GOVERNING E-COMMERCE

PROSPECTS AND PROBLEMS

SEAMUS SIMPSON
Manchester Metropolitan University, UK

and

RORDEN WILKINSON
University of Manchester, UK; Wellesley College and Brown University, USA

Paper prepared for the 31st Telecommunications Policy Research Conference, 'Communication, Information and Internet Policy', National Centre for Technology and Law, George Mason University School of Law, 19-21 September 2003.

Abstract.

The growth and development of advanced communications networks, most outstandingly the Internet, has facilitated the creation of an expanding international electronic marketplace within which electronic commerce takes place with increasing frequency. The relative newness of this electronic forum has ensured that, until recently, e-commerce has been constrained by few rules, disciplinary procedures and operational norms, and has been characterised by considerable uncertainty about how to develop suitable governance arrangements. This paper considers the as-yet-only-weakly-established but nevertheless, nascent, structure of global e-commerce governance. It begins by establishing the character of the main regulation that has so far emerged. Next, it explores the likely shape of a World Trade Organisation (WTO) centred system of e-commerce regulation. We suggest that WTO regulation of e-commerce will result from a series of modifications to existing rules in key legal agreements administered by the Organisation. These rules reflect a negotiated complex of the economic preferences and imperatives of dominant interests in the leading industrial states and will, in turn, be implemented, operationalised, monitored and enforced by a range of state and non-state actors, though they will also contain those concessions necessary to garner compliance to such a system. Two consequences are likely to result from the regulation of e-commerce in this way: (i) the system of disadvantage already existent in global trade governance will be extended to this electronic forum; and (ii) the regulation of e-commerce in this way will 'lock' less able economic actors into an unequal and disadvantageous system of governance with little prospect of change.

Our argument unfolds as follows. We begin by examining the nature of e-commerce and develop an account of why and how it has been propounded as a vehicle for growth for all economies, not least emerging and least developed states. Thereafter, focusing on the Internet in particular, we explore early efforts at developing a global system of e-commerce regulation and, in so doing, identify the regulatory principles and practices that have been established in a number of what might be described as "auxillary", though vitally important, regulatory organisations and which have tended to become common currency in policy circles. We then turn our attention to the nature of global trade governance and the emerging role of the WTO. In the final section, we offer our concluding comments.

GOVERNING E-COMMERCE

PROSPECTS AND PROBLEMS*

Introduction

The emergence and development of Information and Communications Technologies (ICTs) has been heralded as among the most important phenomena of the late 20th, early 21st century. The industrial and commercial exploitation of these technologies has spawned a series of activities deemed increasingly central to the current and, more importantly, future economic and social welfare of a growing proportion of the world's population. The term electronic commerce (e-commerce) has been coined to describe a range of activities which are occurring with growing frequency across rapidly expanding and increasingly innovative electronic communications networks. Principal among the infrastructures at the forefront of facilitating e-commerce is the internet: a medium that has attracted considerable attention from business, government and civil society quarters at local, regional, national and international levels.

The current and future shape of internet-based e-commerce has been the subject of considerable scrutiny, comment and, arguably, hyperbole. This electronic marketplace is viewed by some as the centrepiece of what has been termed a new information economy (see Castells, 1996), a deterritorialised space relatively uncharted and under-exploited in commercial terms. The relative newness of this electronic forum has ensured that until recently e-commerce has been constrained by few rules, disciplinary procedures and operational norms, and has been characterised by considerable uncertainty about how to develop suitable governance arrangements. In a situation wherein the form and functioning of electronic marketplaces are to some extent "up for grabs", it is unsurprising to find that different interests are attempting to influence its emerging shape. At one extreme, certain economic libertarians have argued that the virgin territory of e-commerce presents an opportunity to ensure that only a minimally necessary level of governance is put in place and that an unfettered, (near) perfect economic environment in which governments would be debarred from intervention to garner tax revenue from electronic business activity is maintained (Morris, 2000). At the other extreme, a range of "social" Internet libertarians have expressed dismay at any attempts to impose order on a once untamed Internet - they are particularly ill-disposed to what they consider the colonisation of the Internet by business interests. In between these uneasy libertarian bedfellows lie a majority of interests - social, commercial and political - who have argued for, and taken steps towards the creation of a set of governance arrangements for the "new economy" and its electronic

* Rorden Wilkinson is grateful for the financial assistance of the British Academy (project reference 122853) in the gathering of material and data used in this paper.

marketplace. This task is a complex one, not least because e-commerce has been viewed as an activity of potential global significance.

In this paper, we consider the as-yet-only-weakly-established but nevertheless nascent structure of global e-commerce governance. We do this in two parts. We begin by examining the nature of regulation that has so far emerged. We then explore the likely shape of a World Trade Organisation (WTO) centred system of e-commerce regulation. We suggest that WTO regulation of e-commerce will result from a series of modifications to existing rules in key legal agreements administered by the Organisation. These rules, reflecting a negotiated complex of the economic preferences and imperatives of dominant interests in the leading industrial states, will in turn be implemented, operationalised, monitored and enforced by a range of state and non-state actors, though they will also contain those concessions necessary to garner compliance to such a system. We suggest that two consequences are likely to result from the regulation of e-commerce in this way: (i) the system of disadvantage already existent in global trade governance will be extended to this electronic forum; and (ii) the regulation of e-commerce in this way will 'lock' less able economic actors into an unequal and disadvantageous system of governance with little prospect of change.

Our argument unfolds as follows. In the next section, we examine the nature of e-commerce and develop an account of why and how it has been propounded as a vehicle for growth for all economies, not least emerging and least developed states. Thereafter, focusing on the Internet in particular, we explore early efforts at developing a global system of e-commerce regulation and, in so doing, identify the regulatory principles and practices that have been developed in a number of what might be described as "auxillary", though vitally important, regulatory organisations and which have tended to become common currency in policy circles. We then turn our attention to the nature of global trade governance and the emerging role of the WTO. In the final section, we offer our concluding comments.

The Promise and Opportunity of Electronic Commerce

In 2000, the members of the OECD agreed on both a broad (focusing on all computer mediated networks) and narrow (focusing on the Internet alone) definition of e-commerce which refers to "the sale or purchase of goods or services, whether between businesses, households, individuals, governments and other public or private organisations … [wherein] goods and services are ordered over those networks, but the payment and ultimate delivery of the good or service may be conducted on or offline" (OECD, 2002: 89). No less than the Secretary-General of the United Nations, Kofi Annan, has stated that:

> E-commerce is one of the most visible examples of the way in which information and communications technologies (ICT) can contribute to economic growth. It helps countries improve trade efficiency and facilitates the integration of developing economies into the global economy ... if the world is serious about ... halving the number of people living in extreme poverty by the year 2015, ICT must figure prominently in the effort. Everyone - governments, civil society, private sector businesses - has a vital stake in fostering digital opportunity and putting ICT at the service of development (Annan, 2002: 1).

However, despite the ambitious projections for the growth of e-commerce (see, for instance, Paris 2003) with their attendant promises of economic welfare enhancement, evidence to date suggests that its development has been relatively modest and that it accounts for only a very small proportion of business conducted throughout the global economy. For example, a recent (rather optimistic) estimate suggests that by 2006, e-commerce will account for 18 per cent of global business-to-business and retail transactions (UNCTAD, 2002: 19); whereas in 2000, Internet retail sales accounted for only 1 per cent of total retail sales in the UK and as little as 0.1 per cent in France. In the US, despite significant growth in Internet retail trade in volume and relative share terms, e-commerce retail sales still only accounted for 1.2 per cent of total sales by the mid-point of 2002 (OECD 2002: 66). E-commerce sales make up less than 2% of Gross Domestic Product even in those countries at its leading edge (Gibbs, Kraemaer and Dedrick., 2003: 6).

Despite the patchy availability of reliable data on e-commerce, a number of trends can be identified. First, the spread of e-commerce activity is particularly uneven. This applies across leading edge industrial states, such as the members of the OECD, across developing economies and, between so called developed and developing states. For example, among OECD members, the number of Internet users who actually purchase using the medium is not only low but varies from, for example, approximately 38 per cent in the US, UK, Denmark and Sweden to only 0.6 per cent in Mexico, though, tellingly, there is considerable scope for expansion here, since in many countries the number of computer owners is well above the number of e-consumers (OECD, 2002: 66). Despite significant growth rates in developing economies' combined share of total world e-commerce, the absolute share is not likely to go beyond 7 per cent, with most of this concentrated in the Asia-Pacific region (UNCTAD 2002: 7).

Second, business to business e-commerce is much better developed than business to consumer e-commerce (estimates claim it accounts for as much as 95 per cent of all e-commerce (see UNCTAD, 2002: 8)), yet most of the focus has been on its business-to-consumer potential, since in OECD

countries on average, expenditure by households accounts for half of total domestic demand (OECD, 2002). For developing economies, it has been suggested that a third type of e-commerce between governments or governmental entities and business, known as "B2G", may be an important way to develop electronic commercial practices (UNCTAD, 2000). Third, business to business e-commerce is more prevalent in the service sectors, such as finance and insurance and wholesale trade than it is in retail sectors. Fourth, it is the case that while electronic communications networks, most outstandingly the Internet, are extensively used for advertising purposes, the related commercial transactions are primarily conducted offline (even in countries where 70 per cent of individuals search for prices online, only 20-40 per cent of them make Internet purchases (OECD, 2002: 46)). Fifth, there are important barriers to the further development of e-commerce. These principally concern infrastructural[1], price[2], security, quality of service and, very importantly, consumer taste or behaviour issues. Finally, to date, evidence suggests that the majority of Internet facilitated commerce occurs intra-nationally (OECD 2002) or at most intra-regionally and while business-to-consumer e-commerce has a significant *potential* to generate international trade revenues, there is little evidence that it is doing so at present. This contrasts with projections that e-commerce could have accounted for between 10 and 25 per cent of world trade by 2003 (UNCTAD, 2000: 7).

Thus, it would appear that what lies behind moves towards the creation of a global system for e-commerce governance is its potential, rather than its immediate benefits. In this respect, there are signs that, despite a generally depressed economic situation in the last two years, e-commerce is expanding though there is a serious question over whether or not this will continue. The very modest overall share of developing economies in e-commerce aside, there are indications of progressive uptake. While in Africa, it is argued that online trade revenue will only account for 0.05 per cent of the world total by 2006 (UNCTAD: 2002: 11), significant growth is forecast in both types of Latin American e-commerce - business-to-business e-commerce may amount to 1.8 per cent of the global value by then (Forrester, 2001). In the Asia-Pacific region there is strong growth and further potential in China, Japan and South Korea in particular, while Hong Kong, Indonesia, Malaysia, Philippines, Singapore, Taiwan, and Thailand are in a weaker position. In the least developed countries of the world, e-commerce is almost non-existent, though there are signs of elementary emergence. Significantly, there is evidence that the WTO's liberalisation agenda is being taken up even in these countries, such as Mozambique, Togo, Tanzania, Uganda and Bangladesh (UNCTAD 2001: 191).

---

[1] i.e. technological - the EU has 53 Internet hosts per 1000 inhabitants, the US 272, Mexico 5, and Turkey 4 (OECD, 2002, 40); the majority of countries ranked 91st and below in wealth terms have less than 1 Internet host per 10,000 inhabitants (UNCTAD 2000: 74))

The view of those who seek to promote the promise of e-commerce is neatly encapsulated by the UN Conference on Trade and Development (UNCTAD) (2001: 75) which argued that "[e]ven though the growth of B2B e-commerce in developing economies is expected to continue to be limited, there is no doubt that enterprises in those countries will in the long-run establish a significant presence in B2B e-markets", an optimism reflected elsewhere (see, for example: Editorial, Telematics and Informatics, 2003). It is expectation such as this, which currently prompts efforts being made in various global regulatory fora, not least the WTO, to address e-commerce. To develop a new e-commerce system, nationally let alone globally, requires a huge investment of capital and human resources and carries significant attendant risks, though the history of recent communications regulatory change suggests that benefits can be accrued from being at the forefront of regulatory policy innovation. In the next section, we examine the main features of the early efforts at developing such a system of global e-commerce regulation before considering the role the WTO is currently playing and will most likely to play in this system in the future.

"Early" models of the Global Regulation of Electronic Commerce

The commercial potential presented by the emergence of computer-mediated communications technologies of various kinds quickly led business interests to act to take advantage of potential costs efficiencies across producer and consumer value chains and new market opportunities through promotion and sales activity. An inevitable consequence of this has been a focus on how such burgeoning economic activity might be nurtured and regulated. Though the regulation of e-commerce is, at most, a partly developed activity at this stage, in the context of the following examination of the WTO's likely treatment of the regulatory issues, it is important to chart briefly the major international bodies whose work on e-commerce regulation has begun to shape and characterise a global regulatory approach to the sector. It is often the case that, in the consideration of new regulatory activity within (international) institutions, not only does path-dependency play a crucial role – that is the evolution of institutional practices and procedures in an incremental fashion in keeping with existing ways of operating – but indications of what is perceived to be "best practice" are drawn from elsewhere, and often (at least) partially incorporated into new regulatory models.

The international regulation of e-commerce has been dominated by the consideration of regulatory models for the Internet, since its popular emergence and growing commercialisation from the mid-1990s onwards. However, as noted earlier, e-commerce is not simply Internet commerce and also includes any form of computer mediated commercial exchange, notably Electronic Data Interchange

---

[2] developing country consumers pay on average three times more for communications than do OECD consumers, exacerbated by the fact that telecommunications costs make up a much greater part of a developing economy consumer's disposable income regardless of any pricing differential (UNCTAD 2000: 75),

(EDI). An early attempt at creating international regulation of EDI was the voluntary Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID) agreement in 1987 concluded by the International Chamber of Commerce in collaboration with organisations such as the United Nations Conference on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Europe (ECE), the OECD, the International Organisation for Standardisation (IOS), the World Customs Organisation (WCO), the European Commission, the Organisation for Data Exchange by Tele-Transmission in Europe (ODETTE) and the European Insurance Committee (EIC). This agreement precipitated a number of model interchange agreements in various national contexts, such as the UK, Australia, Canada, the US and Norway. At regional level, the European Commission adopted the European model EDI Agreement (1994) and the Model Interchange Agreement for the International Commercial Use of EDI was concluded by ECE (1995). The basic aim of these agreements was to prepare and smooth the conditions for the development of this form of e-commerce through promoting secure and predictable environments for participants. Other developmental and promotional projects have occurred since in fora such as the EU (notably the Trade Electronic Data Interchange System (TEDIS) programme) and the International Chamber of Commerce (the Electronic Commerce Project (ECP)) (UNCTAD, 1998: 10-11 and 27-28). An important development occurred in 1996, with the passage of UNCITRAL's Model Law on E-commerce which sets out rules for states to follow in their efforts to get rid of legal obstacles and uncertainties to electronic commerce trade. The Model Law covers areas such as the formation and validity of electronic contracts and the recognition, attribution and acknowledgement of receipt of data messages. An important characteristic is its status as a framework law, requiring additional regulation in adopting states, thus giving scope for differential practices within global regulatory systems.

This activity notwithstanding, it has been the well documented emergence of the Internet (Slevin 2000; Winston, 1998) which has brought the potential of e-commerce to the forefront of international regulatory thinking and debate. The Internet, as a "network of networks" heralded the progressive ability to connect computer users across the world in an increasingly fast, sophisticated, efficient, affordable and user-friendly way. It also possessed many of the essential characteristics of a market in that searching, marketing, transacting, payment and delivery could all be facilitated for certain types of goods and services and could at least be partly facilitated for all of them. The Internet presented a significantly broader commercial shop window and trading place from the more "closed" electronic business environments of EDI and other business-to-business e-commerce methods, which largely employed the traditional telecommunications network through the use of increasingly affordable

leased lines. In particular, the potential for global business-to-consumer e-commerce (as well a more open electronic business-to-business market) became apparent.

To many, the emergence of e-commerce via the Internet, with its global reach possibilities, was potentially the ultimate electronic variant of the internationalisation of capitalist production. It was also the case that the Internet and increasingly efficient, affordable and global telecommunications networks provided an additional spur for these developments in the manufacturing and more importantly, the service economy. Thus, e-commerce developments have been increasingly intertwined with the ideology, practices and values of late 20th century transnational capitalism.

As with early efforts made to regulate emerging non-Internet based e-commerce forms, such as EDI, it is of no surprise that a series of initiatives have been launched to develop international regulatory structures, rules and norms of behaviour for the commercial aspects of the Internet. The picture thus far is incomplete, though a number of important characteristic features are discernible in the emerging system of global e-commerce regulation. A range of important global level organisations (see Cogburn, 2003) have either turned their attention to e-commerce issues (organisations here include the OECD, the World Intellectual Property Organisation (WIPO), the UN, the International Chamber of Commerce (ICC), the International Telecommunications Union (ITU) and the Global Business Dialogue) or have been specifically created to deal with regulation of key aspects of the Internet and e-commerce (most notably, the Internet Corporation for Assigned Names and Numbers (ICANN) and the G8 Dot.com Taskforce).

Moreover, moves have occurred to set out aspects of the content of future e-commerce regulation. The US-EU 'Safe Harbour' Agreement[3] is one such instance. The Safe Harbour Agreement results from US and EU efforts to put into place legislation governing data protection in the context of e-commerce. Typically, it witnessed a clash between European approaches to regulation through the implementation of 'hard' legislation and US preferences for a system of self-regulation among users (see Farrell, 2003: 285-296). The result reflected a negotiated settlement between the two powers that pandered to their central concerns. But it was not a straight forward compromise; rather, the result was an 'interface' agreement providing 'European states with reasonable assurance that the private information of their citizens is not abused when it is exported by member firms' while not directly requiring 'the US to change how it regulates e-commerce and privacy' (Farrell, 2003: 297).

[3] The Safe Harbour Agreement bridges the difference between EU and US legislation by providing US organisations with a means of comply with the European Commission's Directive on Data Protection. The Directive prohibits the transfer of personal data to non-European Union nations that do not meet the European "adequacy" standards for privacy protection (pre-Safe Harbour, US legislation did not meet these standards). This it achieves by requesting US Organisations sign up to the Safe Harbour Agreement thereby 'certifying' 'adequate' privacy protection as defined by the Directive. Seven principles form the

Interface aside, Safe Harbour nevertheless imbues this aspect of the emerging system of e-commerce regulation with EU and US characteristics (what we term below 'first mover preferences'), thereby giving them an advantage from the outset.

As ICT-based trade has become more important, it has been suggested that "market consolidation has become a key objective of the dominant players, and every perceived barrier - from piracy to protectionism, have become matters of concern at multilateral trade negotiations" (Thomas, 1999: 220). One of the most influential private business interest groupings is the Global Electronic Business Dialogue (GBDe), an originally 24-strong group of powerful companies from around the world, formed in 1998, with the goal of prioritising the interests of business, through involving itself in negotiations with international organisations working on global regulatory frameworks for e-commerce. It is to be expected that this powerful grouping will be able to exercise some degree of private authority in the process (Franda, 2001) and may even, we argue, act as an agenda setter in this context.

Two of the most high profile international organisations to have considered e-commerce regulation to date are WIPO and ICANN. The long established WIPO has aimed to put in place international arrangements for the protection of intellectual property rights in general and has recently turned its attention to such issues as they might affect e-commerce, where it has played a key role in the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), administered by the WTO. It has stressed, through highlighting potential economic opportunities, which can either be grasped or missed, the importance to developing countries of eradicating the potential for copyright infringements within their borders. One result of this activity is that, through the inter-related activity of WIPO and the WTO, developing economies who "would ideally have preferred a stake in the international information market before acceding to IP rules…have been forced to do so" (Thomas, 1999: 220). WIPO has thus played a significant role in establishing the inherent character of the system of international e-commerce regulation. By contrast, ICANN, established through a US government lead international policy initiative of the late 1990s, has emerged as a new global level organisation whose goal is, broadly speaking, to develop a system of regulation for identificatory names and numbers for users of the Internet. This is a vital and controversial task in commercial terms since possessing a particular domain name is viewed as an important way of establishing a commercial presence and thus the ability to build successful business activities on the Internet. As shown below, though relatively new, like WIPO, it has also made an important contribution (as a

---

core of the Agreement: notice, choice, onward transfer (to third parties), access, security, data integrity, and enforcement. See www.export.gov/safeharbor/

result of its characteristic features as much as its performance) to the establishment of the nature of global e-commerce regulation.

The main activities of the international organisations in e-commerce regulation to date, allow us to discern seven established features of the emerging system. First, and most obviously, it is underpinned by ideological faith in, and the practical pursuit of, a global liberalisation agenda for e-commerce markets. The policy rhetoric from the above organisations has promulgated the logic of open, competitive markets as the most efficacious way of ensuring that economic welfare benefits from e-commerce are delivered to developing and developed states alike - any alternative view is glaringly conspicuous by its absence. Secondly, rhetoric and policy action in organisations such as WIPO and ICANN, in particular, have been aimed at the extension of protection of property rights to the global electronic marketplace. This has resulted in better protection for companies of their "informational capital" (May, 2002: 328) and whilst still not a risk-free scenario, has served make electronic commerce more attractive to those in a position to operate internationally. Third, the idea of foreign direct investment as the only way to deliver the necessary level of resources allowing developing economies to take advantage of e-commerce has been put forward. It has, no doubt accurately, been argued that combined efforts of developing economy governments and their private sectors will be insufficient for the task at hand. The implications of this investment for a typical developing economy's stake in any future "new economy" have, however, been far from adequately addressed.

Fourth, there has been a successful push by national governments from leading edge industrial states in particular (though not exclusively) as well as the private sector to ensure that any developing system of global e-commerce regulation studiously eschews the imposition of customs duties on electronic transactions. It has been argued that the revenue benefits from doing so would be at best negligible and at worst might well serve as a deterrent to future investments. However, unlike the U.S., the EU has established three principles to inform e-commerce taxation: extension of the existing Value Added Tax system; the classification of electronic transactions as traded services and finally that e-commerce services should be taxed at the point of consumption (European Commission, 2000). This required an amendment to existing EU arrangements for the imposition of indirect taxes which operated on the principle that services would be subject to taxation at the point of origination. As a consequence, the EU argued that European companies were being placed at a disadvantage vis a vis their competitors, in particular those from the US, whose government did not impose indirect taxation on e-commerce. The move provides a clear example not only of attempts to garner revenue from e-commerce activity but also to promote the interests of EU companies in the global electronic marketplace (Halpin and Simpson, 2001: 289). It is also an issue which is likely to be pivotal in

determining whether or not developing economies can gain any significant welfare enhancements from the development of e-commerce.

Emergent differences between different trading blocs on the e-commerce issue is likely to be based on the characteristic approaches of their countries and regions to the development of the Information Society in general. Venturelli (2002) has discerned distinct differences of approach between the US, the EU and East Asia, for example, and has noted contradictions within certain of them. In the future development of a global system for e-commerce regulation, further evidence of these differences is likely to be reflected in regulatory negotiations which occur in key global level fora. Sixth, the emerging system of e-commerce regulation has been underpinned by the promotion of industrial self-regulation where market players determine and monitor the implementation of standards of commercial behaviour as well as settle disagreements between each other without recourse to either external regulatory intervention or the legal system. The most high profile example of this is the ICANN organisation, a unique experiment in self-regulation (Kleinwachter, 2001) which has adopted a Uniform Disputes Resolution Procedure for Internet trademark and domain name disagreements. Werle (2002: 151) argues that ICANN "was set up perfectly in line with the United States' government initiative to exclude international organisations such as the ITU [the International Telecommunications Union] from governing the Internet and leave it to private sector self-regulation". The process leading to its inception yet again reflected differences of approach within the US and the EU, where the former pressed hard for the creation of a private self-regulatory structure, whereas the latter argued for a public -private dual regulatory system in which states would play a clear role (Leib, 2002: 160). Finally, the actions of these organisations clearly illustrates a series of policy measures to promote and ease the development of a system of global e-commerce. Government and industry initiatives on issues such as digital signatures, data protection and security serve to develop an environment within which the mechanics of the electronic marketplace develop and thrive.

Thus, though early in the history of global e-commerce regulation, evidence exists of a complementary set of institutional principles and practices being pursued in a loosely connected series of organisations, but which nevertheless pander to dominant interests in leading edge industrial states. That said, though political agreement over the principles and practices of a system of e-commerce regulation is beginning to emerge, this agreement remains the preserve of those advanced industrial states with burgeoning ICT sectors. Moreover, the jurisdiction of these early efforts is limited to the geo-political boundaries of those states. It is reasonable to suppose, then, that a global system of e-commerce regulation is necessary to ensure its expansion. The WTO is the body best equipped to extend the reaches of e-commerce. However, WTO involvement poses significant problems for the

realisation of any welfare enhancement resulting from the extension of e-commerce, particularly for developing countries. It is to these problems and the WTO's potential role in the regulation of e-commerce that we now turn. We begin by exploring the general nature of international trade regulation focusing on the asymmetries that exist therein before moving on to an examination of tentative WTO movements into e-commerce.

E-Commerce and the World Trade Organisation

In order to fully comprehend the potential pitfalls of WTO involvement in e-commerce governance, an understanding of the general nature and, in extension, regulatory biases of the Organisation's existing system of international trade regulation is first required. The WTO's body of rules result from the development of a legal framework centred upon a commitment to three principles first encapsulated in the General Agreement on Tariffs and Trade (GATT – established 1947).[4] The GATT was itself the result of US and UK efforts to move beyond the protectionism and economic isolationism of the inter-war years by putting into place a mechanism for liberalising world trade. Though its rise to prominence resulted from the still-birth of a much grander project – the International Trade Organisation (ITO) (Wilkinson, 2000: 12-30) – the GATT nevertheless institutionalised a system of commercial regulation that put into place the boundaries of international trade regulation.

From the outset, the GATT evolved as an industrial nations club. It was negotiated in a period wherein few colonial territories had achieved formal political independence (let alone developed a capacity to meaningfully participate in trade negotiations) and, as a result, were not represented at its negotiation. As a consequence, the GATT was better suited to regulating and liberalising trade between the industrial economies of its 23 original contracting parties than the primary producing economies of their developing counterparts.

One consequence of the particular system of regulation put into place by the GATT was to build in what Robert Keohane has described as 'first mover advantages' (Keohane, 2002: 253). These first mover advantages enabled the GATT's architects to set in motion of system of liberalisation that sought the active removal of barriers to trade in manufactured, semi-manufactured and (later) high technology goods, but which excluded agriculture, and textiles and clothing. The removal of

[4] These principles are: most-favoured nation (the extension of the preferential commercial treatment given to one party among all third parties) and its corollary national treatment; reciprocity as the basis of negotiation (the commitment to respond to any preferential treatment received in a like manner); and dispute settlement (an agreement to abide by the workings of a commonly accepted dispute settlement mechanism) – (see Wilkinson, 2000: 31-52).

agriculture, and textiles and clothing from the GATT's purview had at least two consequences: (i) it withheld the 'benefits' of open markets from producers of these goods (mainly in newly-independent developing states) and, in doing so, protected increasing inefficient, but politically important US and European producers; and (ii) it built into the GATT a prime negotiating chip, the offer to extend liberalisation to these sectors in return for concessions, to be utilised by the developed states to maintain their advantage at some future point. Successive rounds of GATT negotiations merely built upon the first mover economic preferences of the *General Agreement's* architects; little effort was made to address the economic needs (particularly in agriculture, and textile and clothing production) of developing states.

Once these foundations were established the GATT evolved in a largely incremental, path dependent manner – that is to say, fundamental changes to the GATT's body of rules were eschewed in favour of the development of a system of trade regulation based upon modification and adjustment at the margins. Despite repeated calls to the contrary and significant increases in the number of signatories to the *General Agreement* resulting from mass rounds of decolonisation, this asymmetry in GATT rules was not addressed. Agriculture and textiles and clothing remained outside of the GATT while liberalisation in other areas continued to take place.

By the early 1980s, however, the GATT's asymmetries, coupled with a growth in non-tariff barriers (designed to offset concessions given elsewhere) among other things, nurtured a consensus around the need for a new round of trade negotiations. The result was the launch of a qualitatively different round of negotiations – the Uruguay Round (1986-1994) out of which emerged the WTO. Unlike previous rounds, a backlog of political tension between developed and developing states ensured that the Uruguay Round directed some attention towards addressing the imbalances in GATT rules as well as, more generally, extending the liberalisation agenda. Uruguay did not, however, prove to be the panacea many had hoped.

The result of the Uruguay Round was significant for a number of reasons. First, developing countries succeeded in negotiating agreements on agriculture, and textiles and clothing finally bringing them under GATT rules; but second, the negotiation of these agreements was achieved only in exchange for developing country consent to agreements on services (under the General Agreement on Trade in Services – GATS), intellectual property (under the Agreement on Trade Related Intellectual Property Rights – TRIPs) and investment measures (under the Agreement on Trade Related Investment Measures – TRIMs). Third, unlike the previous GATT system of selectivity wherein additional agreements could be signed up to on an *a la carte* basis (as was the case with four 'plurilateral' agreements) these new agreements were to apply to all members on the basis of a 'single undertaking'.

Yet fourth, rather than rectify the imbalance in GATT rules, the single undertaking merely contributed to its perpetuation and extension. The Agreements on Agriculture, and Textiles and Clothing simply removed the artificial constraint placed on the GATT's remit enabling developing countries to finally enjoy relatively less encumbered market access to US and European markets (though this has yet to fully materialise). The GATS, TRIPs and TRIMs, however, extended the liberalisation agenda to those areas of emerging significance to the advanced industrial countries imbuing these states with additional first mover advantages. Moreover, requiring that these agreements form the basis of a 'single undertaking' served to lock in, at the creation of the WTO, this asymmetry, confining developing states to the long-term production of low value, low technology goods and foodstuffs (and in doing so stifling export diversification) while enabling their industrial counterparts to benefit from the burgeoning new economy.

The notion of a single undertaking is central to thinking about the likely shape of a WTO administered system of e-commerce regulation. The members of the WTO are currently engaged in a new round of trade negotiations (launched at the WTO's fourth ministerial meeting in Doha in November 2001) – the first since Uruguay. It is within the context of the new round that the regulative strictures of e-commerce are likely to be discussed. These negotiations – variously the 'Doha Agenda' and the 'Development Round' – resulted from a perceived need (held principally by the US and EU) for a further extension of the trade agenda and a need to find a solution to the entrenched frustration among developing countries at the persistent inequalities arising from WTO rules and their implementation. The problem, however, is that should the negotiations move beyond their current deadlock and be concluded in accordance with the Doha Declaration (setting out the substance of the negotiations), they will lock developing countries into a further and more acutely asymmetrical system of trade regulation. The reason for this is relatively straight forward. The 'development' dimension of the current negotiations focuses on revisiting the Uruguay Round Agreements, dealing with issues of implementation arising therefrom, and moving forward with the 'built-in' negotiations on agriculture and services. The only value-added dimension in this section of the negotiations is a commitment to take greater account of the economic problems encountered by developing states. The 'developed' side of the bargain is, however, altogether more value-added. Should the negotiations successfully move beyond the mid-term review at the WTO's fifth ministerial meeting in Cancun (10-14 September 2003), negotiations will commence on WTO agreements on investment, competition policy and government procurement. More importantly for us, the successful conclusion of the Cancun meeting could see the Organisation's membership begin to discuss the modalities of regulating e-commerce. Should this prove not to be the case, the likely alternatives are (i) to persist with the current status quo of 'not imposing customs duties on electronic transmissions' (WTO, 2001a: paragraph 34); or (ii) to accept the widespread imposition of barriers to

e-commerce by national governments. We believe the latter to be unlikely. Given the potential of e-commerce, we posit that WTO involvement in the regulation of e-commence is likely to occur in the short to medium-term.

What we have so far, then, is an appreciation that an extension of the WTO's remit into e-commerce would reinforce existing asymmetries in international trade regulation. Leading industrial states would benefit not only from crafting the new regulations (and thus additional first mover preferences) but also from the ability to take advantage of such regulation (something few developing states could do), while developing states would be precluded, structurally and institutionally, therefrom. That said, ground work has already begun and the parameters of a WTO-centred regime of e-commerce regulation are beginning to be put into place. Is it to these emerging foundations that we now turn.

Like most global organisations, the WTO has only recently, and until now very cautiously, involved itself in e-commerce as a policy area. Its 1998 Work Programme in E-Commerce tackled electronic trade from the angles of goods, services, intellectual property and development (WTO, 1998), wherein immediate overlap with the work of other global level organisations on the matter can be witnessed. The most outstanding policy trait on the e-commerce issue to date is what might be described as a "softly-softly" approach which has taken great pains to ensure that no new impediments to electronic trade are put in place (Simpson, forthcoming). Tellingly, the WTO has argued that e-commerce transactions are likely to be absorbed within the remits of existing agreements, with particular emphasis having been placed on the GATS which, it has been argued, covers the majority of Internet transactions (WTO, 2001b).

However, it seems clear that global e-commerce issues may also in the future be relevant to, trade in goods (particularly for developing economies) and thus addressable in the context of GATT; intellectual property (and thus falling under the remit of the TRIPs agreement); and foreign direct investment (thereby having relevance to the TRIMs and any potential WTO agreement on investment – the latter is also currently up for discussion). Furthermore, it may well be the case that, in the context of GATS, the Organisation and its members will need to - rather than merely absorbing e-commerce services into the provisions of the Telecommunications Services Annex, for example - be much more proactive in terms of dealing with new e-commerce related services issues. The preoccupation of the WTO with e-commerce as a services issue is indicative of how the embedded power asymmetries of the Organisation appear to be influencing the likely future treatment of the topic, to the disadvantage of developing states. According to UNCTAD (2000: 10), for developing economies, "e-commerce is not a services issue" since their exports will be focused on semi-manufactured and manufactured goods. In the short to medium-term, they will most likely be able to

use electronic techniques to develop *trade supporting* services, through the generation of lower transaction costs. A particular operational problem emerges here, in that the WTO treats service liberalisation issues in the context of the GATS, while trade facilitation issues are dealt with under GATT (UNCTAD, 2000).

In any event, no matter how narrow (service issues alone) or broad (working under the other treaties mentioned above) focused the WTO's treatment of e-commerce may become, its current stance would seem to suggest that the present and future pattern of policymaking will be significantly influenced by the path-determined principles of what has gone before. Thus, for developing states in particular, the much vaunted possibilities of e-commerce as an engine of growth are unlikely to evolve within the context of agreements which are already the product of leading edge state first preferences and consequent power asymmetries. Thus, a potential catalyst for change - if we are to give at least some credence to ICT policy optimists - is likely to be thwarted by (albeit relatively young) institutional embeddedness.

The WTO recommendation that there should be a moratorium on customs duties on e-commerce transmissions (i.e. digital and digitisable goods) has been supported by an UNCTAD study which suggests that, while the impact would be greater on developing economies (since their share of tariff revenue in total trade revenue is proportionately higher than developed countries) losses would still be negligible. Moreover, it reflects the de fault position of the US government (first articulated in the Clinton Administration's 'Framework for Global Electronic Commerce' – see Farrell, 2003: 288-9) prior to the negotiated settlement of the Safe Harbour Arrangement. However, the issue of taxation of e-commerce is potentially much more serious, particularly regarding services, and considerable revenue losses to all governments may accrue (see Paris, 2003). That said, the provision of technical solutions to allow the taxation of e-commerce services misses the key point that many developing economy governments are, for political reasons, unable to collect tax revenue per se within their territories. It has been noted that thus far "the voice of developing countries is still missing or only partially heard in this debate" (UNCTAD, 2000: 34)

In the WTO's early deliberations, it was determined that e-commerce at present does not require separate (new) rules established for its treatment since existing measures could meet minimum regulatory requirements. In particular, a consensus emerged that the GATS and TRIPs were written in sufficiently technologically neutral language to encompass e-commerce issues; and both agreements conform to the wider model of WTO agreements wherein transnational commercial activity is regulated in accordance with the principles of most-favoured-nation, national-treatment, and reciprocity as the basis of negotiation accompanied by a commitment to dispute-settlement

(Wilkinson, 2000: 43-52). The main issue regarding TRIPS (since WIPO deals with most intellectual property issues) has been how to secure its embedded principles in the e-commerce environment since a large proportion of e-commerce products have high intellectual property contents. The most protracted issues have concerned GATS, since a lot of services (e.g. telecommunications infrastructure and other new services[5]) are relevant here. While early work made little progress on these areas, the principle that the consideration of e-commerce in GATS "should not compromise the level of existing commitments by nullifying the level of commitment extended in different sectors" (UNCTAD 2000: 124) was enunciated. Clearly, the path-dependency generated through early GATS negotiations played a significant role here.

A number of specific e-commerce issues may require treatment within the context of the GATS, though the caution thus far evident in the WTO is the result of a lack of knowledge and experience of the subject. Nonetheless, it seems clear that the much vaunted neoliberal approach will be further promulgated and implemented as necessary within global structures such as the WTO and that any changes to the Organisation will be merely topic specific augmentations within its by now well-defined structure and power relations. It has been suggested that e-commerce might become part of member governments' schedule of commitments in future negotiation rounds while contested issues in trade in e-services might be dealt with in the WTO's Dispute Settlement Body. Other issues, such as security standards and mutual recognition agreements might be negotiated on an optional basis (UNCTAD 2000: 125). E-commerce forms arguably relate to Internet and telecommunications services and market access and national treatment could be defined in the WTO's schedules concerning these services. It has also been suggested that liberalisation of e-commerce related trade might affect issues such as commercial presence and the presence of natural persons engaged in e-commerce related trade. There are also the issues of the movement of experts bi-directionally between developing (investment related movement) and developed (increased demand for e-commerce services and personnel) economies for e-commerce purposes (UNCTAD 2000: 126).

Conclusion

E-commerce, despite the realities of events such as the Dot Com shakeout, is at present an important, and may become in the future a vital, part of the global economy. As shown, the creation of a system of international governance around its development in a number of organisations, though poorly developed as yet, does exhibit a number of important features. As a global trade phenomenon, e-commerce regulation is increasingly likely to be conducted within a system whose epicentre will be the WTO.

---

[5] New services include web-hosting, authentication, data push services, distribution services, internet access services; specific tele-services e.g. telemedicine etc.

Our analysis points to three likely and worrisome features of this emerging system. Firstly, there are currently clear inequalities in the global distribution, provision, and utilisation of e-commerce. Secondly, the regulatory principles already devised for, and within, international organisations dealing with e-commerce prioritise the interests and requirements of developed states and multinational capital. Thirdly, in the context of the WTO, the historical institutionalisation of a bias in global trade regulation against developing states has created inherent structural disadvantages which are in danger of being replicated in its treatment of e-commerce. Whilst there have been clear differences of opinion between the US and the EU in areas such as data privacy, taxation and certain aspects of ICANN's functions, were similar conflicts to emerge in the WTO in future consideration of electronic commerce - as they have done previously in related areas such as telecommunications trade - they may amount to "little more than a complex mating dance" (Calabreze and Redal 1995: 54) leading to the establishment of a system top-heavy with the strategic economic and commercial interests of leading edge indistrial states.

Whilst recent research has found that developing economies may be able to nurture capacity in B2C e-commerce activities, due to national consumer taste preferences (Gibbs, Kraemer and Dedrick, 2003: 16) before they are going to be able to take part in any significant scale e-commerce activities they will need access to infrastructure and content, whose development will require huge investment, well beyond the current resource scope of their domestic public and private sectors combined. The only alternative, therefore, is to allow foreign direct investment to finance any such undertaking. In other words, the potential of e-commerce, which is being heavily sold to developing economies (and as we have shown is not yet backed up by reality), could well be viewed as another lever to open up new investment opportunities to leading edge state ICT (and other, finance etc..) multinationals who consider it worth investing in the territory concerned. Whether they actually invest is not really the issue currently – it is, rather, that the conditions are presently being created to give them the choice to pick and choose where they might do so in the future. In the absence of multinational investment, developing countries are dependent, to varying degrees, on the inflow of technical assistance. However, much of the technical assistance they receive focuses on existing industries and related developments. High end, high technology knowledge transfer rarely forms part of assistance packages. In a recent article, Biukovic (2002: 145) has argued that the development of e-commerce regulation bears comparison with other international trade law development since there are indications that it is being informed by and will draw on business practices and norms ensconced in new *lex mercatoria.* However, whilst this is likely to manifest itself within the WTO, a much broader, more inclusive, set of rules and practices will also need to be developed, if the promises of e-

commerce are to be delivered to consumers and citizens worldwide, though as we have argued, this is unlikely to occur.

Bibliography

Annan, Kofi (2002) Foreword to the E-Commerce and Development Report 2002. New York and Geneva: United Nations.

Biukovic, Ljiljana (2002) "Unification of Cyber-Jurisdiction Rules: Just How Close are the EU and the US?" *Telematics and Informatics,* 19, 139-157.

Calabreze, Andrew and Wendy Redal (1995) "Is There a U.S. Foreign Policy in Telecommunications ? Transatlantic Trade Policy as a Case Study". *Telematics and Informatics*, 12(1) 35-65.

Castells, Manuel, (1996) *The Rise of the Network Society,* Oxford: Blackwell books.

Cogburn, Derrick (2003) "Governing Global Information and Communications Policy: Emergent Regime Formation and the Impact on Africa", *Telecommunications Policy,* 27(2003) 135-53.

Farrell, Henry (2003), 'Constructing the International Foundations of E-Commerce – the EU-US Safe Harbor Arrangement', *International Organization*, 57: 1 (Spring).

Franda, Marcus (2001) Governing the Internet: the emergence of an International Regime, London: Lynne Rienner Publishers

Gibbs, Jennifer, Kenneth Kramaer and Jason Dedrick (2003) "Environment and Policy Factors Shaping Global E-commerce Diffusion: A Cross-Country Comparison", *The Information Society,* 19, 5-18.

GATT (1994), 'Declaration on the Contribution of the World Trade Organisation to Achieving Greater Coherence in Global Economic Policymaking' *annexed* to *The Result of the Uruguay Round of Multilateral Trade Negotiations: the legal texts*, (Geneva: GATT publications).

Halpin, Edward and Simpson, Seamus (2002), "Between Self-Regulation and Intervention in the Networked Economy: the European Union and Internet Policy", *Journal of Information Science,* 28(4), 285-296.

Keohane, Robert O. (2002), *Power and Governance in a Partially Globalized World*, (London: Routledge).

Kleinwachter, Wolfgang (2000) "ICANN Between Technical Mandate and Political Challenges", T*elecommunications Policy,* 24(2000): 553-63.

Leib, Volker (2002) "ICANN - EU Can't: Internet Governance and Europe's Role in the Formation of the Internet Corporation for Assigned Names and Numbers (ICANN), *Telematics and Informatics,* 19, 159-71.

May, Christopher (2002) "The Political Economy of Proximity: Intellectual Property and the Global Division of Information Labour", *New Political Economy*, 7(3), 317-342

Morris, J. (2000) "Markets and the Internet. Editorial: Living in virtual Reality", *Economic Affairs,* March.

OECD (2002) "Measuring the Information Economy", Paris: OECD.

Paris, Roland (2003), 'The Globalization of Taxation? Electronic Commerce and the Transformation of the State', *International Studies Quarterly,* 47: 2 (June).

Simpson, Seamus (2004) "Explaining the Commercialisation of the Internet – a Neo-Gramscian Contribution". *Information, Communication and Society.* Forthcoming.

Slevin, J. (2000) *The Internet and Society*, Cambridge: Polity Press.

Steinmo, Sven, Thelen, Kathleen and Longstreth, Frank (eds.) (1992), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, (Cambridge: Cambridge University Press).

Thomas, Pradip, (1999) "Knowledge Regimes: the WTO, IP and Public Interests in India", *Telematics and Informatics,* 16, 219-31.

Telematics and Informatics (2003) - Forthcoming Special Issue on E-Commerce.

UNCTAD (1998) "Electronic Commerce: Legal Considerations". Study prepared by the UNTCAD Secretariat. 15th May. UNCTAD/SDTE/BFB/1.

UNCTAD (2000) "E-Commmerce and Development Report" New York and Geneva: United Nations

UNCTAD (2001) "E-Commmerce and Development Report" New York and Geneva: United Nations.

UNCTAD (2002) "E-Commmerce and Development Report" New York and Geneva: United Nations

Venturelli, Shalini (2002) "Investing E-Regulation in the US, EU and East Asia: Conflicting Social Visions of the Information Society" *Telematics and Informatics,* 19(2002) 69-90.

Wilkinson, Rorden (1999), 'Footloose and Fancy Free? The Multilateral Agreement on Investment', *Environmental Politics*, 8: 4 (Winter).

Wilkinson, Rorden (2000), *Multilateralism and the World Trade Organisation: the architecture and extension of international trade regulation*, (London: Routledge).

Winston, Brian (1998) *Media, Technology and Society: a History*. London: Routledge.

Werle, Raymond (2002) "Internet @ Europe: Overcoming Institutional Fragmentation and Policy Failure" in Jacinct Jordana (ed.) *Governing Telecoms and the New Information Society in Europe*, Cheltenham: Edward Elgar.

WTO (1998) "Work Programme on Electronic Commerce". 25th September. WT/L/274 (98-3738).

WTO (2001a), 'Doha Ministerial Declaration', WT/MIN(01)/DEC/1, 20 November (adopted 14 November).

WTO (2001b) "Electronic Commerce Briefing Note. Work Programme Reflects Growing Importance". Available at: http://www.wto.org/english/tratop_e/com_e/com_briefnote_e.htm