.*

that identities in cyberspace have no bodies, therefore, unlike in real world, members of cyberspace cannot obtain order by physical coercion.[118]

A contrasting view comes from Frank H. Easterbrook, a Judge of the United States Court of Appeals for the Seventh Circuit, who believes that there is no law of cyberspace but applications of general rules to the problems arisen in cyberspace.[119]

Professor Lawrence Lessig provides an interesting approach to the regulation of cyberspace. He believes that cyberspace shares with real space four modalities of regulation that operate together: the law, social norms, markets and architecture.[120] For Lessig the architecture of cyberspace is code, the software and hardware that gives shape to cyberspaces, and it *"*constitutes a set of constraints on how one can behave.*"*[121]

With the purpose of addressing the legal challenges introduced above, it is useful to lay out the following hypothetical scenario:

Two parties enter into an on-line contract using a "click-wrap agreement"[122] that involves the licensing of a computer game. The aforementioned contract has neither a choice of law clause nor a choice of forum or arbitration clause.

The plaintiff is a consumer who bought the computer game for personal leisure. When the plaintiff tried to install the computer game on her computer, right after she had downloaded it from defendant's web site, surprisingly the plaintiff discovered that not only did the computer game not work, but also that the game caused a malfunction in the computer's operating systems

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[118] *Id.*
[119] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U Chi Legal F 207, 208 (1996).
[120] Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 507 (1999).
[121] *Id.* at 509.
[122] Specht v. Netscape Communs. Corp., 150 F. Supp. 2d 585, 593-594 (S.D.N.Y., 2001) ("A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.").

that deleted all the data stored on the computer's hard disk. This deletion caused the loss of hundreds of archives containing, among other things, a research thesis, research materials and articles, and personal photographs.

The defendant carried out commercial transactions through a web site in a fully electronic basis including electronic order, payment and delivery, and the web site lacked of any specific reference that link it with any given country.

The plaintiff wishes to file an action related to a breach of contract, seeking as a remedy the award of money damages. The domain name of the defendant's web site is registered before "Nic.Ar".[123] However, the information available on Nic.Ar 's database does not look very reliable, like false name and address, but at least shows the DNS servers and the IP address of the web site. This information leads to an ISP that provides free hosting services, but only collects first name, country, zip code, and date of birth of the users without any type of data verification,[124] making impossible to identify the defendant.

The defendant managed the payments through a payment administration company based in ones of the denominated "payments heavens" (e.g., Gibraltar, BVI, Belize, Bahamas or Cayman Islands) which deposit all the payments into a bank account in one of these heavens, which usually have a tight customer information nondisclosure banking law policy. Usually these "payment heavens" work also as "tax heaven", or "Internet heavens," [125] with weak or even not existent regulations for areas such as telecommunications, gathering of evidence, data protection, business incorporations, copyright or consumer protection (among others).

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[123] Network Information Center Argentina Ministerio de Relaciones Exteriores Comercio Internacional y Culto, available at www.nic.ar (the Argentinean Registrar).

[124] E.g., http://www.freeservers.com (last visited Feb.2, 2004).

[125] For a list of these paradises see, OECD - Financial Action Task Force on Money Laundering (FATF), Fourth Annual Review of Non-Cooperative Countries and Territories, at 7-12 (Jun. 20, 2003) at http://www1.oecd.org/fatf/pdf/NCCT2003_en.pdf (last visited Apr. 24, 2004) [hereinafter OECD-FATF Non-Cooperative Countries Review 2003].

This hypothetical scenario demonstrates the difficulties that businesses are faced with operations over open computer-mediated networks in the litigation process. This hypothetical scenario will be referenced throughout the remaining parts of this paper.

B. Main Areas of Law Challenged by the Use of Non-Territorial Commercial Environments

The transnational practice of electronic commerce has an impact over many areas of international law. In order to tackle the analysis of the impact that the use of non-territorial commercial environments have in territorial in legal systems, it is necessary determine which areas of law presents the most challenging issues to international community.

Four main areas of law are decisive to the international regulation of electronic commerce: jurisdiction, applicable law, enforcement and gathering of evidence.[126] The following sections will analyze the problems presented in each of these areas and how actual principles fall short in order to deal with transnational electronic commerce.

1. Jurisdiction[127]

Jurisdiction is commonly defined as the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judiciable and non-judiciable.[128] The states exercise their authority within territorial borders or in relation to presence of nationals, things or activities in a given physical location.

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[126] *See* E-commerce and Development Report 2001, s*upra note 10*, at xxxii-xxxiii.

[127] For the purpose of this section, the terms "jurisdiction", "judicial jurisdiction", "jurisdiction to adjudicate" or "adjudicatory jurisdiction" refer to questions about whether a court is empowered to consider an action that is not exclusively local in character.

[128] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Part IV Introductory Notes, at 230 (1996) [Hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW].

However, the rise of the utilization of open computer-mediated networks, like the Internet, in transnational commercial activities is undermining the aforementioned authority of the states.[129]

The lack of an internationally agreed principle of jurisdiction is a great concern to the business sector because they sum the high risk of being sued in different jurisdictions around the world if they decided to conduct commercial activities through a worldwide accessible interactive web site.

2. Applicable Law

The transnational capabilities of electronic commerce present a serious challenge to the traditional concepts of applicable law. Before the electronic commerce era, traders usually were the only ones who carried out transnational businesses. Transnational business practice indicates that parties to the transactions should set a choice of law clause in their contract to provide more certainty to the enforcement of the contract. Most of national laws and legal systems recognize the power of the parties to set the law to govern the validity and enforcement of their contracts.[130]

In the modern marketplace, non-traders, usually consumers, carry out millions of transactions electronically over computer-mediated networks every day. Unlike traditional transnational businesses, most of these commercial activities are spontaneous and the parties to the contract, usually, do not know each other before hand. Frequently, no choice of law rules are set in their contracts, or, if any are set, they are part of a contract of adhesion. Such choice of law clause may will not be applied in some jurisdictions in situations where consumers are involved.

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[129] *See* David G. Post, *supra* note 105, at 158.
[130] W. Reese, Discussion of Major Areas of Choice of Law, 111 Recueil des Cours 315, 366 (1964).

For this reason, business-to-business transactions are not as challenging as business-to-consumer transnational electronic commerce transactions for the analysis of applicable law issues.

Furthermore, political borders function as signposts informing entities and individuals of the obligations assumed by entering into a new political division, with its own set of rules.[131] The network lacks this kind of indication. Participants in on-line commercial activities frequently are unaware of what is allowed or forbidden in their commercial activities because they do not know other's physical location and therefore cannot be aware of the applicable law to the transaction.[132]

When a transaction touches more than one jurisdiction, the courts should determine which law governs applying private international law (conflict of laws rules).[133] In a case of contractual commercial litigation between two parties located in different countries, in order to decide which law applies to the contract, each party should look for the private international law rules in its own jurisdiction.

In many in civil law countries, private international law rules are set forth in national codes, like civil[134] or judicial codes. In common law countries like United States choice of law rules are found in the federal law of the state of the judicial forum. Under both systems, if the parties do not specify the applicable law in their contract courts apply their choice of law rules to determine the applicable law.

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[131] *See* Johnson & Post, *supra* note 108, at 1369-1370.
[132] *See id.*, at 1374 (Where Minnesota Attorney General's Office placed a warning stating that "persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws." Warning to all Internet users and providers.)
[133] DETLEV F. VAGTS, ET ALL, TRANSNATIONAL BUSINESS PROBLEMS, 3rd Edition, 291 (2003).
[134] E.g., CÓDIGO CIVIL [CÓD. CIV] art. 1205-1216 (Arg.).

3. Gathering of Evidence

Numerous obstacles for filing a lawsuit in a transnational electronic commerce case result from having wrongdoers, victims, other witnesses, documents, and third parties involved in the transaction widely dispersed in many different territories.[135] This dispersion makes it difficult for plaintiffs to gather all the necessary evidence to support their cases.

As was exemplified in hypothetical scenario, defendants can operate in concert from more than one territory using corporate shells and choosing jurisdiction, either with a tight customer information nondisclosure banking law or without participation in any evidence international cooperation agreement, to avoid any investigation and further litigation. The architecture of the network allows them to move their operations from one place to another in a heartbeat using facilities, such as product suppliers, ISPs, express mail delivery services, domain name registries, post office boxes, web site hosting services, banks, credit card processors, data processing centers and advertising agencies in many different countries.[136]

Furthermore, the evidence involved in this kind of procedures is often very volatile, due to the fact that it is stored in computer records that are very easy to move, alter, or erase without any trace. Additionally, information in the hands of third parties such as domain registers or ISPs could be inaccurate or false.

Another important factor is the lack of a worldwide recognition of legal effect, validity and enforceability of data messages and acceptance of computer records as evidence. Despite of

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See also CÓDIGO CIVIL [C. C.] art. 11-12 (Spain).

[135] OECD, Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders, OECD Publications, No. 53134 2003 (2003).

[136] *Id.*

the attempts of the UNCITRAL Model Law on Electronic Commerce,[137] the lack of worldwide uniformity in this area of law is still a great barrier.

4. Recognition and Enforcement of Judgments

The obstacles presented in this area are not exclusive from electronic commerce. This is one of the most problematic subjects in private international law. There is no international consensus, except for the fact that "no state recognizes or enforce[s] the judgment of another State rendered without jurisdiction over the judgment debtor."[138] The principles of recognition vary from state to state.[139] Some states require multilateral or bilateral agreements some require reciprocity or comity, and others recognize judgments directly.[140]

The enforcement of judgments needs international cooperation, but many states refuse to be constrained by international agreement in this area which they consider results in an international obligation that may imply a threat to their sovereignty.[141] Nevertheless, as this paper will later explain, several regional agreements give recognition and enforcement to judgments rendered in other jurisdictions.[142]

A. Current Answers from the Legal Communities and International Organizations

The following section will analyze how countries, regions and international organization deal with the application of private international law. The aim of this analysis, by contrasting these answers with the hypothetical scenario set forth in section A of this chapter (pp. 39-41), is

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[137] *See* UNCITRAL Model Law on Electronic Commerce, *supra* note 19.
[138] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 128, Part IV Introductory Note, at 591 (Foreign Judgments and Awards).
[139] *Id.*
[140] See *Id.* (for more detailed examples of countries with different principles of recognition and enforcement).
[141] *Id.*
[142] See *infra* note 191.

to demonstrate how answer to the hypothetical scenario are unsatisfactory when they have to deal with electronic commerce transactions in non-territorial environments.

1. United States

a) Jurisdiction

In the United States, judicial jurisdiction is the authority of a given state to subject particular persons or things to its judicial process.[143] The principal common law bases for judicial jurisdiction are voluntary submission to the court's jurisdiction, (E.g., consent expressed in a contract with a forum clause) and presence of the defendant within a given political unit.[144] Justice Holmes stated "[t]he foundation of jurisdiction is physical power…",[145] that a given States has over its citizens within a territory.

Modern conceptions of jurisdiction have expanded the traditional bases. In the context of electronic commerce, courts may exercise jurisdiction reasonably if, at the time jurisdiction is asserted over:[146]

(1) A natural person is domiciled, resident, national, or is present in the territory of the state.

(2) A corporation or comparable juridical person is organized pursuant to the law of the state. The domicile of corporations is generally associated with the place of incorporation.

(3) A person, whether natural or juridical, has consented to the exercise of jurisdiction, when they regularly carry on business in the state; had carried on activity in the state, but only in respect of such activity; had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity.

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[143] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 128.
[144] STEINER, VAGTS & KOH, TRANSNATIONAL LEGAL PROBLEMS, 4th Edition, 691 (1994).
[145] McDonald v. Mabee, 243 U.S. 90, 91 (1917)
[146] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 128, § 421.

These bases give rise to personal or *in personam* jurisdiction. One of the main issues concerning the assertion of personal jurisdiction over activities carried on within a state is the quantum of activity constitutionally required to assert jurisdiction. This concept was defined in *International Shoe Co. v. State of Washington,*[147] the leading case in this area, which stated:

> …due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[148]

Additionally, the case states that "the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."[149]

Forty years later in the *Burger King Corp. v. Rudzewicz* case, the Supreme Court gave an approach more closely related to the problem of electronic commerce, stating:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.[150]

In the field of on-line activities the *Pres-Kap, Inc. v. System One*[151] dealt with the implications of subjecting users of "on-line" services, with contracts in out-of-state networks, to personal jurisdiction in foreign jurisdictions. The court decided that different treatment should be given between consumers and businesses in order to not offend traditional notions of fair play

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[147] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)
[148] *Id.*, at 316.
[149] *Id.*, at 316-317.
[150] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)
[151] Pres-Kap, Inc. v. System One, Direct Access, 636 So. 2d 1351 (Fla. App., 1994)

and substantial justice and comply with the minimum-contacts requirement[152]. The court stated: "When a consumer logs onto a server in a foreign jurisdiction he is engaging in a fundamentally different type of contact than an entity that is using the Internet to sell or market products or services to residents of foreign jurisdictions"[153].

Two years later, in the *Inset Systems, Inc. v. Instruction Set* ,[154] the court held that the action of defendant directed its advertising activities via the Internet toward, not only to the state of Connecticut, but to all states. However, the fact that advertisement on the Internet could reach as many as 10,000 possible Internet users within Connecticut and the advertisement was available continuously to any Internet user was sufficient to establish that the defendant purposefully availed itself of the privilege of doing business within Connecticut.[155] This conclusion appears to be too broad and its application would lead to a worldwide jurisdiction if the advertisement can reach communities in other countries. However, there are cases where a defendant clearly does business over the Internet and avails itself purposefully, not only when enters into contracts by means of the World Wide Web, but also when repeatedly sends both electronic and regular mail messages to a plaintiff or posts messages on plaintiff's electronic forums.[156]

In *Zippo Manufacturing v. Zippo Dot Com*[157], the court concluded that the constitutional exercise of personal jurisdiction is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.[158] Therefore, the court identified a sliding scale

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[152] *Id.* at 1353
[153] Zippo Mfg . Co. v. Zippo DOT Com, 952 F. Supp. 1119, 1125 (U.S. Dist., 1997) (Citing *Pres-Kap*).
[154] Inset Systems, Inc. v. Instruction Set, 937 F. Supp. 161 (D. Conn. 1996).
[155] *Id.* at 165.
[156] *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1266 (U.S. App., 1996).
[157] Zippo Mfg. Co. v. Zippo DOT Com, 952 F. Supp. 1119, 1124 (U.S. Dist. , 1997)
[158] *Id.* at 1124.

with three levels of Internet commercial activity.[159] The court first identified Interactive Web Sites, those in which the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet where personal jurisdiction is proper.[160] Next, the court identified Passive Web Sites where defendants post information on an Internet web site and just make it available to those who are interested in its content. This kind of interaction with users in foreign jurisdictions does not set the grounds for the exercise personal jurisdiction.[161] Finally, semi-Interactive Web Sites are described as those in which a user can exchange information with the host computer. The exercise of personal jurisdiction, in this case, should be weighed against the level of interactivity and commercial nature of the exchange of information that occurs on the web site.[162]

In the opinion of Michael Geist, the Zippo test "inhibits e-commerce by effectively discourag[ing] the adoption of interactive websites."[163] Currently, highly interactive web sites are at the core of electronic commerce activity. The application of measures, such as the Zippo test, will have undesirable spillover effects over the promotion of electronic commerce. Businesses engaged in electronic commerce will be discouraged to develop such activities because of the risk of being sued in almost every jurisdiction where interaction is possible. This will produce uncertainty among the business sectors engaged in transnational electronic commerce. For these reasons it was stated that a new standard is needed to determine jurisdiction over Internet contacts.[164] Professor Geist, suggested that the new test should be technology neutral, in order to remain relevant without regard to technological developments. Additionally,

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[159] *Id.*
[160] E.g. Patterson, *supra* note 156.
[161] E.g., Bensusan Restaurant Corp., v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).
[162] E.g., Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1996 U.S. Dist. LEXIS 14978 (E.D.Mo. 1996).
[163] Michael A. Geist*, Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1378 (2001).
[164] *Id.* at 1380.

this test should not discourage on-line interactivity, and most importantly, it should provide sufficient certainty about the legal risk of embarking on electronic activities in interstate or transnational commerce.[165] He embraces the idea of a targeting-based analysis in order to identify the intention of the parties rather than the mere interactive presence of the Zippo test,[166] which looks omnipresent in non-territorial environments like the Internet. Support was given to this approach by a case involving on-line gambling,[167] where the New York court asserted jurisdiction over respondents, an Antigua and Barbuda foreign gambling corporation that targeted its on-line activities at New York residents and others. The Court, basing itself on federal statutory provisions,[168] decided:

> The Internet site creates a virtual casino within the user's computer terminal. By hosting this casino and exchanging betting information with the user, an illegal communication in violation of the Wire Act and the Travel Act has occurred.[169]

The court also had found that the exchange of information from the server of the Antigua gambling company to residents in New York constituted targeting of illegal activities towards New York, and was therefore subject to personal jurisdiction.[170] The repercussions of this case will be discussed later in this work.[171]

Nevertheless, when the French *Ligue Contre la Racisme et L'Antisemitisme* (LICRA) filed a lawsuit against Yahoo! Inc. before a French court,[172] one of the most resounding cases involving jurisdiction, applicable law and enforcement of judgment and targeting technology began. The controversy arose over the fact that French users of www.yahoo.com were able to

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[165] *Id.*
[166] *Id.*
[167] People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844 (N.Y. Misc., 1999).
[168] *See* 18 USCS § 1084; 18 USC § 1952; 18 USC § 1953.
[169] *See* People v. World Interactive Gaming, *supra* note 167, at 852.
[170] *Id.* at 853.
[171] *See* discussion *infra* pp. 63-64.

access the offers of Nazi-related items for sale, activity forbidden under French criminal law.[173] The court found jurisdiction on the reasoning that Yahoo's conduct caused harm in France. Yahoo!, Inc. argued that the www.yahoo.com site was directed to an American audience and governed by a term of use agreement with a choice of law rule in favor of United States law, therefore, the company was under the protection of the U.S. First Amendment. The county court of Paris did not accept Yahoo! Inc. arguments and ordered "YAHOO! Inc. to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes".[174] Yahoo! Inc. removed the contents from its site but the company sought declaratory judgment against the order of the Tribunal de Grande Instance de Paris before the District Court of The Northern District of California.[175] The declaratory judgment was granted in favor of Yahoo! Inc.[176] The response of the Northern District court of California to the French decision is the best example of the collision between two territorial-based sovereignty principles and demonstrates the impact that activities carried out over computer-mediated networks have on legal principles such as jurisdiction, applicable law and enforcement of judgments.

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[172] UEJF et La Ligue Contre Le Racisme et L'Antisemitisme c/ Yahoo! Inc. et Yahoo France, T.G.I. Paris, Nov. 20, 2000, Juriscom.net, available at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf [hereinafter, LICRA v. Yahoo!].

[173] CODE PENAL [C. PEN] § R.645-2 (Fr.).

[174] Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1184 (U.S. Dist. , 2001) (translation attested accurate by Isabelle Camus, February 16, 2001) [hereinafter Yahoo! I].
See also Ordonnance de référé n° 00/05308 et 00/05309, 22 mai 2000 (Fr.), available at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte (last visited Apr. 24, 2004).

[175] *See Id.*

[176] *Id.* at 1994.

b) Applicable Law

In United States, conflict of law rules usually should be sought within the State law, in the State, which the court is located, i.e., the law of the forum.[177] However, in an attempt at harmonization, almost every state has adopted Article 2 of the Uniform Commercial Code.[178] The conflicts of law rules included in the latest revised UCC § 1-301 (d)[179] provides solutions when parties to a contract located in different jurisdictions did not set any choice of law clause:

"In the absence of an agreement effective under subsection (c), and except as provided in subsections (e) and (g), the rights and obligations of the parties are determined by the law that would be selected by application of this State's conflict of laws principles."[180]

Most states, in order to determine which law applies to a contract without a choice of law clause, have followed the approach of the Restatement Second of the Conflicts of Law, which enumerates the subsequent point of contact:[181]

(1) The place of contracting;

(2) The place of negotiation of the contract;

(3) The place of performance;

(4) The location of the subject matter of the contract;

(5) The domicile, residence, nationality, place of incorporation and place of business of the parties.

The comment to this section defines the place of contracting as "the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract

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[177] *See* Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941) (Stating that this principle apply even if the court is a federal court sitting in diversity jurisdiction).
[178] U.C.C. § 2-101 (1998)
[179] *See* U.C.C. § 1-301(2004); DETLEV F. VAGTS, 290 (pointing that due to this is one of the last revisions of the UCC it was not already adopted in all States).
[180] *See Id*.

binding effect, assuming, hypothetically, that the local law of the state where the act occurred rendered the contract binding."[182]

Additionally, the Restatement establishes that the law of the State with which the contract has its "most significant relationship" governs its validity, and the obligations created thereby.[183] The concept of the most significant relationship with the contract is easy to establish in the context of tangible operations but it becomes blur in the context of fully digital electronic commerce transactions.

c) Recognition and Enforcement of Judgments

In the recognition and enforcement area "the full faith and credit clause of the Constitution stops at the water's edge";[184] because United States is a party to no treaty, multilateral or bilateral, committing it to grant recognition and enforcement.[185]

The *Hilton v. Guyot*[186] is the leading case expressing the American position towards enforcement of foreign judgments. Justice Gray, delivering the opinion of the court, explaining the principles for recognition and enforcement more than a century ago:

> "When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it

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[181] RESTATEMENT (SECOND) OF CONFLICTS OF LAW, § 188 [hereinafter RESTATEMENT SECOND OF CONFLICTS OF LAW].
[182] *Id.* at § 188, (Comment on Subsection (2)).
[183] *Id.* at § 332b.
[184] DETLEV F. VAGTS, 31.
[185] *Id.*
[186] Hilton v. Guyot, 159 U.S. 113 (1895).

> was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect."[187]

2. European Union

The principles of international jurisdiction, recognition and enforcement in the European Community were originally set by the 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments,[188] known as "The Brussels Convention". Subsequently, in 1998, the European Communities (with the exception of Denmark) and the members of the European Free Trade Association (EFTA) States, Iceland, Norway and Switzerland, signed the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[189] which reproduces the Brussels Convention. Both conventions set forth a number of principles in order to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements. Later on, both conventions were revised and updated in order to attain the objective of free movement of judgments in civil and commercial matters, and to adapt international jurisdiction issues to the appearance of new forms of trade like electronic commerce, which were non-existent in 1968.[190]

The result was the enactment of the Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters that has been in

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[187] *Id*., at 205-206.
[188] Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, Sep. 27, 1968, 454/72 EEC, 1972 O.J. (L 299) [Hereinafter Brussels Convention].
[189] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sep. 16, 1988, 592/88 EEC, 1988 (L 319) [hereinafter Lugano Convention].
[190] Norel Rosner, *International Jurisdiction in European Union E-Commerce Contracts*, llrx.com (2002), at http://www.llrx.com/features/eu_ecom.htm#fn11 (last visited Apr. 24, 2004).

force since March 2002,[191] again with the exception Denmark. The Brussels I Regulation sets jurisdictional principles that have a direct impact on electronic commerce. Article 2 sets the general jurisdiction rule: the domicile of defendants in a member state, whatever their nationality, is the place where defendants shall be sued and for non-nationals domiciled in member stated applies the same rules of jurisdiction.[192] Article 5 sets forth the rule on contractual matters, stating that a person domiciled in a member state may be sued in the courts of another member state if the performance of the contract's obligations takes place in that state.[193] In the case of sale of goods, the place of performance will be the place in a Member State where, under the contract, the goods were delivered or should have been delivered. Regarding the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided is point of connection to open jurisdiction.

In the areas of recognition and enforcement of judgment, Chapter III of the Brussels I Regulation[194] has an equivalent function to the full faith and credit clause of the American Constitution. It states that "[a] judgment given in a Member State shall be recognized in the other Member States without any special procedure being required",[195] as well if the judgment rendered by a Member State is enforceable in that State and is specifically declared to be enforced in other Member States it shall be enforced there.[196]

Section 4 of the Brussels I Regulation[197] deals with consumer contracts and gives an approach to business-to-consumer jurisdiction on electronic commerce activities. According to

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[191] *See* Council Regulation 2001/44/EC, 2001 O.J. (L 012) [Hereinafter Brussels I Regulation]; In case of the Kingdom of Denmark the 1978 version of the Brussels Convention will be applicable, as published in Official Journal L 304, 30/10/1978, 1 – 73.
[192] *See* Brussels I Regulation, Article 2, at 3.
[193] This article also clarifies the concept of place of performance of the obligation.
[194] *Id.* at arts. 33-56.
[195] *Id.* at art. 33.
[196] *Id.* at art. 38.
[197] *See supra* note 191, Brussels I Regulation, arts. 15-17.

Article 16, consumers have the choice to bring proceedings either before the courts of a Member State where the other party has its domicile or before the courts of a Member State where the consumer is domiciled.[198] A proposal posted in an interactive web site, not addressed to one or more specific persons or to one or more specific territories would fall under the scope of Article 15 (c). This article clearly specifies that a contract concluded with a person who pursues commercial or professional activities within the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, falls under the provisions of Article 16. This issue has generated great concern within the business sector due to the high risk of being sued in a large number of jurisdictions if a business enterprise decided to conduct business-to-consumer activities through a worldwide accessible interactive web site[199].

By interpreting Article 15, the nature of goods or services (tangible or digital) involved in the transaction seems to be irrelevant to its application in the context of electronic commerce. Only the fact that one of the parties in the contract is a consumer domiciled in a Member State and the other party directs or made available its activities in that Member State is relevant to trigger the application of Article 15. However, what happens when the defendant is domiciled in a third country outside the Union? Article 15 is clear, stating that Section 4 will apply without prejudice from Article 4.[200] Therefore, if the defendant (the seller) has his domicile in the United States and the plaintiff (the consumer) has her domicile in Belgium, the plaintiff has two options.

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[198] *See Id.* art 16.1.
[199] *See* Rosner, *supra* note 190.
[200] Brussels I Regulation, s*upra* note 191, art 4 (stating that "[i]f the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State." and "[a]s against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.").

The plaintiff may either look for the Belgian rules of jurisdiction[201] in order to identify which court has jurisdiction or look for rules in the United States to open jurisdiction. If the defendant is a national of member state of the Lugano convention Section 4 of the Lugano convention will apply.

3. Latin America

The best place to look for harmonized main areas of study in Latin America is the Code or Private International Law, best known as "*The Bustamante Code*" or "*Código Bustmante*"[202] approved by the Convention of Private International Law at the 6th Pan American Conference held in La Havana, Cuba in 1928. This is not only one of the oldest Conventions in force of private international law, but also, with its 437 articles, one of the most comprehensives works performed in this area. The Bustamante Code was signed by twenty states and ratified by fifteen.

With respect to jurisdiction, article 323[203] sets the rule when the parties did not agree to any specific jurisdiction. In this case, the jurisdiction of the courts will be decided based on the place of the performance of the contract's obligations or the domicile of the defendant or secondary the place of defendant's residence. In the evidence area, Title Seven deals with cooperative process of gathering evidence among the signatory states.[204] In the recognition and

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[201] *See* Brussels I Regulation, *supra* note 191, Annex I, at 18 (listing the different rules of jurisdiction of the Member States applicable to article 4 of the Regulation).

[202]Sixth International Conference of American States, Convention on Private International Law (Bustamante Code), adopted at Havana, Cuba, 20 February 1928. For text, see OAS, Law and Treaty Series No. 34, OAS, Washington, D.C. [hereinafter Bustamante Code]

See also Organization of American States, A-31: Convention of Private International Law (Bustamante Code), available at http://www.oas.org/juridico/spanish/tratados/a-31.htm. (last visited Apr. 24, 2004) (Signed and ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela; signed but not ratified by Argentina, Colombia, Mexico, Paraguay, and Uruguay).

[203] *Id.* art 323.

[204] *Id.* arts. 398-411

enforcement of judgments area, Title Ten[205] sets the rules. It almost fulfills the same goal, among fifteen Latin-American States, as the Brussels I Regulation.

Other regional regulations on recognition and enforcement judgments are the Montevideo Treaties of 1899 and 1940. Title III of the treaty of Montevideo on International Procedural Law of 1889[206] binds Member States[207] *vis-à-vis* on these matters.[208] In 1940, a new version of the Treaty of Montevideo[209] replaced the 1889 version without further changes in the text but with changes in the member states.[210]

4. Hague Conference on Private International Law

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[211] and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,[212] with 49 and 40 contracting states respectively, constitute the most extensive international cooperation framework in the area of gathering evidence abroad. One of the limitations of this cooperation framework is the incompatibility of the information requested by one contracting state with the local laws,[213] or the impossible performance of such

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[205] *Id.* at 423-37

[206] First South-American Congress on Private International Law, Treaty on International Procedural Law, adopted at Montevideo, Uruguay, 11 January 1889. For text see, OAS General Secretariat, Inter-American Treaties and Conventions, Treaty Series No. 9, Rev. 1993 [hereinafter Treaty of Montevideo 1889].

[207] Ratified by Argentina, Bolivia, Paraguay, Peru, Uruguay and acceded to by Colombia.

[208] Treaty of Montevideo 1889, *supra* note 206, arts. 5-12.

[209] Second South-American Congress on Private International Law, Treaty on International Procedural Law, adopted at Montevideo, Uruguay, 19 March 1940. For text, see Supplement of Documents in 37 Amer, J. Int'l L., 1943, at 116 [hereinafter Treaty of Montevideo 1940].

[210] Signed and ratified by Argentina and Paraguay and signed but not ratified by Bolivia, Brazil, Colombia, Peru, and Uruguay.

[211] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.

[212] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

[213] *See Societe Internationale Pour Participations Industrielles et Comerceiales*, S.A. v. Rogers, 357 U.S. 197 (1958), (Involving impediments under Swiss law to disclose bank information, an take testimony to bankers).

requests, due to procedural or practical problems, of the other state.[214] Moreover, many civil law states have entered reservations expressing that they will not execute letters of request issued for obtaining pre-trial discovery of documents - a very common practice in common law states.[215]

In the area of applicable law, the Convention on the Law Applicable to Contracts for the International Sale of Goods,[216] adopted by the extraordinary session of 1985, sets very important principles for applicable law in transnational trade. The aim of this convention was to revise the Convention on the Law Applicable to International Sales of Goods of 1955[217] and to be a complement of the Vienna Convention on International Sales of Goods[218] in order to create an international legal framework on this area.[219] Unfortunately, the convention was signed by five States[220] but ratified by only one.[221] Therefore, it has not yet entered into force due to lack of ratifications. The convention applies specific rules if the parties have not chosen the law applicable to the contract. The rules are the *lex venditori,*[222]or law of the seller,[223] based on the theory of characteristic performance; the law of the buyer;[224] the principle of manifestly closer

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[214] E.g., non-recognition of electronic records as evidence or impossibility to retrieve information from third parties due to a lack of legal obligation to keep these records.

[215] Conf. Argentinean and French reservation to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, available at http://www.hcch.net/e/status/stat20e.html.
See also Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522 (1987) (Involving problems of interpretation between U.S. and France).

[216] Convention on Applicable Law on Contracts of International Sale of Goods, 22 December, 1986, 24 I.L.M. 1575 [hereinafter Hague Convention on Applicable Law on Contracts of International Sale of Goods 1986].

[217] Convention on the law applicable to international sales of goods, 15 June, 1955, available at http://www.hcch.net/e/conventions/index.html (last visited Apr. 24, 2004) [hereinafter Hague Convention on Applicable Law on Contracts of International Sale of Goods 1986].
The convention was signed by Belgium, Denmark, Finland, France, Italy, Luxembourg (not ratified), Netherlands (not ratified), Norway, Spain, Sweden, Switzerland and Niger.

[218] *See* CISG, *supra* note 51.

[219] Arthur Taylor von Mehren, Explanatory Report on the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, at 15 (1987), available at http://www.hcch.net/e/conventions/expl31e.html (last visited Apr. 24, 2004).

[220] Argentina, Czech Republic, Moldova, Netherlands and Slovakia.

[221] Argentina ratified the convention on October 4, 1991.

[222] ANTONIO BOGGIANO, INTERNATIONAL CONTRACTS, 2nd Edition 225 (1995).

[223] Hague Convention on Applicable Law on Contracts of International Sale of Goods 1986, *supra* note 216, art. 8 (1).

[224] *Id.*, art. 8.2.

connection, as an exception to aforementioned rules; and, finally, in the auction field, the law of the state where the auction takes place or the exchange is located. Those specific rules of conflict are rules and not presumptions. Therefore, they should be applied before any examination of whether the contract is manifestly more closely connected with another law.[225]

In the area of jurisdiction and enforcement of judgments, the Hague Conference has been working in Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters since 1993.[226] The purpose of this convention is to create an international framework for recognition and enforcement of judgments, which will lead to generate more predictability for litigants in determining the jurisdictional basis and the likeliness of recognition and enforcement in other contracting states.[227] Chapter III of the Draft Convention deals with recognition and enforcement.[228]

5. United Nations Commission on International Trade Law

Through its working group IV, UNCITRAL has and is engaged in important activities towards the regulation and harmonization of transnational electronic commerce. Two of the most important developments in the area of electronic commerce are the Model Law on Electronic Commerce and the Model Law on Electronic Signatures.[229] The aim of the model laws is to

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[225] BOGGIANO, 223.

[226] Hague Conference on Private International Law, Annotated Checklist of Issues to Be Discussed at The Meeting of The Special Commission on Jurisdiction and the Enforcement of Judgments, Preliminary Document No. 1 at 2 (Jun. 20-24, 1994), available at: http://www.hcch.net/e/workprog/jdgm.html.

[227] *Id.* at 4.

[228] Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, arts. 23-36 (Oct. 30,1999), available at http://www.hcch.net/e/conventions/draft36e.html [Hereinafter Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matter].
See also Hague Conference on Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, (Jun. 6-20, 2001) (New version interim text), available at http://www.hcch.net/e/workprog/jdgm.html.

[229] UNCITRAL Model Law on Electronic Commerce, *supra* note 19; G.A. Res. 56/80 U.N. GAOR, 56th Sess., 85th plen. Mtg, U.N. Doc. A/56/588 (2001) [hereinafter Model Law on Electronic Signatures].

promote the harmonization of concepts and principles among the different countries in order to facilitate the transnational electronic commerce. Therefore, many states had followed both the Model Laws to incorporate in their legislation harmonized concepts and principles.[230] Nowadays, the working group IV is working on the drafting of an international convention for electronic commerce[231] on the basis of the abovementioned model laws. One of the most salient characteristics of its works is the constant interrelation with other international organizations towards the development of standardized principles in international trade law.

6. World Trade Organization

In the area of development and international trade, the lack of regulations of transnational electronic commerce in a global trade forum and "hands off" or proactive "tariff-free environment" policies of several National Governments (e.g. United States)[232] generates serious problems for developing countries. Because of the lack of borders in cyberspace, companies from developed countries that are trading digital goods and services are able to access any market with tremendous competitive advantages. Authorities in developing countries are unable to subject these transactions to any control, tax or custom duty and are, therefore, losing revenues.[233] Most of the competitive advantages are attributable to the practice of not imposing customs duties on international electronic transmissions due to the moratorium maintained by the WTO since the Geneva Ministerial Declaration 6 years ago and extended by the 2001 Doha

[230] UNCITRAL, Status of Conventions and Model Laws, Sections 13, 15, *supra* note 54.
[231] *See* U.N. GAOR 9th Comm., 40th Sess., U.N. Doc. A/CN.9/527 (Report of Working Group IV, Vienna, 14-18 October 2002); U.N. GAOR 9th Comm., 41th Sess., U.N. Doc. A/CN.9/528 (Report of Working Group IV, New York 5-9 May 2003); U.N. GAOR 9th Comm., 42nd Sess., U.N. Doc. A/CN.9/546 (Report of Working Group IV Vienna, 17-21 November 2003).
[232] *See* WT/GC/W/493/Rev.1, s*upra* note 35.
[233] *See* E-commerce Report 2001, *supra* note 10, tables 21-23 at 129-132.

Ministerial Declaration,[234] which have been encouraged through pressure by the developed countries. Other competitive advantages, must respect to tax-free national policies established in developed countries[235] that create hidden subsidies to foster local development on electronic commerce, which is oddly enough, condemned by the multilateral system of WTO.[236] Additional advantages come from the utilization of digitalization technologies and highly-developed telecommunications infrastructure available in developed countries, and subsequently not available in developing countries,[237] enhancing one of the main obstacles to a real free trade system - the unbalanced competition among countries.

On March 24, 2004 a WTO panel ruled that the United States policy prohibiting the supply of gambling and betting services from outside the United States to consumers in the United States violates the United States' obligations under GATS and its specific commitments.[238] This panel responded to a requirement of the Permanent Delegation of Antigua and Barbuda who presented the first electronic commerce-related dispute before the World Trade Organization on July 21, 2003. The delegation requested the establishment of a panel in order to consider certain measures of the United States prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States. These measures

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[234] *See* Geneva Ministerial Declaration, *supra* note 27; WTO Ministerial Conference, Doha Ministerial Declaration, at § 34 WT/MIN(01)/DEC/1 (November 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#electronic.

[235] *Cf.* Internet Tax Freedom Act, *supra* note 4, Sec. 101(a) (Establishing a Moratorium on taxation of Internet-related activities "[n]o State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act.
(1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and (2) multiple or discriminatory taxes on electronic commerce.")

[236] *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreements, Annex 1A, art. 1.1 (a)(1) (iii), The Results of the Uruguay Round of Multilateral Trade Negotiations : the Legal Texts, at 264 (1994) (Establishing that "subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: (iii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)").

[237] *See* E-commerce and Development Report 2003, *supra* note 12 at 16-17.

[238] Mat Richtel, *U.S. Online Gambling Policy Violates Law, W.T.O. Rules*, N.Y.TIMES, March 26, 2004 at C5.

appear to conflict with the United States' obligations under GATS[239] and its Schedule of Specific Commitments annexed to the GATS.[240] The claim is based on the grounds that the central, regional or local authorities of the United States allow numerous operators of United States origin to offer all types of gambling and betting services in the United States. In contrast, it is not possible to obtain such authorization to supply gambling and betting services from outside the United States. Moreover, United States authorities also restrict international transfers and payments relating to gambling and betting services offered from outside the United States. The final result of the application of these laws[241] has the effect of prohibiting all supply of gambling and betting services of 19 companies licensed in Antigua and Barbuda that offer sports betting and casino games over the Internet.[242] Additionally, Canada, the European Communities, Japan, Mexico and Chinese Taipei have reserved their rights to participate in the Panel proceedings as a third party.[243]

This panel decision, which has not been published officially, is a very important lesson for countries that foster "hands off policies" and "regulation-free environments" in relation to global trade and electronic commerce. It is proof of how depredatory policies of United States and other developed countries towards electronic commerce can have a boomerang effect. Furthermore, it also demonstrates how difficult it is for a country to control the activities of its citizens[244] carried out by open computer-mediated networks.

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[239] *Cf.* GATS, *supra* note 25, arts. VI: 1, VI: 3, VIII: 1, VIII: 5, XVI: 1, XVI: 2, XVII: 1, XVII: 2 and XVII: 3.
[240] WTO Document WT/DS285/2, Sector 10.D, Jun. 13, 2003 (Request of a panel decision by Antigua and Barbuda).
[241] *See id.* (for a List of US measures taken by the United States Congress which infringe on the obligations under GATS).
[242] Richtel, *supra* note 238.
[243] WTO Document WT/DS285/3, 26 Aug 2003.
[244] *See* Richtel, *supra* note 238 (Statement of *David Carruthers, chief executive of Betonsports.com, an Internet sports book operation and casino with headquarters in Costa Rica and back-office operations in Antigua and Barbuda* stating that in 2003, his company took 33 million bets from people in North America, most of them from 1.2 million registered customers who are United States residents.).

However, U.S. Justice Department prosecutors have begun to threaten possible legal actions against third parties such as American broadcasters, publishers, advertisers, ISP and payment methods companies that perform their services on behalf of online casinos.[245] The crackdown has relied on a controversial legal notion that holds that American businesses, "by providing advertising, technology and other services, are 'aiding and abetting' gambling sites that fall outside of US jurisdiction."[246] For these reasons, several big media operators have stopped advertising offshore Internet casinos.[247]

7. Organization for Economic Cooperation and Development

In order to set standards in electronic commercial practices, the OECD has issued the Guidelines for Consumer Protection in the Context of Electronic Commerce[248] and the Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders.[249] The WP9 Sub-Group for Consumption Taxes on Electronic Commerce has been working, since 2001, in one work plan focused in the following areas: verification of the declared jurisdiction of residence of the customer in B2C online transactions, verification of the status of the customer, registration thresholds, technology-based and technology-facilitated collection mechanisms, and international administrative cooperation.[250]

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[245] Mat Richtel, *Companies Aiding Internet Gambling Feel U.S. Pressure*, N.Y.TIMES, March 15, 2004, at A1
[246] *Id.*
See also People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 851 (N.Y. Misc., 1999).
[247] *Id.*
[248] OECD, Guidelines for Consumer Protection in the Context of Electronic Commerce, OECD Publications, code 93 2000 02 3 P1 (2000).
[249] OECD, Committee on Consumer Policy, Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders, OECD Publications, code 93 2003 06 3 P (2003).
[250] OECD, Work Plan of the WP9 Sub-Group on Electronic Commerce 2001-2003, Feb. 7, 2002, at http://www.oecd.org/document/46/0,2340,en_2649_33741_1834414_119666_1_1_37441,00.html (last visited Apr. 24, 2004).

The "Taxation and Electronic Commerce: Implementation of the Ottawa Taxation Framework Conditions - 2003 Report", provides an overview of the work performed in this area and highlights the further work with a very interesting focus on the use of technology for the collection of consumption taxes.[251] The report focuses specifically on the collection of taxes on digitized products sold from a vendor in one country to a consumer in another[252] and an approach to the creation of simplified registration system that would allow the development of a legal and administrative environment aided by business driven technological solutions.[253]

8. International Chambers of Commerce

The ICC has issued the guidelines for "General Usage for International Digitally Ensured Commerce",[254] the "Best Practices for Customer Redress in Online Business"[255] and the "Best Practices for Online Dispute Resolution (ODR) in B2C and C2C transactions".[256]

[251] OECD, Taxation and Electronic Commerce: Implementation of the Ottawa Taxation Framework Conditions - 2003 Report, at 23 (2003), available at http://www.oecd.org/dataoecd/45/19/20499630.pdf (last visited Apr. 24, 2004).
[252] *Id.*
[253] *Id.*
[254] ICC, General Usage for International Digitally Ensured Commerce (GUIDEC), available at http://www.iccwbo.org/home/guidec/guidec_one/guidec.asp (Nov, 1997).; ICC, General Usage for International Digitally Ensured Commerce (GUIDEC) – version II, available at http://www.iccwbo.org/home/guidec/guidec_two/foreword.asp (Oct, 2001).
[255] ICC, Best Practices for Customer Redress in Online Business (Nov. 2003), at http://www.iccwbo.org/home/e_business/word_documents/PUTTING-rev.pdf (last visited Apr. 24, 2004).
[256] ICC, Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions (Nov. 2003), available at http://www.iccwbo.org/home/e_business/word_documents/DISPUTES-rev.pdf (last visited Apr. 24, 2004).

CHAPTER V

PRELIMINARY CONCLUSION: UNSOLVED PROBLEMS & INITIATIVES TO FOLLOW

A. Jurisdiction

Most of the legal principles of jurisdiction are insufficient to get around legal problems originating in non-territorial commercial environments where physical location is unnecessary and nationality is hard to define. Even the approach of personal jurisdiction becomes futile when it is impossible to physically locate defendants in order to enforce judgments, and it is also a threat to the development of electronic commerce when its application is too broad. The indiscriminate application of this principle would cause spillover effects because of the fear of on-line businesses to being sued in multiple jurisdictions solely for its presence in cyberspace. The European approach towards the regulation of consumer activities also generates great concern within the business sector if the Brussels I Regulation if interpreted broadly. Therefore, businesses need a way to efficiently limit their transaction solely to the states where they assume the risk of being sued. Moreover, it has been pointed out that the language of the Regulation could lead to awkward situations.[257] A consumer with a permanent domicile in the territory of a Member State can conclude a contract while the consumer is transitory in a state outside the union and still will be able to bring an action before the courts in the state of their permanent domicile.[258]

Sellers need to be able not only to foresee the possible risk of being sued in a given territory, but also the possibility to target their operations to certain jurisdictions and refuse to

[257] Rosner, *supra* note 190.
[258] *Id.*

engage in business with persons or entities in others jurisdictions.[259] Consumers should be able to have information about the seller in order to weight the benefits against risk to buy a product in a given jurisdiction.

B. Applicable Law

Traditional concepts of applicable law are unsuitable in non-territorial environments. Most of the national choices of law rules fail when applied to cyberspace due to a constant reference to territorial places such as "domicile," "place of celebration of the contract," "place of negotiation," "State where the seller has his place of business"[260] or "State where the buyer has his place of business".[261] Contrasting these principles with the hypothetical scenario expressed previously, is it possible to apply the principles of the Restatement Second of Conflicts of Law? Should the place where the buyer performs the click wrap agreement be the place of contracting? Where is that place? Is it in the server of the seller? Is it on the computer equipment of the buyer? Is it somewhere in the middle? In answering these questions, it is important to remember how easily and quickly one can move a server from one place to another. Moreover, in the case of the hypothetical scenario, is the average buyer able to determine the physical location of buyer's server? Finally, is it wise to treat information allocated in servers as places? It looks like the answer is that it is not possible to identify the place where the last act necessary to give the contract binding effect is located. Therefore, the place of contracting principle is not suitable for electronic commerce transactions. Similarly, the place of negotiation of the contract does not appear to be very helpful in solving the problem, because it shares the same characteristics as the

[259] *See* Gheist, *supra* note 163, at 1385-86.
[260] Convention on Applicable Law on Contracts of International Sale of Goods1986, *supra* note 216, Art. 8(1).
[261] *Id.,* Art. 8(2), at 1576.

place of contracting principle in that the place might be a web site hosted somewhere or even mirrored in several locations at the same time around the globe.

United States, European, Latin American and international principles set the place of performance as a point of contact in the applicable law. This concept could be applicable to electronic commerce transactions of tangible goods, but if digital goods or services are involved, the definition of this place becomes blurred. For example, what is the place of performance of a distance learning service? From the student's point of view, it will be the place where he is receiving the educational service (e.g., home, a hotel room during a business trip, a cyber café during holydays or the plane on the way back home). From the professor's point of view, it will be the place where he is teaching (e.g., his office or his home) and from the institution that charges for the service, which could be anywhere else. The same happens with digital goods. What is the place of performance? Is it the place from which the buyer downloads the digital goods or the place where the digital goods are going to be stored? Each of these situations point out that the determination of place of performance is not always viable in non-territorial commercial environments.

The location of the subject matter of the contract is applicable when the contract deals with specific physical things, or affords protection against a localized risk.[262] This principle is not helpful for digital electronic commerce transactions. Where is the place of delivery for software? Or, more specifically, where is the place of provision for an electronic financial news bulleting delivered to a cellular phone? Could it be the location of the seller's server, where the software is available to be downloaded by the buyer? Otherwise, could it be the location were the goods rest after the download process, thus the computer equipment of the buyer?

[262] *See supra* note 181.

Alternatively, it could it be the place where the cellular phone is currently located?[263] All the options sound equivalently rational. Nevertheless, it is important to take into account how easy and fast it is to move a server from one place to another, given the new mobile possibilities of computer equipments or cellular phones. Therefore, it is not reasonable to consider either the location of the seller's server or the location of the buyer's computer equipment or wireless communications devices places, due to its constant mobility and the weak correspondence between the current location of the device and the real location of the person or the entity. Fortunately, "in the realm of conflict of laws, although a stringent physicality requirement - embodied in the rules of *lex locus contractu* and *lex locus delicti* - has been abandoned as transborder events and transactions have become commonplace during the twentieth century, in favor of a more flexible "interest analysis"".[264] It is imperative for the regulation of electronic commerce to shift in these territorial conceptions.

C. Gathering of Evidence Abroad

The lack of global international cooperation in gathering evidence abroad[265] combined with the technological difficulties inherent in obtaining such information form third parties increase cost of international litigation. This situation excludes many victims of commercial and non-commercial abuses (e.g., fraud, consumer rights violations, deceptive commercial practices, breach of contract or criminal activities) from legal solutions and adequate redress. In a global

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[263] See Gratton, *supra* note 101, at 1 (pointing that communications service providers may use the location data of a wireless user's device derived from pinpoint tracking technologies that are either network-based solutions (relying on accessing information in a carrier's home location register to locate the wireless device) or handset-based solutions that rely on a global positioning system (''GPS'') where information derived from a GPS chip in the wireless device is reported to the provider over the wireless network.).

[264] David G. Post, *supra* note 105, at 158.
See also id. n.13.

market like the Internet, any jurisdiction without regulation on this matter automatically becomes a shelter for deceptive, fraudulent and criminal activities in cyberspace.

D. Recognition and Enforcement of Judgments

In the field of recognition and enforcement of judgments, it is important to follow the efforts of the Hague Conference on Private International Law,[266] the European[267] and Latin American[268] models. The solutions achieved to the other legal obstacles will be rendered useless without a global cooperative framework in this area.

E. State Sovereignty

National governments are not able to effectively control transnational commercial activities to and from their territories in borderless environments (e.g., taxation, custom duties, commercial protective measures, export and import controls, among others). This problem significantly affects not only a states' revenues and economy,[269] but also their sovereignty and security (e.g., export controls over encryption and GPS/GIS software for military use).[270]

F. International Trade and Development

In the area of development, the lack of access of developing countries to digitalization technologies and high-speed communications generates an unbalanced marketplace for electronic commerce. For that reason, companies located in developed countries, operate with

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[265] Is important to bear in mind that, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters has only 39 contracting States and the many reservations and narrow United States approach make it less useful even among the contracting states.
[266] *See supra* note 216.
[267] *See* Brussels I Regulation, *supra* note191.
[268] *See* Bustamante Code, *supra* note 202.
[269] *See* E-commerce Report 2001, *supra* note 10 at 128.

certain advantages and easily became multinational. They are able to compete on-line with local companies from developing countries with lower infrastructure costs, without paying local taxes or custom duties.[271] On the other hand companies located in developing countries, that trade the same goods or service in a traditional way, have to pay taxes, custom duties and have to suffer other commercial barriers when they try to get developed markets via traditional means. However, the recent panel ruling of WTO on on-line gambling demonstrates that not only developing countries could be affected by this situation. Therefore, there is an imperative need for a framework able to control the digital flow of goods to and from different territories.

G. Consumer Protection

The situation of consumers is quite delicate, because many international regulations expressly exclude consumers from their scope of regulation. The Vienna Convention on Contracts for the International Sale of Goods,[272] the Hague Convention on Applicable Law on Contracts of International Sale of Goods of 1986[273] and the WTO framework, which lack a forum for individuals, are enlightening examples. Oddly enough, many ongoing projects like the latest attempt in the regulation of electronic commerce, the UNCITRAL Preliminary Draft Convention on the Use of Data Messages in the Context of International Contracts,[274] expressly exclude consumers from their sphere of application. An explanation of this exclusion resides in the traditional and historic nature of consumers' commercial activities, whether or not those

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[270] *Cf.* International Traffic in Arms Regulations, *supra* note 84.
[271] *See* Arthur J. Cockfield, *Jurisdiction to Tax: A Law and Technology Perspective*, 38 Ga. L. Rev. 85, 117 (2003).
[272] *See*, CISG, art. 2(a), *supra* note 45.
[273] *See*, *supra* note 216, art. 2 c) (has not yet entered into force due to only two States have ratified it).
[274] See, U.N. GAOR 9th Comm., 43rd Sess., UNCITRAL Working Group IV, Annex, art. 2(a), U.N. Doc. A/CN.9/WG.IV/WP.108 (2004), also available at http://www.uncitral.org/english/workinggroups/wg_ec/wp-104e.pdf [hereinafter UNCITRAL Draft Convention on Electronic Commerce].

activities were predominantly domestic. For this reason, international organizations are not accustomed to dealing with the consumer and do not see them as actors in international trade. Nevertheless, the new global market has been changed this trend and in the future, consumers will become a growing community of global traders. Fortunately, other organizations, like OECD, ICC and Consumers International[275], are carrying out a wonderful work towards the protection of consumers. Notwithstanding, their works have not yet a binding effect among the international community it is still a great attempt to define standards for the business community towards the creation of new customary commercial law, a new *lex mercatoria*, or maybe a new "*lex mercatoria electronika*".[276]

Fortunately, at the regional level, the work performed by the European Union provides an example to follow. The Directive on Electronic Commerce generates a wide framework for consumer protection regulating several activities in different articles[277] and incorporates to the spectrum of the information society services[278] an extensive number of directives related to different areas of consumer protection.[279] One such directive is the Council Directive 97/7/EC on

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[275] Consumer International is an international ONG that foster the protection of consumer rights around the world, for more information about the organization see http://www.consumersinternational.org.

[276] *See* Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 Tex. L. Rev. 553, 553-55 (1998) (comparing the development of the *lex mercatoria* and the *lex informatica*).
See also Bénédicte Fauvarque-Cosson, *Standard Private International Law Tested by the Networks, Address Before the International Colloquium Internet law European and International Approaches* (Nov. 19, 2001), available at http://droit-internet-2001.univ-paris1.fr/pdf/ve/Fauvarque_B.pdf, at 10.
See also, V. Gautrais, G. Lefebvre & K. Bennyekhlef, *Droit du Commerce Électronique et Normes Applicables: l'Émergence de la Lex Electronica*, Revue de Droit des Affaires Internationales 1997 at 548 (1997). (Electronic Commerce Law and Applicable Standards: the Emerging of the Lex Electronica)

[277] *See* Directive on Electronic Commerce*, supra* note 52, Arts. 3, 10, 11, 16 (Regulating internal market, information to be provided by the service provider, placing of the orders and code of conducts).

[278] *See id*. preamble at 2.

[279] *See* Directive 93/13/EEC, O.J. (L 95) 29 (on unfair terms in consumer contracts).
See also Directive 97/7/EC, O.J. (L 144) 19(on the protection of consumers in respect of distance contracts); Directive 84/450/EEC, O.J. (L 250) 17 (concerning misleading and comparative advertising) as amended by Directive 97/55/EC, O.J. (L 290) 18; Directive 87/102/EEC, O.J. (L 42) 48 (for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit) as last amended by Directive98/7/EC, O.J. (L 101) 17; Directive 93/22/EEC, O.J. (L 141) 27 (on investment services in the securities field) as last amended by Directive 97/9/EC, O.J. (L 84) 22; Directive 90/314/EEC, O.J. (L 158) 59 (on package travel, package holidays and package tours); Directive 98/6/EC, O.J. (L 80) 27 (on consumer production in the

protection of consumers in respect of distance contracts.[280] This Directive regulates, among other things, the information available to consumers before the conclusion of any distance contract,[281] right of withdrawal,[282] performance of the contract,[283] cancellation of a payment where fraudulent use has been made,[284] effective redress systems,[285] burden of proof[286] and supervision of compliance with the directive.[287]

H. Irrelevance of Physical Location in Cyberspace

The place of business, the domicile or the nationality is irrelevant to electronic transactions of digital goods. The structure of the Brussels and Lugano conventions and the Brussels I Regulation reside in the concept of domicile that is sometimes totally irrelevant in electronic commerce transactions. Article 60 of the Brussels I Regulation describes the domicile as the place where a company has its statutory seat or place of incorporation, central administration, or principal place of business. However, these three concepts are powerless when one tries to apply them to non-territorial environments. Legal principles that refer to the place of negotiation, performance or delivery, point to facts of a commercial relationship as a point of connection. In contrast, concepts such as domicile, residence or place of incorporation

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indication of prices of products offered to consumers); Directive 92/59/EEC, O.J. (L 228) 24 (on general product safety); Directive 94/47/EC, O.J. (L 280) 83 (on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis); Directive 98/27/EC, O.J. (L 166) 51 (on injunctions for the protection of consumers' interests) as amended by Directive 1999/44/EC, O.J. (L 171) 12; Directive 85/374/EEC, O.J. (L 210) 20 (on the approximation of the laws, regulations and administrative provisions concerning liability for defective products) as amended by Directive 1999/34/EC, O.J. (L 141) 20; Directive 1999/44/EC, O.J. (L 171) 12 (on certain aspects of the sale of consumer goods and associated guarantees) Directive 92/28/EEC, O.J. (L 113) 13 (on the advertising of medicinal products13).

[280] *Id.* Directive 97/7/EC.
[281] *Id.* art. 4.
[282] *Id.* art. 6.
[283] *Id.* art. 7.
[284] *Id.* art. 8.
[285] *Id.* art. 11.
[286] *Id.*

concepts relay on the information that each party knows in respect to the other. Only when consumers are able to known the real domicile of a company will they be protected by this structure. In the hypothetical scenario, the buyer does not have a clue about this information, and even the information sometimes does not exist because the seller only has a "presence" in cyberspace and not in the real world.

I. On-line Disputes Resolutions (ODR)

A very important development towards the regulation of electronic commerce will be the dispute resolutions of controversies by technological means. In this global market characterized for its technological speed, traditional judiciary process is becoming unsuitable to address controversies arising in non-territorial commercial environments. Several reasons such as duration of the process, cost, complexity of the litigation, uncertainty in the decisions, recognitions and enforcements of judgment, among others reasons, tip the balance in favor of on-line disputes resolutions systems (ODR). ODR systems resolve problems generated in non-territorial environments with a simplified process that not involved physical presence and movement of the parties to a given jurisdiction. It is a special jurisdiction created by the parties' autonomy in order to ease the process of adjudication of justice in a fast and cost-effective fashion. It has a vital importance in cases that involve consumers due to asymmetrical relationship between the amount of money that is at stake and the high cost of international commercial litigation.[288]

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[287] *Id.*

[288] *See* Philippa Lawson, *Disputes in cyberspace: Online dispute resolution for consumers in cross-border disputes – an international survey*, Consumers International Office for Developed and Transition Economies (2000) available at http://www.consumersinternational.org/document_store/Doc29.pdf.
See also The Council of Better Business Bureaus, *Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution* (2002), available at http://www.ilpf.org/events/jurisdiction2/presentations/blumenfeld_pr/blumenfeld1.htm.

The Commission of the European Communities addressed this issue[289] and noted that it is seldom that consumers' disputes come before the courts, as they tend to be small claims. The Commission also noted the need to harmonize the question of the law applicable to a consumer contract in the context of alternatives, including electronic dispute resolution procedures. Considerable efforts have been undertaken at Community level to increase the development of ADR in the field of electronic commerce, such as: community financial support for ODR initiatives,[290] quality control projects for commercial sites,[291] and university studies and training programs.[292]

J. Steps to Follow

It is very important to take into account the OECD's developments towards the implementation of a simplified registration system[293] and the verification of the declared residence of the customer in business-to-consumer online transactions[294] combined with the concept of targeting operations to certain jurisdictions. This could be the mechanism that allows companies that want to avoid the risk of being sued in every state where the content of their on-line business is available to achieve their goal.

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[289] Green Paper on alternative dispute resolution in civil and commercial matters, COM(2002)196 (01).

[290] ECODIR (Electronic COnsumer DIspute Resolution Platform) available at http://www.ecodir.org receives Community financial support, which is managed by the European Commission, Health and Consumer Protection Directorate-General. Online Confidence is a project supported by the Commission under its TEN-Telecoms programme (Directorate-General for the Information Society).

[291] E.g., Webtrader, a private international project aimed at controlling commercial sites and awarding quality labels. This project includes consumer organizations from 10 countries, 8 of them Member States and is involved in the development of codes of conduct and the setting in place of ADR systems. It receives Community financial support, which is managed by the European Commission, Enterprises Directorate-General.

[292] E.g., ECLIP (Electronic Commerce Legal Issues Platform), a consortium of five European research centres specialising in legislation on the new technologies, http://www.eclip.org, This work receives the support of the European Community, which is managed by the Commission, Information Society Directorate-General, under the IST programme (Information Society Technology Programme) http://www.cordis.lu/ist/home.html

[293] *See supra* note 251.

[294] *See supra* note 250.

The Spanish Government has made a very interesting implementation of EC Directive 97/7/EC.[295] There, merchants doing business by distance selling should be registered and authorized by the autonomic community's government.[296] When distance selling reaches more than one autonomic community, the national government, through the Ministry of Commerce and Tourism, keeps a register, and gives the authorization and exchange information with the autonomic communities about the registered companies.[297] The Spanish initiative should be taken into account as a very important step towards the international regulation of electronic commerce. The registration element, as was noted before, will be one of the pillars of the jurisdictional framework for the regulation of transnational electronic commerce, which will be explained and discussed in the next chapter.

In the taxation area, Directive 2002/38/EC[298] establishes a special scheme oriented to facilitate compliance with fiscal obligations under EU VAT (Valued Add Tax) by operators providing electronically supplied services[299] who are neither established nor required to be identified for tax purposes within the Community.[300] Operators are only required to register for VAT purposes when their transactions involve sales to consumers. In applying this scheme, any operators supplying services by electronic means to consumers within the Community should identify themselves for EU VAT tax purposes in a single European Member State, taking

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[295] *See* Directive 97/7/EC, *supra* note 279.
[296] Art. 37 of the Retail Commerce Act, (B.O.E., 1996, 15) (Spain) [Hereinafter Spanish Retail Commerce Act]. Autonomic Communities internal political divisions within the Spain, i.e., state or provincial governments.
[297] *Id.* at Art. 38.
[298] Directive 2002/38/EC, O.J. (L 128) 41-44 (VAT: special arrangements applicable to services supplied electronically).
[299] *See Id.*, Anex L, at 44 (For an illustrative list of electronically supplied services referred to in article 9(2)(e) of Directive 77/388/EEC). Is important to note that the list classifies as services the supply of digital products such as music, films, games, software, images and text.
[300] *Id.* at 41.

advantage of streamlined compliance and on-line reporting procedures.[301] "Non-EU businesses are able to register with a tax authority in a Member State of their choosing"[302] and are required to charge VAT to final consumers domiciled within the EU according to a standard Member State tax rate of the customer's State.[303] Every three months, operators pay the tax they have collected to the Member State's administration where they have registered, together with a return in electronic form detailing total sales for each EU Member State.[304] The electronic detailed form is used by the Member State of registration to reallocate tax revenue in the countries of the consumers.[305]

A jurisdictional framework for electronic transnational commercial activities could remove the legal obstacles and will promote the development of an electronic marketplace with equal opportunities of access and growth to all countries. The principles delineated by the UNCITRAL Model Law on Electronic Commerce[306] should be considered the mainstay[307] to support an international solution[308] inspired by initiatives discussed above and materialized by the use of the latest technologies. The last chapter of this paper set forth a possible solution to the international regulation of electronic commerce.

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[301] Activities of European Union Summaries of Legislation, VAT: Special Arrangements Applicable to Services Supplied Electronically, (2003) available at http://www.europa.eu.int/scadplus/leg/en/lvb/l31044.htm(last visited Apr. 24, 2004) .
See also, Stephen Bill & Arthur Kerrigan, *Practical Application of European Value Added Tax to E-commerce,* 38 Ga. L. Rev. 71, 81 (2003).
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] Directive 2002/38/EC, *supra* note 298, art. 1.9, at 43.
[306] *Supra* note 19.
[307] However, an updated and clearer version of the definition of electronic commerce would provide much-needed strength to the UNICITRAL principles,
[308] *See,* UNCTAD E-commerce and Development Report 2001, supra note 10 at 127.

CHAPTER VI

TOWARDS AN INTERNATIONAL SOLUTION OF TRANSNATIONAL ELECTRONIC COMMERCE

It is crucial to stress that the solution set forth in this chapter is only intended to regulate commercial activities carried out in cyberspace. It will not affect non-commercial activities that make the Internet network the new "marketplace of ideas."[309] As a matter of fact, a solution in the commercial area will contribute to keep the non-commercial Internet activities related to the free exchange of ideas and knowledge free of regulation.

A. The Missing Link

In the history of the world, evolution has always had a "missing link". The Darwinian evolutional conceptions, considered the missing link to be between reptiles and mammals and even between apes and humans. Today, with the advent of the Internet, the globalization of the economy, and the raising of the electronic commerce era, transnational trade face a new challenge in its evolution. Therefore, the international community needs to find a link between non-territorial commercial environments, created by the use of computer-mediated networks in commercial transactions, and the ancient territorial-based legal principles which ruled transnational trade for centuries.

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[309] JOHN MILTON, AREOPAGITICA, (George H. Sabine ed., 1951) (1644)
See also Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion of Justice Holmes).

The first question is why it is necessary to find such link rather than a new solution. The answer to this question has a practical reason. The role of the link is to be a bridge between the new matters generated in cyberspace and the traditional concepts of the territorial world with a "functional equivalent approach."[310] The functional equivalent approach will be allowed to set an internationally agreed concept applicable by current national legal systems, without reforming every piece of legislation in every country or trying to reach international agreements on jurisdiction, applicable law and enforcement of judgment that, until now, have not prospered. Otherwise, no matter how good the solution, the international regulation of electronic commerce will face tremendous obstacles towards its implementation.

Therefore, things that occur under a totally different conception in cyberspace can be interpreted and assimilated under territorial-based principles. The UNCITRAL Model Law on Electronic Commerce, in order to facilitate the use of electronic commerce in an acceptable way to states with different legal, social and economic systems and with the aim to contribute significantly to the development of harmonious international economic relations,[311] has developed harmonization principles in the electronic commerce area. At the drafting process of the Model Law, it was noted that states should be able to "adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements."[312] The Model Law singles out the basic functions of paper-based formal requirements, which when they are met by data messages, enable data messages to benefit from the same level of legal recognition as paper documents

[310] *See supra* note 20, Guide to enactment of the UNCITRAL Model Law on Electronic Commerce, at paragraph 15.
[311] *Supra* note 19.
[312] *Id.* at paragraph 15

performing the same function.[313] The Model Law takes the functional-equivalent approach in articles 6 to 8 with respect to the concepts of "writing," "signature" and "original."[314]

B. Registration as a Link between Territorial Places and Cyberspace

An analysis of the nature of electronic commerce transactions, its technological obstacles, the legal challenges that such obstacles present to the national regional and international communities, finally the work performed in such communities towards the solutions of those challenges show that the current framework is unable to overcome these problems effectively. Moreover, the most significant challenge to the regulation of electronic commerce is the dichotomy between territorial-based ruling and non-territorial environments to rule.

The fact that most of the regulation on jurisdiction and applicable law principles relies on "places,"[315] considered as a given physical location within a territory, in order to adjudicate jurisdiction or set the applicable law, leads to the conclusion that the legal concept of "place" needs a functional equivalent for non-territorial commercial environments.

The concept of registration in a given jurisdiction in order to tie an on-line activity to a certain territory could be a possible functional equivalent approach to the concept of place. The application of the concept of registration to places that are not under the control of any

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[313] *Id.* at paragraph 18.
[314] *Id.*
[315] See RESTATEMENT OF FOREIGN RELATIONS LAW, § 421, *supra* note 128.
See also supra note 134 (Argentinean and Spanish civil codes).
See also Restatement Second of Conflicts of Law, § 188, *supra* note 181.
See also Brussels I Regulation, *supra* note 191.
See also Bustamante Code, *supra* note 202.
See also Hague Convention on Applicable Law on Contracts of International Sale of Goods 1986, *supra* note 216, art. 8 (1), 8 (2).
See also Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, , *supra* note 228, arts. 23-36.

jurisdiction is not a novelty. A wide number of states, in local[316] and international regulations, have adopted this concept regarding to the nationality of ships. The best examples of multilateral international regulation in this area are the Convention on the High Seas[317] with 62 states parties and the United Nations Convention on the Law of the Sea,[318] with 145 states parties.

Like the high seas, the Internet is an environment open to states and is not subject to exclusive sovereignty or regulation by any nation.[319] Additionally, Professor Ramón G. Brenna affirms:

> Maritime commerce is special because it touches many jurisdictions and means a new level of global interaction. On one hand, the sea has brought an incredible value of trade and commerce to world civilization. States were willing to give up some amount of national sovereignty in exchange for the benefits to world economy and culture. On the other hand States must realize the tremendous leap forward that the Internet makes towards a global marketplace and a global village and they must relinquish some sovereignty in exchange for the benefits of Internet.[320]

Under maritime conventions, states establish, for example the conditions for the registration of ships within their territory in order to grant nationality and the right to fly their flag.[321] Therefore, ships have the nationality and fly the flag of the country where they are registered.[322] A "[s]tate[] must effectively exercise its jurisdiction and control in administrative,

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[316] *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 181, § 501.
[317] Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Convention on the High Seas].
[318] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [U.N. Convention on the Law of the Seas].
[319] *Cf.* Convention on the High Seas, art. 2, *supra* note 317; U.N. Convention on the Law of the Seas, arts. 88, 89, *supra* note 318.
See also Matthew R. Burnstein*, Note, Conflicts on the Net: Choice of Law in Transnational Cyberspace,* 29 Vand. J. Transnat'l L. 75, 103-04 (1996).
[320] Ramón G. Brenna, *Acuerdos de Partes y los Contratos de Internet, ¿Solución o Problema?*, in APORTES PARA UNA MEJORA EN LA CALIDAD INSTITUCIONAL HACIA UNA FUTURA LEGISLACIÓN EN MATERIA INFORMÁTICA, Secretaría Parlamentaria Hon. Senado de la Nación, Instituto Federal de Estudios Parlamentarios, 480-8 (Buenos Aires, 2004) (Translation provided by the author).
[321] *See* Convention on the High Seas, art. 5, *supra* note 317; Convention on the Law of the Seas, art. 91, *supra* note 318.
[322] *See* i*d.*

technical and social matters over ships flying its flag."[323] In the case of electronic commerce, instead of registering ships, we will register business and consumers engaging in on-line commercial transactions. Therefore, when a regulation, such as a conflict of law rule, points to a connecting point related to a place or physical location (e.g., domicile, residence, place of business) of a party to establish either jurisdiction or applicable law, the functional equivalent will be applied and will replace the connecting point with the place of registration.

The use of flags in maritime law serves as a means of ship identification. With regard to electronic commerce, states would give electronic identifications to registered consumers and businesses. These electronic identifications would provide the contracting parties to an electronic commerce transactions and national administrations with vital information such as nationality, domicile, place of incorporation, and consumer or business status. In the case of physical persons, additional information, such as, age would be added in order to allow businesses to deny the provision of goods or services to persons under a determined age (e.g., adult entertainment industry, cigarettes or alcoholic beverages, mature rated movies or games). In order to protect the privacy of individuals, personal information, such as, name and postal address, could be excluded from the information provided in the electronic identification.[324] However, this exchange of information raises privacy issues. For this reason, the information exchanged by the electronic identifications should be that necessary to the transaction (e.g., only specify jurisdiction, age but not other personal information). The rest of the personal information will

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See also RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 128, at §501.

[323] *See* Convention on the High Seas, art. 5, *supra* note 317.

[324] *See* Council Regulation 45/2001 on the Protection of Individuals with Regard to the Processing of Personal Data by the Community Institutions, art. 1.1, 2001 O.J. (L 008) 3.

remain in the national register database under strict confidentiality and will only be disclosed under certain circumstances (e.g., judicial requirements).[325]

A very important thing to bear in mind is the place of registration. It must be a "genuine link"[326] between the territorial location of the parties and the jurisdiction of the registration. States can register only businesses and consumers that have a genuine link to its jurisdiction (e.g., nationality, domicile or incorporation within the territory).[327] Otherwise, the concept of registration will face the same problems that flags of convenience present to admiralty law,[328] fostering registration in the aforementioned "tax or Internet heavens"[329] with weaker regulations in the area of consumer protection, recognition and enforcement of judgment, gathering of evidence, data protection, and taxation.

The application of the concept of registration as a functional equivalent to the territorial concepts of "place" and "physical location" in the context of non-territorial commercial environments will allow the Registrar State "to exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to"[330] businesses or consumers registered in relation with their commercial activities. Continuing with the ship analogy, when entities registered in different jurisdictions collide, the rules of private international law apply, and if they set as a point of connection a place (like domicile, residence or place of incorporation), the place of registration will be considered.

This fiction created for jurisdiction of the state's flag, generally recognized in admiralty law,[331] is oriented to give certainty to which set of rules apply to activities that constantly cross

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[325] *Id.* at art. 20.
[326] *Cf.* Convention on the High Seas, art. 5, *supra* note 317.
[327] *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 128, at comment §501.
[328] *See* Burnstein, *supra* note 317, at 107-08
[329] *See supra* note 125.
[330] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 128, § 502 (2).
[331] *See Id.* at Reporters' notes 3 § 502.

political borders and generally without notice of the each party location. Moreover, the application of the concept not only will allow business to target their commercial activities to jurisdictions that allow such activities but also will let them avoid being sued in the ones that prohibit such activities.[332]

Additionally, consumers will have more information available about the company with which they are contracting and will be certain of its existence, real location and weighing the risk to contract with a given jurisdiction. Finally, states and their administrations will be able to have more control and information available about the flow of digital goods and services conducted to and from its territories in order to apply export/import controls, taxes, custom duties or protect their citizens from harmful activities. For these reasons, registration of business and consumers within their jurisdiction will be a pre-requisite to engage in on-line commercial activities.

C. A Link Between Law and Technology

The solution to the regulation of electronic commerce is not completely a legal issue. Like the antidote for a snake bite made from the snake's poison, the only way for the international community to be able to deal with this tremendous enterprise is to use the help of the same technology that creates the problem.

The solution should work over the Internet, using the same architecture and technology that makes the Internet so unique with standard languages and protocols. The solution should be standardized, as technology-neutral as possible and accessible to any country regardless of its level of development. From a technological standpoint this is not a great challenge to accomplish.

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[332] E.g., LICRA v. Yahoo!, *supra* note 172; People v. World Interactive Gaming, *supra* note 167.

1. National Registers Databases

Each country should have a national register with a database of consumers and a database of businesses involved in electronic commerce transactions.[333] These registers should be interconnected with other national registers in other to exchange information of transnational transactions.

2. Jurisdictional Network

A network should connect the different national registers in order to exchange information about their databases' registries. The network will need the connection of approximately 192 hosts, which correspond to the number of different jurisdictions of sovereign states in the world.[334] Each national register host will exchange information about its registries at the request of other national register hosts, as well at the request of registered entities or individuals willing to engage in commercial activities with persons registered in that national register.

3. Electronic Identification of the Parties

Electronic identification of the parties should be based on digital signatures relying on public-key cryptography, following the principles of the UNCITRAL Model Law on Electronic Commerce.[335] The electronic identification of consumers (consumer ID) should be supported in mediums that allow its portability by individuals. However, electronic identification of businesses (business ID) should be built in their web sites in such a way that Internet browsers

[333] *Cf.* Spanish Retail Commerce Act, *supra* note 296.
[334] *See* U.S. Department of State, Independent States in the World, Fact Sheet (February 27, 2004) available at http://www.state.gov/s/inr/rls/4250.htm (last visited Apr. 24, 2004) (Recognizing 192 States by the U.S. government and pointing that are 191 members of U.N.).

can automatically read its information and inform the users about its content (e.g., SSL certificates or S-HTTP).[336] The national registers will act as third trusted parties, known as "Certification Authorities," issuing consumer and business IDs following standard processes to allow its international verification by the different national registers.

4. Codification of On-line Activities

Online activities should be codified to allow for classification and treatment in the same way that the Harmonized Commodity Description and Coding System (HS), created under the auspices of the World Customs Organization (WCO),[337] classifies goods for international trade purposes. A standard should be set in order to allow the business sector to classify products and services in their web sites or on-line applications.

5. Electronic Agents

National register databases should be configured with electronic agents to interpret the information exchanged and be able to process different operations such as calculation of tax rates, distribution of the tax revenues among involved states,[338] apply custom duties and reject operations incompatible with their internal regulations (e.g., on-line gambling, export of encryption technologies).

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[335] Model Law on Electronic Signatures, *supra* note 229, art. 3.
[336] An SSL Certificate is an electronic file that uniquely identifies individuals and Web sites and enables encrypted communications. SSL Certificates serve as a kind of digital passport or credential. Typically, the "signer" of a certificate is a "Certificate Authority" (CA). Verisign Inc., Guide to Securing Your Web Site For Business, at 3 (2003), available at http://www.verisign.com/resources/gd/secureBusiness/secureBusiness.pdf (last visited Apr. 24, 2004).
See also supra note 56 (definitions of SSL and S-HTTP).
[337] http://www.wcoomd.org/
[338] *See* Arthur J. Cockfield, *supra* note 271 at 118.

D. A Jurisdictional Framework for Electronic Commerce

1. The Registration Process

National governments should establish a registration process in order to provide electronics identification to consumers and businesses. The procedure would be organized in different ways, but the verification of the identity of consumers and the corroboration of businesses incorporation papers will be a requirement. Governments might delegate the registration process in third parties involved in electronic commerce activities, like the aforementioned necessary players[339] (e.g., ISPs, credit cards and payment companies, or authentication and security providers).

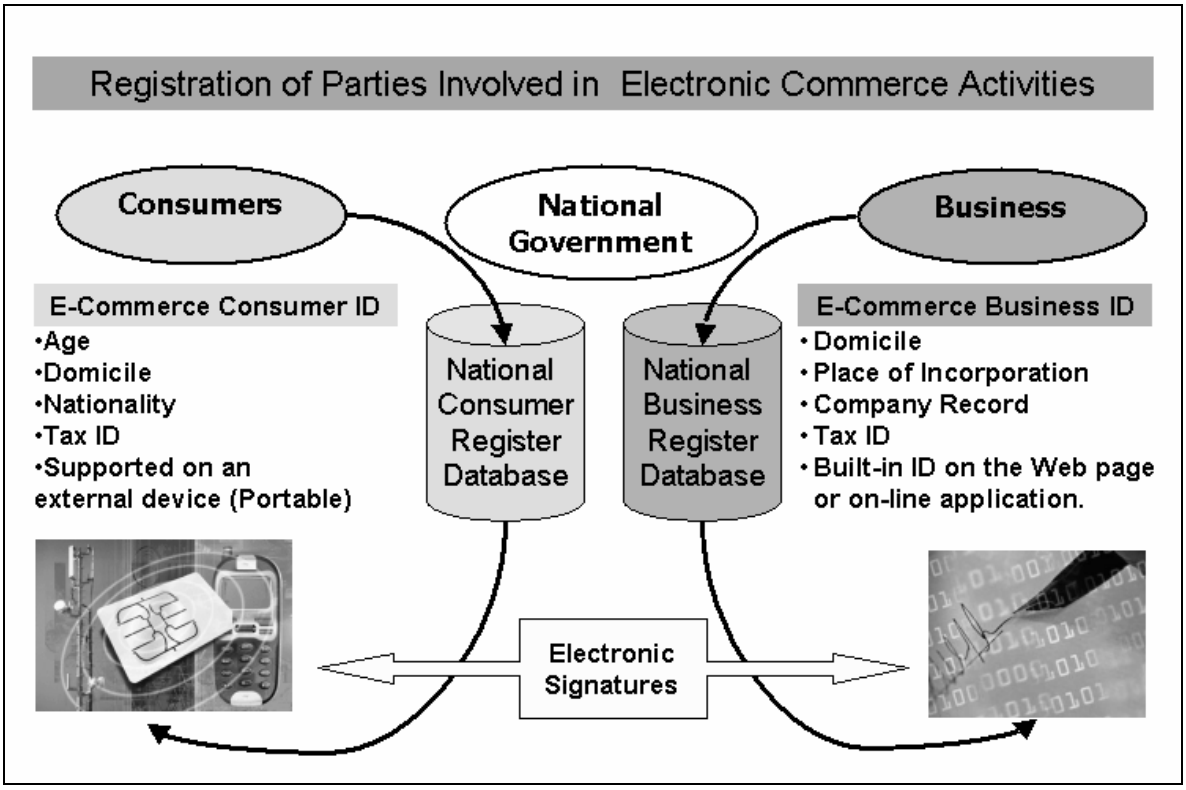
The registration process will start with the registration before the respective National Register of businesses, professionals or individuals, established within the territory of the state, who are engaged in any kind of commercial transactions offered through the use of computer-mediated networks. The businesses will provide: company name, tax identification, domicile and other incorporation information. The register will open a record of the business in its database and generate an electronic identification provided in a format that the business is able to incorporate in its website or other information system (e.g., a digital certificate).[340] Business could not only sell goods or services but also could engage in purchases of good and services, for example in business-to-business relationships.

Consumers or users engaged in business-to-consumer activities should also register before the respective National Register. Consumers will provide information such as name, age, tax identification and domicile. The register will issue the electronic identification with a

[339] *See* discussion *supra* p.21.
[340] *See* Model Law of Electronic Signatures, *supra* note 229, at art. 2 (defining "Certificate" as a data message or other record confirming the link between a signatory and signature creation data).

dissociation of some personal data provided in order to protect consumer privacy. The consumer ID should be supported in an external device to allow identification of consumers on the move, fostering M-commerce activities and avoiding the risk of identity theft from the consumer's computer equipment (e.g., smart cards, memory tags, or chips that can be used in cellular phones, PDAs or public computers). Additionally, in some cases consumers can engage in operations as sellers, like in the case of auctions of used goods (consumer-to-consumer). IDs should be personal and non-transferable. Either business or consumers IDs could expire after a period of time and be renewed, suspended, or revoked by the national register due to misbehavior of the ID holders or responding to safety measures (security jeopardy of the ID). Figure 4 describes the registration phase:

Figure 4: Registration of the Parties Involved in Electronic Commerce Activities.



2. Enforcement of the Registration Process

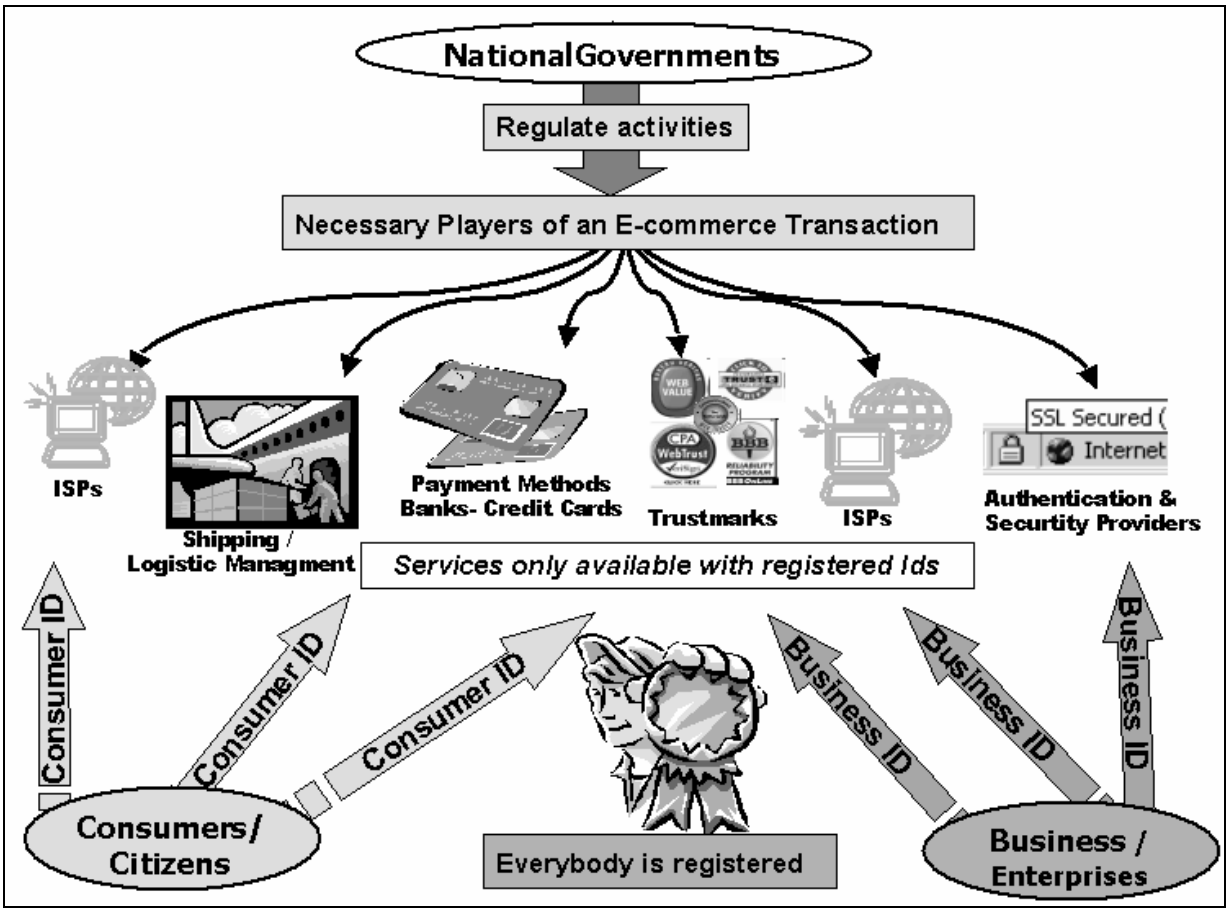
The first question that arises after describing the registration process is whether national governments will enforce the registration process? The answer to this question resides in the state's power to regulate the activities of the new intermediates in electronic commerce transactions. As stated early in this paper, electronic commerce activities need the interaction of different actors even though they are under the regulation of national authorities.[341] For example, ISPs needs the authorization of governmental agencies to operate, as well financial institutions or shipping and logistic companies. If national governments demand that ISPs, financial institutions, shipping and logistic companies, authentication and security providers, quality certifications or advertising companies must render their services only to registered businesses, businesses are going to be forced to comply with the requirement. Otherwise, they will not be able to get hosting, payment systems, courier services or advertisement within the territory, and, therefore, lose market share. Moreover, national governments should demand that registered businesses engage in commercial transactions only with registered costumers.

National governments should demand that financial institutions provide payment methods to consumers (e.g., credit cards) to furnish ways to provide authorization to on-line transactions only with a consumer ID. Additionally, national governments can delegate registration functions to either financial institutions, ISPs or other third trusted parties. They will act as registration authorities for the government because they are able to have a personal contact with individual in order to validate the consumer's identity and other information required for the

[341] See discussion pp. 24-25.

registration process.[342] Following this scheme, everybody will be registered with the national registers. Figure 5 illustrates the enforcement of the registration process.

Figure 5: Enforcement of the Registration Process.

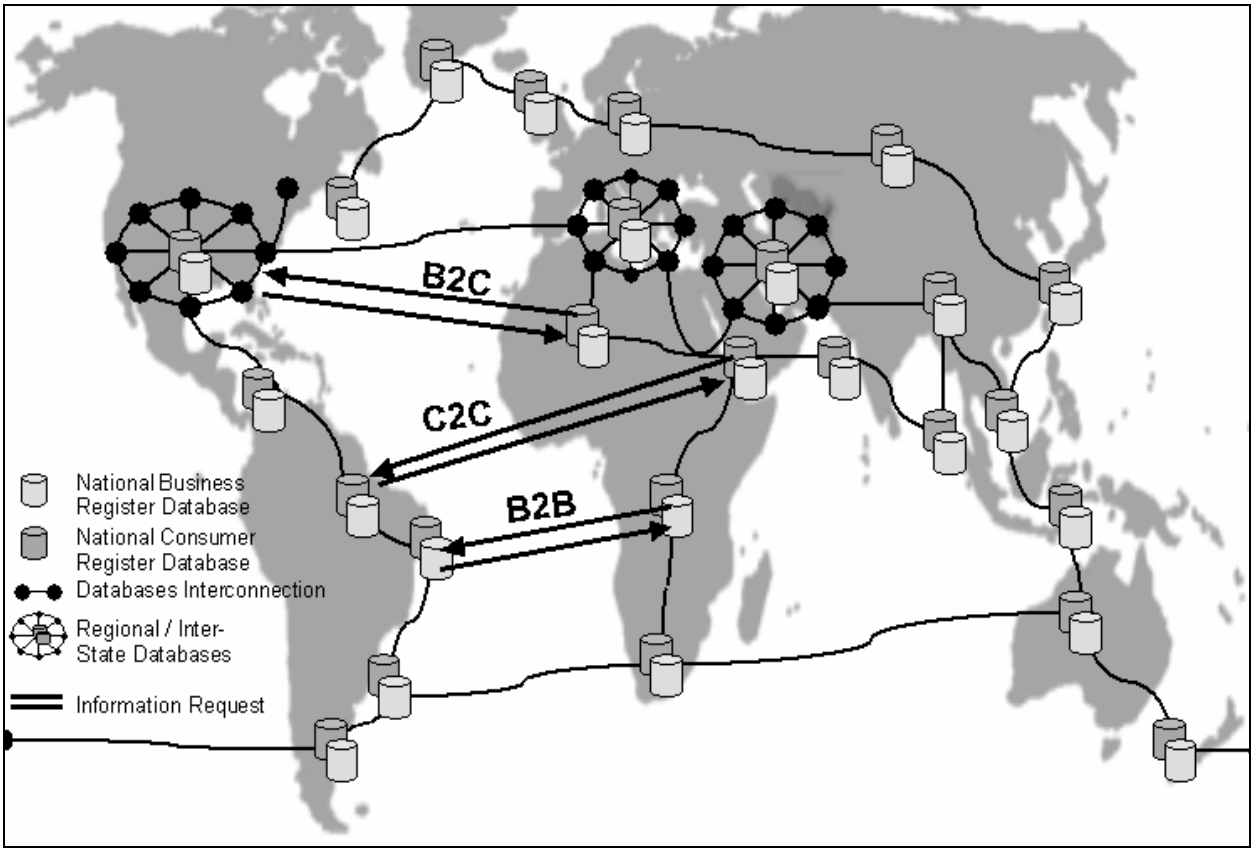


3. Operation of the Jurisdictional Framework

Once each country sets up its national register, the network will be ready to interconnect the different host registers around the world. Business and consumers involved in electronic commerce transactions can proceed with the registration process in their national jurisdictions. Figure 6 illustrates the interconnection of the different national or regional registers around the world and how they would exchange information.

[342] *Cf.* Decree No. 2628, art. 35, Dec. 19, 2002, [30052] B.O. 5 (Arg.) (Regulating registration authorities for the digital signature infrastructure in Argentina).

Figure 6: Interconnection of the Global Jurisdictional Network.



The following example is useful for a better understanding of the operation of the jurisdictional framework. A consumer, located in Argentina is looking for a downloadable computer game. The consumer surfs the Internet and finds the desired product on a website located in United States.

First, the consumer will check the certificate of the seller in a form of a Business ID, built-in to its website web site. An electronic agent in the consumer's browser could perform this process automatically, alerting the consumer if the Business ID has expired, has been suspended or has been revoked. In addition, the certificate will provide the address, place of incorporation, and full name of the company. It might also provide information about consumer protection

legislation and redress systems in the seller's country. After checking the information available, the consumer will then decide whether to proceed with the operation or to find another seller.

Second, when the consumer places an order, for example a computer game with violent scenes rated for persons over eighteen years old, the information system of the business will check jurisdiction and age of the consumer from the consumer's ID. Businesses can program their systems to target operations to certain jurisdictions and deny operations with certain jurisdictions due to trademark conflicts,[343] *odre public* regulations,[344] export restrictions or marketing reasons. After checking the consumer ID information, the business will decide to proceed with the operation or to deny the transaction.

Third, once finished with the exchange of electronic identifications, the business and the consumer will interchange information with their own national register.

Fourth, electronic agents in U.S. and Argentinean national register databases will interchange information about the transaction and will test if the transaction complies with a predefined set of rules regarding to taxation, custom duties, regulation of commercial activities (e.g., forbidden activities like on-line gambling or pornography), import/export controls (e.g., encryption software) or custom offences (e.g., counterfeit products).

Fifth, if the transaction does not pass the test, the national registers will send an alert to the parties banning the transaction. If the test finds no conflict between both jurisdictions, each national register will send a confirmation to each registrant[345] and calculate the amount of taxes

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[343] *See* Playboy Enters. v. Chuckleberry Publ., 939 F. Supp. 1032, 1044 (U.S. Dist. , 1996) (ordering an Italian defendant either to shut down its web site, in conflict with plaintiff trademarks, or prohibit United States users from accessing the site in the future).

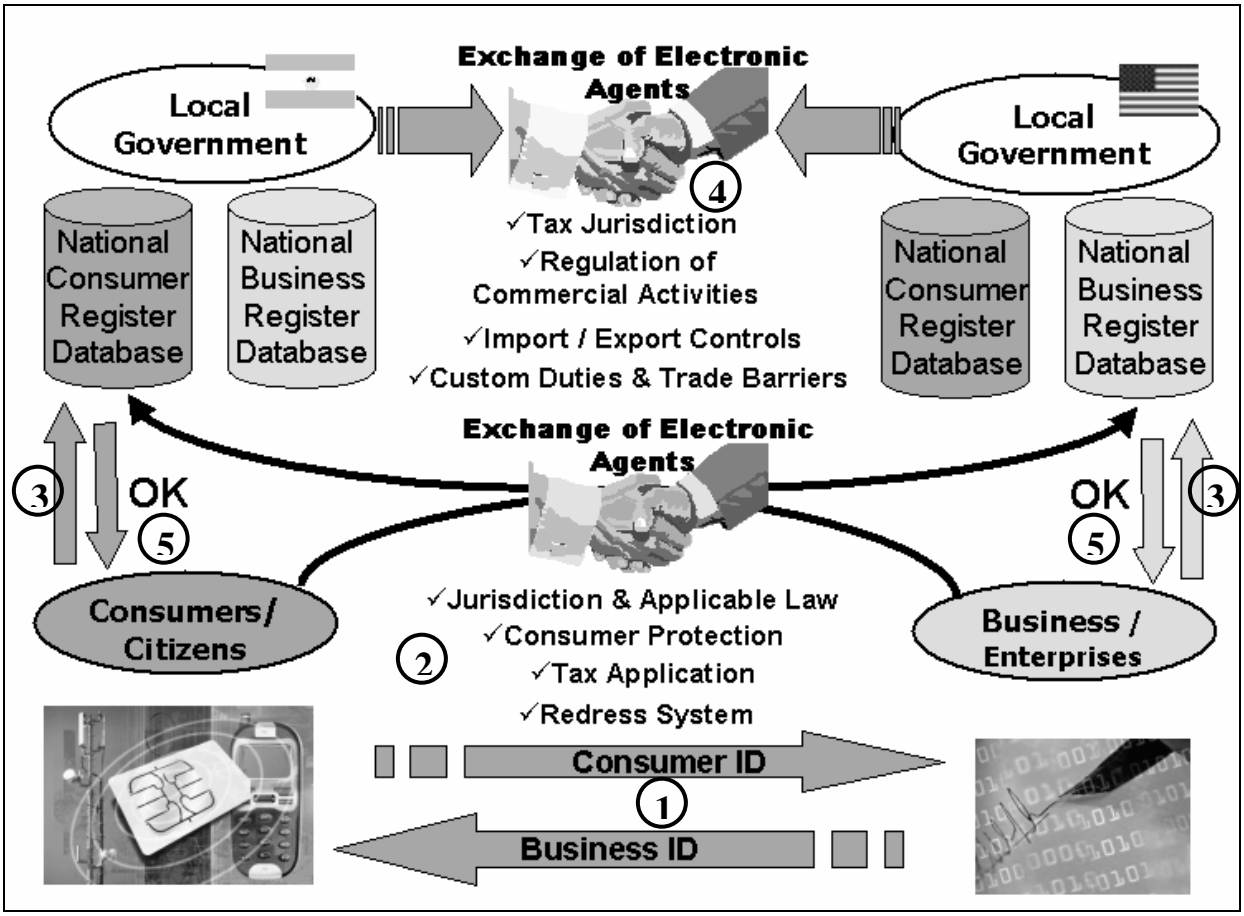
[344] *See* LICRA v. Yahoo!, *supra* note 172.

[345] *See* World Custom Organization, Recommendation of the Customs Co-Operation Council Concerning the Use of the WCO Data Mapping Guide for Customs UN/EDIFACT Messages, TC2-3845 (Jun. 21, 1995), available at http://www.wcoomd.org/ie/En/Recommendations/dmg_rece.htm (Recommending the use of a Data Mapping Guide for Customs in order to exchange EDI messages between Customs administrations and between Customs Administrations and trade users, using the UN/EDIFACT standard)

and custom duties that each party should pay, according to each country's rates and taxing systems.[346]

Finally, the parties will proceed to the payment and downloading phase to finish the operation. Once the operation concludes, a confirmation will be triggered from the business information system to both national registers in order to keep a record of the transaction. Figure 7, illustrates, step by step, all operations of the jurisdictional framework.

Figure 7: Operation of the Jurisdictional Framework.



[346] This feature will help to avoid problems of double taxation.
See also, Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theorical and Comparative Perspective*, 38 Ga. L. Rev. 1, 49-65 (2003) (for additional readings on the subject).

Additionally, an arrangement between governments and financial institutions that handle the payment methods, might allow direct retention taxes and other custom duties on behalf the governments. It might be possible with a combination of electronic agents which will apply tax rates according to the locations of the contracting parties and the amount of the transaction, and electronic funds transfers which will perform the debit and credit operations from the tax payer account to the government account.

E. The Need for an International Multilateral Agreement

The best way to achieve the proposed solution is through multilateral cooperation. The solution should be global and incorporate as many countries as possible in order to avoid the "paradises", which serve as a shelter for illegal and deceptive commercial practices.

Member states of the jurisdictional framework will have powerful tools to restrain commercial activities with non-member states. National registers and the new intermediaries could impose restraints on electronic commerce transactions of consumers and incorporated business (e.g., payment systems will not process transactions within certain jurisdictions). Non-member states will face a decrease in their transactions because consumers of their goods or services who are residents of foreign member states will not be able to contract with non-member jurisdictions. Therefore, their activities will be limited to their internal markets or other non-member states. The national registers could impose the restraints directly, or in a roundabout way through the new intermediaries of electronic commerce transactions. However, it is crucial to determine an agreed characterization of these restraints in order to avoid

restrictions to free trade and therefore, violations to international trade commitments under the WTO agreements.[347]

A multilateral agreement is necessary to establish the legal and technological foundations of the jurisdictional framework and to coordinate this work with other international agreements in order to avoid interference with established principles of international trade.

With respect to the law, the starting point could be the adoption of principles of the UNCITRAL Model Law on Electronic Commerce and Electronic Signatures[348] to provide the technological solution with a solid legal base, allowing the recognition of electronic documents and signatures for commercial purposes. On the technological side, it will be necessary to define technological standards to be implemented by the national governments and the private sector towards the creation and interconnection and exchange of information among the national registers, consumers and business.

It is important to bear in mind that this is going to be a long-term process, and will be possible to advance only gradually in the regulations of other fields.

F. Collaboration of the Private Sector

The present solution is a combination of national and international regulations, self-regulation of the market main actors and technology. The collaboration of the new intermediaries in electronic commerce transactions will be critical for the success of the solution. They will be the key for the enforcement of the registration system.

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[347] *See* discussion on WTO panel decision over on-line gambling services, pp. 62-64.
[348] UNCITRAL Model Law on Electronic Commerce, *supra* note 19; UNCITRAL Model Law on Electronic Signatures, *supra* note 229.

At the beginning, the solutions might looks too burdensome to businesses that have to adapt their web site to comply with the technological standards. Nevertheless, in the long run, they will benefit from the jurisdictional framework because they will be able to target their activities to the desired markets, increase their global commercial activities, decrease the risk of being sued in multiple jurisdictions, prevent fraudulent operations and create a more secure and feasible environment to foster a greater number of electronic commerce transactions.

The collaboration of organizations, which set the technological standards that rule the Internet,[349] will be vital to set out the technological standards of the jurisdictional framework. Additionally, to coordinate work on the Internet, software and technology industries will be need to develop Internet browsers and web site applications with the required capabilities for recognition and exchange of the aforementioned electronic identifications and agents.

G. Definition of the Institutional Framework to Carryout a Multilateral Convention on Electronic Commerce

In order to assure the global coverage of the jurisdictional framework a multilateral convention is necessary. It is very important that the international organization that provides the framework to carryout this convention has the greatest possible number of members. For this reason, United Nations seem to be the most suitable organization, more specifically its commission on international trade law (UNCITRAL). UNCITRAL for the past thirty years has been specializing in commercial law reform worldwide, for the last 10 years has been working on electronic commerce and nowadays is working on the draft of an international convention for

[349] E.g., the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Assigned Numbers Authority (IANA), the Internet Engineering Task Force (IETF), the Internet Law & Policy Forum (ILPF), the International Telecommunication Union (ITU) and the World Wide Web Consortium (W3C).

electronic commerce.[350] Nevertheless, an international organization like WTO is another possible institution to carryout this convention because it not only has 147 members but it also has multilateral system of disputes settlement that in the last 10 years has shown a great performance. Moreover, the Hague Conference on Private International Law is working in the four main areas of law that are decisive to the international regulation of electronic commerce: jurisdiction, applicable law, enforcement and gathering of evidence.

Coordinated work among these institutions along with the collaboration of other international organizations in the legal and commercial area such as the Organization for Economic Co-operation and Development (OECD),[351] International Chamber of Commerce (ICC),[352] World Customs Organization (WCO)[353] and Consumers International is paramount.[354] Additionally as was previously stated[355] the collaboration of the organization involved in the technological aspects will be crucial to the development of a jurisdictional framework for electronic commerce.

[350] See *supra* note 231.
[351] http://www.oecd.org/
[352] http://www.iccwbo.org/
[353] http://www.wcoomd.org/
[354] http://www.consumersinternational.org/
[355] *See supra* note 349.

CHAPTER VII

CONCLUSIONS

The adoption of the jurisdictional framework discussed in this paper will provide a technological structure to make possible the regulation of commercial activities in cyberspace. It will provide *the link* between the non-territorial commercial environments and the territorial-based legal system trying to exercise their sovereign powers over a borderless space. Without the technological framework, the linkage between these two environments is not going to be possible. Nevertheless, technology by itself cannot solve the problem. A multilateral convention is necessary to bring common standards to the various legal systems around the world in order to validate the creation of the jurisdictional framework. This framework will give a solid legal base to the technological solution and establish the concept of registration as the bridge to the two environments and to work as a functional equivalent to traditional concepts of choice of law rules.

There is no doubt that the negotiation of a multilateral convention will be a difficult task. However, the constant growth of electronic commerce and digitalization technologies that allow digitalization of traditional products and, therefore, its commercialization by computer-mediated networks will have a spillover effect in developed country economies. This spillover effect is due to the fact that digital products are not taxable in non-territorial commercial environments.[356] Consequently, an increase in the substitution of traditional products by digital products commercialized over computer-mediated networks will have an inversely proportional impact in

[356] With some exceptions like the European Communities.

tax revenues. This situation will force developed countries to regulate non-territorial commercial environments in the near future.

Additionally, this solution will improve the quality of information on the flow of commerce, allowing businesses to target their operations and national administrations to control the flows of digital goods and services within their borders, in order to exercise its sovereignty over certain activities. Problems like the Yahoo!, Inc.[357] (the French case), or the People v. World Interactive Gaming Corp[358] (the United States case) can more successfully be solved with the use of this proposed jurisdictional network.

A regulated electronic market will also give opportunities to developing countries, allowing them to benefit from the advantages of electronic commerce without compromising their internal markets and promoting the development of an electronic marketplace with equal opportunities of access and growth to all countries.

Finally, this legal framework for electronic commerce will set the ground for a more predictable electronic market, protecting the different players against harmful activities and generating more confidence among consumers and businesses involved in online commercial activities. This solution sounds like utopia, but this utopia is on the horizon.

> *It is in the horizon […].*
> *I get two steps closer, and it moves two steps away.*
> *I walk ten steps and the horizon walks ten steps ahead.*
> *No matter how much I walk, I will never reach it.*
> *For what does Utopia serve? For this it serves: to walk.*
>
> Eduardo Galeano[359]

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[357] *Supra* note 172.
[358] *Supra* note 167.
[359] EDUARDO GALEANO, LAS PALABRAS ANDANTES (1993) (translation from the Spanish version: Ella está en el horizonte […]./ Me acerco dos pasos, ella se aleja dos pasos./ Camino diez pasos y el horizonte se corre diez pasos más allá./ Por mucho que yo camine, nunca la alcanzaré./ ¿Para que sirve la utopía? Para eso sirve: para caminar.).

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