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# Electronic Commerce and the Free Trade Area of the Americas

*J. Barrett Willingham\**

## I. Introduction.

We are on the verge of a revolution that is just as profound as the change in the economy that came with the industrial revolution. Soon electronic networks will allow people to transcend the barriers of time and distance and take advantage of global markets and business opportunities not even imaginable today, opening up a new world of economic possibility and progress.<sup>1</sup>

The Internet's emergence as a global information infrastructure has pushed electronic communications and computer network issues to the forefront of today's legal and business issues. Businesses in all sectors of the world economy are struggling to understand what impact these new technologies will have on their current operations.<sup>2</sup> Evidenced by all of the various governmental and quasi-governmental entities establishing electronic commerce guidelines, electronic commerce governance will likely become extremely important in trade agreement discussions.

Accordingly, success in today's global marketplace requires understanding the different domestic and international approaches to electronic commerce governance. The proposed Free Trade Area of the Americas (FTAA) and its respective approach to electronic commerce provides a perfect example of how important electronic commerce has become and how important the need for balance between international and domestic approaches has become.<sup>3</sup> Because of the international nature of the Internet and electronic commerce, government cooperation and regulatory systems interoperability will only grow in importance. While regional trade agreements such as the FTAA need to

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1. President William J. Clinton and Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce*, 1128 PLI/Corp 509, 511 (1999), available at <http://www.ecommerce.gov/framework.htm> [hereinafter *A Framework for Global Electronic Commerce*].
  2. Moreover, enterprises are attempting to cope with the rapid pace of development in information technologies and to discover what new opportunities these developments will produce. See Jane Winn, *Open Systems, Free Markets and the Regulation of Internet Commerce*, 72 TUL. L. REV. 1177, 1179 (1998) (discussing client authentication in an Internet business world).
  3. Such a claim, however, begs the question: Are these treaties becoming more vital in a global environment, or are they becoming obsolete due to the advent of simple, world-wide electronic commerce? This comment does not specifically address this question, as only time will tell.
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address electronic commerce, they need to do so by following some as yet undefined internationally accepted framework.

The purpose of this paper is to draw attention to the increasing importance of international cooperation in (1) improving global technological capacity; (2) increasing network access; (3) maximizing the benefits for the global community; and (4) developing legal standards for electronic commerce. Failing to do so will allow industrialized countries to dominate the electronic commerce world due to their obvious comparative advantages. Therefore, regional trade agreements are likely to grow in importance over the short run to promote cooperation in electronic commerce. This article will address the following points:

- (1) The history of electronic commerce and its business and legal significance;
- (2) The effects of electronic commerce and Internet business on traditional trade theory and how trade theory must adapt to this new phenomenon;
- (3) Domestic and international approaches to dealing with problems of electronic commerce;
- (4) How the developing FTAA is dealing with electronic commerce and what level of importance it should be granting U.S. and international efforts; and
- (5) Criticisms of the FTAA approach and suggestions for improvement.

## II. Electronic Commerce.<sup>4</sup>

Electronic Commerce has come to mean many different things to our society. On one level, it represents a profoundly different way in which businesses relate to each other. On another level, it represents a cornucopia of educational and shopping opportunities. Finally, electronic commerce has challenged government at all levels—but especially at the federal level—to determine that its role should be, when to intervene (if at all), and how to further the promise of the technology while protecting our citizens against the risks.<sup>5</sup>

Although no true internationally accepted definition exists,<sup>6</sup> electronic commerce generally encompasses the production, distribution, marketing, sale, or delivery of goods and

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4. See *E-commerce and Development*, U.N. Commission on Trade and Development, at 14-16 <http://www.unctad.org> [hereinafter *UNCTAD Report*], for a basic discussion of the economics of electronic commerce.

5. *Towards Digital eQuality*, U.S. GOV'T WORKING GROUP ON ELECTRONIC COMMERCE, SECOND ANNUAL REPORT, at i (1999) [hereinafter *Towards Digital eQuality*].

6. See *Defining and Measuring Electronic Commerce: A Status Report*, OECD Doc. DSTI/ICCO/IIS(99)4/FINAL, at 8-9 (Oct. 1999) (discussing the importance of defining "electronic commerce."). A larger but related question still left unaddressed is whether software and other digital transmissions are goods or services. Among World Trade Organization (WTO) nations, goods are treated under the General Agreement on Tariffs and Trade (GATT), which largely bans the imposition of trade barriers. Services fall under the General Agreement on Trade in Services (GATS), which offers countries more latitude to fiscally discriminate against imports. See Dan Richman, *WTO Disarray Leaves Issue of Duties on E-Commerce Unclear*, SEATTLE-POST INTELLIGENCER, Dec. 10, 1999, at A16.

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services by electronic means.<sup>7</sup> The two most readily known modes of electronic commerce are: (1) Electronic Data Interchange (EDI)<sup>8</sup> through closed computer systems; and (2) Internet<sup>9</sup> business through more of an open computer network. EDI has been around since the 1970s, but due to its prohibitive cost, has remained a tool of the multinational corporations.<sup>10</sup>

Internet business, on the other hand, brings the efficiencies of EDI to the masses, although through a more open, less safe network.<sup>11</sup> "E-commerce technologies are developing rapidly, and software that enables business-to-business e-commerce is migrating from closed technologies and systems such as EDI to open systems using the TCP/IP protocols, complementing, extending or replacing traditional EDI due to its relative simplicity and lower costs."<sup>12</sup>

While legal scholars, practitioners, and legislators offer quite a number of different—and often conflicting—solutions to the legal perplexities of the Internet,<sup>13</sup> new models of

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7. For the purposes of this paper, I will be using the definition of electronic commerce advocated by the WTO. See *Development Implications of Electronic Commerce*, WTO Doc. WT/COMTD/W/51, at para. 3 (Nov. 23, 1998) [hereinafter *Development Implications of Electronic Commerce*].
  8. See generally *The Commercial Use of Electronic Data Interchange: A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (1990) (discussing the Electronic Messaging Service's Task Force and its work regarding electronic data interchange and model trading partner agreements to further its use).
  9. See *ACLU v. Reno*, 929 F. Supp. 824, 830-849 (S.D.N.Y. 1996) (discussing fully the "Nature of Cyberspace" and defining the Internet as "not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.").
  10. See *The Emerging Digital Economy*, U.S. DEPARTMENT OF COMMERCE, <http://www.ecommerce.gov/danc3.htm>.
  11. See *id.*; see also Jane Winn, *Cryptography and Electronic Commerce: Update on Recent Developments*, <http://www.smu.edu/~jwinn/crypto-update.htm> [hereinafter Winn, *Cryptography*].
  12. *Business-to-Business Electronic Commerce: Status, Economic Impact and Policy Implications*, OECD Doc. DSTI/ICCP/IE(99)4/FINAL, at 10 (Oct. 11, 1999) [hereinafter *Business-to-Business Electronic Commerce*].
  13. Legal questions brought about by the Internet but not discussed in this brief paper include, but are not limited to: jurisdiction (See Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COM. L.J. 117 (1997)); privacy (See Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 771 (1999)); taxation (See Auri Weitz, Note: *WWW.Foreign Corporation.Com: The United States Taxation of International Business Transactions Conducted Over the Internet*, 9 FORDHAM I.P., MEDIA & ENT. L.J. 1035 (1999); see also David Forst, *Old and New Issues in the Taxation of Electronic Commerce*, 14 BERKELEY TECH. L.J. 711 (1999)); patent, trademark, and copyright issues (See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999)); first amendment issues (See Norman Redlich & David R. Lurie, *First Amendment Issues Presented by the "Information Superhighway"*, 25 SETON HALL L. REV. 1446 (1995)); advertising and consumer protection regulations (See Nicole Ladouceur, *Calibrating the Electronic Scales: Tipping the Balance in Favour of a Vigorous and Competitive Electronic Market for Consumers*, 25 CAN.-U.S. L.J. 295 (1999); see also Christopher J. Schulte, *Abracadabra International, Ltd. v.*
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commercial interaction are developing as businesses and consumers participate in the electronic marketplace and reap the resultant benefits.<sup>14</sup> "Entrepreneurs are able to start new businesses more easily, with smaller up-front investment requirements, by accessing the Internet's worldwide network of customers."<sup>15</sup>

While electronic commerce will help further the free flow of information, ideas, goods and services by opening up global markets and business opportunities, it has potentially far-reaching economic and social implications for many facets of life, including the nature of work, the role of governments, and even the environment.<sup>16</sup> The nature of this paper, however, concerns specifically the far-reaching implications electronic commerce will have on international trade.

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*Abracadabra Creations Inc. – Internet Advertising Just Federalized the Nation's Service Mark Law!*, 22 HAMLINE L. REV. 563 (1999)); antitrust and deceptive trade practices (See John Graubert & Jill Coleman, *Consumer Protection and Antitrust Enforcement at the Speed of Light: The FTC Meets the Internet*, 25 CAN.-U.S. L.J. 275 (1999); see also Serge G. Avakian, *Comment: Global Unfair Competition in the Online Commerce Era*, 46 UCLA L. REV. 905 (1999)); and record retention and email policies (See Anne L. Lehman, *E-Mail in the Workplace: Questions of Privacy, Property or Principle?*, 5 COMM. L. CONCEPTS 99 (1997)).

14. For example, see UNCTAD Report, *supra* note 4, at 65, promoting the new concept of E-velopment:

By nature, e-commerce is cross-sectoral, inter-disciplinary and global. These three characteristics alone suffice to indicate the lines which a successful e-commerce strategy must follow: (1) involve all related sectors of activity (trade, but also trade supporting services such as banking, insurance, transport, customs and telecommunications), (2) involve all relevant dimensions of the national society, including government, law makers, regulators, educators as well as business representatives, and (3) always consider possible national actions in their interrelationship with international developments (including legal, fiscal and more generally as they relate to 'governance').

15. *A Framework for Global Electronic Commerce*, *supra* note 1, at 512.
  16. "The trading world is beginning to see increasing conflicts between the Heaven of unimpeded trade and the perceived need to use trade restrictions as the lever to achieve social or political objectives in such areas as the environment, worker rights, and national security." Richard O. Cunningham, *NAFTA in the Global Context*, 23 CAN.-U.S. L.J. 379, 380 (1997). The global arena of electronic commerce is not likely to change this. In fact, it might actually exaggerate it as developing countries struggle to maintain their cultures in the face of global information via the Internet. "Since new conditions require new rules of fair trading, and since conditions always change and evolve, the Heaven of totally free trade [will always be] just beyond our grasp." *Id.* at 382. For a general discussion on the social impacts of electronic commerce, see *The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Research Agenda*, OECD Doc. DSTI/ICCP(98)15REV2 (Sept. 22, 1998) [hereinafter *The Economic and Social Impact of Electronic Commerce*].
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### III. Traditional Trade Agreements.

In theoretical terms, free trade generally means that there are no artificial impediments to the exchange of goods across national markets and that therefore prices faced by domestic producers and consumers are the same as those determined by the world market . . . In practical terms, free trade describes a policy of the nation-state toward international commerce in which trade barriers are absent, implying no restrictions on the import of goods from other countries or restraints on the export of domestic goods to other markets.<sup>17</sup>

Classic free trade theory propounds the view that reducing or eliminating barriers to trade between all countries will increase world economic welfare through: (1) the operation of comparative advantage; (2) the creation of economies of scale; (3) the increase in competition; and (4) the promotion of more efficient domestic industries.<sup>18</sup>

Traditional trade agreements, either regional or global in scope, are designed to increase trade participation by a larger proportion of the global trading community.<sup>19</sup> In the post-World War II evolution of the world trading system, "the global community has striven mightily to reduce and even eliminate one set of trade barriers after another."<sup>20</sup> NAFTA did just that by agreeing to eliminate all tariffs between member countries by the year 2008,<sup>21</sup> and the FTAA proposes to do just the same for the entire Western Hemisphere, starting in the year 2005.<sup>22</sup> "A major element of the trade agenda for the next decade will be the task of extending the world trading regime beyond trade in goods to include trade in services, trade-related investment issues, and the mushrooming information sector."<sup>23</sup> This phenomenon is likely to hold true in a FTAA arena.

The electronic commerce explosion stands to help further international trade by eliminating barriers to trade.<sup>24</sup> Electronic commerce succeeds in moving economic activity closer to some of the ideals of perfect competition: low transaction costs, low barriers to entry, and improved access to information for the consumer. "Developments in global network technologies . . . make transmission of all kinds of digitized data fast, cheap and

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17. DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 5 (1996).

18. See, e.g., WILSON B. BROWN & JAN S. HOGENDORN, *INTERNATIONAL ECONOMICS: THEORY AND CONTEXT* § 2 (1994); see also *THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS* (Jagdish Bhagwati & Arvind Panagariya eds., 1996).

19. See BRIAN McDONALD, *THE WORLD TRADING SYSTEM* 3 (1996).

20. Cunningham, *supra* note 16, at 379-380.

21. See North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (entered into force Jan. 1, 1994). NAFTA's principle objectives include: eliminating barriers to trade in goods and services between the parties; promoting conditions of fair competition; substantially increasing investment opportunities; and enhancing the competitiveness of the partners' firms in global markets. *Id.* at Preamble and art. 102.

22. See generally Miami Summit of the Americas, *Plan of Action*, Dec. 9-11, 1994, <http://www.ftaa-alca.org/>.

23. Cunningham, *supra* note 16, at 384.

24. See *Dismantling the Barriers to Global Electronic Commerce*, <http://www.oecd.org//dsti/sti/it/ec/prod/dismantl.htm> [hereinafter *Dismantling the Barriers to Global Electronic Commerce*].

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simple . . . This environment offers lower barriers to entry for electronic commerce. Today, for a few thousand dollars, anyone can become a merchant and reach consumers throughout the world.”<sup>25</sup>

While electronic commerce eliminates such traditional barriers to trade as time and distance, it also creates new problems never previously encountered. “[G]eographical and political boundaries mean little in this networked environment.”<sup>26</sup> Tariff and non-tariff barriers will impact the growth of electronic commerce.<sup>27</sup> Countries will dismantle barriers to global electronic commerce at different speeds, raising competitive concerns and risks to the development of global electronic commerce.<sup>28</sup> “However, like it or not, e-commerce is here to stay and is already changing the world trade landscape: a dream come true for proponents of free trade and a nightmare for countries which still feel the need to protect their domestic industries.”<sup>29</sup>

The emphasis on trade, as we look forward, is important because without trade, electronic commerce will not become global. The need to adhere to existing trade commitments, and to expand them, becomes emphasized in an electronic commerce environment. A balance between self-regulation and national and international regulation is therefore required. This need for balance is readily seen in the current FTAA<sup>30</sup> deliberations concerning electronic commerce among thirty-four divergent countries.

#### IV. Free Trade Area of the Americas (FTAA).

Our continued economic progress depends on sound economic policies, sustainable development, and dynamic private sectors. A key to prosperity is trade without barriers, without subsidies, without unfair practices, and with an increasing stream of productive investments. Eliminating impediments to market access for goods and services among our countries will foster economic growth . . . Free trade and increased economic integration are key factors for raising standards of living, improving the working conditions of people in the Americas and better protecting the environment.<sup>31</sup>

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25. *Id.*; see also *Business-to-Business Electronic Commerce*, *supra* note 12, at 23 (adding that the adoption of electronic commerce and Internet-based strategies not only reduces barriers to international transactions, it shifts the boundaries of firms and restructures the organization of supply chains).
  26. *Dismantling the Barriers to Global Electronic Commerce*, *supra* note 24.
  27. See *Business-to-Business Electronic Commerce*, *supra* note 12, at 24.
  28. See *The Economic and Social Impact of Electronic Commerce*, *supra* note 16, at 5.
  29. Mustapha Kamil, *E-commerce Changing World Trade Landscape*, *BUS. TIMES* (Malaysia), Dec. 21, 1999, at 18.
  30. For a discussion of the history of free trade in the Americas, see generally THOMAS ANDREW O'KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* (1997); Sam Laird, *Latin American Trade Liberalization*, 4 MINN. J. GLOBAL TRADE 195 (1995); Claudio Grossman, *The Evolution of Free Trade in the Americas: NAFTA Case Studies*, 11 AM. U.J. INT'L L. & POL'Y 687 (1996).
  31. Miami Summit of the Americas, *Declaration of Principles*, Dec. 9-11, 1994, available at OAS, *The Free Trade Area of the Americas (FTAA) Process*, <http://www.sice.oas.org/ftaa/miami/sadope.asp>.
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At the Summit of the Americas in December 1994, Heads of States and Governments from thirty-four democratically elected governments throughout the Western Hemisphere agreed to construct the FTAA, stretching from Alaska to Tierra del Fuego, by the year 2005.<sup>32</sup> While the exact manner in which the FTAA will come into being, either through piecemeal accession, agreements between subregional trading blocs, or through some as yet undetermined method,<sup>33</sup> the fact still remains that electronic commerce and the laws needed to regulate it are playing an increasingly important role.<sup>34</sup>

32. See generally *Free Trade Area of the Americas (FTAA) 2005*, <http://www.mac.doc.gov/ftaa2005/> (discussing the initiative to create a western hemisphere free trade area by the year 2005); see also Paul A. O'Hop Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127 (citing *Remarks Announcing the Enterprise for the Americas Initiative*, 1 Pub. Papers 873, 875 (June 27, 1990) while discussing the formation of the Enterprise for the Americas Initiative by President Bush); PETER S. WATSON ET AL., *COMPLETING THE WORLD TRADING SYSTEM: PROPOSALS FOR A MILLENNIUM ROUND* 222-225 (1999) (pointing out the structural and legal difficulties that face the negotiations with a particular emphasis on the bloc-to-bloc struggle between MERCOSUR and NAFTA and how the lack of comprehensive, fast-track authority has held up the negotiations thus far).
33. See Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L L. 539 (1995) (discussing the remote likelihood of piecemeal accession to the NAFTA in order to create the FTAA); see also Frank J. Garcia, *Americas Agreements – An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1997) (advocating the creation of Americas Agreements as an interim stage leading to the FTAA); Peter H. Smith, *Whither Hemisphere Integration? Hemisphere Accord May Take a Decade, but Subregional Agreements May be Enough to Attract Commerce and Investment*, BUS. ECON. 39, July 1, 1999, available at 1999 WL 8583550 (discussing the three potential routes to the FTAA); Lisa Anderson, *Comment: The Future of Hemispheric Free Trade: Towards a Unified Hemisphere?*, 20 HOUS. J. INT'L L. 635, 638 (1998) (“[F]reer trade and hemispheric integration might occur as it has occurred for years: at a slower pace, through bilateral and multilateral trade agreements between nations, and through the linking of regional and sub-regional trade organizations.”). Some experts predict, however, that the failure of the WTO's Third Ministerial Conference in Seattle and U.S. pressure for higher labor and environmental standards will push Latin America towards regional efforts at economic cooperation rather than the FTAA. See Richard Samuel, *Trade-Latin America: Region Retreats from Integration Process*, INTER PRESS SERV., Jan. 19, 2000, available at 2000 WL 4089492. See also Linda Diebel, *Seattle Fallout Drifts South: Mass protest in Seattle against globalization and the World Trade Organization struck a chord in Latin America*, TORONTO STAR, Dec. 26, 1999, available at 1999 WL 24010794 (discussing the potential long-term fallout from the WTO's failure to start the next Ministerial in Seattle, as well as discussing the political environment of the major Latin American countries for the coming year); but cf. Kenneth H. Mackay, *After Seattle, What? We need to speed up the pace of hemispheric free-trade negotiations*, TIME, Dec. 20, 1999, available at 1999 WL 31516757 (drawing a distinction between the WTO Ministerial and Seattle and the separate FTAA negotiations, pointing out that three weeks before the Seattle Ministerial, the FTAA trade ministers put labor and environmental standards on the FTAA agenda, keeping the FTAA very much on track).
34. Evidence of its growing importance could be found at the conference organized by the National Law Center for Inter-American Free Trade (NCLIFT), the Organization of American States (OAS), and the Business Software Alliance held September 30 through October 1, 1999, entitled “Responding to the Legal Obstacles to Electronic Commerce in Latin America.” Information on this conference can be found at <http://www.natlaw.com/ecommerce/index.htm>.



The San Jose Ministerial Declaration of the Summit of the Americas recognized the growing importance of electronic commerce and instituted a joint government-private sector committee to make recommendations, noting "the rapid expansion of Internet usage and electronic commerce in our Hemisphere."<sup>35</sup> The Joint Committee recently returned with its Report with Recommendations to Ministers.<sup>36</sup> "Drafted with the full participation of private sector representatives from throughout the hemisphere and approved by government delegates, the Joint Committee of Experts on Electronic Commerce recommended a broad range of market-led policies that would expand the benefits of e-commerce to the region."<sup>37</sup> In their report, the Joint Committee outlined electronic commerce in the Western Hemisphere and gave their recommendations as to how electronic commerce could be furthered under the FTAA.<sup>38</sup> What follows is a synopsis of the Joint Committee's findings as well as specific information on electronic commerce developments in Latin America.

A. OVERVIEW OF ELECTRONIC COMMERCE IN THE WESTERN HEMISPHERE.<sup>39</sup>

Within the Western Hemisphere, a significant disparity currently exists among the countries of the region with respect to Internet use and electronic commerce. For example, some 35 percent of U.S. and 25 percent of Canadian citizens use the Internet, whereas most Latin American countries have less than 3 percent of their citizens on-line.<sup>40</sup>

Similarities in culture, economic factors, and language would seem to suggest, however, strong potential for electronic commerce among the countries that will comprise the FTAA.<sup>41</sup>

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35. *San Jose Ministerial Declaration*, at para. 19, [http://www.ftaa-alca.org/ministerials/costa\\_e.asp](http://www.ftaa-alca.org/ministerials/costa_e.asp) [hereinafter *San Jose Ministerial Declaration*].

36. *See Report with Recommendations to Ministers*, FTAA Joint Government-Private Sector Committee of Experts on Electronic Commerce (Nov. 4, 1999), <http://www.ftaa-alca.org> [hereinafter *FTAA Joint Government-Private Sector Report*].

37. *Towards Digital eQuality*, *supra* note 5, at 10.

38. *See FTAA Joint Government-Private Sector Report*, *supra* note 36, at 4.

39. For a more in-depth study of various electronic commerce issues central to Latin America, see *Electronic Commerce in the Western Hemisphere: An Ongoing Series*, Inter-American Trade Report (Nov. 5, 1999), <http://www.natlaw.com/bulletin/1999/9911/991105b.htm>.

40. *Id.* at 3.

41. *See* Paul A. Greenberg, *Latin America Looks to Microsoft for E-Commerce Leadership*, E-COMMERCE TIMES, Oct. 20, 1999, <http://www.ecommercetimes.com/news/articles/991020-4.shtml>.

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### 1. *United States.*

The United States, according to some studies, accounts for about eighty percent of the global total of electronic commerce.<sup>42</sup> The amount of electronic commerce within the United States continues to rise at a dramatic rate. By 2004, online retail sales are expected to reach \$184 billion.<sup>43</sup> More astoundingly, by 2003, business-to-business trade within the United States will soar to \$1.3 trillion, an amount that would represent more than nine percent of total U.S. business.<sup>44</sup>

Unfortunately, those same studies indicate that U.S. households with incomes of \$75,000 per year are twenty times more likely to have home Internet access than those at lowest income levels, and those on incomes less than \$25,000 per year cited cost as a major impediment.<sup>45</sup> The correlation between income and access to the Internet means that policies to ensure access for lower income groups may be needed. Despite the data showing that a preponderance of electronic commerce is being conducted in the United States, the United States has been proactive in addressing the concerns of developing countries and the affects of global electronic commerce.<sup>46</sup> This disparity, or digital

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42. See *The Economic and Social Impact of Electronic Commerce*, *supra* note 16, at 5 ("While its share will probably decrease, it does not face some of the constraints that confront Europe and Asia, such as high cost and the lack of sufficient bandwidth and the slow pace of planned liberalization of the telecommunications sector.")

OAS documents on the FTAA note that the United States represents nearly 80 percent of the combined hemispheric GDP. And while 52 percent of Latin America's exports go to the U.S., only 14 percent of U.S. exports go to Latin America. The OAS Trade Unit notes that this asymmetry is much greater in the case of small Caribbean and Central American economies, which send over half their exports to the United States but account for only 1.5 percent of total U.S. imports.

Samuel, *supra* note 33.

According to some, more than ninety percent of all world Internet use is confined to users in North America and Europe. See John Parry, *Third World Fears Tax-Free Net Proposals*, TECHWEB NEWS, Mar. 9, 1998. But despite these statistics, some reports emphasize that developing countries and economies in transition that embrace the new possibilities may be able to find a position in the new markets very quickly. See UNCTAD Report, *supra* note 4.

43. See *Online Retail To Reach \$184 Billion By 2004 As Post-Web Retail Era Unfolds*, <http://www.forrester.com/ER/Press/Release/0,1769,164,FF.html>.

44. *U.S. On-Line Business Trade Will Soar To 1.3 Trillion By 2003, According To Forrester Research*, <http://www.forrester.com/ER/Press/Release/0,1769,121,FF.html>. Globally, business-to-business trade conducted over the Internet will rise to \$3.2 trillion representing an incredible five percent of global gross domestic product (GDP). See *id.*

45. *OECD Forum on Electronic Commerce: Report on the Forum*, OECD Doc. SG/EC(99)12, at 30 (Nov. 26, 1999) [hereinafter *OECD Report on the Forum*]; see also *Towards Digital eQuality*, *supra* note 5, at vi.

46. Many developing countries, however, do not approve of the United States' efforts to promote its framework: "Major trading nations, led by the United States, have systematically exercised a sort of neomercantilist strategy by introducing electronic commerce (E-commerce) into global trading arrangements to enhance their own wealth, power and market access at the expense of others." Wiwit Wirsatyo, *E-Commerce at Global Negotiation*, JACKARTA POST, Mar. 31, 1999, available at 1999 WL 5634036. Wirsatyo proposes that developing countries should work together in pursuit of their interests and should identify their current strengths and utilize

divide,<sup>47</sup> within the U.S. population parallels the digital divide between the United States and the rest of the Western Hemisphere.

## 2. Latin America and South America.

"When a new technology rolls over you, if you're not part of the steamroller, you're part of the road."<sup>48</sup> Many developing countries, including much of Latin and South America, see a steamroller heading their way in the form of electronic commerce. But, such economically less-developed countries are saying they are not going to be rushed into agreeing to a trade regime that may leave them disadvantaged.<sup>49</sup> While the vote is still out on whether electronic commerce will be a benefit<sup>50</sup> or detriment<sup>51</sup> to developing

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them to get concessions in negotiations. *See id.* At the same time, Wirsatyo believes major trading nations should extend their facilities and technical assistance to developing nations "to promote an understanding among business networks and to enhance the capacity and development of human resources." *Id.* The United States and the European Union continue to alienate developing countries by seeking an international consensus on Internet regulation. *See* Steven M. Hanley, *Comment: International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997 (1998).

47. A digital divide is the gap between individuals and communities that have access to the Information Age tools and those who don't. *See The Clinton-Gore Administration: Working to Bridge the Digital Divide*, The White House, Dec. 9, 1999, <http://www.pub.whitehouse.gov/>.

48. *UNCTAD Report*, *supra* note 4, at 8 (quoting Stuart Brand, Founder, Global Business Network).

49. Developing countries, including much of Latin and South America are worried because they are not as technologically advanced as developed nations. Generally, they fear this lack of technological capacity will lead to their becoming E-commerce consumers rather than producers. In addition, some fear E-commerce

will lead to the erosion of their local and national languages and cultures. They may be tempted to impose local content requirements on Internet services. This . . . has political appeal in countries wishing to protect their local languages and cultures. Strong nationalistic feelings consequently may have the effect of prolonging negotiations.

Wirsatyo, *supra* note 46.

Developing countries are challenged to create a balanced and pragmatic approach as quickly as possible while maintaining some measure of sovereignty over national interests. Kamil, *supra* note 29. The interests of small economies are, at least in principle, to be safeguarded through WTO principles and their fair application. Stuart S. Malawer, *National Governments Should Defer to the Private Sector and Avoid Undue Restrictions on Electronic Commerce*, LEGAL TIMES, Feb. 8, 1999, at S40 (briefly describing the WTO's initiatives concerning electronic commerce).

50. Electronic commerce has the potential to reduce the costs of economic growth for developing countries. According to Mexican President Ernesto Zedillo,

the biggest betrayal of those poorest people would be to try to tell them that you don't need electronic commerce, or suggest to them one way of getting something out of the WTO is to block electronic commerce . . . It's like saying to them, 'don't have electricity, don't have bridges, don't have railways.'

WTO Chief, Mexican President: *Free Trade Failure Only Hurts Poor*, DOW JONES INT'L NEWS SERV., Jan. 28, 2000; *see also UNCTAD Report*, *supra* note 4 (arguing that there are distinct advantages for developing countries due to the inconsistent uptake of electronic commerce technologies and business paradigms); *see also Seminar on Electronic Commerce and Development*, WTO Doc.

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countries, their fears need to be addressed in any regional trade agreement dealing with electronic commerce. The disparity between advanced and emerging economies in terms of reaping the benefits of these new growth areas cannot be underestimated.

Barriers in the form of low quality of telecommunications infrastructure, the high cost of basic Internet access, tariff barriers, and the high cost of shipping slow the growth of electronic commerce in the Western Hemisphere.<sup>52</sup> Evidence of the great inequality of access across regions and countries can be seen in telephone mainlines per thousand people, where recent studies have shown a dramatic drop in mainline availability between OECD countries and Latin America and the Caribbean countries, which have availability ratios scarcely above twenty percent of the OECD figure.<sup>53</sup> Still further analysis of the percentage of computers and their Internet connectivity show a dramatic difference between Latin America and the highest income countries. "In High-income countries, there are, on average, 375 Internet hosts per 10,000 inhabitants. Yet, for the most advanced developing countries region, Latin America and the Caribbean, the figure is less than 8—in several other developing country sub-regions it is below even 1."<sup>54</sup>

While these reports show a glaring disparity in access to networked services between Latin America and high-income countries (such as Canada and the United States), the

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WT/COMTD/18, at 1 (Feb. 19, 1999), <http://www.wto.org/wto/ecom/wtcomtd18.doc> (arguing that electronic commerce helps developing countries overcome traditional barriers to trade).

51. For a discussion of developing nations' fears, see *supra* notes 47-50. Unfortunately, electronic commerce requires pre-existing technology, communications infrastructure, and security. High access costs have relegated most electronic commerce in developing countries to that that occurs within the offices of multinational corporations. "Small and medium-sized enterprises in developing countries, therefore, do not benefit from the business potential of the Internet in the same way as their counterparts in the West." Chantal Thomas, *Transfer of Technology in the Contemporary International Order*, 22 FORDHAM INT'L L.J. 2096, 2098 (1999) (calling for the development of an international legal framework covering technology transfers). In a study of specifically business-to-business electronic commerce uptake across countries, the OECD stated:

The impacts of e-commerce on business and markets will vary across countries and sectors. Country effects will depend on the sectoral composition of the economy and the location of different parts of enterprise value chains and sector supply chains.... Furthermore, new sector-specific Internet-based business models are developing rapidly in countries which have the appropriate infrastructure (low cost, competitive communications, broad supply, and rapid uptake of new technologies, entrepreneurial culture), and these models are spreading quickly across countries which have similar technological and business bases and industry structures.

The basic results of the study showed significant variations in business-to-business electronic commerce uptake across countries, with the United States leading. While business readiness for e-commerce is increasing rapidly, there are still significant country and sector differences in the potential to use e-commerce due to major differences in Internet use. See *Business-to-Business Electronic Commerce*, *supra* note 12, at 5, 7.

52. See Greenberg, *supra* note 41.

53. See UNCTAD Report, *supra* note 4, at 17-20 (noting that "the present imbalance will take a considerable time to correct").

54. *Id.* at 23.
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numbers are changing.<sup>55</sup> Latin America has seen a recent rapid growth in Internet use and could more than double its participation rate by 2003.<sup>56</sup> "Latin America at present accounts for only about eight million Internet users, but by the year 2003 it is estimated that there could be as many as thirty-four million users in the region."<sup>57</sup>

"Now, Latin America is experiencing an Internet explosion. We are right where the U.S. was back in 1996 and 1997."<sup>58</sup> In a recent poll, International Data Corporation (IDC) found that eighty-five percent of respondent Latin American companies are "currently using or plan to use e-commerce within the next two years."<sup>59</sup> The companies participating in the study indicated, however, that implementation of electronic commerce is still sluggish.<sup>60</sup> "Overall, Latin America-based e-commerce can be characterized as a very nascent, but growing market . . . It remains to be seen if this interest will translate into aggressive investments in the region or if this is simply overly optimistic projections fueled by the hype surrounding the Internet."<sup>61</sup>

"The area's greatest hope may be for corporations outside the region to invest in business-to-business commerce solutions that will . . . allow the countries to keep pace with

55. See generally Michael Pastore, *Increased Demand Fuels Latin American Net Service Market*, INTERNETNEWS.COM, Jan. 24, 2000, [http://www.internetnews.com/intl-news/article/0,1087,6\\_293041,00.html](http://www.internetnews.com/intl-news/article/0,1087,6_293041,00.html).

56. See FTAA Joint Government-Private Sector Report, *supra* note 36, at 3.

57. *Id.*; see Beth Cox, *E-Commerce in Latin America to Hit \$8 Billion by 2003*, INTERNETNEWS.COM, June 23, 1999, [http://www.internetnews.com/ec-news/article/0,1087,4\\_143241,00.html](http://www.internetnews.com/ec-news/article/0,1087,4_143241,00.html); see also Brendan M. Case, *Mexican E-Ventures: Businesses South of Border Discovering Potential Online*, DALLAS MORNING NEWS, Jan. 12, 2000, at D1 (describing how, after years of hesitation, corporate Mexico is finally waking up to the Internet as entrepreneurs attempt "to make the Internet a gateway to customers in wealthy countries such as the United States, in a bid to broaden the benefits of Mexico's many free-trade agreements"); see also *Four Billion Dollars Invested in Information Technology in 1999, 34 Percent More in 2000*, CORP. MEX., Feb. 23, 2000, available at 2000 WL 8443914.

58. Robert Conlin, *Spanish Language Portal Opens Door To \$44 Million Funding*, E-COMMERCE TIMES, June 23, 1999, <http://www.eCommerceTimes.com/news/articles/990623-4.shtml> (quoting El Sitio founder and CEO Roberto Cibrian-Campoy). Latin American-based companies are experiencing tremendous growth in electronic commerce. Latin American portal El Sitio International expects to grow six-fold by the year 2002. See Robert Conlin, *Latin American Portal Shifts Into High Gear*, E-COMMERCE TIMES, July 29, 1999, <http://www.ecommercetimes.com/news/articles/990729-1.shtml>.

Most Spanish-language Web sites are based in the U.S. and are after a hybrid of Spanish-speaking U.S. residents and Latin American residents with little concern for local content . . . El Sitio, however, develops local content through a stable of 80 journalists working out of offices in Buenos Aires, Mexico City, Sao Paulo, Brazil and Montevideo, Uruguay. El Sitio recognizes each country as different and develops content tailored to their culture.

*Id.*

59. Greenberg, *supra* note 41 (adding that Microsoft continues to dominate the mindshare market among companies in the region).

60. See *id.* (finding that only eleven percent reported current usage with the finance industry most aggressively adopting e-commerce solutions throughout Latin America).

61. *Id.* (quoting Alex Manfrediz, an analyst with IDC Latin America).

countries that are already more advanced in their technology.”<sup>62</sup> Indeed, companies are recognizing the growth potential in the Latin American market, stumbling over each other to establish strategic alliances with Latin American companies. In responding to the surge in Internet users in Latin America, such venerable companies as Lycos,<sup>63</sup> Hewlett-Packard,<sup>64</sup> AOL,<sup>65</sup> Dell,<sup>66</sup> and Microsoft<sup>67</sup> are developing Spanish language sites aimed at both the U.S. Latino-American market as well as the Latin American market. Even companies from outside the Western Hemisphere see the potential of the Latin American market.<sup>68</sup>

A new industry report says that spending on Web commerce in Latin America is projected to reach the \$8 billion mark by the end of 2003.<sup>69</sup> The report said “that spending on Web commerce in Latin America reached nearly \$167 million in 1998, an increase of 361 percent over 1997 levels.”<sup>70</sup> Unfortunately, and evident to many in the industry, “as

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62. *Id.*

63. Lycos launched localized content sites in Brazil, Mexico, Argentina, Peru, Chile, and Venezuela. See Robert Conlin, *Lycos Targets Latin Markets On Two Continents*, E-COMMERCE TIMES, Oct. 19, 1999, <http://www.ecommercetimes.com/news/articles/991019-7.shtml>.

64. See Mary Hillebrand, *HP Puts E-Commerce to Work in Latin America*, E-COMMERCE TIMES, Sept. 10, 1999, <http://www.ecommercetimes.com/news/articles/990910-5.shtml> (“Hewlett-Packard Co. announced . . . that it is teaming with StarMedia Network, the largest Spanish-language and Portuguese-language online service in the world, to help merchants put their wares online . . . HP believes that driving e-commerce is the way to help the Internet as a whole expand in Latin America.”).

65. AOL has teamed with the Buenos Aires-based financial services Web site LatinStocks.com to provide content and online stock trading. “This deal is the latest effort in an overall strategy by AOL to quickly expand its presence throughout Latin America . . . AOL has reportedly earmarked \$200 million (US\$) for its continuing foray into an exploding Latin American e-commerce marketplace.” Chet Dembeck, *AOL Takes Stake In Latin Brokerage*, E-COMMERCE TIMES, Nov. 24, 1999, <http://www.ecommercetimes.com/news/articles/991124-4.shtml>.

66. Dell Computer announced the launch of its Latin American online store at [www.dell.com/la](http://www.dell.com/la). Dell is the “first to offer an online store that serves countries throughout Latin America” and expects “the number of online purchases in the region to quickly accelerate.” Andy Wang, *Dell Targets Latin America*, E-COMMERCE TIMES, Apr. 29, 1999, <http://www.ecommercetimes.com/news/articles/990429-3.shtml> (quoting Rosendo G. Parra, senior vice president and general manager for Dell’s Americas Public and International Group).

67. In an effort to establish a presence in the Latin American market, Microsoft created a joint venture agreement with Mexico’s largest telecommunications company, Telefonos de Mexico, to create a portal for Spanish-speaking consumers in Latin and North America. See Robert Conlin et al., *Microsoft Matches Rivals With Spanish Language Portal*, E-COMMERCE TIMES, Oct. 19, 1999, <http://www.ecommercetimes.com/news/articles/991019-10.shtml>.

68. See Robert Conlin, *Softbank Plows \$100M Into Latin American Venture*, E-COMMERCE TIMES, Jan. 11, 2000, <http://www.ecommercetimes.com/news/articles2000/000111-7.shtml> (recognizing the potential of Latin America, “Japanese Internet investor Softbank Corp. . . . launch[ed] a \$100 million (US\$) fund aimed at the Latin American market.”).

69. See Cox, *supra* note 57.

70. *Id.* (discussing the report from IDC).

71. *Id.* (quoting Annika Alford, program manager for IDC Latin America’s Internet Research).

72. *Id.*

the conduit to Web commerce, the Latin American extension of the information super-highway is more riddled with silver-lined potholes than it is paved with gold."<sup>71</sup> While "the potential is real, many obstacles need to be overcome before it becomes a reality."<sup>72</sup>

The glaring disparity amongst the countries that propose to form the FTAA in terms of network accessibility for electronic commerce creates incredible difficulties for negotiators. The need for a balance between domestic and international regulation becomes that much more difficult due to the technological and cultural gaps between the countries.

#### B. WORLD TRADE ORGANIZATION APPROACH TO ELECTRONIC COMMERCE.

Electronic commerce is inherently global and transcends borders. Electronic commerce policies and activities (national, regional, public or private sector) will be most effective if they are compatible with a global approach. International cooperation is necessary to avoid having national approaches fragment regional and global markets, and unduly restrict trade. Governments, business, consumers and academia must work collaboratively to create an environment in which electronic commerce can flourish to maximize the social and economic benefits for all.<sup>73</sup>

Many international groups such as the International Chamber of Commerce (ICC),<sup>74</sup> the United Nations (U.N.),<sup>75</sup> and the Organization for Economic Cooperation and

73. FTAA Joint Government-Private Sector Report, *supra* note 36, at 5.

74. The ICC has authored a number of studies and recommendations for businesses worldwide concerning electronic commerce and how businesses should adopt it, promote it, and effectively self-regulate it. See *A Global Action Plan for Electronic Commerce Prepared by Business with Recommendations for Governments*, 2nd Edition (Oct. 1999), <http://www.iccwbo.org/>; see also *The Perspective of the Global Business Dialogue on Electronic Commerce (GBDE) on the WTO and Its Relationship to E-Commerce*, <http://www.gbde.org/conference/wtopaper.html>.

75. Perhaps the most prominent source of international law for contracts is the United Nations Commission on International Trade Law (UNCITRAL), a political unit of the U.N. that has, among other duties, proposed a Model Law on Electronic Commerce. See *Revised Report on International and Regional Bodies: Activities and Initiatives in Electronic Commerce*, OECD Doc. SG/EC(99)5 (Oct. 13, 1999) [hereinafter *Report on International and Regional Bodies*]. ("The general mandate of the Commission is to further the progressive harmonization and unification of international trade law and to remove unnecessary obstacles to international trade caused by inadequacies and divergence in national legislation affecting trade."). For a general discussion of the UNCITRAL Model Law on Electronic Commerce, see A. Brooke Overby, *UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce*, 7 TUL. J. INT'L & COMP. L. 219 (1999) (UNCITRAL established the Model Law on Electronic Commerce as neither a comprehensive, "code-like" articulation of the rules and regulations for electronic information transmission, nor intended to govern every aspect of e-commerce). The United Nations Conference on Trade and Development (UNCTAD) is another unit of the U.N. that has as its goals "to maximize the trade, investment and development opportunities of developing countries, and to help them face the challenges arising from globalization and integrate into the world economy." See *Report on International and Regional Bodies*, *supra*. UNCTAD has released a study of electronic commerce issues for developing countries, which calls for: (1) governments and firms to act in harmony to capitalize on electronic commerce; (2) improved access to telecommunications; and (3) an enabling environment at the national and international levels. *UNCTAD Report*, *supra* note 4, at 7.

Development (OECD)<sup>76</sup> are developing their own solutions to electronic commerce problems. However, the World Trade Organization (WTO) is expected to be the leader in developing regulations and standards for electronic commerce.<sup>77</sup>

When the WTO<sup>78</sup> was created in 1995, "the Internet and the World Wide Web were mere blips to which brick-and-mortar businesses gave little regard—not envisioning the digital competition that would arise in the intervening four years."<sup>79</sup> On September 25, 1998, the WTO Declaration on Global Electronic Commerce<sup>80</sup> began a comprehensive work program to examine all trade-related issues relating to global electronic commerce, stressing the "economic, financial, and development needs of developing countries and recognize that work is also being undertaken in other international fora."<sup>81</sup>

The WTO must act in this area to further electronic commerce growth while at the same time protecting the differing domestic interests of WTO Members.<sup>82</sup> How the WTO

76. The OECD, a think tank and forum for the world's twenty-nine most industrialized nations to negotiate cooperation and policies on international trade, has been at the forefront of multilateral efforts to create a regulatory framework for electronic commerce. The OECD created an Electronic Commerce Forum, which subsequently called for developing infrastructures and improving access in order to maximize the benefits for all. See *OECD Report on the Forum*, *supra* note 45.

77. See generally *Declaration on Global Electronic Commerce*, WTO Doc. WT/MIN(98)/DEC/2 (May 25, 1998) [hereinafter *Declaration on Global Electronic Commerce*].

78. The WTO was created by the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). See *Marrakesh Agreement Establishing the World Trade Organization*, 33 I.L.M. 1125 (1994).

79. WATSON, *supra* note 32, at 89. While the WTO would seem the ideal institution to address global electronic commerce issues, the international trading system "has been even later than domestic systems with proposals—despite the fact that other international organizations were attempting to form some consensus." *Id.* See also Winston J. Maxwell & Thomas P. Newman, *Electronic Commerce Considered by World Trade Organization; Comprehensive Regulatory Review Begun*, N.Y.L.J., Nov. 16, 1998, at S7, (col. 1) (pointing out that WTO electronic commerce negotiations are expected to involve GATT, GATS, and the application of other multilateral agreements, "especially those relating to intellectual property, telecommunications and government procurement").

80. Among the policy issues identified by the study are the legal and regulatory frameworks necessary for Internet transactions, security and privacy questions, taxation, access to the Internet, market access for suppliers, trade facilitation, public procurement, intellectual property questions, and regulation of content. See *Development Implications of Electronic Commerce*, *supra* note 7, at 1, 10.

81. *Declaration on Global Electronic Commerce*, *supra* note 77, at 1.

82. See WATSON, *supra* note 32, at 91.



addresses trade issues of electronic commerce will dictate the long-term impact it will have on both developed and developing countries.<sup>83</sup>

Two of the most important steps the WTO has taken to promote electronic commerce so far involve infrastructure costs and access to the global network. The Basic Telecommunications Agreement (BTA)<sup>84</sup> and the International Technology Agreement (ITA)<sup>85</sup> aim to promote improved access to the Internet infrastructure through competition in telecommunications markets and the elimination of trade barriers to information technology. Both of these agreements were concluded under the auspices of the WTO and have recently entered into effect.<sup>86</sup>

The BTA is already showing benefits. Through commitments on market access, national treatment, and regulatory safeguards, the Agreement has "encouraged billions of dollars in international investment in new telecommunications facilities, much of it led by U.S. firms. As a result, low-cost telecommunications services are removing geography (and borders) as a constraint on the delivery of a broad range of services and products."<sup>87</sup>

83. See Gary G. Yerkey, *High-Tech Firms Urge Governments to Keep Hands Off E-Commerce in Seattle*, INT'L TRADE REP., at 1871 (Nov. 17, 1999). But, the abrupt end to the WTO's meeting in Seattle leaves unclear just what protection electronic commerce now enjoys against discriminatory international trade barriers. See also Richman, *supra* note 6.

The fiasco in Seattle should be attributed to the WTO's large membership, a factor that makes consensus building virtually impossible. See Marc Castellano, *WTO Talks End in Shambles, Widespread Intransigence Blamed*, JEI REP., Dec. 10, 1999; see also *WTO Talks Collapse*, THE HINDU, Dec. 5, 1999 ("In an attempt to make the negotiating process more inclusive the negotiations became too large to manage when there were such wide differences over complex issues."). The United States was accused of playing to domestic audiences in a pre-election year at the expense of upending the Seattle discussions. Many developing nations felt that the United States simply was trying to dictate global policy and undercut a chief source of growth for the nonindustrialized world—the export of low-cost products. See Castellano, *supra*.

84. See *WTO: Agreement on Telecommunications Services* (Fourth Protocol to General Agreement on Trade in Services), 36 I.L.M. 354 (1997). The WTO Basic Agreement on Telecommunications is key to the future of electronic commerce. But, the fact that the WTO agreement on basic telecommunications has still not been signed by all WTO signatories is of concern. See *A Review of Market Openness and Trade in Telecommunications*, OECD Doc. DSTI/ICCP/TISP(99)5/FINAL (Sept. 20, 1999).

85. See *WTO: Agreement on the Implementation of the Ministerial Declaration on Trade in Information Technology Products*, 36 I.L.M. 375 (1997).

86. See Malawer, *supra* note 49.

87. See Charlene Barshefsky, *Hearing on the World Trade Organization: The Seattle Ministerial and Millennium Negotiations*, CONG. TESTIMONY, Nov. 2, 1999, available at 1999 WL 27596525.

Since this agreement went into effect, the ability of dominant carriers in foreign countries to keep rates artificially high and depress demand for telecommunications services and electronic commerce has weakened significantly. . . . Such expansion has created competition for investment to develop regional data and electronic commerce hubs, encouraging many WTO members . . . unilaterally to improve their market access commitments. At the same time, U.S. exports of telecommunications services and equipment have increased significantly following the entry into force of the WTO basic telecommunications services agreement in February 1998 (as well as the Information Technology Agreement, which is on course to eliminate import duties on virtually all equipment related to the Internet.)

*Id.*

The ITA has contributed significantly to lower costs for construction of the Internet and other basic infrastructure for electronic commerce. "Under the ITA, forty-six countries—representing nearly ninety-five percent of the \$600 billion worldwide market for information technology products—will reduce tariffs on these products to zero, generally by the year 2000."<sup>88</sup> The ITA covers the core technology products of the Internet, including "semiconductors and printed circuit boards, computers, most telecommunications equipment, and computer networking equipment."<sup>89</sup> The existence of the BTA and the ITA, among other international efforts in electronic commerce, only further emphasizes the electronic commerce needs for developing regions such as Latin America and South America.

## V. Western Hemisphere Electronic Commerce Needs.

Although the issues brought about by electronic commerce tend to overlap, three areas seem to require immediate attention: developing infrastructure and improving access, dealing with the digital divide, and minimizing regulatory uncertainty in new electronic environments.<sup>90</sup>

### A. DEVELOPING INFRASTRUCTURE AND IMPROVING ACCESS.

The potential benefits of electronic commerce have brought to the forefront the question of access and use of information infrastructures. In this context, the global community has emphasized the need for governments to give priority to communication infrastructure issues.<sup>91</sup> "[G]overnments need to reflect on how to ensure access to electronic commerce not only to their own remote communities and disadvantaged population, but to other nations that are falling behind in infrastructure development and in their ability to use and diffuse electronic commerce."<sup>92</sup>

Technological capacity is frequently viewed as one of the most important determinants of a nation's future economic growth and competitiveness in international trade. "The technological revolution, the increasing globalization of production and trade and the consideration of large economic spaces can lead to a better world for all, provided the international community takes positive action to prevent the marginalization of developing countries and to ensure their active participation in the world economy."<sup>93</sup>

The primary concern, therefore, is that as technology assumes more importance in international trade, developing countries will become primarily consumers rather than

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88. Ambassador Susan Esserman, CONG. TESTIMONY, Oct. 13, 1999, available at 1999 WL 27595620 (discussing Electronic Commerce and U.S. trade policy).

89. *Id.* (stating that "the U.S. is leading efforts to expand the scope of this agreement to include additional products driven by information technology, and to address non-tariff barriers").

90. See *Dismantling the Barriers to Global Electronic Commerce*, *supra* note 24.

91. See *A Review of Market Openness and Trade in Telecommunications*, OECD Doc. DSTI/ICCP/TISP(99)5/FINAL, at 5-6 (Sept. 20, 1999) (quoting the Business Statement on the Impact of Telecommunications Liberalisation, made on the occasion of the OECD Ministerial Conference "A Borderless World: Realising the Potential of Global Electronic Commerce," Oct. 8, 1998).

92. *OECD Report on the Forum*, *supra* note 45, at 26.

93. *Tehran Final Documents*, at para. 4, U.N. Doc. UNCTAD/PSM/CAS/363 (1991).

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producers. The disparity in the technology base in the countries of this world, while providing extreme profits for established companies, creates a huge barrier to electronic commerce.<sup>94</sup> Internet Service Providers (ISP) are just now entering countries in Latin America and South America.<sup>95</sup> For the dream of true global electronic commerce to be fulfilled, the telecommunications infrastructures of all countries must be compatible. As it now stands, the United States and other industrialized countries maintain a distinct advantage in this category and therefore dominate electronic commerce.<sup>96</sup> This, in the short run, should increase the importance of international trade organizations and trade agreements such as the FTAA to determine fair and equitable trade rules.

The growth of global electronic commerce depends upon a global information infrastructure. "Developing this infrastructure requires creating effective competition in telecommunications markets and ensuring the growth of global electronic commerce through expanded access to the information infrastructure and services."<sup>97</sup> Indeed "[i]t is the Internet, with its open, non-proprietary standards which exploit the existing communications infrastructure that is behind the change and plays an important role in fueling the growth of electronic commerce."<sup>98</sup> Further telecommunications innovations are needed "so that access is not a function of income, location, price, or specialized skills, and computing becomes truly ubiquitous."<sup>99</sup>

#### B. DEALING WITH THE DIGITAL DIVIDE.

Less developed countries are describing this potential electronic commerce divide as the "digital divide."<sup>100</sup> This digital divide could take many forms—between richer and

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94. See *Business-to-Business Electronic Commerce*, *supra* note 12 (citing generally *Building Infrastructure Capacity for Electronic Commerce – Leased Line Development and Pricing*, OECD Doc. DSTI/ICCO/TISP(99)4/FINAL (Aug. 5, 1999)) [hereinafter *Building Infrastructure Capacity for Electronic Commerce*] (The cost of access to network infrastructure by firms differs significantly between liberalized and regulated markets across OECD countries, and this has major impacts on the rate of uptake of Internet-based business-to-business electronic commerce).

95. See Mimi De la Sierra, *Gaining Access*, BUS. MEX. 42, Feb. 1, 1999 (discussing the growth in interest and use of the Internet in Mexico and other Latin American countries). See also *supra* notes 47-62 and accompanying text for discussion of Latin American Internet use.

96. See *supra* notes 42-46 and accompanying text for discussion of U.S. Internet use.

97. OECD *Report on the Forum*, *supra* note 45, at 7. The OECD points out in a study of telecommunications pricing that "the market is developing not only new ways for users to buy and sell telecommunication capacity but also rapidly increasing the amount of capacity to meet expected demand based on current market signals. It is important that all countries open their telecommunications markets to full infrastructure and service competition." See also *Building Infrastructure Capacity for Electronic Commerce*, *supra* note 94, at 5. That study further notes that, the customers and suppliers of any business are only as close as the performance of the network allows. Performance is tied to the availability and price of the underlying capacity. Accordingly, the notion that the Internet gives access to a global marketplace for any business that connects to the growing network of networks needs to be qualified by the quality, availability and price of service.

*Id.*

98. *Dismantling the Barriers to Global Electronic Commerce*, *supra* note 24.

99. *Id.*

100. See discussion of "digital divide," *supra* note 46.

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poorer countries or between the well off and better educated in richer countries and their less educated fellow citizens. Governments have the responsibility to work to avoid this. A common effort by governments, non-governmental organizations (NGOs), the private sector, and individuals is needed to address the new challenges and bridge the gap that the digital world might be creating.<sup>101</sup>

The danger of a digital divide, at the national and international level, needs urgent policy attention. The "digital divide" is perceived differently in different countries. Much work remains to be done and there are many possibilities for cooperation in this work. What must be stressed is that this is a digital opportunity for all.<sup>102</sup> The challenge to governments, therefore, is to work collaboratively to create a society that is better equipped to maximize the benefits of e-commerce.

### C. LEGAL FRAMEWORK.

"Throughout the world, countries are fast realizing that their legal systems cannot take into account the rapid developments brought on by electronic commerce through the Internet and are scrambling to undertake massive domestic efforts to reform their commercial systems."<sup>103</sup> The general consensus seems to be that, for the potential of commerce on the Internet to be realized fully, "governments must adopt a non-regulatory, market-oriented approach to electronic commerce, one that facilitates the emergence of a transparent and predictable legal environment to support global business and commerce."<sup>104</sup> Governments will profoundly affect the growth of electronic commerce on the Internet. "By their actions, they can facilitate electronic trade or inhibit it. Knowing when to act and—at least as important—when not to act, will be crucial to the development of electronic commerce."<sup>105</sup>

Rule-making, however, is traditionally a retroactive process, codifying existing commercial practices, ratifying society's acceptance of those practices, and providing some sense of stability to better assure further use.<sup>106</sup> The promulgation of rules in electronic

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101. See *The Clinton-Gore Administration: From Digital Divide to Digital Opportunity*, Feb. 2, 2000, at <http://www.whitehouse.gov/WH/New/digitaldivide/index.html>; see also *Memorandum for the Heads of Executive Departments and Agencies: Use of Information Technology to Improve Our Society*, Dec. 17, 1999, The White House, Office of the Press Secretary, at <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pd:/oma.eop.gov.us/1999/12/20/2.text.1>; *Memorandum for the Heads of Executive Departments and Agencies: Electronic Commerce*, Dec. 17, 1999, The White House, Office of the Press Secretary, at <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pd:/oma.eop.gov.us/1999/12/20/5.text.1>; *Memorandum for the Heads of Executive Departments and Agencies: Narrowing the Digital Divide: Creating Opportunities for All Americans in the Information Age*, Dec. 9, 1999, The White House, Office of the Press Secretary, at <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pd:/oma.eop.gov.us/1999/12/9/5.text.1>. For a description of national and international efforts to combat the growing digital divide, visit <http://www.digitaldividenetwork.org>.

102. See *Towards Digital eQuality*, *supra* note 5, at 49.

103. WATSON, *supra* note 32, at 89.

104. *A Framework for Global Electronic Commerce*, *supra* note 1, at 512.

105. *Id.*

106. See Jeffrey B. Ritter & Judith Y. Gliniecki; *The Need for Harmonized National Reforms*, 6 HARV. J. L. & TECH. 263 (1993).

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commerce will therefore require inventive approaches, since the advancing technology far outpaces the legislative process. Unfortunately, the borderless world of electronic commerce could be lost because of legal barriers in the world's different countries.<sup>107</sup> "It is critical that the legal framework supporting commercial transactions on the Internet be governed by consistent principles across state, national, and international borders."<sup>108</sup> Indeed, it would be "absurd" to leave each state to devise its own set of laws for "what must be a seamless global whole."<sup>109</sup> With the advent of electronic commerce, the focus must shift from harmonization to coordination to bring disparate legal systems together in an effort to create legal systems that are unified in their approach to such a far-reaching, global problem.<sup>110</sup>

While virtually every government or non-governmental organization across the globe has started to address electronic commerce issues, the negotiations currently taking place for the FTAA provides a looking glass into how a regional trading agreement addresses issues of both domestic and international nature created by the Internet and electronic commerce. As will be discussed in the next section, the trade ministers of the FTAA are faced with only three choices: (1) promote what it thinks will be the global framework for electronic commerce within its member countries; (2) create its own framework; or (3) wait for the WTO to establish an internationally accepted framework. The trade ministers chose the third, finding that, "for the time being at least, any coverage of electronic commerce as a trade issue will be left to the World Trade Organization."<sup>111</sup>

## VI. FTAA Recommendations—the FTAA Joint Government-Private Sector Committee of Experts on Electronic Commerce.

According to the FTAA Joint Committee, "attention will need to be paid to address the opportunities and create an enabling environment in order to avoid the deepening of inequalities in the access and use of information technologies that could widen the social and economic gap between and within countries of the Western Hemisphere."<sup>112</sup> The problems within Latin America are the same problems pointed out in the OECD reports and in the WTO reports.

107. See Malcolm McDonald, *States' Legal Barriers 'Threat to E-Commerce*, NZ INFOTECH WLY., Nov. 2, 1998. Unfortunately, states are already enacting inconsistent laws. A survey of U.S. laws alone shows that forty-four states have enacted electronic or digital signature legislation so far. Many of these laws are inconsistent because some states are using "electronic" and "digital" interchangeably. See *States Enacting Inconsistent Laws to Boost E-Commerce*, COMM. DAILY, May 17, 1999 (noting the need for consistent, technology neutral electronic commerce laws).

108. *Towards Digital eQuality*, *supra* note 5, at vi. The situation is further complicated by the inconsistency of codes among countries, many of which are a reflection of cultural norms.

109. McDonald, *supra* note 107 (quoting Law Commission president David Baragwanath).

110. See Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931 (1998) (questioning whether the symbiotic relationship between domestic and international legal reform will result in products sufficiently similar to advance global electronic commerce).

111. Peter Menyasz, *FTAA Trade Ministers Make No Progress on Electronic Commerce's Role in Talks*, INT'L TRADE REP., at 1820 (Nov. 10, 1999) (quoting Canadian International Trade Minister Pierre Pettigrew).

112. *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 4.

Whether or not the region successfully meets these challenges will depend in large part on the approach that FTAA governments and private sectors adopt toward this innovative medium. The Joint Committee Report points out that electronic commerce "should propel the economies of FTAA members, lead to a higher standard of living for FTAA citizens, and generate new opportunities for the well-being and development of our communities."<sup>113</sup> Despite the projections, there is still a long way to go before Latin America joins the electronic commerce mainstream.

The Committee's report outlined to the FTAA trade ministers a number of challenges governments in the hemisphere are expected to face on issues related to electronic commerce, including network accessibility, common standards, and promoting electronic commerce in smaller economies.<sup>114</sup>

#### A. NETWORK ACCESS/COMPETITION.

Taking advantage of global electronic commerce depends upon access to efficient and reliable telecommunications networks. In many FTAA countries, this will require significant investment in developing infrastructure, which in turn will rely heavily on attracting private capital. Regulation, directed at encouraging competition and ensuring that providers can reach end-users and each other under reasonable and non-discriminatory terms and conditions will tend to promote investment and infrastructure development and enable e-commerce services and applications to be accessed easily.<sup>115</sup>

To promote access to basic telecommunication services, the Joint Committee recommends that FTAA governments should provide greater competition in telecommunication services on a non-discriminatory basis.<sup>116</sup> This corresponds with the WTO Basic Telecommunication Agreement.<sup>117</sup> Policies that encourage competition, facilitate inter-connection conditions, and allow private investment will help to reduce the cost of Internet access and promote telecommunications infrastructure development.<sup>118</sup>

FTAA countries that do not have universal affordable access to telecommunications infrastructure must face the challenge of achieving such access in a new environment of competitive markets. Governments must ensure the reliability of the Internet infrastructure and "ensure that sufficient bandwidth is available to meet the increased demand of expanding electronic commerce, particularly in countries that already lack an adequate level of bandwidth."<sup>119</sup>

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113. *Id.*

114. *See id.* at 6-8; *see also* Menyasz, *supra* note 111.

115. *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 6.

116. *See id.* For a recent overview of telecommunications reform in the Americas, *see Telecommunications Reform in the Americas: New Legislation and the Regulatory Framework*, 13 AM. U. INT'L L. REV. 971 (1998).

117. *See* discussion concerning the Basic Telecommunications Act (BTA), *supra* note 84.

118. To provide for the widest participation of their citizens and to increase their electronic commerce awareness and skills, FTAA Governments should promote Internet access points open to the public, such as in schools, libraries, community centers, or public phone centers. *See FTAA Joint Government-Private Sector Report*, *supra* note 36, at 6.

119. Menyasz, *supra* note 111.

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#### B. STANDARDS.

"The continued growth of electronic commerce requires global interoperability."<sup>120</sup> The Joint Committee recommends that Member states harmonize their networks and services to ensure interoperability across the western hemisphere, "specifically through the Inter-American Mutual Recognition Agreement for Conformity Assessment of Telecommunications Equipment negotiated within the Inter-American Telecommunications Commission."<sup>121</sup> The Joint Committee calls for governments to support standards-setting within international, voluntary, and consensus-based organizations, noting that such "market-driven standards serve to endure interoperability, allow interconnection, broaden market acceptance, reduce costs and allow large systems, such as the Internet, to be built from equipment and software provided by a large number of manufacturers."<sup>122</sup>

#### C. SMALLER ECONOMIES.

Electronic commerce has the potential to provide smaller economies with improved access to information, improved means and ease of communications to business contacts, lower priced products, reduction of barriers to entry to world markets, reduced transactions costs and improved potential for delivery of services. Thus, electronic commerce can enhance innovation and economic efficiency for the region as a whole.<sup>123</sup>

In order to promote electronic commerce within smaller economies, the Joint Committee recommended that FTAA governments of smaller economies should encourage greater participation in electronic commerce, and that generally, FTAA governments should share information and experiences on policies that "will encourage development, attract investment and promote the widest use of electronic commerce."<sup>124</sup>

#### D. LEGAL FRAMEWORK.

Much of the remainder of the FTAA report centers around the legal framework, or "marketplace rules," necessary to promote electronic commerce, including recommendations on: (1) intellectual property protection;<sup>125</sup> (2) Internet governance;<sup>126</sup> (3) taxation

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120. *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 6.

121. Menyas, *supra* note 111.

122. *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 6.

123. *Id.* at 7.

124. *Id.*

125. *See id.* at 9 ("The ability to perfectly copy electronic data, to distribute it instantly on a global basis, and the growth of ecommerce raise a number of issues for holders of intellectual property and governments related to the effective protection of intellectual property"); *see also* Menyas, *supra* note 111 ("Cooperative efforts will be required to make information on the rights of creators of intellectual property and the treatment of their copyrighted materials over open communications networks widely available and easily accessible.").

126. *See FTAA Joint Government-Private Sector Report*, *supra* note 36, at 10 (noting that the allocation of IP addresses, the coordination of the adoption of new Internet protocol parameters, and the management of the Internet's route server system are crucial to electronic commerce); *see also* Menyas, *supra* note 111 ("Efforts must be made, either through the Internet

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and electronic payments;<sup>127</sup> (4) contract law;<sup>128</sup> (5) security and reliability;<sup>129</sup> (6) authentication and electronic signatures;<sup>130</sup> and (7) consumer protection.<sup>131</sup>

#### E. WTO FRAMEWORK.

The Joint Committee, having determined that the WTO agreements provide a global framework of rules governing trade in goods, services, and intellectual property, recommends that FTAA member countries should follow closely and actively participate in the ongoing work and any future negotiations in the WTO related to electronic commerce.<sup>132</sup> In general, many of the FTAA recommendations follow WTO agreements or defer to the WTO Work Program on trade-related aspects of electronic commerce.<sup>133</sup>

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Corporation for Assigned Names and Numbers or elsewhere, to ensure that sufficient top-level domain names are available, particularly in Latin America and the Caribbean, where there is significant potential for growth in demand for domain names.”).

127. See *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 10 (“Many countries have recognized that electronic commerce will not reach its full potential if it is subject to discriminatory tax treatment. Electronic commerce depends upon swift, secure and effective payment systems. This requires an appropriate policy framework.”); see also Menyas, *supra* note 111.
  128. See *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 10 (“Electronic commerce depends on the ability of the parties to a transaction to enter into a binding and legally enforceable agreement. Further analysis is required to determine whether electronic commerce issues are adequately covered by existing laws and regulations or whether there is a need to introduce any changes.”); see also Menyas, *supra* note 111 (“In developing a secure legal framework for electronic commerce, FTAA governments must consider the legal recognition of digitally signed documents and contracts . . . Consideration should be given to resolving jurisdictional issues such as which laws apply and in which forum legal issues should be resolved.”).
  129. See *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 11 (“Widespread use of strong encryption is essential for electronic commerce to flourish in the Western Hemisphere.”); see also Menyas, *supra* note 111. FTAA countries must ensure the right of redress for consumers in cases of dishonest or fraudulent claims by either buyers or sellers in electronic commerce transactions, but any legislation must be flexible and remain as technology-neutral as possible to permit governments to keep up with the breakneck speeds of technology development.
  130. See *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 11 (“Parties to electronic transactions must be able to identify each other with certainty and verify that the content of their messages has not been altered during transmission. Thus, electronic authentication technologies and methods are critical enablers of electronic commerce.”); see also Menyas, *supra* note 111 (“Rules developed across the hemisphere on strong encryption technology must keep in mind national security concerns, but should not be so restrictive as to create unnecessary barriers to electronic trade.”).
  131. See *FTAA Joint Government-Private Sector Report*, *supra* note 36, at 12 (“Electronic commerce could facilitate schemes to defraud consumers, and creates new challenges both for consumers seeking to evaluate risks and for businesses seeking to provide traditional consumer protections in the online environment.”).
  132. See *id.* at 9.
  133. One Delegation went so far as to say that the issue of electronic commerce is of a global nature and should be dealt with only in the multilateral arena, such as the WTO and WIPO. See *id.* at 13.
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The end result of the Joint Committee's findings and of their report to the FTAA is that the trade ministers for the thirty-four countries participating in the FTAA negotiation are still unable to decide whether electronic commerce should be included in the talks to create a hemispheric free trade area.<sup>134</sup> While this might seem an unfortunate result, given the growing importance globally of electronic commerce, what the trade ministers have essentially done is bide their time until a more established international framework exists. This might be risky given that some experts consider one calendar year to be the equivalent of five or six Internet years.<sup>135</sup>

## VII. Criticisms of the FTAA Approach.

While this result might seem prudent given the current lack of international consensus, the FTAA should be doing more to promote electronic commerce infrastructure development within its member countries.<sup>136</sup> Electronic commerce can and should help the FTAA countries expand their trade, increase their global competitiveness, and hasten their integration into a unified, regional market. The dividends could be especially high for the smaller economies that traditionally have been hampered by limited information, high market entry costs, and distance from major markets.<sup>137</sup>

Unfortunately, within its thirty-four countries, the FTAA can count only Canada and the United States as prepared to take advantage of the electronic commerce revolution.<sup>138</sup> Most of the countries within the proposed FTAA currently lack the required infrastructure to allow true electronic commerce.<sup>139</sup> If the FTAA is to compete with the global community, its countries must be prepared to take advantage of electronic commerce and its potential. While promoting telecommunications competition within developing countries will help, the FTAA must take more concrete steps to alleviate this problem within

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134. See *id.* ("The Joint Committee did not reach consensus at this moment on the recommendation of how electronic commerce should be dealt with in the context of the FTAA negotiations."); see also *U.S. Secretary of Commerce William M. Daley Welcomes FTAA Report by Electronic Commerce Experts*, U.S. DEP'T OF COMMERCE, COMMERCE NEWS, at <http://www.ecommerce.gov/PressRelease/pressecec.html>.

135. See *OECD Report on the Forum*, *supra* note 45, at 19 ("Francis Lorentz, head of the French E-Commerce Task Force, pointed out that since the Ottawa Conference [in 1998], 5 or 6 'Internet years' had elapsed.").

136. In a recent address before the Council of the Americas Conference, USTR Charlene Barshefsky noted that discussions had started on "a series of hemispheric electronic commerce initiatives adopting such measures as privacy principles and the recognition of electronic commerce." *Remarks by USTR Charlene Barshefsky to Council of the Americas Conference*, Federal News Service, May 2, 2000, available in LEXIS.

137. See *U.S. Secretary of Commerce William M. Daley Welcomes FTAA*, *supra* note 134; see also discussion of electronic commerce, *supra* notes 4-6, 10-12, and accompanying text.

138. See discussion of U.S. Internet use, *supra* notes 43-44, and accompanying text.

139. See discussion of Latin American Internet use, *supra* notes 55-72, and accompanying text.

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the next five years (by 2005).<sup>140</sup> Five years, according to one electronic-commerce expert, is the equivalent to thirty Internet years.<sup>141</sup> If less-developed countries within the FTAA have not significantly addressed this problem now, they could quickly be left behind.

While the FTAA should keep abreast of national developments within its potential member countries, the FTAA should also follow international developments from the WTO, but the ICC, the U.N., and OECD as well, since electronic commerce is international and global in reach. The FTAA is faced with this unenviable paradox: it must unify disparate or non-existent national approaches and follow a currently non-existent international framework.<sup>142</sup> Fortunately, the U.S. framework seems to be slowly gaining acceptance as a global framework, at least among the developed countries.<sup>143</sup>

Simply acceding to the WTO or to the U.S. framework does little to address infrastructure problems and differences in legal approaches. WTO member countries are not bound to follow anything at present since there are only recommendations or guidelines on electronic commerce. The FTAA is faced with the need to do much more to address differences in electronic commerce capabilities of its member countries, especially if it wishes to compete in the globalized economy.

## VIII. Conclusion.

By the time the FTAA is formed in 2005, the Internet will be far advanced and electronic commerce will be far more important than it is today. While electronic commerce should foster free trade and expanded efficiencies of trade, developing countries are at a severe technological disadvantage. Electronic commerce requires fundamental basics of computers, computer networks, and telecommunication infrastructures that many developing countries simply do not have. This lack of technology creates a barrier to trade in the global marketplace and will hamper the growth towards true global electronic commerce.

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140. For a general discussion of legislation on electronic commerce in Latin American countries, see *Electronic Commerce in the Western Hemisphere: An Ongoing Series*, INTER-AMERICAN TRADE REP. (Dec. 31, 1999), at <http://www.natlaw.com/bulletin/1999/9912/991231a.htm>; *Symposium: Responding to the Legal Obstacles to Electronic Commerce in Latin America*, 17 ARIZ. J. INT'L & COMP. LAW 5 (2000) (discussing the General Principles on Electronic Commerce in the Americas (GPECA) based on recommendations to the National Law Center for Inter-American Free Trade (NLCIFT)).

141. See OECD Report on the Forum, *supra* note 45, at 19.

142. One expert stated "the efforts of individual countries to create a legal environment beneficial to e-commerce falls short of establishing a regional or hemispheric approach." *Electronic Commerce in the Western Hemisphere: An Ongoing Series*, INTER-AMERICAN TRADE REP. (Jan. 14, 2000) (quoting M. Devoto from Argentina). He goes on to advocate an international initiative "that incorporates or ratifies the basic, non-conflicting legal principles adopted by each country. Assuming it is ratified by the member states, such general initiative would serve to harmonize existing laws and practices as well as to facilitate commerce with the European Union and the United States." *Id.*

143. See *Towards Digital eQuality*, *supra* note 5, at iii.

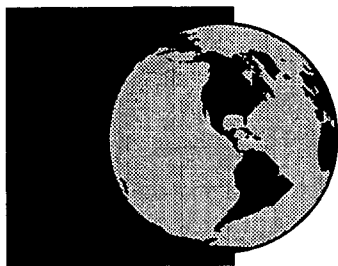
Nowhere is this more evident than the disparity in electronic commerce capabilities within the proposed FTAA. The FTAA is faced with the unenviable task of addressing national approaches of its thirty-four member countries as well as international approaches from a host of different groups. The FTAA is forced with trying to establish a regional framework for a global phenomenon. While the FTAA has taken initial steps to address such problems, it must continue to examine: (1) the U.S. approach (as the central electronic commerce figure in the Western hemisphere); (2) the business approach (because most frameworks are calling for self-regulation and joint business-government cooperation); (3) the OECD recommendations (simply because they have taken the lead and have conducted more studies than anyone else); and finally (4) the WTO (as the obvious world trade body).

The FTAA Joint Committee of Experts on Electronic Commerce has come out with its own findings and seems content to sit back and let the WTO take the lead for the time being. This approach seems appropriate given the current lack of international consensus on electronic commerce regulation, but might prove fatal. While the global community faces a long, arduous process of consensus development over the right ways to protect consumers without killing electronic commerce, if the FTAA doesn't do something now or begin to address the inherent problems, it will leave developing countries behind and create a hemisphere-wide trade agreement dominated on the electronic commerce front by a few technologically advanced powers. The FTAA needs to be taking concrete steps to address the infrastructure and access inequities amongst its countries. It shouldn't wait for the WTO to come out with something or hope that businesses do it on their own.

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