Electronic Uncertainty Within the International Trade Regime

Philip M. Nichols

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ELECTRONIC UNCERTAINTY WITHIN THE INTERNATIONAL TRADE REGIME

PHILIP M. NICHOLS*

INTRODUCTION .................................................. 1380
I. ELECTRONIC COMMERCE IS IMPORTANT ................. 1384
II. UNCERTAINTY CONSTITUTES A LIMIT TO ELECTRONIC COMMERCE'S GROWTH ............. 1390
   A. CERTAINTY IS A PREREQUISITE FOR COMMERCE IN FORMAL SYSTEMS ...................... 1391
   B. CERTAINTY TOOK A LONG TIME TO DEVELOP ........... 1394
      1. Common Law ........................................ 1394
      2. Code Law .......................................... 1397
   C. NO CERTAINTY EXISTS IN ELECTRONIC COMMERCE ...... 1402
      1. UNCITRAL Has Failed to Create Certainty ........ 1403
      2. Local Efforts Provide Even Less Certainty .......... 1406
III. THE WORLD TRADE ORGANIZATION RECOGNIZES THE NEED FOR CERTAINTY, BUT ITS APPROACH IS FLAWED ................ 1408
   A. DIFFERENT REGIMES ARE NOT SATISFACTORY .......... 1410
      1. URETS ........................................... 1411
      2. UN/CEFACT ...................................... 1414
IV. THE WORLD TRADE ORGANIZATION SHOULD COORDINATE LAWS CONCERNING ELECTRONIC CONTRACTING .................. 1415

* Associate Professor of Legal Studies, The Wharton School of the University of Pennsylvania. Carrie M. Reilly provided invaluable research assistance for this article. The author is a member of the law working group of UN/CEFACT. The opinions expressed herein are personal and not the representations of that group.
INTRODUCTION

Electronic commerce is changing the face of commerce around the globe. It already constitutes a large portion of business in the United States and Europe, and has enormous potential for growth worldwide. The growth of electronic commerce, however, is not limitless. One factor that could limit the use of electronic media is uncertainty in the creation of contracts.

In the most general and most used sense, electronic commerce simply means "the production, distribution, marketing, sale or delivery of goods or services by electronic means." This general definition can be broken down further into a more specific definition describing three types of transactions: the advertising, searching and marketing stage; the ordering and payment stage; and the delivery stage. While the second definition reflects the pervasive possibilities of electronic commerce, the first focuses on electronically effectu-
ated transactions, with which this article is concerned.

With respect to transactions, the law can act either as an inhibitor, through overregulation, or as an enabler, by providing an infrastructure for the creation of relationships. Unfortunately, much of the attention of those concerned with electronic commerce has been focused on the former.

The lack of attention paid to enabling electronic commerce is particularly unfortunate. Electronic commerce, which is blind to political borders, could contribute to the process of globalization and its attendant benefits. While the concept of globalization is somewhat amorphous, the most narrow and most often used meaning of the term globalization is economic globalization. Jeffrey Sachs posits

See OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 1 (1985) (explaining that a transaction occurs when a good or service is transferred across a technologically separable boundary).

See Jeffrey Goldfarb, Top Officials to Set Own Policy Agenda in Bid to Sidestep Government Mandates, 4 ELECT. COM. & L. (BNA) 76, 76 (1999) (reporting that senior officials from leading internet, communication and media firms have formed a coalition to “stave off” government regulation of electronic commerce, particularly with respect to privacy, taxation, intellectual property, content, and jurisdiction); Arthur Rogers, European Parliament Approves Directive Calling for Light Regulation of E-Commerce, 4 ELECT. COM. & L. 408, 408 (1999) (stating that the European Parliament emphasizes the need for little regulation, particularly with respect to transactions that cross borders).

See ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 113 (1992) (arguing that globalization consists of a shift from predominantly local consciousness to a consciousness that includes a global orientation); see also IAN CLARK, GLOBALIZATION AND FRAGMENTATION: INTERNATIONAL RELATIONS THEORY IN THE TWENTIETH CENTURY 16 (1997) (suggesting that the fact that globalization involves conscious perspective causes the concept to be both pervasive throughout various disciplines and difficult to define). But see ANTHONY GIDDENS, CONSEQUENCES OF MODERNITY 21 (1990) (speaking of globalization as the technological compression of time and space and the concomitant lifting of relationships from the local context).

See CLARK supra note 5, at 21 (stating that the vast majority of globalization theorists present it as a characteristic of economic activity). Legal theorists agree. See infra note 9. For examples of a focus on economic integration in a variety of disciplines, see Daniel Drezner, Globalizers of the World, Unite!, WASH. Q., Winter 1998, at 209, 212 (discussing the role of nation states within the economic logic of globalization); Roger Hayter & Sun Sheng Han, Reflections on China’s Open Door Policy Towards Foreign Investment, 32 REGIONAL STUD. 1 (1998) (attributing China’s economic policies in part to economic globalization); Richard C. Jones, Remittances and Inequality: A Question of Migration Stage and Geographic Scale, 74 ECON. GEOGRAPHY 8 (1998) (discussing economic globalization’s effect
that globalization occurs along four paths: trade, finance, production, and a growing web of economic treaties and institutions. Similarly, Stephen Kobrin suggests that globalization consists of deep economic integration. The majority of legal scholarship also describes globalization as primarily an economic phenomenon.

The benefits of economic globalization are clear. David Ricardo’s theory of comparative advantage predicts that international
trade allows countries to specialize in the production of goods and services that they are the most efficient at producing. Countries do not need to produce goods or services that they are less efficient at producing because they can purchase those goods and services from other countries. The channeling of resources to their most efficient uses results in greater wealth for all trading countries. This phenomenon underlies the predictions for increased global wealth that accompanied the trade liberalization introduced by the Uruguay Round of Multilateral Trade Negotiations, predictions that ranged from 212 billion U.S. dollars per year to over 274 billion U.S. dollars per year starting in the year 2002. If, as the economic definitions of globalization suggest, globalization does increase transnational trade, then Ricardo’s theory suggests an increase in global wealth for all. Electronic commerce, therefore, should be nurtured.

While the technology that supports electronic commerce is blind to borders, the laws that support electronically created relationships are not. Businesses, then, have the physical ability to transact across borders but are uncertain as to what will happen when they do. Without that certainty, it is unlikely that businesses will, in fact, fully exploit the potentials of electronic commerce. Even though the World Trade Organization recognizes the importance of electronic commerce, it will increase inequality in the rich countries and will cause dislocation in the poor countries.


12. See Root, supra note 11, at 38; see also EDWIN MANSFIELD, ECONOMICS: PRINCIPLES, PROBLEMS, DECISIONS 358 (7th ed. 1992) (discussing wealth creation through international trade).

13. See INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK: MAY 1994, at 86-87 (1994) (summarizing four different studies on the predicted increase in global wealth that would be caused by increased trade due to trade liberalization introduced by the Uruguay Round); see also John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, 49 WASH. & LEE L. REV. 1227, 1231 (1992) (stating that the basic policy underlying the world trading system is “to pursue the benefits described in economic theory as ‘comparative advantage’”).
commerce, its response has been to focus on inhibitory regulations. With respect to contract formation, the World Trade Organization requests only that its members adhere to standards created by any recognized international organization.\(^4\) Given the number and inadequacy of these standards, this request does virtually nothing to create certainty.

This paper suggests that the World Trade Organization is in a position to remedy the anomalous situation created when technological ability surpasses legal infrastructure. The World Trade Organization can and should promulgate a legal regime among its members. However, because the Organization itself does not have the resources or the expertise to create such a regime, its role should be one of cooperative coordination among those organizations that do have resources and expertise. An instructive example of such cooperation is the World Trade Organization’s formalized cooperation with the World Intellectual Property Organization.

I. ELECTRONIC COMMERCE IS IMPORTANT

Two types of changes possibly indicate the importance of a business practice: those that affect the way that business is conducted and those that affect the way that people view business. Electronic commerce is effecting both types of changes, clear evidence that electronic commerce is important.

Due in part to electronic commerce itself, the rapidly changing business environment makes figures notoriously unreliable. Nevertheless, three simple tables illustrate the insinuation of electronic commerce into global commerce. These tables demonstrate that businesses are spending an increasing amount of money on engaging in electronic commerce, that electronic commerce represents an increasingly large percentage of commercial transactions, and that electronic commerce is changing the nature of retail sales around the globe.

---

14. See infra note 117 and accompanying text.
Table 1

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>37.2</td>
<td>74.4</td>
<td>133.1</td>
<td>222.7</td>
<td>407.2</td>
<td>707.9</td>
<td>80%</td>
</tr>
<tr>
<td>Europe</td>
<td>5.6</td>
<td>18.8</td>
<td>49.4</td>
<td>112.4</td>
<td>223.0</td>
<td>430.3</td>
<td>138%</td>
</tr>
<tr>
<td>Asia/Pacific</td>
<td>0.7</td>
<td>1.9</td>
<td>3.9</td>
<td>7.6</td>
<td>14.6</td>
<td>27.5</td>
<td>109%</td>
</tr>
<tr>
<td>Japan</td>
<td>1.9</td>
<td>5.3</td>
<td>10.9</td>
<td>18.6</td>
<td>28.7</td>
<td>44.9</td>
<td>88%</td>
</tr>
<tr>
<td>Rest of World</td>
<td>4.9</td>
<td>10.6</td>
<td>20.3</td>
<td>36.6</td>
<td>60.2</td>
<td>106.8</td>
<td>85%</td>
</tr>
<tr>
<td>Total</td>
<td>50.3</td>
<td>111.0</td>
<td>217.6</td>
<td>397.9</td>
<td>733.7</td>
<td>1,317.4</td>
<td>92%</td>
</tr>
</tbody>
</table>

Clearly, the amount that businesses spend on electronic commerce is growing. Electronic commerce, therefore, constitutes a part of commerce that businesses cannot ignore. Significantly, increased spending on electronic commerce is not limited to the United States or even to the West. Moreover, in addition to raw spending by businesses, transactions represent a growing portion of commerce. Japan and the United States provide useful examples as illustrated by the next table.

---

Table 2

**Electronic Commerce in the United States and Japan**

### Market Size (in yen)

<table>
<thead>
<tr>
<th></th>
<th>1998 (bn)</th>
<th>2003 (bn)</th>
<th>% Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business-to-consumer</td>
<td>65</td>
<td>3,160</td>
<td>4,762</td>
</tr>
<tr>
<td>Business-to-business</td>
<td>8,620</td>
<td>68,000</td>
<td>689</td>
</tr>
<tr>
<td>Total</td>
<td>8,685</td>
<td>71,160</td>
<td>719</td>
</tr>
<tr>
<td>Japan as % of US</td>
<td>40</td>
<td>38</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>1998 (bn)</th>
<th>2003 (bn)</th>
<th>% Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business-to-consumer</td>
<td>2,250</td>
<td>21,300</td>
<td>847</td>
</tr>
<tr>
<td>Business-to-business</td>
<td>19,500</td>
<td>165,300</td>
<td>748</td>
</tr>
<tr>
<td>Total</td>
<td>21,750</td>
<td>186,600</td>
<td>758</td>
</tr>
</tbody>
</table>

### Percentage of commercial transactions conducted electronically

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>2003</th>
<th>% Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business-to-consumer</td>
<td>0.02</td>
<td>1.0</td>
<td>0.98</td>
</tr>
<tr>
<td>Business-to-business</td>
<td>1.5</td>
<td>11.2</td>
<td>9.7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>2003</th>
<th>% Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business-to-consumer</td>
<td>0.4</td>
<td>3.2</td>
<td>2.8</td>
</tr>
<tr>
<td>Business-to-business</td>
<td>2.5</td>
<td>19.1</td>
<td>16.6</td>
</tr>
</tbody>
</table>

In raw dollar terms and in percentage terms, the amount of commercial activity conducted electronically is increasing. Indeed, by 2004, seven percent of retail sales overall will be conducted electronically. That percentage, however, may be much higher in particular industries. The third table, representing retail sales in the

---


United States, demonstrates the pervasive nature of electronic commerce in some industries.

Table 3
U.S. ONLINE RETAIL PROJECTIONS BY CATEGORY

<table>
<thead>
<tr>
<th>(Millions)</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>% of total 2004 retail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total US revenue</td>
<td>20,252</td>
<td>39,755</td>
<td>64,179</td>
<td>101,128</td>
<td>143,758</td>
<td>184,481</td>
<td>7%</td>
</tr>
<tr>
<td>Media</td>
<td>3,617</td>
<td>5,461</td>
<td>7,444</td>
<td>10,091</td>
<td>11,867</td>
<td>12,598</td>
<td>22%</td>
</tr>
<tr>
<td>Software</td>
<td>1,240</td>
<td>1,898</td>
<td>2,472</td>
<td>2,964</td>
<td>3,168</td>
<td>3,290</td>
<td>50%</td>
</tr>
<tr>
<td>Books</td>
<td>1,202</td>
<td>1,715</td>
<td>2,200</td>
<td>2,724</td>
<td>3,152</td>
<td>3,279</td>
<td>16%</td>
</tr>
<tr>
<td>Music</td>
<td>848</td>
<td>1,386</td>
<td>2,067</td>
<td>3,213</td>
<td>3,946</td>
<td>4,286</td>
<td>25%</td>
</tr>
<tr>
<td>Videos</td>
<td>326</td>
<td>643</td>
<td>705</td>
<td>1,190</td>
<td>1,601</td>
<td>1,743</td>
<td>15%</td>
</tr>
<tr>
<td>Event tickets</td>
<td>300</td>
<td>669</td>
<td>1,208</td>
<td>1,926</td>
<td>2,917</td>
<td>3,929</td>
<td>14%</td>
</tr>
<tr>
<td>Apparel</td>
<td>1,620</td>
<td>3,607</td>
<td>6,581</td>
<td>14,710</td>
<td>20,181</td>
<td>27,128</td>
<td>3%</td>
</tr>
<tr>
<td>General apparel</td>
<td>1,061</td>
<td>2,566</td>
<td>5,106</td>
<td>12,333</td>
<td>16,694</td>
<td>22,516</td>
<td>11%</td>
</tr>
<tr>
<td>Footwear</td>
<td>121</td>
<td>290</td>
<td>392</td>
<td>605</td>
<td>902</td>
<td>1,085</td>
<td>2%</td>
</tr>
<tr>
<td>Accessories</td>
<td>438</td>
<td>751</td>
<td>1,083</td>
<td>1,772</td>
<td>2,585</td>
<td>3,527</td>
<td>9%</td>
</tr>
<tr>
<td>Gifts and flowers</td>
<td>656</td>
<td>998</td>
<td>1,788</td>
<td>2,853</td>
<td>3,923</td>
<td>4,659</td>
<td>12%</td>
</tr>
<tr>
<td>Flowers</td>
<td>354</td>
<td>550</td>
<td>1,000</td>
<td>1,565</td>
<td>2,151</td>
<td>2,472</td>
<td>13%</td>
</tr>
<tr>
<td>Greetings</td>
<td>134</td>
<td>177</td>
<td>333</td>
<td>587</td>
<td>729</td>
<td>798</td>
<td>8%</td>
</tr>
<tr>
<td>Specialty gifts</td>
<td>167</td>
<td>271</td>
<td>454</td>
<td>701</td>
<td>1,043</td>
<td>1,389</td>
<td>13%</td>
</tr>
<tr>
<td>Household goods</td>
<td>250</td>
<td>618</td>
<td>1,221</td>
<td>2,084</td>
<td>3,562</td>
<td>5,755</td>
<td>3%</td>
</tr>
<tr>
<td>Recreation</td>
<td>595</td>
<td>2,139</td>
<td>4,189</td>
<td>6,961</td>
<td>11,243</td>
<td>15,039</td>
<td>3%</td>
</tr>
<tr>
<td>Toys and video games</td>
<td>253</td>
<td>610</td>
<td>1,098</td>
<td>1,739</td>
<td>2,991</td>
<td>3,663</td>
<td>10%</td>
</tr>
<tr>
<td>Sporting Goods</td>
<td>165</td>
<td>586</td>
<td>1,162</td>
<td>1,949</td>
<td>3,068</td>
<td>4,220</td>
<td>8%</td>
</tr>
<tr>
<td>Tools and garden</td>
<td>177</td>
<td>944</td>
<td>1,930</td>
<td>3,273</td>
<td>5,184</td>
<td>7,156</td>
<td>5%</td>
</tr>
<tr>
<td>Leisure travel</td>
<td>7,798</td>
<td>13,950</td>
<td>20,732</td>
<td>26,042</td>
<td>29,447</td>
<td>32,097</td>
<td>12%</td>
</tr>
<tr>
<td>Automobiles</td>
<td>400</td>
<td>1,800</td>
<td>4,500</td>
<td>12,200</td>
<td>16,567</td>
<td>16%</td>
<td>4%</td>
</tr>
<tr>
<td>Electronics</td>
<td>3,178</td>
<td>5,785</td>
<td>9,710</td>
<td>13,317</td>
<td>20,152</td>
<td>24,211</td>
<td>16%</td>
</tr>
<tr>
<td>Computer hardware</td>
<td>1,964</td>
<td>3,471</td>
<td>5,737</td>
<td>9,154</td>
<td>11,424</td>
<td>12,541</td>
<td>40%</td>
</tr>
<tr>
<td>Consumer electronics</td>
<td>1,205</td>
<td>2,315</td>
<td>3,974</td>
<td>6,163</td>
<td>8,728</td>
<td>11,670</td>
<td>10%</td>
</tr>
<tr>
<td>Housewares</td>
<td>446</td>
<td>1,000</td>
<td>1,574</td>
<td>2,584</td>
<td>4,113</td>
<td>5,908</td>
<td>8%</td>
</tr>
<tr>
<td>Appliances</td>
<td>179</td>
<td>405</td>
<td>459</td>
<td>756</td>
<td>1,268</td>
<td>2,023</td>
<td>9%</td>
</tr>
</tbody>
</table>

18. Id.
Forrester Research, which provides some of the most accurate data on electronic commerce, suggests that its own estimates and other estimates of the growth of electronic commerce are too conservative. Forrester points out that consumers will rapidly adopt online shopping, traditional retailers will offer more goods on the internet, newcomers will tap new areas for retail selling, and technological advancements will make online shopping more convenient. Forrester also predicts a surge in retail electronic commerce in 2010, when a generation of shoppers who have spent their entire lives online will reach their peak earning years. Such consumers “will seamlessly integrate online and offline shopping.”

The potential of electronic commerce is changing the way businesses conduct operations. As the Organization for Economic Co-operation and Development points out, electronic commerce is “more than just an accumulation of ICT applications related to miscellaneous business processes. In its broadest sense, the goal of Electronic Commerce is the creation of a new kind of commercial

<table>
<thead>
<tr>
<th>Furniture</th>
<th>268</th>
<th>595</th>
<th>1,114</th>
<th>1,828</th>
<th>2,845</th>
<th>3,884</th>
<th>5%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food and beverage</td>
<td>513</td>
<td>1,132</td>
<td>2,459</td>
<td>5,009</td>
<td>10,836</td>
<td>16,863</td>
<td>3%</td>
</tr>
<tr>
<td>Health and beauty</td>
<td>509</td>
<td>1,189</td>
<td>2,108</td>
<td>3,833</td>
<td>6,294</td>
<td>10,335</td>
<td>5%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>778</td>
<td>1,807</td>
<td>3,365</td>
<td>5,219</td>
<td>7,023</td>
<td>9,394</td>
<td>14%</td>
</tr>
</tbody>
</table>

19. See id.
20. Id. at 1.
21. Id. at 3; see also Charting the Trade Routes of the Future: Towards a Borderless Economy, WTO Doc. Press/77 (Sept. 29, 1997) (statement of Renato Ruggiero, Director General of the World Trade Organization, to the International Industrial Conference) (noting that “[i]n 1995 some 50 million personal computers were sold worldwide against 35 million cars).
environment in an electronic milieu." Electronic commerce changes the fundamentals of almost every segment of business. For example, shippers and packagers will face an increase in deliveries of smaller packages on tighter schedules. Distributors—in an attempt to avoid becoming unnecessary middlemen between producers and consumers—are presenting themselves to consumers as one-stop shops that offer a wider selection of goods and services. All business segments must move to a business structure that accommodates customers’ new expectations.

Electronic commerce is also changing theoretical approaches to business. Again, the fundamental changes wrought by electronic commerce challenge fundamental theoretical assumptions. For example, one theoretical construct poses a tension between richness—customized products, tailored services, and one-to-one contact—and reach—mass production, mass distribution, and mass marketing—and suggests that each company must find its own balance between the two. Electronic commerce removes virtually all of the tension be-


24. See Clyde W. Witt, Thinking Inside the E-Box, MATERIAL HANDLING ENGINEERING, Nov. 1999, at 20 (discussing changing role of shippers and packagers). Packaging, therefore, must be more durable but can be less attractive, as it must protect the item through shipping but no longer has to draw a consumer’s attention. Id.

25. See David Hunter, Distribution Gets Wired, CHEMICAL WEEK, Nov. 3, 1999, at 29, 29-30 (discussing changes to distribution). The article also reports a survey of 16 global chemical firms and how electronic commerce will change their sales patterns. Most predicted large increases in their Internet sales but said they would continue to use distributors. Id. at 31. The role of distributors, however, is going to change because they will likely become more integrated into the stream between producers and consumers. Id. at 30.

26. Craig Zupan suggests six basic changes: “replace inventory with information, replace vertical integration with virtual integration, eliminate non value-added steps in the supply chain, move from making segmented products to making customer-specified products, move from internally designed products to collaboratively designed products, and excel at providing product information and advice.” Craig Zupan, Becoming a Digital Apparel Company: A Sea Change With Major Implications, APPAREL INDUS. MAG., Nov. 1999, at 64.

27. See SUSSKIND, supra note 22, at 290-92 (predicting that conceptions of law will also change, from a problem solving paradigm to one of risk reduction or hyper specialization).
two. \textsuperscript{28} Electronic commerce removes virtually all of the tension between richness and reach, and thus changes the way that supply chains, companies, brands, publishing, retail bundling and so much else are conceptualized. \textsuperscript{29} Similarly, electronic commerce will change the treatment of pricing, competition, and business structure.\textsuperscript{30}

The World Trade Organization estimates that in the near future, one quarter of the industrial countries' economic activity will involve electronic commerce. \textsuperscript{31} Clearly, electronic commerce represents a potential revolutionary change in the manner in which business is perceived and conducted, as well as an enormous opportunity for growth in all commerce, particularly transnational commerce. At the moment, however, that potential is limited by the uncertainty that accompanies the creation of relationships in these new media.

\section*{II. UNCERTAINTY CONSTITUTES A LIMIT TO ELECTRONIC COMMERCE'S GROWTH}

The OECD, which supports increased economic activity, summarizes the issue of certainty: "[c]ommerce depends on confidence. For the electronic marketplace to flourish in both its customer and enterprise dimensions, buyers and sellers alike must have at least the level of confidence in the outcome of electronic commerce as they have in more traditional kinds of transactions." \textsuperscript{32} That level of confidence does not yet exist. Richard Ravin is far more prosaic than the OECD: "[w]ell, you can't sign an electronic contract. It's never reduced to paper. Business people are not quick to enter into contracts that they

\begin{itemize}
  \item \textsuperscript{28} See generally Philip Evans & Thomas Wurster, Blown to Bits (1999).
  \item \textsuperscript{29} See id.
  \item \textsuperscript{30} See OECD, The Economic and Social Impact of Electronic Commerce 16 (1999) (discussing changes caused by electronic commerce). Among other things, fine market segmentation, auctions, and the ease of changing prices will change how people conceptualize price structuring. The need for flatter and more streamlined companies and the ability to collaborate on many levels will change the way that people view companies. \textit{id}.
  \item \textsuperscript{32} OECD, \textit{supra} note 23, at 42.
\end{itemize}
don’t have any certainty will be enforced in courts.” Certainty, therefore, could constitute the limiting factor with respect to the use of this otherwise pervasive tool.

A. CERTAINTY IS A PREREQUISITE FOR COMMERCE IN FORMAL SYSTEMS

The institutions that facilitate commerce can be sorted into two types: formal and relational. Relational institutions rely on preexisting relationships and take into account the social position or status of the parties that use those relationships. Examples of relationally oriented institutions include the traditional African practice of marrying a chieftain’s daughter in order to secure rights to grazing land, and


34. Institutions are “previously established sets of guidelines within which a given group of people relate to one another. These guidelines form the patterned expectations of behavior for members of that group.” Barbara P. Thomas-Slayter, Structural Change, Power Politics, and Community Organization in Africa: Challenging the Patterns, Puzzles and Paradoxes, 22 WORLD DEV. 1479, 1480 (1994); see also Stephen Krasner, Structural Cause and Regime Consequences: Regimes as Intervening Variables, in INTERNATIONAL REGIMES 1, 1 (Stephen Krasner ed., 1983) (discussing “principles, norms, rules and decision-making procedures against which actor expectations converge in a given area”).

35. See YEHUDI A. COHEN, MAN IN ADAPTATION: THE INSTITUTIONAL FRAMEWORK 106 (1971):

Customary law is made up of established rules and procedures that are not codified, that remain informal and personal in application. In a system of customary law, the resolution of disputes takes place in the course of face-to-face relationships within the community. Justice – to the extent it is ever done –emerges from the collective judgment of the community, often tacit rather than explicit. The force of law is in consensus, and the personalities and backgrounds of the disputants play an important part in the outcome.

See also ANN E. MAYER, ISLAM AND HUMAN RIGHTS 40 (2d ed. 1995) (“Nonindividualistic and even anti-individualistic attitudes are common in traditional societies, where individuals are situated in a given position in a social context and are seen as components of a family or community structures, rather than as autonomous, separate persons.”).

the contract law of the Soviet Union.37

The majority of the world either uses or is moving towards the use of formally oriented institutions to facilitate commerce.38 Formal institutions treat all parties equally and allow the creation of enforceable relationships between strangers.39 The contract laws of the common law systems and the code law systems are examples of formally oriented institutions used to facilitate trade.40

It is important to note two aspects of formal institutions, particularly those of contract laws. First, relationships are enforceable, and second, relationships can be forged among strangers. Businesses can seek out the cheapest and most suitable transaction regardless of their relationship (or lack of previous relationships) with the other party.

37. See E. ALLEN FARNSWORTH & VICTOR P. MOZOLIN, CONTRACT LAW IN THE USSR AND THE UNITED STATES: HISTORY AND GENERAL CONCEPT 3 (1992) (stating that contract law in the Soviet Union was infused with social purpose and must be understood as a social phenomenon); Lisa A. Granik, Soviet Contract Law and Perestroika, 78 GEO. L.J. 231, 236 (1989) (book review) (noting that in Soviet law existing relationships had an effect on how contracts would be interpreted).


39. See COHEN, supra note 35, at 106-07:

Formal law is administered through formal and often ritualized legal procedures. In such systems, lawyers and judges emerge as specialized technicians who study the law and rely on precedent and stereotyped actions in determining what it is and how it is to be applied. . . . A concern with precedent and ritualized procedure is intimately related to the use of impersonal criteria as the ideal standard in the administration of law.

See also ELMER S. MILLER, INTRODUCTION TO CULTURAL ANTHROPOLOGY 190 (1979) (explaining that informal law is personal, whereas formal law is impersonal).

40. Contracts within the common and code law systems are formal institutions in that they allow for the creation of enforceable relationships among strangers without regard to preexisting relationships. This attribute of a contract is often referred to as "freedom to contract." See Ralph James Mooney, The New Conceptualism in Contract Law, 74 OR. L. REV. 1131, 1134 (1995) ("The most fundamental conception returning to dominate contract law today is ‘freedom of contract.’"). The French equivalent is autonomy of the will. See BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 35 (2d ed. 1992) (noting that autonomy of will is “common to both English and French classical theories and remains part of the common currency of both systems”).
In other words, widespread commerce can occur. Indeed, while some commerce does occur on a relational basis, the operation of a free market depends on formal contractual institutions. John Wallis and Douglass North go so far as to say that contract "undergird[s] our modern economy." Contract law provides certainty in two areas. First, it determines that some promises and agreements will be enforced. Second, it provides clear rules for the interpretation and enforcement of those promises and agreements, thereby creating certainty and predictability for those engaged in commerce. Thus, those who do enter into a relationship with a stranger can both rely on that relationship and


42. See Stewart Macauley, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963) (discussing business transactions that occur on a relational basis, and why people choose to use, or not to use, legal sanctions when there is a breach of contract).

43. See Frank B. Cross, The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System, 70 Tex. L. Rev. 645, 651 (1992) (arguing that while market transactions would occur in the absence of legally enforceable contracts, they would surely be fewer in number); see also G. Richard Shell, Opportunism and Trust in Negotiation of Commercial Transactions: Toward a New Cause of Action, 44 Vand. L. Rev. 221, 267-68 (1991) (noting that reputational sanctions cannot provide the amount of trust that legal sanctions can provide for commercial transactions).

44. See John Joseph Wallis & Douglass C. North, Measuring the Transaction Sector in the American Economy, 1870-1970, in Long-Term Factors in American Economic Growth 95, 122 (Stanley L. Engerman & Robert E. Gallman eds., 1986) (suggesting that the enforcement of private property rights through formal contract helps explain the contrast between the high-income countries and the Third World countries).

45. See infra notes 54-61 and accompanying text (discussing the question of which promises to make legally enforceable).

46. See Cross, supra note 43, at 651 (noting the certainty and predictability created by contract law); see also G. Richard Shell, Contract in the Modern Supreme Court, 81 Cal. L. Rev. 431, 507 (1993) (using the late 1980s collapse of the Stock Market as an example of the need for clear rules and contractual certainty in commercial transactions).
predict what that relationship will be.\textsuperscript{47}

Certainty did not come easy. When projecting forward to certainty in electronic contracting, it is worth reviewing the development of certainty in the paper world.

B. CERTAINTY TOOK A LONG TIME TO DEVELOP

Certainty did not appear out of thin air. Both the common law and the code law systems struggled mightily with the concept of contract. In both cases, commercial needs provided a great deal of impetus for the creation of contract law. When considering the uncertainty that exists with respect to electronic media, it is worth briefly reviewing those influences.

1. Common Law

Early common law distinguished between written and parole agreements. Certainty of written agreements could be achieved under a seal, due to formalities that were attached to a seal that included the swearing of an oath. The basis for enforcement was moral rather than legal: the ecclesiastic courts held that violating one’s sworn word was a sin, punishable by excommunication from the church. The church’s threat, therefore, provided certainty.\textsuperscript{48} Parole agreements, in contrast to covenant, did not give rise to an action by themselves. Rather, action on oral agreements was based on the notion that a thing or benefit should be returned to the person to whom it was en-

\textsuperscript{47} But see Avner Greif, \textit{Reputations and Coalitions in Medieval Trade: Evidence on the Maghribi Traders}, 49 J. Econ. Hist. 857, 877 (1989) (describing avoidance of profitable transactions); see also Avner Greif, \textit{Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders’ Coalitions}, 83 Am. Econ. Rev. 525 (1993) (describing the relational institutions of the Maghribi traders). In contrast, those who operate within a relational commercial setting can deal only with those with whom they have the requisite preexisting relationship. The Maghribi traders of the medieval Mediterranean period, for example, traded throughout the Mediterranean, but only among themselves; enormously profitable deals with Christians and Muslims were not entered into because such parties were outside of the relational system upon which the Maghribi relied for certainty and enforcement.

\textsuperscript{48} See R.H. Helmholtz, \textit{Canon Law and the Law of England} 263 (1987) (“It was a sin to violate one’s sworn promise. And the canon law held that one could be obliged, under pain of excommunication, to complete the promise.”).
titled. Thus, action on a simple agreement was possible only if one party had at least partially performed under the agreement; an oral exchange of executory promises could never be enforceable in such a system.

Common law courts struggled throughout the fifteenth and sixteenth centuries to solve the puzzle of creating certainty with respect to executory agreements. Pressure for change came from the growing commercial sector, which, as it grew, depended more on executory agreements. This expanding commercial sector viewed ecclesiastical courts, courts of equity, and lay merchant courts—each of which enforced certain types of executory promises—as useful alternatives to the courts of law. Jurists, however, did not want to create a system whereby any promise, no matter how lightly made, could be

49. See Jean E. Rowe & Theodore Silver, The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance From the Fifteenth Through the Twentieth Centuries, 33 DUQ. L. REV. 807, 810 (1995) (discussing the difference between enforcement of parol and sealed agreements through the writ of trespass and assumpsit).

50. See Parviz Owsia, Formation of Contract: A Comparative Study Under English, French, Islamic and Iranian Law 125 (1994) (analyzing the shortcomings and gaps left in the system, which led to the use of equitable remedies).

51. See Clinton W. Francis, Practice, Strategy, and Institution: Debt Collection in the English Common Law Courts, 1740-1840, 80 NW. U. L. REV. 807, 848 n.159 (1986) (discussing the disadvantages of debt sur contract); see also James Oldham, Reinterpretations of 18th-Century English Contract Law Theory: The View From Lord Mansfield's Trial Notes, 76 GEO. L.J. 1949, 1956-59 (1988) (analyzing the change from assumpsit to indebitatus assumpsit). Courts interpreted sales agreements so that title to goods passed at the time a bargain was concluded, and thus delivery of the goods or tender of the sales price was no longer necessary to bring an action for detinue or debt sur contract. These actions, however, were limited by factual requirements and procedural complexities.

52. See E. Allen Farnsworth & Viktor P. Mozolin, Contract Law in the USSR and the United States: History and General Concept 190-91 (1987); see also Owsia, supra note 50, at 125 (attributing competitive pressure not only to other court systems but also to competition among the common law courts of law). The way that the court systems was structured created significant financial and prestige interests in maintaining large shares of litigation, and thus the possibility that these competing courts would siphon away lawsuits was a serious threat to the courts of law. See Francis, supra note 51, at 36 (describing interests of law courts in maintaining share of litigation and describing competition with other courts).
enforced. Certainty, therefore, was balanced against common sense.

In the sixteenth century, courts of law recognized a tortious action based on a set of fictitious secondary promises that were held to have been exchanged when parties entered into executory contracts—promises to perform or pay as agreed in the contract. These secondary promises were enforceable under the action of indebitatus assumpsit. From the contemporary vantage point, it seems ungainly that courts had to fabricate a promise to keep an already given promise. On the other hand, this fabrication was necessary to overcome the enormous mental obstacles inherent in the creation of a method for parties to determine which of their promises would be enforced.

In *Slade's Case*, decided in the early seventeenth century, a jury found that no secondary promises existed. A large body of common law judges who gathered to debate the matter determined that “every contract executory imports in itself an assumpsit, for when one agrees to pay money, or to deliver anything, he thereby assumes or promises to pay or deliver” and that “the mutual executory agreement of both parties imparts in itself reciprocal actions upon the case, in addition to action of debt.” *Slade’s Case* established the nature of the action of assumpsit and, more importantly, allowed remedy for a purely executory agreement.

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53. See Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 573 (1933) (noting that most “would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness”).


executory promises, courts were free to refine the rules surrounding enforcement, and the remainder of the seventeenth century was devoted to creating rules of certainty.\(^5\)

The tremendous amount of commercial activity and the concurrent laissez-faire attitude toward business transactions throughout the development of contract law cannot be ignored when discussing contract certainty in the context of electronic commerce.\(^5\) The extreme argument is that the benefit of commercial interests shaped all law in general.\(^6\) A more defensible argument explains that the exaltation of commerce affected the development of commercial law, including contract.\(^6\) At a minimum, scholars agree that commercial activity contributed to the rule of freedom of contract and to rules that created certainty with respect to economic transactions between strangers.\(^6\)

2. Code Law

Early Roman law created certainty in the creation of a binding

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58. It was during this period that the concept of consideration was conceived and fully developed. See generally E. Allan Farnsworth, The Past of Promise: A Historical Introduction to Contract, 69 COLUM. L. REV. 576 (1969) (discussing development of the doctrine of consideration); Robert H. Jerry, The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History, 72 TEX. L. REV. 1317, 1327 (1994) (noting that the 17th century court was devoted to developing the concept of consideration).

59. See Herbert Hovenkamp, Evolutionary Models in Jurisprudence, 64 TEX. L. REV. 645, 667 (1985) (noting that Herbert Spencer is often put forth as an example of this attitude). Spencer, the Dean of the School of Social Evolution, viewed the state as an "inefficient and potentially harmful instrument . . . . [S]ociety survived only when every person had maximum freedom with a minimum of restrictions." Id.


61. See FARNSWORTH & MOZOLIN, supra note 52, at 197 (attributing the development of a requirement of consideration to the influence of business interests on the law); see also CECIL H.S. FIFOOT, HISTORY AND SOURCES OF COMMON LAW: TORT AND CONTRACT 399 (1949) ("The large commercial interests of the new age sought a general sanction not for charitable gifts but for business enterprise. In such an environment it is not surprising that the judges should have required some material inducement to the defendant's undertaking.").

62. See LAWRENCE M. FREIDMAN, CONTRACT LAW IN AMERICA 20-24 (1965) (discussing how the notion of freedom of contract intertwined with laissez-faire).
agreement through a ritual *stipulatio*. The ritual required the saying of certain words in a certain order as well as a symbolic transfer of a scale. By the end of the first century B.C., the consent of involved parties enforced commercial contracts, although these contracts still were required to comply with certain formulas.

Justinian’s codification of first century B.C. laws faced numerous refinements following its rediscovery in Bologna in the eleventh century. By the sixteenth century, the general outline of certainty was clear. The natural law principle of pacta sunt servanda acted as a secular substitute for the religious tenet that prescribed the keeping of one’s word (in order to prevent the sin of lying). As a natural law principal, pacta sunt servanda was more readily accepted by jurists than was the canonist prescription, and thus provided the lay courts with a coherent rationale for enforcing purely executory contracts.

Code law, however, confronted the same problem as common law: how to balance certainty against the severity of enforcing every


65. See Nicholas, *supra* note 64, at 1605-06 (discussing nature of formulas). Contracts were enforced by *praetors*—officers in charge of civil disputes. Over the course of three hundred years, the praetors devised the formulas that were required for giving effect to the various types of consensual contracts.

66. See OWSIA, *supra* note 50, at 140 (“By the sixteenth century the Roman law of contracts as it had been revived and applied in the southern part of France provided certain fragmentary elements to be used for the construction of a general theory of contract.”).

67. See Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405, 430 (1994) (stating that French emphasis on *pacta sunt servanda* may be the fundamental difference between French and common law notions of contract). Pacta sunt servanda for French law consists of exact performance of a contract, while in common law, the focus is on conclusions. *Id.*

68. See OWSIA, *supra* note 50, at 140 (discussing replacement of canonist rules with *pacta sunt servanda*).
agreement. In order to resolve this problem, French jurists returned to Roman law. Roman *causa*, which examines parties’ motives for entering into an agreement, transformed into French *la cause*, which considers parties’ volition. An agreement will be binding if the parties indicate that they wish to be bound by it, and the agreement is legal.


Certainty is also important with respect to contracts between parties in different countries. The international community recognized the need for transnational certainty as early as the 1930s, when the International Institute for the Unification of Private Law requested a group of European scholars to draft a uniform law for the international sale of goods. That effort was suspended during the Second


71. See French Civil Code 411 (John H. Crabb trans., 1977) (defining “*la cause*” as an element “consisting of an adequately serious *‘cause’* or reason for a person to have obligated himself contractually; parallel in function to ‘consideration’ in Anglo-American contracts, and often similar in factual basis, it is without the formal concept of reciprocal exchange of benefits and detriment.”); see also von Mehren, *supra* note 69, at 1009 (comparing common law consideration with *la cause*). See generally Nicholas, *supra* note 40, at 19 (cautioning, however, that *la cause* is not a perfect analog to consideration because after ascertaining that the parties intended to be bound its primary function is to deny effect to illicit or immoral contracts).

72. See Michael H. Whincup, *Contract Law and Practice: The English System and Continental Comparisons* 70 (2d ed. 1992) (explaining that *la cause* has two parts, the first asking whether the parties’ intent to be bound exists, and the second asking if the reasons and purposes of the parties are lawful).

World War, and revived in 1951 at the request of a number of European nations. In 1956 a draft law circulated for comment. During this time, the scholars also began working on a uniform law for the formation of contracts for the international sale of goods. A draft of that law circulated in 1958.\(^\text{74}\)


From the outset, it was clear that the Uniform Laws would not be globally adopted. The drafting and promulgation of the Uniform Laws had come almost exclusively from Europe, and other regions were thus hesitant to adopt them.\(^\text{76}\) Nonetheless, the need for a cohesive transnational infrastructure remained. In 1966, the United Nations formed the United Nations Commission on International Trade Law ("UNCITRAL") for the purpose of dealing with issues of international trade law.\(^\text{77}\) One of the first issues taken up by UNCITRAL was the need for a uniform law for international sales contracts. Rather than work from the conventions promulgated by The Hague, UNCITRAL decided to create new conventions using more globally representative negotiating groups. In 1978, a full decade after it began deliberations, UNCITRAL concluded a draft on international sales and a draft on contract formation. In a moment of common

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\(^{74}\) See John Honnold, *A Uniform Law for the International Sales*, 107 U. PA. L. Rev. 299 (1959) (recounting the efforts to formulate and circulate this law).


sense, it combined the two drafts into the draft Convention on Contracts for the International Sale of Goods, and submitted the draft for approval.

In 1980, UNCITRAL convened a conference in Vienna for the purpose of concluding the Convention. Sixty-two nations and eight international organizations participated in the meeting. Several working groups heavily scrutinized the draft and modified various sections. The Convention then passed with no dissenting votes. Over fifty countries have ratified the Convention.

The driving force behind the unification of laws with respect to transnational contracts for sales was the desire to create certainty through uniformity. The multiplicity of national laws left transnational actors uncertain as to which law would apply and how the law would be interpreted. By reducing or eliminating these uncertainties and creating certainty regarding the rules and the interpretation of those rules, the drafters of the Convention hoped to increase the amount of international trade and thus the benefits that flow from that trade. Indeed, the transmittal letter that accompanied the pro-

78. See HONNOLD, supra note 76, at 10-11 (listing the voting statistics and discussing the conference). The original eleven parties to the Convention were Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia. As of January 1997, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Chile, Cuba, Czech Republic, Denmark, Ecuador, Estonia, Finland, Georgia, Germany, Guinea, Iraq, Lithuania, Luxembourg, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Uganda, Ukraine, and Uzbekistan, had also become parties to the Convention.

79. See MCC-Marble Ceramic Ctr., Inc. v. Ceramic Nuova D’Agastino S.P.A., 144 F.3d 1384, 1391 (1998) (“One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law . . . ”); see also C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 3, 8-9 (1987) (stating that the primary goal of the Convention was the unification of international sales law).


81. See C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 3 (1987) (stating that uni-
posed convention to the United States Senate stated:

International trade is now subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction . . . . The Convention's uniform rules offer effective answers to these problems. Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade.  

C. NO CERTAINTY EXISTS IN ELECTRONIC COMMERCE

The certainty that developed over several hundred years of evolution of contract law does not extend to electronic contracts.  

82. Message from the President of the United States to the Senate Transmitting the United Nations Convention on Contracts for the International Sale of Goods, 19 WEEKLY COMP. PRES. DOC. 1290 (Sept. 21, 1983). Not everyone agrees that the Convention has created the certainty sought by its drafters. See, e.g., David Frisch, Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit, 74 TUL. L. REV. 495, 507-08 (1999) (stating that because the Convention "was not drafted with any particular legal system in mind, there will be no reliable source of gap fillers" and thus the benefits of uniformity will not be achieved); see supra Unification and Certainty, note 80, at 1984 (stating that the uniformity of the Convention is illusory).


Uncertainty in the electronic domain manifests itself in three ways. First, the law is slow to respond to the new situations created by electronic commerce. Second, the uncritical application of existing law to the situations created by new technologies is inadequate. Third, the creation of different laws by different jurisdictions reduces certainty and predictability.

The lack of certainty can be illustrated by a brief examination of multinational and local attention to the creation of electronic contract law.

1. UNCITRAL Has Failed to Create Certainty

Just as UNCITRAL took up the issue of transnational contracting in the 1970s, it also attempted to deal with electronic contracting in the 1990s and beyond. In 1984, UNCITRAL received a report from the Working Party on Facilitation of International Trade Procedures. The report noted that the environment of transnational commerce law: The Need for Harmonized National Reforms, 6 HARV. J.L. & TECH. 263, 264 (1993) (arguing that “current legal structures pervasively incorporate a preference for paper-based systems”).

85. See Sabett, supra note 84, at 529 (describing the slow reaction of law to technological advances as a barrier to the use of electronic commerce); Ritter & Gliniecki, supra note 84, at 263 (stating that law is failing the challenge of keeping pace with technological change); see also Houston Putnam Lowry, The United Nation’s Commission on International Trade Law Model Law on Electronic Commerce and Guide to Enactment, 5 ILSA J. INT’L & COMP. L. 433, 433 (1999) (“The law must keep up with technology if it is to remain relevant.”).

86. See Sabett, supra note 84, at 527 (discussing hardships created by applying existing contract law to electronic contracts).

87. See Ritter & Gliniecki, supra note 84, at 283 (concluding that differing regimes are burdensome and costly and may keep out smaller companies); see also Sabett, supra note 84, at 534 (arguing that transnational use of electronic commerce will not occur on a large scale until laws for electronic commerce are harmonized).

88. See Boss, The Internet and the Law; supra note 84, at 587 n.6 (stating that “UNCITRAL has taken the lead at the international level in formulating the law governing electronic commerce”); see also Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U. PA. L. REV. 687, 730 n.177 (1998) (describing the UNCITRAL Model Law on Electronic Commerce as a continuation of the Convention and as taking the Convention “one step further” because of the emphasis on uniformity of interpretation).

89. See Amelia H. Boss, Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform, 72 TUL. L. REV. 1931, 1950
merce was moving toward information exchange and suggested that UNCITRAL was the appropriate body to deal with the legal questions created by this change. The following year, UNCITRAL adopted a recommendation encouraging governments to take certain actions regarding automatic data processing. That recommendation was endorsed by the General Assembly.

In 1988, UNCITRAL reported that national governments had done little with respect to automatic data processing, and that the electronic formation of contracts was emerging as a significant issue. UNCITRAL, thus, undertook to consider issues surrounding the electronic formation of contracts, and placed the matter within its Working Party on International Payments. That Working Party eventually suggested that UNCITRAL create and promulgate uniform rules on electronic commerce. The Working Party was renamed the Working Party on Electronic Data Interchange and given this task.

The Working Party spent four years drafting a model law on electronic commerce and used the laws of local sovereigns as a starting point.
point. The goal was to eliminate the parts of those laws that inhibited electronic commerce, for example the requirements that contracts be in paper form. A draft model law was submitted to UNCITRAL in 1995. One year later, UNCITRAL adopted the Model Law on Electronic Commerce. The Model Law was intended to be enacted as part of the local law of a sovereign. The model law very much reflects the working group's focus on the inhibitory effect of law on the use of electronic commerce. The heart of the Model Law is article five, which states that "[i]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." The intent of this paragraph is to mitigate the inhibitory, regulatory aspect of law on the use of electronic commerce. In dealing with this aspect of law, however, the Model Law falls victim to the third reason that no certainty exists with respect to the formation of electronic contracts: it leaves regulation in the hands of local


95. See A. Brooke Overby, Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce, 7 TUL. J. INT'L & COMP. L. 219 (1999) (emphasizing that the Model Law is intended to "provide essential procedures and principles" for e-commerce, while "offering the enacting states broad discretion to regulate beyond the Model Law in specific areas and also to tailor the Model Law to their own jurisdictions."); Harold S. Burman, Ten Years of the United Nations Sales Convention: Building on the CISG: International Commercial Law Developments and Trends for the 2000's, 17 J.L. & COM. 355, 358 (1998) (stating that the Model Law "has already found wide usage as a basis for new national and domestic law proposals on computer-based commercial transactions").

96. See UNCITRAL Model Law, supra note 94, art. 5; see also commentary at note 31 (stating that article five is the "fundamental principle").

97. See Maureen A. O'Rourke, Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?, 14 BERKELEY TECH. L.J. 635, 638 (1999) (stating that "[t]he intent of the law was to facilitate electronic commerce by providing for essentially equivalent treatment of electronic and paper records.").
law and thus does not create uniformity.

Unfortunately, the Model Law also does little to support the facilitating aspects of law. Only one article, article eleven, deals with contract formation. This section states that “in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages.” This provision illustrates not only the third reason that uncertainty exists with respect to electronic contracts, but also exemplifies that current law is inadequate to deal with technological advances. For example, article eleven does not take into account the new communicative technologies of electronic commerce. Even if article eleven were adopted by every country in the world, the unfortunate reality is that it would provide virtually no guidance for dealing with the new terrain created by electronic media. Thus, the provision adds almost nothing to the certainty needed for greater transnational utilization of electronic commerce.

2. Local Efforts Provide Even Less Certainty

The difficulty with local creation of laws for electronic contracting reflects three general areas of uncertainty in transnational electronic contracting. First, local efforts are usually reactive rather than proactive. Second, local courts that lack guidance often apply the rules of paper contracts to electronic contracts. Third, the creation of disparate local law does not create certainty for those who use electronic media to create transnational relationships.

A general criticism of local efforts is that they are generally reactive rather than proactive. Local law, in other words, is not attempting to create certainty. Rather, it is attempting to answer questions raised after parties have entered into relationships. While some degree of certainty may be created for those who follow, little incentive exists in terms of certainty for those who lead with respect to transnational electronic commerce.

A second observation is that local courts, in the absence of any guidance, often transfer the laws that apply to paper contracts and

98. See UNCITRAL Model Law, supra note 94, art. 11.

99. See Ritter & Gliniecki, supra note 84, at 270 (noting that local law has been reactive to the changes brought about by electronic commerce).
apply them to electronic contracts. For example, the United States District Court for South Carolina compared a web site to a magazine advertisement and determined that the web site did not constitute an offer to sell.100 This comparison is puzzling because the court also opined that the web page in question was a hybrid of passive and interactive and, thus, escaped easy categorization.101 Similarly in another case, a New Jersey court flatly stated that there was "no significant distinction" between electronically formed contracts and paper contracts.102

While this reasoning is straightforward, it is wrong. The digital world can convey so much more information in so many different ways between various parties than the paper world that the comparison between the two ultimately, and inevitably, must fail.103 Those who seek certainty will not be satisfied with such an approach.

Finally, dealing with electronic commerce through uncoordinated local efforts inherently contributes to uncertainty. Electronic com-

100. See ESAB Group Inc. v. Centricut, L.L.C., 34 F. Supp. 2d 323, 333 (D.S.C. 1999) (holding that the website does not constitute an offer to sell without some other substantial act to show that the commercial activity was directed at the forum state).

101. See id. at 330 (explaining that the page was a hybrid because a person could either telephone the company, create an account on the page, and use the page interactively, or access the information that was presented on the page and use that information in a non-interactive manner).

102. See Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (holding that since the plaintiffs were "free to scroll through the various computer screens that presented the terms of their contracts," the mere "clicking" on the agreement was enough to show that the plaintiffs assented to be bound by the terms of the contract).

103. See Robert Barnes, Brookfield Case Shows Poor Fit Between Trademark Doctrine and Technology, 4 ELECT. COM. & L. REP. (BNA) No. 28, at 634 (July 21, 1999) (arguing that courts must create new law because the laws created for the nondigital media simply do not work). With respect to the particular case he is reviewing, Barnes states that the Ninth Circuit Court of Appeals in the past was able to apply old doctrine to the digital media, but that in this case, the application of such laws finally broke down and the court "had to modify established legal principles . . . to fit the realities of e-commerce." Id. Again, this phenomenon is not limited to commercial regulation but instead will be seen throughout many types of regulation. See, e.g., Kenneth P. Doyle, FEC Approves Web Link to Campaign Sites; Backs Inquiry Into Need for Internet Rules, 4 ELECT. COM. & L. REP. (BNA) No. 17, at 358 (Apr. 28, 1999) (stating that people inside and outside the Federal Election Commission believe that FEC rules do not fit the digital media).
merce lends itself to the creation of relationships without reference to geographical borders. To the extent that the laws supporting the creation of electronic contracts are piecemeal and haphazard, parties cannot know what to expect with any given relationship that spans borders. Indeed, it was the uncertainty inherent in a patchwork of laws that led to the negotiation and adoption of the Convention on Contracts for the International Sale of Goods. As Bernard Audit notes, "[m]unicipal laws are ill-adapted to the regulatory needs of international trade and, in particular, to those of international sales."

III. THE WORLD TRADE ORGANIZATION RECOGNIZES THE NEED FOR CERTAINTY, BUT ITS APPROACH IS FLAWED

The World Trade Organization recognizes the simultaneous potential and uncertainty that electronic commerce creates. At the second Ministerial Conference, the World Trade Organization issued a Declaration on Global Electronic Commerce. The declaration directed the General Council of the World Trade Organization to "establish a comprehensive work programme to examine all trade-

104. See supra notes 10-13 and accompanying text (discussing borderless aspects of electronic commerce).


106. See General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, art. 4(1), 33 I.L.M. 1, 16 (1994) [hereinafter Charter] (establishing the Ministerial Conference as the primary deliberative body of the World Trade Organization, and that the Conference was to be "composed of representatives of all Members" to "meet at least once every two years."). The first Ministerial Conference was held in Singapore, the second in Geneva, and the third, infamously, was held in Seattle.

107. See Declaration on Global Electronic Commerce, WTO Doc. WT/MIN/98/DEC/2 (May 25, 1998) [hereinafter Declaration] (reaffirming that "global electronic commerce is growing and creating new opportunities for trade" and urging the General Council to take action to promote electronic commerce).

108. See Charter, supra note 106, art. 4.2, 33 I.L.M. at 16 (providing that when the Ministerial Conference is not in session, the General Council would meet "as appropriate" to conduct the business of the Ministerial Conference).
related issues relating to global electronic commerce. Addition-
ally, the declaration directed the General Council to "recognize that work is also being undertaken in other international fora."

The General Council promulgated the Work Programme on Electronic Commerce in September of 1998. The programme calls on each of the three bodies administering the three major trade agreements, as well as the Committee on Trade and Development, to evaluate certain issues relating to their area of interest. No mention, though, is made of contract certainty. The Council on Trade in Goods, however, is directed to examine standards governing electronic commerce.

Two months later, the Council for Trade in Goods released a report. The report specifically notes that the uncertainty or disparate
treatment of electronic commerce is an issue for consideration by the Committee on Technical Barriers to Trade. The report then gives the only guidance provided by the World Trade Organization for creating certainty with respect to the creation of contractual relationships through electronic media:

A link between the [Technical Barriers to Trade] Agreement and electronic commerce exists insofar as the Agreement encourages the use of international standards when these exist, or their completion is imminent . . . . Members would be encouraged by the TBT Agreement to use international standards in relation to electronic commerce, provided they are satisfied that the body that has developed them meets the requirements of being international.\(^\text{115}\)

At this point the report does not differentiate between technical and legal uncertainties. The report goes on, however, to supply a non-exhaustive list of international bodies working on electronic commerce, including the Organization for Economic Cooperation and Development, UNCITRAL, the International Telecommunications Union, UN/CEFACT, and UNCTAD. Most of these bodies are attempting to create transnational rules for the formation of contracts through electronic media.

The World Trade Organization’s approach to contract uncertainty, simply put, is to allow Members to choose from a menu of different possible regimes.\(^\text{116}\) This approach does little to promote certainty, and therefore does little to promote transnational commerce.

A. DIFFERENT REGIMES ARE NOT SATISFACTORY

The use of different regimes is unsatisfactory. The uncertainty that exists in the absence of accepted rules is not mitigated when conflicting rules are allowed. Two groups that are the furthest along in

\(^{115}\) See id.

\(^{116}\) See WTO Secretariat, Checklist of Issues Raised During the WTO Trade Facilitation Symposium—Note, G/C/W/113 (Apr. 21, 1998) (emphasizing the need to address legal issues of electronic commerce, suggesting multilateral solutions and supporting a facilitating role for the World Trade Organization). The World Trade Organization has also responded to calls from its members that it coordinates legal regimes in this area.
the promulgation of rules illustrate this problem. Those two bodies are the International Chamber of Commerce, which is in the final stages of developing URETS, and the UN/CEFACT, which has promulgated the Model Electronic Commerce Agreement.

I. URETS

The International Chamber of Commerce is a nongovernmental "association of internationally-oriented enterprises and their national organizations" that works to "promote international commerce worldwide." In 1995, the International Chamber of Commerce initiated Project E-100 for the purpose of "grounding emergent electronic commerce in reliable, internationally standard practices." In 1997 Project E-100 was renamed the Electronic Commerce Project, and three working groups were formed: the E-Terms Working Group, the Information Security Working Group, and the Electronic Trade Practices Working Group.

In November of 1999, the latter working group concluded the Uniform Rules on Electronic Trade and Settlement (URETS). URETS is intended to be a general set of rules that are voluntarily incorporated into an agreement through reference by the parties. These rules are also intended to apply to any electronic transaction conducted through any medium.

URETS contains twelve articles. Of those twelve, only three relate in some way to contract formation. They read:

4.0 Validity and Formation of an Electronic Agreement

4.1 Waiver: The parties, to the extent permitted by local law, waive any rights to contest the validity of a contract effected by Electronic Message on the sole ground that it was effected by that particular means of communication.

117. See W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 25 (2d ed. 1990) (discussing the founding of the ICC in 1919 and its membership of over 7000 enterprises and organizations).


4.2 Compliance with Applicable Law: Each party shall determine that the content or application of an Electronic Message is consistent with applicable law of its country and shall take all measures to inform without delay the other party of any inconsistency and any required action.

4.3 Formation of an Electronic Agreement: An Electronic Agreement effected by the use of an Electronic Message shall be concluded when the Electronic Message indicating acceptance enters the information system of the recipient, in a form capable of being processed by that system.

4.4 Evidence: The parties agree to waive the right to contest the validity of Electronic Messages solely because these messages are electronic.

5.0 Form & Authentication of Electronic Messages

5.1 All Electronic Messages must identify the sender and recipient(s) and must be capable of being authenticated.

5.2 All parties to an Electronic Trade Transaction must ensure that all Electronic Messages are created in a form which is readable by the recipient.

6.0 Processing & Acknowledgement of Receipt of Electronic Messages

6.1 Processing of Electronic Messages Received: Unless otherwise stated in these Rules or stipulated in the relevant Electronic Agreement, all parties receiving Electronic Messages must process any such messages and initiate any required action within the next two business days after receipt of those Electronic Messages.

6.2 Acknowledgements:

Acknowledgement is not required unless provided for in the relevant Electronic Agreement.

An acknowledgement should only be an Electronic Message which references the initiating Electronic Message along with the date and time of message receipt.

An acknowledgement of receipt of an Electronic Message does not necessarily constitute acceptance of the content therein.

Where an acknowledgement of receipt is required, such acknowledgement must be sent before close of business on the next business day from the time of receipt of the Electronic Message unless otherwise agreed to by the parties in the relevant Electronic Agreement.

If the sender does not receive the acknowledgement of receipt by the close of business on the next business day, or the deadline for the acknowledgement set out in the Electronic Agreement, the sender may treat the Electronic Message as having never been sent.

Where parties to an Electronic Agreement have agreed to use a designated party to receive Electronic Messages, receipt by the designated party con-
Of these, article four obviously is the most pertinent to contract formation. Yet article four says almost nothing, other than that a contract is formed when acceptance is received. Problems arise when this rather uncontroversial statement is used to craft a general set of rules for all mediums. Subpart three states that the contract is formed when the acceptance "enters the information system of the recipient, in a form capable of being processed by that system." This leaves open many questions regarding specific technology, such as when a web page enters a system. The efforts of the International Chamber of Commerce are important because it is a respected body whose suggestions reach much of the commercial world. It is likely that, if asked to use uniform terms created by an international body, many members of the World Trade Organization would refer to URETS. At the moment, however, URETS does not resolve uncertainty. Moreover, the International Chamber of Commerce is not the only international body that crafted uniform rules for electronic contracts. World Trade Organization members could also refer to UN/CEFACT.

120. See id., arts. 4-6.
121. See id. art 4.3.
122. The application of rules governing point to point communication technologies to the Internet is troubling in general and certainly is not a shortcoming of URETS alone; any regime that attempts a generalized regulation will face this problem.
123. The Chamber's rules on documentary collection, for example, are the standard for international letters of credit. The Chamber's INCOTERMS are the standard terms for assigning responsibilities in the transnational delivery of goods. The Chamber coordinates regularly with intergovernmental organizations, including the OECD. See Boris Kozolchyk, The Immunization of Fraudulently Procured Letter of Credit Acceptances, 58 BROOK. L. REV. 369, 381 (1992) ("Many instruments sent for international collection are made subject to the International Chamber of Commerce rules."); Jon Marks, Trade's Global Police Force, FIN. TIMES, May 8, 1996, at 16 ("The ICC has roles ranging from the exotic—such as countering piracy on the high seas—to the mundane—such as the business of regulating documentary credits and drafting up international norms for contracts . . . Terms set down by the ICC may become the near-universally recognised norms of international business.").
2. UN/CEFACT

The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) is the intellectual descendant of Working Party 4 (which dealt with trade facilitation) and UN/EDIFACT (which dealt with electronic data interchange). UN/CEFACT’s primary mandate is the facilitation of trade through electronic means. As is the case with the ICC’s Electronic Commerce Project, UN/CEFACT is also divided into working groups, one of which is the law working group. The law working group has produced a Model Electronic Commerce Agreement, which will soon be presented for endorsement by the General Assembly of the United Nations as a United Nations recommendation.

The Model Electronic Commerce Agreement is intended as a framework agreement that will be explicitly entered into by the parties and will govern subsequent electronic agreements. Parties

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128. See UN/CEFACT Plenary Session and UN/CEFACT @ Work: Delivering Solutions for Tomorrow’s World (visited June 12, 2000) <http://www.unece.org/cefact/marchconf/main1.htm> (discussing plans for the recent UN/CEFACT Annual Plenary session in March 2000).

129. See CEFACT Electronic Commerce Agreement (visited June 12, 2000) <http://www.sas.upenn.edu/~mkathryn/cefact/CEFACT.html> (providing an example of the web form of this agreement). This agreement is effectuated through an “instrument of offer” that is completed and sent to another party who then completes and returns the attached “instrument of acceptance.” The party that sends the instrument of offer does not have to be the party that will be the offeror in the
transacting electronically enter the agreement directly. As a result, the agreement can be customized according to the parties' needs. For example, the parties are asked to specify what media they will use and what media they will accept. Similarly, the parties can specify whether receipt of transmissions must be acknowledged or whether an acceptance can be withdrawn.

The greater specificity and flexibility of the Model Agreement raise the potential for conflict with the International Chamber of Commerce's URETS. In contrast to URETS, those who use the Model Agreement may not be required to send all electronic messages in a form readable by the recipient and may not be required to process messages within two days. On the other hand, the Model Agreement only has effect between parties that proactively enter into it and does not create background certainty.

The merits of each of URETS and the Model Electronic Commerce Agreement are worthy of a separate, much lengthier treatment. For purposes of this discussion, however, even a brief examination of the two documents demonstrates that neither one alone creates a great deal of certainty, and that both together could create confusion.

IV. THE WORLD TRADE ORGANIZATION SHOULD COORDINATE LAWS CONCERNING ELECTRONIC CONTRACTING

Not every issue that touches on transnational commerce falls within the purview of the World Trade Organization. It is fair to ask whether the Organization should take on any responsibility with respect to electronic commerce in addition to asking its members to

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130. See Model Agreement, supra note 128, inst. of offer, Sec. 2.

131. See id. §§ 2.3.2, 3.2.2 (noting that the Model Agreement uses default provisions in the event that the parties do not make a choice).

132. See URETS, supra note 120, art. 5.2 (providing, under the Model Agreement, that parties may specify what forms will be used).

133. See id. art 6.0 (indicating that parties to the Model Agreement can choose whether acknowledgment is required and what the period will be).
adhere to some internationally acceptable standard. Answering that question requires an examination of three narrower questions: whether the matter of a legal regime for electronic contracts falls within the authority of the World Trade Organization, what form of action the World Trade Organization could take, and whether any precedent suggests that the Organization would be successful.

A. THE MATTER IS WITHIN THE AUTHORITY OF THE WORLD TRADE ORGANIZATION

The World Trade Organization faces myriad requests for action on myriad issues ranging from the promulgation of democracy and gender equality to the creation of an international tax code. Obviously, the Organization cannot—and should not—attempt to satisfy all of these requests. The author of this article has suggested elsewhere that four criteria must be satisfied before the World Trade Organization undertakes an issue:

The World Trade Organization should not pursue an issue unless it satisfies these criteria. First, the issue must be within the legal authority of the Organization. Second, the issue must be substantial. Third, the Organization must be able to enforce any requirement that it makes of its members. Finally, the issue must require international coordination, and there must

be a credible argument that the World Trade Organization is the international organization that can provide the optimal coordination.\textsuperscript{135}

Those criteria are satisfied in the case of the creation of contract certainty for electronic commerce. The issue is clearly within the legal competency of the World Trade Organization. The organic document of the Organization states as one of its purposes, "expanding the production of and trade in goods and services."\textsuperscript{136} Both the organic documents and the history of the World Trade Organization and the organization that it replaces—the GATT—indicate that the Organization is competent to impose requirements on its members in addition to those that are imposed in the trade agreements annexed to the Organization’s charter.\textsuperscript{137} Although electronic contracting could involve relationships other than trade, it clearly is directly related to trade.\textsuperscript{138} Moreover, electronic contracting has very obvious implications for international trade.\textsuperscript{139} The issue is within the World Trade Organization’s legal authority.

The issue is also substantial, which is the second criteria. According to the World Trade Organization’s own estimations, a quarter of the industrial world’s trade will be conducted electronically.\textsuperscript{140} Electronic commerce is fundamentally changing the way that businesses

\begin{itemize}
  \item \textsuperscript{136} See Charter, supra note 106, at preamb.
  \item \textsuperscript{137} See id. art. 3(2) (“The [World Trade Organization] may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.”). Several of the multilateral trade negotiation rounds undertaken pursuant to the GATT resulted in the imposition of requirements on parties to the General Agreement on Trade and Tariffs. \textit{See also} John Croome, Restraining the World Trading System: A History of the Uruguay Round 6 (1995) (“[T]he core of the [Tokyo] Round’s results consisted of separate multilateral agreements whose main aim was to reduce or control non-tariff distortions to trade.”); John Jackson et al., \textit{Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules}, 81 MICH. L. REV. 261, 267 (1982) (discussing the Tokyo Round of multilateral trade negotiations).
  \item \textsuperscript{138} See supra notes 109-114 and accompanying text.
  \item \textsuperscript{139} See supra notes 109-114 and accompanying text.
  \item \textsuperscript{140} See supra note 31.
\end{itemize}
conduct business, and the way that business is conceptualized.\textsuperscript{141} No one can predict how substantial electronic commerce will be, but no one can deny that it will be substantial.

The matter of creating contract certainty in the electronic realm also satisfies the criteria of substantiability. Without contract certainty, businesses are less likely to utilize electronic means of creating contractual relationships. Furthermore, without an international regime, they are even less likely to create those relationships across borders.\textsuperscript{142}

Third, the World Trade Organization can enforce member requirements with respect to the creation and harmonization of electronic contract law. An obviously analogous requirement is contained in the Agreement on Trade Related Aspects of Intellectual Property, which requires members to create and harmonize laws recognizing and protecting intellectual property rights.\textsuperscript{143} It should be noted that the World Trade Organization itself does not enforce the requirements. Rather, members bring complaints against other members whose actions "nullify or impair" the benefits that should accrue pursuant to the various trade agreements administered by the Organization.\textsuperscript{144} Enforcement, then, is easiest if members are required to take specific, identifiable actions. The creation and harmonization of electronic contract law is both specific and identifiable. Therefore, the requirement is enforceable.\textsuperscript{145}

\textsuperscript{141} See supra notes 19-31 and accompanying text.

\textsuperscript{142} See supra notes 31-32 and accompanying text; notes 79-82 and accompanying text.

\textsuperscript{143} See Marco C.E.J. Bronckers, The Impact of TRIPS: Intellectual Property Protection in Developing Countries, 31 COMMON MKT. REV. 1245 (1994) (discussing requirements imposed on countries and how developing countries will comply with those requirements).

\textsuperscript{144} See Charter, supra note 106, annex 2 (stating that dispute settlement be conducted pursuant to the Understanding on Disputes, another annex to the World Trade Organization charter); see also JOHN H. JACKSON, THE WORLD TRADING SYSTEM 94-95 (1989) (pointing out that the key to invoking the GATT dispute-settlement mechanism is almost always 'nullification or impairment,' an unfortunately ambiguous phrase); Curtis Reitz, Enforcement of the General Agreement on Tariffs and Trade, 17 U. PA. J. INT'L ECON. L. 555, 580-87 (1996) (providing an excellent explication of the dispute settlement process).

\textsuperscript{145} Examples of requirements that would be less specific and identifiable could include a requirement that a member create democratic institutions within its
Finally, the creation of a legal infrastructure that enables electronic commerce requires global coordination. Electronic commerce has "demolished" concepts of time and space. 146 In the process, it has also demolished the concept of borders. 147 Electronic commerce is inseparable from the phenomenon of globalization. 148 At the same time however, there is no supranational body capable of imposing commercial law across borders—laws are still created and enforced by sovereigns. The creation of a legal infrastructure that supports electronic contracts across borders, therefore, requires coordination of local laws. 149

B. THE WORLD TRADE ORGANIZATION COULD COORDINATE ELECTRONIC CONTRACT LAW

For the most part, the World Trade Organization does not create international law that it imposes on members. 150 Rather, it provides minimum standards for laws and regulations that must be observed. The World Trade Organization has demonstrated that its members will adhere to the standards it promulgates. The World Trade Organization, however, does not have limitless resources and knowledge.

system of government or that a member adopt nondiscriminatory attitudes towards unempowered members of its society. See generally supra note 113 (discussing the many issues that the World Trade Organization has been asked to address).

146. See Walter B. Wriston, Bits, Bytes, and Diplomacy, FOREIGN AFF. 172, 175 (Sept./Oct. 1997) (acknowledging that the new technological revolution has given the freedom of information to individuals).

147. See Jessica Matthews, Power Shift, FOREIGN AFF. 50 (Jan./Feb. 1997) (noting that globalization has led to the creation of relationships with little regard for political borders).

148. See supra notes 5-10 and accompanying text (discussing globalization).

149. See Ritter & Gliniecki, supra note 84, at 283 (stating that harmonization of electronic contracting laws will increase international trade); see also Boss, supra note 84, at 587 (stating that businesspeople desire coordination of electronic contracting laws).

The Organization, therefore, should cooperate with and coordinate the work of others who have expertise and resources with respect to electronic commerce. Coordination with bodies like the International Chamber of Commerce and UN/CEFACT are good examples of the benefits of such cooperation. The International Chamber of Commerce has expertise in drafting rules of general applicability, but those rules lack specificity. UN/CEFACT on the other hand, has expertise in drafting specific rules, but those rules are only applicable between consenting parties. The combination of those two areas of expertise under the umbrella of the World Trade Organization—which has a world wide constituency that adheres to its standards—would do much to create certainty in the electronic formation of contracts.\footnote{151}

C. A SUCCESSFUL PRECEDENT EXISTS—COOPERATION WITH THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

Once again, the requirements imposed by the Agreement on Trade Related Aspects of Intellectual Property provide a useful precedent. Article 68 of that agreement requires the Council for Intellectual Property, in consultation with the World Intellectual Property Organization, to establish appropriate ways of cooperating with that organization.\footnote{152} In December 1995, the two organizations concluded a Cooperative Agreement, signed by the two Directors-General in January of 1996.\footnote{153} The agreement delineates cooperation between the two in respect to three areas: notification of, access to and translation of national law; implementation of article 6ter of the Paris

\footnote{151. Robert Hudec describes a similar symbiosis between the United States, which had expertise drafting very detailed bilateral trade agreements, and England, which had experience drafting multilateral agreements of general applicability. The combined efforts of the two, brought about by their cooperation during the second World War, eventually resulted in the General Agreement on Tariffs and Trade. See ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 5-12 (2d ed. 1990) (describing the cooperation of Great Britain and the United States).}

\footnote{152. See TRIPS, supra note 106, art. 68.}

\footnote{153. See Agreement Between the World Intellectual Property Organization and the World Trade Organization, WTO Doc. IP/C/6 (Jan. 1, 1996) (purporting to establish a mutually supportive relationship between these two organizations and to establish arrangements for future cooperation).}
Convention; and legal-technical assistance and technical cooperation. In July 1998, the two organizations concluded a Joint Initiative on Technical Cooperation, which specifically delineates means of providing technical assistance to countries attempting to comply with the requirements of membership in the World Trade Organization.

Cooperation between the World Trade Organization and the World Intellectual Property Organization is manifested in several ways. The World Intellectual Property Organization has established a physical presence within the World Trade Organization, having observer status in the General Council, the Council for Intellectual Property, the Committee on Trade and Development, and several accession working parties. Interestingly, the General Council and the Council for Intellectual Property invited the World Intellectual Property Organization to attend meetings on the subject of electronic commerce.

The World Intellectual Property Organization has provided significant logistical support to the World Trade Organization by providing copies and translations of intellectual property laws of all


155. See id.

156. See Technical Note on the Accession Process, WTO Doc. WT/ACC/7/Rev.1 (Nov. 19, 1999) (describing the accession process to the World Trade Organization, including a provision for technical assistance to acceding governments).


member and nonmember parties to the Paris Convention. The World Intellectual Property Organization also provides speakers and consultants for seminars arranged by the World Trade Organization. On an informal basis, the Council for Intellectual Property often refers to observers from the World Intellectual Property Organization for technical assistance when parsing matters of intellectual property law.

The area of technical assistance is most enlightening for purposes of creation of a harmonized infrastructure of electronic contract law. Developing countries that were founding members of the World Trade Organization were given until the year 2000 to create laws or bring existing laws into compliance with the Agreement on Trade Related Aspects of Intellectual Property. Parties acceding to the World Trade Organization must also bring their laws into accordance with the Agreement on Trade Related Aspects of Intellectual Property. Thus, there has been a huge demand for assistance in drafting or amending laws so that those laws comply with the international regime. The World Trade Organization has neither the manpower nor the technical expertise necessary to satisfy that demand. Instead, the World Intellectual Property Organization has worked with developing parties and countries acceding to the World Trade Organization. In other words, one international organization has used its resources and expertise to help members of another international organization comply with that organization's requirements. Moreover—and pertinent to the possibility of the coordination of efforts by other organizations with respect to electronic contracting—the World Trade Organization has used other organizations to craft specific national law. By all accounts, the cooperation between the two organizations has been very successful.159

CONCLUSION

Electronic commerce is important for many reasons. Some of these reasons are purely economic. Electronic commerce is also important, however, because it changes the ways in which people can create relationships and the ways in which people perceive the world.

Electronic commerce also reveals an anomaly of globalization. The technological ability and the mental willingness to create relationships now pay little regard to political borders. The legal infrastructures that support relationships, however, still stop at the border. At the moment, there is no supranational body to create transnational legal institutions. Such legal institutions must be pieced together from national law.

By focusing on the types of regulations that inhibit commerce rather than turning to laws that enable transactions, the World Trade Organization is abdicating an opportunity to effectuate greater economic activity among its members. It need not do so, and in fact should not. As perhaps the leader among commercially oriented international organizations, the World Trade Organization could work with other international organizations that have expertise and experience in creating regimes for electronic contracts. Its cooperation with the World Intellectual Property Organization provides an example of prior successful cooperation.