# "The extraterritorial enforcement of consumer legislation and the challenge of the internet"

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*Perhaps more than any other business activity, electronic commerce requires a balanced approach to co-regulation. Whether consumers are purchasing from a trader based locally or overseas through the internet this should not influence the availability of remedies for defects or breach of contract. Whilst business-to-business transactions may continue to be regulated by the rules of private international law, this has proved inadequate for consumers. Governmental regulation and enforcement both have a role to play. Whatever regime emerges must, however, have a large measure of consistency, predictability and transparency. A key component in this regard is arriving at common understanding of the jurisdictional rules that will apply to the regulation and enforcement of consumer protection standards by the various governmental authorities.*

## Introduction

Cross-border commerce is becoming easier for individual consumers through improvements in telecommunications, including the ability to carry out on-line real-time transactions through the internet. This means that more consumers will be directly importing goods purchased from overseas, with the same ease as they once purchased them from suppliers based locally.[1] For consumers, whether the trader they are purchasing from is based locally or overseas should not influence the availability of remedies for defects or breach of contract. Such consumer protection laws are increasingly common at the national level, but their enforcement extraterritorially presents major challenges to the global legal system.

Consumer protection laws – and laws in general,[2] are presented with practical enforcement difficulties by the internet. The internet potentially increases these challenges to a degree that threatens to undermine the effectiveness of the national consumer protection laws which have been developed hitherto. Whilst business-to-business transactions may continue to be regulated by the rules of private international law, this has proven inadequate for consumer laws. Criminal laws, and public international law, also have implications for the consumer protection, but are beyond the scope of this paper.

A fundamental issue with internet commerce is the question of which country's laws apply to the transaction – the jurisdiction or territoriality question. For laws can generally only be enforced through national courts. This becomes especially important in the context of consumer protection laws, for conflict of laws rules were developed in the business-to-business sector, and are unsuited to dealing with the low-cost transactions which constitute the great majority of business-to-consumer transactions. Enforcement however is even more important.

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[1]The Business research firm, eMarketer, predicts the total business-to-consumer (B2C) commerce market will reach $90.1 billion by the end of 2003, up US$30 billion over 2002. By 2005, the B2C e-commerce market is projected to reach US$133 billion; R Naraine, "B2C Goes From Rags to Riches" *Ecommerce News*, 25 April 2003, at <*http://ecommerce.internet.com/news/news/article/0,,10375_2196821,00.html*>.

[2]See, e.g., W B Wriston, *The Twilight of Sovereignty: How the information revolution is transforming our world* (1992).

This paper will examine challenges to the enforcement of national consumer protection laws presented by the internet, and in particular their application and enforcement. It will focus principally on New Zealand and Australian law and practice, with some coverage of the US and Canada, and to a lesser degree the European Union.

**Enforcement of laws internationally**

Commerce has rarely if ever been exclusively national. Throughout the course of human history the practical realities of international trade meant that much business was conducted at a distance, often overseas, with only limited opportunities for face-to-face contact between merchants. Many transactions were conducted by agents, whilst many relied upon correspondence. In Europe, and those countries which derived their legal traditions from that continent, each form of trade was regulated by rules of private international law, including the custom and usages of the merchants, the Law Merchant, or *lex mercatoria*.[3] Gerard de Malynes regarded Law Merchant as customary law approved by the authority of all kingdoms and not as law established by the sovereignty of any prince.[4] It was the "law of all nations".[5] Certain elements of the modern commercial law grew out of the Law Merchant,[6] which indeed continues to develop today as customary international law.[7]

Although there was an important international law element, all law was – and is – prima facie territorial in nature.[8] But many international laws were recognised by national legal systems, just as the laws of war involved both domestic and international elements.[9] In the English experience, which was to shape the laws of the common law world, these international laws were recognised by the common law, albeit often at the instigation of Parliament.[10] Although the substantive law and procedures of the common law world broadly reflected the international character of trade, it was also influenced by the insular tendencies of domestic

[3]L Trakman, *The Law Merchant – The Evolution of Commercial Law* (1983) (henceforth Trakman, *The Law Merchant*).
[4]Gerard de Malynes, *Consuetudo vel Lex Mercatoria, or the Ancient Law Merchant* (1979).
[5]*Luke v Lyde* (1759) 2 Burr 882; 97 ER 614, per Lord Mansfield, CJ.
[6]Trakman, *The Law Merchant*; B Benson, "The Spontaneous Evolution of Commercial Law" (1989) 55 *Southern Economic Journal* 644, 646-647.
[7]K P Berger, *The Creeping Codification of Lex Mercatoria* (1999).
[8]*American Banana Co v United Fruit Co* 213 US 347, 357 (1909). Recognizing the problems of extraterritorial enforcement, the United States Supreme Court has held that "legislation of Congress, unless a contrary intent appears, is merely to apply only within the territorial jurisdiction of the United States." *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991), citing *Foley Bros Inc v Filardo*, 336 US 281, 285 (1949). Although Congress "has the authority to enforce its laws beyond [US] boundaries," this principle "serves to protect against unintended clashes between our laws and those of other nations, which could result in international discord." *EEOC* at 248, citing *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963).
[9]A Roberts and R Guellf (eds), *Laws of War* (2000); G Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (1980).
[10]As with the Statute of the Staple 1352-3 (27 Edw III stat 2) (Eng).

law.[11] This was scarcely surprising since it was administered in national courts, imbued with the approach of a national legal system.[12] Sometimes the domestic influences prevailed, and the law was but little affected by international developments.[13] At other times international developments had a great influence on domestic laws.[14] In part this depended upon the contemporary strength of the individual nation-State, or upon its size and international influence.[15]

The advent of modern electronic trade conducted through cyberspace, and the consequent challenges to territorial borders, combined with the growth in regional free-trade alliances, has meant that there is an increased emphasis upon the international aspects of law.[16] But though the number of international treaties and conventions has increased,[17] this is only partly a consequence of technological change. Globalisation, for political and economic reasons, continues to have widespread effects on law. Nor is the internet, as a challenge to the legal system, a novel phenomenon.[18] Domestic legal systems have faced before the challenge of accommodating other legal traditions and technological changes.[19] What may be different now is the extent to which the changes which this new technology brings are being decided at international and supranational level, and this has important implications for national sovereignty and independence.[20]

If sovereignty means the "final authority within a given territory",[21] then the contemporary growth of internationalisation, especially that brought about by the internet, must have serious implications for State sovereignty.[22] Whilst the *lex mercatoria* impinged upon domestic sovereignty, in so far as this had developed in the early days of the law merchant, it did so to a

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[11]N Cox, "The regulation of cyberspace and the loss of national sovereignty" (2002) 11(3) *Information and Communications Technology Law* 241.

[12]DR Johnson and D G Post, "Law and Borders: The Rise of Law in Cyberspace" (1996) 48 *Stanford Law Review* 1367.

[13]As in the commercial law of England from the late nineteenth century to the late twentieth century; see A Harding, *A Social History of English Law* (1966).

[14]Particularly from within the same legal tradition, see, e.g., Jerome Elkind (ed), *The impact of American law on English and Commonwealth law: A book of essays* (1978).

[15]R Floud and D McCloskey, *The Economic History of Britain since 1700*, 2nd edn (1994).

[16]For one small aspect of this see B Boer, "The Globalisation of Environmental Law: The Role of the United Nations" (1995) 20(1) *Melbourne University Law Review* 101.

[17]See e.g., J Clift, "The UNCITRAL Model Law and electronic equivalents to traditional bills of lading" (1999) 27 *Journal of the Section on Business Law of the International Bar Association* 311; S Eiselen, "Electronic commerce and the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980" (1999) 6 *EDI Law Review: Legal Aspects of Paperless Communication* 21.

[18]J L Goldsmith, "Regulation of the Internet: Three Persistent Fallacies" (1998) 73 *Chicago-Kent Law Review* 1119.

[19]For a criticism of the "regulation sceptics", who (using descriptive and normative claims) assert that the internet is fundamentally different to earlier situations, and requires unique means of regulation, see J L Goldsmith, "Against Cyberanarchy" (1998) 65 *University of Chicago Law Review* 1199.

[20]See, e.g., Cox, "Regulation of cyberspace" note 11 above.

[21]F Hinsley, *Sovereignty*, 2nd edn (1996); S Krasner, "Sovereignty: an institutional perspective" (1988) 21 *Comparative Political Studies* 66.

[22]Cox, "Regulation of cyberspace", note 11 above.

limited extent. Perhaps more importantly, the law merchant evolved slowly, and did not impose an expectation of compliance upon any country.[23] It was, and is, a form of customary law. Custom is general State practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent State authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations.[24] The existence of custom, unlike treaty-law, depends upon general agreement, not deliberate consent.[25] This requires time to develop, and is often uncertain. The internet presents immediate problems, though not such as cannot be resolved through recourse to traditional legal principles and mechanisms.

The literature on the jurisdictional challenges of e-commerce is voluminous, and is largely focussed on private law aspects of this issue, namely whose courts and whose laws will apply in relation to private disputes arising out of e-commerce.[26] These rules are those of private international law, or the rules of conflict of laws. The fundamental question, in any legal dispute, is in which country's legal system will the dispute be resolved? This is the forum question, and concerns the jurisdiction. Secondly, whose law will apply to the transaction? This is the choice of law question – the proper or applicable law.[27] Thirdly, there is the question of the recognition and enforcement of judgements.[28] In the absence of evidence that

[23]Trakman, *The Law Merchant*.

[24]*Lotus Case (France v Turkey)* 1927 PCIJ ser A No 10 (Judgment of 7 Sept); *Asylum Case (Colombia v Peru)* 1950 ICJ 266 at 276 (Judgment of 20 Nov); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v US)* 1950 ICJ 266 at 299-300 (Judgment of 12 Oct); *Fisheries Case (UK v Norway)* 1951 ICJ 116 (Judgment of 18 Dec); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, 1969 ICJ 3 at 97-98 (Judgment of 27 June). See also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* 1969 ICJ 3 at 43-45 (Judgment of 20 Feb) in which the International Court of Justice emphasised the importance of opinio juris even in the face of inconsistent state practice in *Nicaragua v US*. Opinio juris may be determined from resolutions of international organisations, notably the General Assembly.

[25]G v Glahn, *Law Among Nations: An Introduction to Public International Law*, 7th edn (1996).

[26]R Tassé and M Faille, "Online Consumer Protection in Canada: The Problem of Regulatory Jurisdiction" (Aug 2001) *Internet and E-Commerce Law in Canada*; R de Bruin, *Consumer trust in electronic commerce: time for best practice* (2002); Goldsmith, "Three Persistent Fallacies", note 18 above; T Puurunen, "The Legislative Jurisdiction of States over Transactions in International Electronic Commerce" (2000) 18 *Marshal Journal of Computer and Information Law* 689.

[27]Substantive foreign law will apply, generally, where the parties have included a choice of law provision in a contract; where under the forum's own laws status is determined under the laws of the place of birth or marriage; in tort, where lex loci delicti applies; and in the enforcement of foreign judgments (assuming that the application of foreign law does not offend public order); O Renault, "Jurisdiction and the Internet: Are the traditional rules enough?" paper prepared by the Uniform Law Conference of Canada (1998), at <*http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm*>, no 7.

[28]In New Zealand governed by the Reciprocal Enforcement of Judgments Act 1934 (NZ). This has been applied to Orders in Council have been made in respect of many individual jurisdictions.

foreign law applies, courts have traditionally applied the substantive and procedural rules of the forum.

These rules have developed over time, and have been influenced by international conventions, such as the Brussels, Lugano (for the European Union), and Rome Conventions.[29] But each country has its own conflict of laws rules,[30] and there is no effective or established customary international law that regulates personal jurisdiction[31] – despite the failed attempt to introduce a Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[32] The position in New Zealand is that the courts will have jurisdiction if documents initiating proceedings may properly be served on that court.[33] The US position is that even if a foreign court passes a judgment or direction against a legal entity of a particular country say Country A, then that judgment or direction would not be applicable automatically to country A's legal entity or citizen.[34] Since 1995 there has been a great increase in the amount of cyberspace litigation, especially in the US. Some courts have simply applied traditional jurisdictional rules,[35] while others have tried to devise new tests to accommodate the peculiarity of the medium.[36] But the precise nature of cyber-law remains uncertain. Is it primarily national law, or a mixture of national and international? Or is it (as some have suggested) altogether different?

These are important questions, for the effective enforcement of consumer laws will only be possible if these can be answered, as there are limitations to what can be achieved through international co-operation alone. If enforcement remains purely (or perhaps, more accurately, principally) national, this itself presents difficulties, though not fundamentally different to those presented by traditional international trade. However, the number of international contracts being made has greatly increased over time, and the proportion of these business-to-customer has increased at an even greater rate. This has brought with it difficulties for national regulators and enforcement agencies, to whom their nationals turn when presented with a consumer grievance. The response from the regulators is varied, but that from the courts has been to apply national consumer laws over internet contracts, wherever possible.

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[29]Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, Brussels, 27 Sept 1968; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, Lugano, 16 Sept 1988; and Convention on the law applicable to contractual obligations, Rome, 19 June 1980.

[30]Electronic Commerce Part Two: A Basic Legal Framework (New Zealand Law Commission R58, 1999) paras 12-21.

[31]F Juenger, "Judicial Jurisdiction in the United States and in the European Communities: A Comparison" (1984) 82 *Michigan Law Review* 1195, 1211.

[32]See, the "Report on the Second Meeting of the Informal Working Group on the Judgments Project", 6-9 Jan 2003 (February 2003). This failed largely due to US opposition, grounded in concerns that it would hinder the development of the internet.

[33]*Cockburn v Kinzie Industries Inc* (1998) 1 PRNZ 243, 246 per Hardie Boys J (HC); *Biddulph v Wyeth Australia Pty Ltd* [1994] 3 NZLR 49.

[34]*Yahoo! Inc v La Ligue contre Le Racisme et L'Antisemitisme*, 145 F Supp 2d 1168; 169 F Supp 2d 1181 (2001); A Manolopoulos, "Raising 'Cyber-Borders': The Interaction Between Law and Technology" (2003) 11(1) *International Journal of Law and Information Technology* 40.

[35]I.e. *Bensusan Restaurant Corp v King*, 40 USPQ (2d) 1519 (SDNY), confirmed by US Court of Appeals (2d cir) 10 Sept 1997.

[36]Renault, "Jurisdiction and the Internet", note 27 above.

This presents important conflict of laws questions. For how may a consumer obtain legal redress against an internet-based trader except by complex litigation through national courts? Consumer laws by their nature should be consumer-friendly, and should enable consumers to have recourse through national courts. Indeed, conflict of laws principles do allow laws to be applied extraterritorially.

Historically, there has been a legislative presumption against the extra-territorial application of public law statutes, as a matter of statutory interpretation.[37] This is based on a historical concern not to infringe on the sovereignty of other states (or provinces) by purporting to regulate conduct that occurs wholly within the boundaries of another jurisdiction.[38] Customary international law however permits a nation to apply its law to extraterritorial behaviour with substantial local effect,[39] as well as the extraterritorial conduct of its citizens or domiciliary.[40]

The US Federal Trade Commission (FTC) acts against fraudulent and deceptive foreign e-businesses that harm US consumers. The FTC Act gives the FTC authority over acts "in or affecting commerce" and defines "commerce" to include "commerce with foreign nations." The act also gives the FTC specific authority to investigate practices that "may affect the foreign trade of the United States".[41]

US anti-trust laws provide a broad base for assertion of jurisdiction, which permit jurisdiction over foreign activities that have "a direct, substantial, and reasonably foreseeable effect" on commerce in the United States.[42] However, extraterritorial enforcement by the United States often generates a perception abroad of a sort of "United States imperialism".[43] This is particularly so where the effects are profound.[44] The extraterritorial application of the United States antitrust laws caused considerable disquiet overseas:

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[37]Though there are important exceptions, including in the consumer law field. For example, the Fair Trading Act 1986 (NZ) states, in s 3, that "This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand."

[38]Tassé and Faille, "Online Consumer Protection in Canada", note 26 above. See also *Buchanan v Rucker* (1808) 9 East 192; 103 ER 546, 547: "Can the Island of Tobago pass a law to bind the rights of the whole world?".

[39]*The Case of the* "SS Lotus" 1927 PCIJ (ser A) No 10, 18-25.

[40]*Blackmer v US*, 284 US 421, 436 (1932) ; *US v Rech*, 780 F2d 1541, 1543 n 2 (11th cir, 1986).

[41]J Bernstein, Director, Bureau of Consumer Protection, US FTC, "Fighting Internet Fraud: A Global Effort" (May 2000) 5(2) *Economic Perspectives, An Electronic Journal of the U.S. Department of State*, at <*http://usinfo.state.gov/journals/ites/0500/ijee/ftc2.htm*>.

[42]From the Sherman Anti-trust Act (1890) Title 15 U.S.C. §§ 1-7; Federal Trade Commission Act (1914) Title 15 U.S.C. §§ 41-51.

[43]R Pitofsky, "Competition Policy in a Global Economy – Today And Tomorrow", The European Institute's Eighth Annual Transatlantic Seminar on Trade and Investment Washington, DC, 4 Nov 1998, at <*http://www.techlawjournal.com/atr/81104ftc.htm*>.

[44]As, e.g., in *Hartford Fire Insurance Co v California*, 509 US 764 (1993) [where UK reinsurers were compelled to adhere to the US regulatory regime].

> Where a transnational antitrust issue is really a manifestation of a policy conflict between governments, it should be recognized that there may be no applicable international law to resolve the conflict. In such cases, resolution should be sought through the normal methods of consultation and negotiation. For one government to seek to resolve the conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right.[45]

Other countries have also applied their laws extraterritorially.[46] But the larger the economy the greater the influence, and perhaps, the greater the resentment of smaller economies. In *Libman*[47] the Supreme Court of Canada ruled that "it is sufficient that there be a 'real and substantial link'" between the proscribed conduct and the jurisdiction seeking to apply and enforce its law. Clearly, the "real and substantial link" test for the proper assertion of prescriptive jurisdiction will often result in more than one, and perhaps many, jurisdictions being capable of properly asserting authority over conduct that has effects in more than one jurisdiction. It is this fact that suggests the need for clearer prescriptive jurisdictional rules,[48] especially for consumer laws.

The European Union has also been active in developing rules relating to jurisdictional issues in the context of e-commerce. Undoubtedly this is facilitated by the existence of a treaty-based regime integral to the development of the Single Market, a regime that, perforce, has long provided for resolution of jurisdictional matters. The primary instruments in the civil or private law context in this regard have been the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which deal with jurisdiction to adjudicate matters as well as with the enforcement of extra-territorial judgments, and the Rome Convention on the Law Applicable to Contractual Obligations. The latter determines which state's substantive law shall be applied in cross-border disputes.[49] The Brussels 2 Regulation is now also applicable.[50] But none of these have direct application to consumer laws.

**The legal challenge of the internet**

Most private international law rules and principles are evolving, and may be traced some distance into the past. There is nothing new about courts being called upon to decide which

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[45]J S Stanford, "The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad" (1978) 11 *Cornell International Law Journal* 195. See also J P Griffin, "Foreign Governmental Reactions to US Assertion of Extraterritorial Jurisdiction" (1998) 6 *George Mason Law Review* 505.

[46]As for example, the High Court of Australia found in *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433.

[47]*R v Libman* [1985] 2 SCR 178.

[48]Tassé and Faille, "Online Consumer Protection in Canada", note 26 above.

[49]Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, Brussels, 27 Sept 1968; Convention on the law applicable to contractual obligations, Rome, 19 June 1980.

[50]Council Regulation (EC) 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ 2000 L160. This came into force March 2002.

court will have jurisdiction, which law will apply, or how judgment will be enforced. But these questions are rendered more difficult by the virtual nature of the internet. Complex litigation – or arbitration – may be possible in business-to-business transactions involving millions of dollars, but are impracticable for business-to-consumer transactions and smaller commercial contracts.

Why does the internet present particular difficulties? Because of its global reach into homes, and its universality and immediacy. It is possible, for the first time, for traders to reach consumers directly, without any middleman.[51] The internet, what we call "cyberspace", is an interconnected electronic communications network. It has no physical existence as a whole, though comprised of a large number of individual networks (the result being a conceptual confusion[52]). In essence the internet exists in a virtual world, cyberspace, rather than in the real, geographical, world.[53]

Cyberspace does have a common language, allowing different operating systems to speak to one another. At its highest level it is co-ordinated by the Internet Assigned Numbers Authority (IANA) and a central Internet Registry (IR).[54] However, as might be expected of a system which has no physical home, the internet has no controlling body, though the ICANN (Internet Corporation for Assigned Names and Numbers) regulates some aspects of the net. This is the non-profit corporation that was formed to assume responsibility for the Internet Protocol (IP) address space allocation, protocol parameter assignment, domain name system management, and root server system management functions previously performed under United States Government contract by Internet Assigned Numbers Authority (IANA) and other entities.[55] No one country can regulate the internet effectively, as is seen in the internationalisation of ICANN[56] – though it is possible for individual countries to exercise at least partial control the internet within their territory.[57]

Partly because of the international – and unregulated (or self-regulating) nature of the internet, there has been a tendency to claim that the changes we can observe in sovereignty, the State,

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[51]The internet service providers (ISP) are middlemen, though the consumer is largely unaware of their existence.

[52]J Goldsmith and L Lessig, "Grounding the Virtual Magistrate" at <*http://mantle.sbs.umass.edu/vmag/groundvm.htm*>.

[53]G Zekos, "Internet or Electronic Technology: A Threat to State Sovereignty" (1999) 3 JILT <*http://elj.warwick.ac.uk/jilt/99-3/zekos.html*>; D G Post and D R Johnson, "'Chaos Prevailing on Every Continent': Towards a New Theory of Decentralized Decision-Making in Complex Systems" (Social Science Research Network Electronic Library) at <*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=157692*>; D Burk, "Federalism in Cyberspace" (1996) 28 *Connecticut Law Review* 1095.

[54]Post and Johnson, "Chaos Prevailing on Every Continent", note 53 above.

[55]See <*http://www.icann.org/*>.

[56]See, for instance, JS Fishkin, "Deliberate Polling As a Model for ICANN Membership" (1999) (Study paper from the Berkman Centre for Internet and Society at Harvard Law School) <*http://www.cyber.law.harvard.edu/rcs/fish.html*>.

[57]J Linchuan Qiu, "Virtual Censorship in China: Keeping the Gate between the Cyberspaces" (1999-2000) 4 *International Journal of Communications Law and Policy* 1; C Elliott, "The Internet – A New World without frontiers" [1998] NZLJ 405.

jurisdiction and law are caused by the internet.[58] It has been said that the very nature and growing importance of the net calls for a fundamental re-examination of the institutional structure within which rule-making takes place.[59] But the globalisation of commerce is not a new phenomenon. Nor would it be necessarily valid to assign to the one cause a range of paradigm changes in society, economics and governance.

It however remains true that our existing international laws are predicated on the existence of the sovereign State. The notions of sovereignty and statehood were once among the most important aspects of public international law. Its heyday was perhaps in the late nineteenth century, when sovereign states enjoyed almost unfettered independence of action. These were subject only to the regulation of their diplomatic and military action, principally by the Law of Armed Conflict, or the Laws of War. International law has been called "the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another".[60]

But the norms of international law, even in the nineteenth century, which saw the acme of the concept of the sovereign nation-State, recognised multiple sources of authority. Many modern philosophers of law (not to mention political scientists) have concluded that using largely nineteenth century concepts of sovereignty as a benchmark of what political authority should be is either teleological at best or wrong at worst.[61] Yet it remains pervasive.

The internet, as a transnational system of communications, has shown signs of developing a distinct legal form.[62] The analogy between the rise of a separate law of cyberspace and the Law Merchant has been observed by Hardy.[63] But the Law Merchant evolved, as did other forms of international customary law, through usage and practice. It did not require a central authority, and nor was it inconsistent with sovereignty, de facto or de jure.

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[58]A W Branscomb, "Jurisdictional Quandaries for Global Networks" in L M Harasim (ed), *Global Networks: Computers and International Communication* (1993) ch 5.

[59]Post and Johnson, "Chaos Prevailing on Every Continent", note 53 above.

[60]*West Rand Central Gold Mining Co v The King* [1905] 2 KB 391 quoting Lord Russell of Killowen in his address at Saratoga in 1876. See also Sir Michael Howard, G J Andreopoulos and M R Shulman (eds), *The Laws of War – Constraints on Warfare in the Western World* (1994); J Gillingham and J C Holt (eds), *War and Government in the Middle Ages* (1994).

[61]K Pennington, *The Prince and the Law, 1200-1600: Sovereignty and rights in the Western legal tradition* (1993), 121.

[62]Though a separate jurisdiction for cyberspace has been rejected by the courts; *New Zealand Post v Leng* [1999] 3 NZLR 219, 226 per Williams J.

[63]I T Hardy, "The Proper Legal Regime for 'Cyberspace'" (1994) 55 *University of Pittsburgh Law Review* 1020.

But that is not to say that the internet is in any sense a source of authority in its own right.[64] To have sovereignty, a State must have a permanent population.[65] It must have a defined territory.[66] It must also have a government, and it must have the capacity to enter into diplomatic relations.[67] Although the formal application of the Montevideo Convention is confined to Latin America, it is regarded as declaratory of customary international law.[68] The Arbitration Commission of the European Conference on Yugoslavia, in Opinion No 1, declared that:

> The State is commonly defined as a community which consists of a territory and a population subject to an organised political authority.[69]

No other entity could be regarded as a sovereign State, whatever its de facto power. But this does not mean that sovereign States alone enjoy a monopoly of power or authority.[70] As the concept of State sovereignty declines, so notions of racial sovereignty have grown. The idea that a given population group is, or ought to be, sovereign within a larger country is not confined to any one country, such as New Zealand.[71] Yet, sovereign States have clung tenaciously to their rights, rights which have become more precious as they become rarer.[72]

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[64]Though, there have been arguments made that it should be; Johnson and Post, "Law and Borders", note 12 above; D R Johnson and D G Post, "And How Shall the Net be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law", draft paper at *Cyberspace Law Institute Papers on Cyberspace Law* (1996) at <*http://www.cli.org/emdraft.html*>. Geist, Reidenberg, and others have rejected this notion: see, e.g., J R Reidenberg, "Governing Networks and Rule-making in Cyberspace" (1996) 45 *Emory Law Journal* 922; J R Reidenberg, "Lex Informatica: The Formulation of Information Policy Rules Through Technology" (1998) 76 *Texas Law Review* 553.

[65]See the judgment of the International Court of Justice in the *Western Sahara* case, (1975) 12 *International Court of Justice Reports* 63-65; 59 *International Law Reports* 30, 80-82.

[66]Which may however be very small, or even of varying extent; *United States v Ray*, 51 ILR 225; *Chierici and Rosa v Ministry of the Merchant Navy and Harbour Office of Rimini*, 71 ILR 283; *Re Duchy of Sealand*, 80 ILR 683.

[67]This was expressly outlined in the Montevideo Convention on the Rights and Duties of States, signed 26 Dec 1933; M O Hudson (ed), *International Legislation* (1931-50), vol 6, 630.

[68]The Montevideo Convention on the Rights and Duties of States, signed 26 Dec 1933; Hudson, *International Legislation*, note 67 above, vol 6, 620.

[69]*Opinion No 1*¸92 ILR 162, 165. On the Arbitration Commission generally see M Craven, "The EC Arbitration Commission on Yugoslavia" (1995) 66 *British Yearbook of International Law* 333.

[70]N Cox, "Tax and regulatory avoidance through non-traditional alternatives to tax havens" (2003) 9(1) *New Zealand Business Law Quarterly* 10-32.

[71]For comparative purposes, see R Conley, "Sovereignty or the Status Quo? The 1998 pre-referendum debate in Quebec" (1997) 35 *Journal of Commonwealth and Comparative Politics* 67; P Howe, "Nationality and Sovereignty Support in Quebec" (1998) 31 *Canadian Journal of Political Science* 31.

[72]For the impact of electronic commerce generally, see C C Nicoll, "Electronic Commerce: a New Zealand perspective" (1999) 6 *EDI Law Review: Legal Aspects of Paperless Communication* 5.

The notions of sovereignty and statehood are not easily defined or explained. To a large degree this is because they are principally political concepts, rather than merely legal principles.[73] With the growth in both the (horizontal) extent and (vertical) reach of international agreements, treaties, conventions and codes, national independence is becoming less dominant. This tendency is becoming more noticeable in the modern commercial environment, and especially the internet. If electronic communication is (almost) instantaneous and global, who should regulate it and define its rules? Should it be subject to national regulation within some normative system – as the Law Merchant – or should it be recognised as a uniquely international system which requires international, or transnational, control?[74]

Some legislative provisions have been made to accommodate this new grundnorm of the globalisation of electronic commerce.[75] If commerce is now seen to be primarily international in nature, the scope of domestic law is, to some degree, restricted. However, international trade is not new, and the legal system has developed rules for regulating disputes. But nineteenth and twentieth century conflict of laws principles do not satisfy the requirements of consumer laws. These require immediate, simple, low-cost remedies.

The limitations of paper-based evidential requirements when faced with the requirements of modern electronic communications, are a case in point. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce provides that an electronic signature may be legally effective as a manual signature, but does not define an electronic signature.[76] Thus although international treaties or conventions may give some guidance, it remains for the domestic legislature to provide the detail. The Model Law also does not override any rule of law intended for the protection of consumers, but it was drafted without special attention being given to issues which might arise in the context of consumer protection.[77]

The Electronic Transactions Act 2000 (NZ) is based on work carried out by the New Zealand Law Commission, and closely follows both the Model Law on Electronic Commerce prepared by UNCITRAL in 1996 and the Australian Electronic Transactions Act 1999 (Cth) – itself heavily influenced by UNCITRAL.[78] The purpose of the Act is to facilitate the use of electronic technology. This it does by reducing uncertainty regarding the legal effect of electronic communications, and allows certain paper-based legal requirements to be met by using functionally equivalent electronic technology.[79]

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[73]S Krasner, "Sovereignty: an institutional perspective" (1988) 21 *Comparative Political Studies* 66-94.

[74]See Zekos, "Internet or Electronic Technology", note 53 above.

[75]In the US, the Digital Millennium Copyright Act (1998), Pub L No 105-304, 112 Stat 2860, 2905; in New Zealand the Electronic Transactions Act 2000 (NZ).

[76]Article 7.

[77]This exclusion is a result of the terms of reference under which UNCITRAL operates than from any reasoned view that exemption of consumer protection is justified; Electronic Commerce Part Two: A Basic Legal Framework (New Zealand Law Commission R58, 1999) paras 103.

[78]See J D Gregory, "The authentication of digital records" (1999) 6 *EDI Law Review: Legal Aspects of Paperless Communication* 47; J D Gregory, "Solving legal issues in electronic commerce" (1999) 32 *Canadian Business Law Journal* 84.

[79]Explanatory Note to Electronic Transactions Bill.

The Act is predicated upon the idea that the principles applicable to the making of a contract by electronic means should be no different to the principles applicable to contracts formed orally or in writing on paper. Indeed, the decided cases appear to have accepted that proposition as self-evident.[80] These principles may vary from country to country, though there are certain points upon which all jurisdictions agree.

It is these common elements which form the basis for the United Nations Commission on International Trade (UNCITRAL) Model Law on Electronic Commerce. Under article 7 of the Model Law, the elements of the functional equivalent to a signature are the need:

> To identify the person and to indicate that person's approval of the information contained in the data message; and
>
> For the method to be as reliable as was appropriate for the purpose for which the message was generated or communicated.[81]

Article 7 only applies where a signature is a requirement of law. Where a signature is not required by law then the normal rules in relation to proving an agreement apply. These general rules allow some flexibility to domestic law. But they also impose some common standards.

Whilst it is not unusual for domestic laws to be influenced by international developments, it is perhaps true that New Zealand – and most other countries – had little choice but to adopt the UNCITRAL model, and alter its domestic laws accordingly. The nature of electronic commerce has some important differences from traditional trade, not least of which is its speed and universality. This latter attribute means that the electronic age poses particular problems for municipal legal systems, and for the States which created them.

For the most part the internet is international, and its users are not adequately served by existing laws with respect to conflict of laws.[82] The efficacy of the concept of "closest and most real connection"[83] is also reduced, in that no part of the world is any more directly affected than any other by events on the web, as information is available simultaneously to anyone with a connection to the internet.[84] In the field of protection of intellectual property rights the same is true.[85]

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[80]*Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC); *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories* 724 F Supp 605 (1989); Electronic Commerce Part One: A Basic Legal Framework (New Zealand Law Commission R50, 1998), para 52.

[81]Electronic Commerce Part One: A Basic Legal Framework (New Zealand Law Commission R50, 1998), paras 316-320, 344-345.

[82]Though not necessarily because of any profound difference between cyberspace and territorial space, but rather because of the complexity of cyberspace; Goldsmith, "Against Cyberanarchy", note 19 above.

[83]*McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (CA); L Collins (ed), *Dicey and Morris on the Conflict of Laws*, 13th edn (2000) ch 32.

[84]Johnson and Post, "Law and Borders", note 12 above.

[85]D L Burk, "Muddy Rules for Cyberspace" (1998-99) 21 *Cardozo Law Review* 121, at <*http://www.cardozo.yu.edu/cardlrev/v21n1/burk.pdf*>.

Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility[86] – and legitimacy – of applying laws based on geographic boundaries. Location remains important, but it is virtual location, rather than physical location – there is no necessary connection between an internet address and a physical location.[87] If territorial States are not the sole source of authority for the regulation of the internet, do the other sources – whatever they might be – enjoy a claim to legitimacy?

The limits of national control of the internet are perhaps exaggerated.[88] Principally that is because nations are increasingly acting in concert to deal with the borderless nature of cyberspace by creating both relatively uniform laws across jurisdictions, and agreements for international co-operation in surveillance and investigation.[89] A country has no choice but to promote vigorously the introduction of new technology in order to maintain and increase its international competitiveness[90] – and this may mean the adoption of international norms – such as UNCITRAL, in the drafting of which it has had comparatively little influence. Increasingly, private, non-State parties are regulating cyberspace.[91] The resulting uncertainty has led some to argue that law should recognise a separate jurisdiction, or even a separate sovereignty, for the internet.[92]

The difficulty facing national jurisdictions is one of enforcement, which has led to other forms of regulation, including (but not limited to) trans-national, international, institutional, sectoral and private.[93] There are an increasing number of examples of private control or self-regulatory control, sometimes involving codes. Unfortunately these disparate approaches exasperate the already marked divisions. Nor are there signs that international co-operation will be practical outside narrow legal fields such as copyright and cyber-crime.[94]

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[86]Something which may be related to the relative length of the virtual border, see Johnson and Post, "Law and Borders", note 12 above.

[87]For a general description of the Domain Naming System, see D L Burk, "Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks" (1995) 1 *University of Richmond Journal of Law and Technology* 1.

[88]Goldsmith, "Against Cyberanarchy", note 19 above.

[89]A B Overby, "Will cyberlaw be uniform?: an introduction to the UNCITRAL Model law on Electronic Commerce" (1999) 7 *Tulane Journal of International and Comparative Law* 219 G Greenleaf, "An Endnote on regulating cyberspace: Architecture vs Law?" (1998) *University of New South Wales Law Journal* 21.

[90]cf S Serafini and M Andrieu, *The Information Revolution and its Implications for Canada* (1981) 96.

[91]P S Berman, "Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation" (2000) 71 *University of Colorado Law Review* 1265.

[92]Goldsmith and Lessig, "Grounding the Virtual Magistrate", note 52 above; at the very least, that it should self-regulate: Johnson and Post, "Law and Borders", note 12 above.

[93]See, for example, L Lessig, *Code and other laws of cyberspace* (1999); C Marsden, *Regulating the Global Information Society* (2000).

[94]The WIPO, Council of Europe Convention, respectively: World Intellectual Property Organisation Copyright Treaty, adopted in Geneva on 20 Dec 1996; Convention on Cybercrime, Budapest, 23 Nov 2001 (ETS No 185).

**Enforcement of laws on the internet – general approach**

The law merchant evolved over a long time, so that no particular country or era could be said to have had an excessive influence on its development. The process was largely evolutionary and, in so far as it was not imposed by a sovereign State, was democratic. It was largely created by the merchants themselves,[95] though subject to alteration by individual States.[96] It may be that the same will be said of the internet, when its definitive history is written. The almost instantaneous global reach of the internet, and the potentially adverse affects of the internet on countries – particularly in economic and social terms – combine to ensure that governments have responded to the challenge of this emerging technology. But they have not responded consistently.

In its broad approach to the internet, the United States of America has chosen to rely on self-regulation,[97] rather than direct regulation. This is subject to exceptions, however, such with respect to internet pornography.[98] The FTC has also been seeking a more active role in regard to spammers.[99] An alternative approach to that of self-regulation is a balance of self-regulation and direct regulation, as advocated by the European Union.[100] A third option would be direct regulation, which also has support, as in China.[101] Thus far there has however been little sign of a global consensus developing as to the appropriate form of internet regulation, domestic, trans-national, or international. This presents major problems for the internet consumer.

To date, most efforts to address this deficiency have concentrated on increased international co-operation. Some of this is web-based, such as the econsumer.gov website, which tracks

[95]Trakman, *The Law Merchant*.
[96]See *The Antelope* (1825) 10 Wheat 66.
[97]See The White House, *A Framework for Global Electronic Commerce* (1997), at <*http://www.w3.org/TR/NOTE-framework-970706.html*>.
[98]Children's Online Protection Act, 1998, Pub. L. No. 105-277, Div C, tit. 13, ch 1302(6) available at <*http://www.cdt.org/legislation/105th/speech/copa.html*>.
[99]The FTC uses the unsolicited emails stored in its database to pursue law enforcement actions against people who send deceptive spam email; "You've Got Spam: How to "Can" Unwanted Email", <*http://www3.ftc.gov/bcp/conline/pubs/online/inbox.htm*>. The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into "Consumer Sentinel", at <*http://www.consumer.gov/sentinel/*>, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the US and abroad; <*http://www3.ftc.gov/bcp/conline/pubs/online/inbox.htm*>.
[100]Common Position Adopted by the Council with a View to the Adoption of a Directive of the European Parliament and the Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market 14263/1/99 REV (Feb 28, 2000) ("Electronic Commerce Directive"). See now "Electronic Commerce" Directive 2000/31/EC OJ 2000 L178/1.
[101]Qiu, "Virtual Censorship in China", note 57 above. China has regulated access to the internet through centralised filtered servers, and by requiring filters for in-state internet service providers and end-users; T Wu, "Cyberspace Sovereignty? – The Internet and the International System" (1997) 10 *Harvard Journal of Law and Technology* 647, 652-654.

consumer complaints from a number of countries.[102] This co-operation often results in de facto self-regulation of the internet. The Organisation for Economic Co-operation and Development has issued guidelines which calling on the organization's 30 member states – which include the United States, Japan, Germany and the United Kingdom – to cooperate in the fight against international fraud.[103] This clearly allude to the problem of unsolicited commercial e-mail. The internet may not be outside the law, but the application and enforcement of laws remain difficult. Ultimately, a new legal regime may emerge, one which responds to the difficultly of regulating a technology which has either insufficient, or too many, laws.[104]

Unlike the *lex mercatoria*, which developed over an extended period of time, just as customary international law has traditionally developed, the growth of internet law may not permit the international community the luxury of time. For this reason States may have little choice but to defer to the views of the majority, or the stronger economic blocks, whatever implications that may have for the longer-term future of State sovereignty.

As Hall noted almost a hundred years ago, primarily international law governs the relations of independent States, but "to a limited extent ... it may also govern the relations of certain communities of analogous character".[105] Nor is he alone, similar views being expressed by other writers.[106] Lawrence also wrote that the subjects of international law are sovereign States, "and those other political bodies which, though lacking many of the attributes of sovereign States, possess some to such an extent as to make them real, but imperfect, international persons".[107] Whereas these scholars tended to define subjects of international law as States and certain unusual exceptions, there are others who go further in opening up the realm of reasonable subjects of the law of nation.[108]

Whether the internet can, or should, become subject to international law is a question the answer to which could be as seminal as the adoption of the Law of Oléron or the resolution of the Thirty Years War at the Treaty of Westphalia – the so-called Diet of Worms.[109] Perhaps the response of governments to the age of electronic communications cannot be limited to the piecemeal adoption of laws in response to individual problems. But for the present, there remain difficulties for the consumer.

**Particular problems for consumer legislation**

[102]At <*http://www.econsumer.gov/*>. As yet, such tools are only partly successful, due to incomplete coverage and limited knowledge of their existence among consumers.
[103]"OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders", 11 June 2003.
[104]Too many, if this is seen as primarily a jurisdictional problem in traditional conflict of laws terms.
[105]W E Hall, *A Treatise on International Law*, 8th edn A. Pearce Higgins (ed) (1924).
[106]G Schwarzenberger, *A Manual of International Law*, 1st edn (1947); W Friedmann, *The Changing Structure of International Law* (1964).
[107]T J Lawrence, *The Principles of International Law*, 7th edn (1924) 69.
[108]Sir Hersch Lauterpacht, "The Subjects of the Law of Nations" (1947) 63 LQR 444.
[109]1648.

The particular problems with respect to consumer protection on the internet may include – but are not limited to – the following:

- Information deficiencies, such as the inability of the consumer to find out basic information about the product or service, and the trader, on which to make informed decisions;
- After sales difficulties, such as failure to supply the goods or services after payment has been made, problems with the delivery of goods, unsatisfactory goods or services, or goods or services that present health or safety risks;
- Fraud and unethical conduct, such as identity deception, false advertising, receiving payment without intending to supply, and scams like pyramid selling schemes, and some work from home or investment schemes; and
- Problems with privacy issues.[110]

The difficulties for consumers derive from the fact that the internet is not geographically-based, and also from its ephemeral nature. Questions of sovereignty have practical effects with respect to the enforcement of private international law, which is not readily achieved without recourse to litigation or arbitration. This presents problems for consumers. The purpose of consumer protection legislation is to give consumers rights which can ideally be obtained without recourse to the courts. But not every country has these laws, and their provisions are not consistent. We will look first at consumer protection laws in Australia.

The Australian Competition and Consumer Commission (ACCC) is the agency primarily responsible for the enforcement of consumer protection laws in Australia at the national level. In addition, other Commonwealth regulators in the area of consumer protection include the Australian Securities and Investments Commission (financial services), the Australia New Zealand Food Authority (food safety), and the Department of Health and Aged Care (therapeutic goods). The ACCC's enforcement work is complemented by the work of fair trading authorities in each State and Territory which administer mirror fair trading legislation at the regional level. All these organisations perform a valuable role in providing consumers with access to effective redress in relation to a range of fair trading issues.[111]

The Privacy Amendment (Private Sector) Act 2000 (Commonwealth) makes certain types of acquaintance "spam" (unsolicited advertising emails) illegal as of December 2001. Businesses covered by the provisions of that Act must obtain permission from their customers in some situations prior to using their email addresses for anything that can be construed as spam. In November 2000, Australia secured its first conviction related to spamming – a stock touting spammer was convicted on two charges, including one charge under s 76E(b) of the Crimes Act 1914 (Commonwealth). This section imposes a maximum penalty of 10 years imprisonment, and makes it an offence to interfere with, interrupt or obstruct the lawful use

[110] A Asher, Deputy Chairman ACCC, "Existing Framework for Consumer Protection in E-Commerce An Australian Perspective", Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, 20 July 2000, available at *<http://www.accc.gov.au/speeches/2000/asher_apec_20_7.htm>*.

[111] Asher, "Existing Framework for Consumer Protection in E-Commerce", note 110 above.

of, a computer by means of a carrier (telephone line or ISP) or facility provided by the Commonwealth.[112]

Additionally, it appears that spam is already illegal at common law.[113]

In general, the ACCC seeks compliance with the consumer protection legislation it administers by a range of means including litigation, administrative settlement (including the acceptance of court enforceable undertakings), promotion of self-regulation, compliance programmes, information and liaison. However, e-commerce is new territory for law enforcement agencies, including the ACCC.[114] International co-operation can be achieved through international networks of consumer protection agencies, like the OECD Committee on Consumer Policy, the International Marketing Supervision Network (IMSN), and the International Society of Consumer and Competition Officials (ISCCO).[115] Litigation is not the preferred option because of the jurisdictional problems, and the costs involved.

The combination of court action and compliance programmes can be effective. For example, the Australian Institute of Permanent Make-up was required to change its advertising on its website after Australian Competition and Consumer Commission action in the Federal Court of Australia. The trader was ordered to publish disclosure statements on its website "that the benefits of cosmetic tattooing are not permanent and will generally only last three to five years. If clients wish to maintain the colour or shape they will require further treatments. The advertising concerned claims about micro-pigmentation procedures offered in the cosmetic surgery and beauty industries. The procedures were claimed to be permanent but documentation actually supplied to consumers advised that the product only lasts between three to five years before further treatment would be required to maintain the desired effect. The ACCC Commissioner responsible for health matters warned businesses that e-commerce trading was not an excuse to ignore obligations imposed by the Trade Practices Act 1974 (Commonwealth).[116]

International internet sweep days have also been successful. Sweep day number 4, held 29 January 2002, was aimed at misleading claims about health products. ACC was the lead agency for the sweep, which was under the auspices of the IMSN. In total, 58 agencies from 19 countries were involved, and 1,410 suspicious sites were identified. Further action taken included educational emails sent to site operators.[117]

One of ACCC's key strategies is working together with overseas agencies to consider how best they can protect the interests of consumers in the increasingly global marketplace. They are learning how they can improve their enforcement techniques and improve cooperation levels with overseas consumer protection agencies, how they can encourage ethical traders to

[112]The behaviour that led to this particular charge was that the offender relayed his spam off the affected third party computer systems.
[113]T Rollo, "Liability for spam through trespass to goods" (2001) 8 *Privacy Law and Policy Reporter* 77. This alternative approach may provide an avenue for stopping spam without having to get a law passed by Parliament, and a narrower version of this approach has been successful against spammers in the United States.
[114]Asher, "Existing Framework for Consumer Protection in E-Commerce", note 110 above.
[115]Asher, "Existing Framework for Consumer Protection in E-Commerce", note 110 above.
[116]ACCC Press Release, MR 16/012 Feb 2001.
[117]Sweep Report, International Internet Sweep Day, 29 Jan 2002 (ACCC, 2002).

take self-regulatory action to ensure that the interests of consumers are protected and how consumers themselves can avoid the ever growing number of international scams targeted at them.[118]

Techniques used include co-operation on cases, co-operation agreements,[119] internet sweep days, ACCC internet clinic, self-regulatory initiatives,[120] best practice model, alternative compliance mechanisms.[121] These latter promoting understanding in business of how to achieve compliance;

- encouraging appropriate co/self-regulatory responses to systemic problems (for example through the development of codes of conduct);
- emphasising the commercial value of compliance and encouraging business to install appropriate compliance programmes;
- developing practical guidelines on how to comply with the Act;
- liaising and cooperating with relevant industry and consumer stakeholders;
- educating business and consumers about their rights and responsibilities under the Act through a range of means;
- targeted use of the media; and
- contributing to reviews of self-regulatory mechanisms.[122]

The emphasis is upon self-regulation, education, and international co-operation, rather than the enforcement of national consumer laws, whose application may be problematic.

We will now look at certain specific consumer problems. The first is misleading and deceptive practices and false representations. Here the questions may be how can these actions be prevented in electronic marketing and selling? How can the consumer protection provisions of the Fair Trading Act 1986 (NZ) (or their equivalent overseas) be enforced in a simple and low-cost way for New Zealand consumers?[123] Advertising on the internet can be, and often is, misleading and deceptive.

Under what circumstances can national tribunals and courts hear claims relating to traders operating from other countries? What consideration should be given to effects of differing judicial interpretations, and the application of common and civil law, in different countries? The rules of private international law would have to be used. Could alternative international redress systems offer remedies to consumers which are speedy, cheap and effective?[124]

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[118]Asher, "Existing Framework for Consumer Protection in E-Commerce", note 110 above.
[119]One example is the *Econsumer* website, available at <*http://www.econsumer.gov*>.
[120]Including private initiatives such as the Internet Consumer Protection Agency.
[121]Asher, "Existing Framework for Consumer Protection in E-Commerce", note 110 above.
[122]Asher, "Existing Framework for Consumer Protection in E-Commerce", note 110 above.
[123]K Manch, "Electronic commerce and consumer policy, information and education" (1998) 7 *Compliance* 6.
[124]Manch, "Electronic commerce and consumer policy", note 123 above.

The location and identification of businesses can also present problems for the consumer. As is already the case with traditional mail order, electronic commerce implies an increase in transactions in which there is no direct contact between the consumer and the business, and no geographical link.

How can a consumer be satisfied that the business is legitimate? How will a consumer find the business in the event of a dispute? Should electronic traders be required to provide details of their physical location in case of a dispute? What should be the responsibilities of those providing the medium for electronic marketing, such as Internet Service Providers, to consumers in dispute with an electronic trader who has failed to provide a physical address?

The formation of the contract is also important. Who makes the offer and who accepts? Is the contract made when it is accepted or when notification of acceptance is received? In New Zealand, the Electronic Transactions Act 2000 (NZ) now governs this area.[125] Is there a way to preserve, for legal purposes, the conditions of the contract as agreed between consumer and trader? Can digital signatures be sufficiently robust to guarantee the identity of the parties? This is also covered by the Electronic Transactions Act 2000 (NZ), though only in broad terms. And how can consumers be satisfied the products they are buying internationally meet appropriate standards of safety?[126]

Consumers are likely to have more difficulty identifying the trader that they are dealing with when purchasing from traders based overseas. This is also an issue for enforcement agencies. However, the Commission will trace traders through other traders such as Internet Service Providers (ISP) and fulfilment houses.[127]

An issue that will arise with representations made on websites is the permanence of the representation. What may have been represented in one hour may be different the next. Unlike with television, radio or print advertisements, there is no script, tape or proof to record what was represented. If a copy was not made of the representation on the website, then there may be nothing that can be used as evidence to show what was claimed.[128] Indeed, there may be no evidence that a contract was ever made, except credit card records.

But perhaps the key issue for consumers and enforcement agencies is that once an overseas trader is located and a breach of the Act is alleged, will the courts have jurisdiction to hear the matter? For a court to establish that an offence has occurred it must first establish that it has

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[125]Electronic Commerce Part Two: A Basic Legal Framework (New Zealand Law Commission R58, 1999).

[126]Manch, "Electronic commerce and consumer policy", note 123 above. In New Zealand, The major source of standards for many products is the Standards Council. Most of these national standards have safety provisions built in. But unlike the regulations under the Fair Trading Act 1986 compliance is voluntary, unless adopted later by legislation. The Fair Trading Act has been used for products not covered by specific legislation, and are usually reactive. One example is dangerous baby walkers, the subject of a discussion paper in 2000. Examples of existing standards include the Product Safety Standard (Children's Toys) Regulations 1992, enforcing the New Zealand Standard NZS 5822:1992 [to prevent young children choking]; *Baby Walker Safety: Investigation into the need for a product safety standard* (2000), *at <http://www.consumer-ministry.govt.nz/papers/babywalkers.DOC>*.

[127]Manch, "Electronic commerce and consumer policy", note 123 above.

[128]Manch, "Electronic commerce and consumer policy", note 123 above.

jurisdiction. Even if jurisdiction is established, it may be difficult to enforce any penalties or orders. This remains a simple problem of private international law.

These are the types of enforcement issues that will increasingly arise as commerce becomes more globally focused.

The Australian equivalent of the Commerce Commission of New Zealand, the Australian Competition and Consumer Commission (ACCC), noted in its paper the Global Enforcement Challenge:[129]

> Global market mechanisms offer a number of features that make them an attractive means of operation for unethical traders. For instance:
>
> Setting up a business using global market mechanisms often means incurring minimal start-up and operating costs. This allows relatively easy entry by traders to global marketing industries. Traders can set up shop easily and cheaply, anywhere in the world.
> Global market mechanisms, by their very nature, allow traders access to consumers worldwide. Distribution of advertising material is possible at a very low cost via mass media, postal or global telecommunications. Consumers can respond to inducements easily and quickly. This also provides traders with an excellent source of information on consumers, which is sometimes used for unethical purposes.
> Taking into account the size of the available market, it is not surprising that some global market mechanisms offer the promise of high turnovers (e.g. the pay-per-call industry).
> Global market mechanisms are forms of distance selling, allowing some degree of anonymity. New technologies in particular help scammers to escape detection. For instance, Internet traders can change their names and personas in cyberspace. New payment systems may also worsen this problem by eliminating the need for information to be supplied by traders, such as postal addresses and telephone numbers.
> The transitory nature of global marketing, i.e. no established base of operations is necessary, means scammers can close up operations and set up new schemes in different countries quite easily.
> The anonymity offered by global market mechanisms, their transitory nature, and the fact that transactions are carried out across national borders means that generally scammers can easily abscond after committing a fraud, with little chance of being caught.[130]

Traditionally, consumers and businesses have purchased goods and services from companies they know, and which are likely to be based near their home or place of business. However, this is changing, and the legal regime must keep abreast of these changes.

To ensure that ethical traders are not unfairly disadvantaged by the increase in cross-border commerce, the Commerce Commission of New Zealand has developed a strategy to help ensure awareness, acceptance and compliance with the spirit of the Fair Trading Act 1986 (NZ). The strategy involves:

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[129] ACCC, *The Global Enforcement Challenge - Enforcement of consumer protection laws in a global marketplace - Discussion Paper* (1997) 3.
[130] Manch, "Electronic commerce and consumer policy", note 123 above.

Continuing to take precedent and deterrent action against New Zealand-based traders. This could mean that a trader could have action taken against them for misrepresentations made on a website.

Surveillance of all media, including the Internet, for cross-border fair trading issues. There are some issues the Commission investigates proactively to establish whether breaches of the Act are occurring. Future surveillance will include looking at the representations made on websites.

Working with overseas fair trading enforcement agencies to try to bring about compliance by overseas-based traders who operate in New Zealand. The Commission currently has close contacts with its equivalent organisation in Australia along with other Australian consumer protection agencies. In some circumstances, these agencies may be better placed to take action against a trader than the Commission.

Continuing the Commission involvement with Fair Trading Operations Advisory Council (which links New Zealand government and Australian federal and state government fair trading organisations) and look at building similar networks, particularly with agencies in North America and Europe, where a number of the issues originate from. This will ensure that the Commission is aware of the current "hot" issues which are spreading from country to country.

Working with service providers and industry associations to bring about awareness and acceptance of, and compliance with, the Fair Trading Act. Traders such as ISPs can help prevent the dissemination of misleading representations. The Commission will shortly be approaching ISPs to discuss how it can help ensure that ethical traders and consumers are not disadvantaged by websites which appear to breach the Fair Trading Act.[131]

This problem is not unique to New Zealand, or the Asia Pacific region, an elsewhere – though countries such as New Zealand are particularly vulnerable as they are small and geographically remote from major trading partners – and therefore major potential users of the internet.

Law enforcement cooperation with foreign counterparts is critically important to US efforts to address the challenges of cross-border Internet fraud. The same technology that Internet frauds use is proving invaluable to international law enforcers whose job is to track down fraudsters and stop their activities. This is achieved by identifying non-complying websites, and informing them that they are acting illegally. Only as a last resort is legal action undertaken. The FTC also plays an active role in public policy discussions on international consumer protection principles for the global economy.[132]

Alternative dispute resolution is also an alternative for the consumer – or the business – which suffers as a result of an internet transaction. The number of online dispute resolution services is on the rise.[133] Whilst these are being promoted by both the European Union and the private sector, they will be likely to be only a partial solution. Its effectiveness would however be

[131]Manch, "Electronic commerce and consumer policy", note 123 above.

[132]Bernstein, "Fighting Internet Fraud", note 41 above.

[133]See A E Almaguer and R W Baggott III, "Note, Shaping New Legal Frontiers: Dispute Resolution for the Internet" (1998) 13 *Ohio State Journal on Dispute Resolution* 711, 720; C Kessedjian and S Cahn, "Dispute Resolution Online" (1998) 32 *International Lawyer* 977, 980-981. Examples include Online Ombuds Office (<*http://www.ombuds.org*>);Square Trade (<*http://www.squaretrade.com*>); and WEBDispute (<*http://www.webdispute.com*>).

enhanced by a programme of education, and the systematic encouragement of resource to such avenues by consumer protection agencies.

## Conclusion

The internet and the advent of almost instantaneous global communications have had and will continue to have major effects upon international trade law. In particular, evidential rules founded on former paper-based procedures have proven to be not flexible enough to accommodate the advent of the internet and contracts made in cyberspace. Just as the law merchant evolved to accommodate contracts negotiated between parties who were physically apart, so cyberspace law must do so for the electronic age.

Traditionally, the formation of legal norms for conducting trade was by States, subject to certain principles accepted by the international community. But this has proven inadequate for the control of electronic commerce, because this can be said to be truly international, having no physical presence.

The new environment has necessitated an increased degree of international co-ordination, if not co-operation. Unlike the evolutionary development of the *lex mercatoria*, the advent of electronic communications has resulted in the enforced adoption of international norms, such as the UNCITRAL Model Law on Electronic Commerce.

This poses a threat to State sovereignty. It is no longer possible for the nation-State to be the sole, or even prime, regulator of economic norms. Decisions respecting the forms of law will be made not at the national level, but internationally. These will be made by political blocks such as the European Union and the United Nations, and, in some instances, by non-governmental organisations. The result could be the evolution of an international cyberspace law. But there are wider implications for national legal systems which cannot be ignored.

A more serious threat to state sovereignty is now coming from private and code control, which has evolved as national and international regulation has failed to respond quickly enough to the challenge of internet regulation. Given the international co-operation is inherently inhibited by political considerations, including the existence of regional power blocks, it is perhaps unsurprising that this has been so.

Global commerce provides many opportunities for greater competition through a greater range of products and services at varying prices and quality standards. However, it also provides challenges for consumers seeking redress and enforcement agencies seeking to ensure healthy competition. Reliance on existing conflict of law rules is insufficient to protect consumers, even if it is practical for business-to-business disputes.

To respond to this challenge, in New Zealand the Commerce Commission is adopting a more global focus by working more closely with equivalent overseas agencies and looking for issues that are raised on the Internet as well as through traditional media. Enforcement, however, works best when industry takes responsibility for itself, such as through the development of codes of practice and disputes resolution procedures. For this reason the Commission will work more closely with the industry associations whose members are

involved in some way in the promotion of cross-border commerce to ensure healthy competition for the benefit of ethical traders and consumers.[134]

Perhaps more than any other business activity, electronic commerce requires a balanced approach of "co-regulation," or what has been called "a new paradigm for governance that recognizes the complexity of networks, builds constructive relationships among the various participants (including governments, systems operators, information providers, and citizens), and promotes incentives for the attainment of various public policy objectives in the private sector."[135]

Governmental regulation and enforcement has a role to play in this regard. Whatever regime emerges must, however, have a large measure of consistency, predictability and transparency. A key component in this regard is arriving at common understanding of the jurisdictional rules that will apply to the regulation and enforcement of consumer protection standards by the various governmental authorities.[136] This may allow more effective public law enforcement and individual consumer private law enforcement through the courts, which is presently hampered by differing understandings of the applicable principles.[137] But it cannot be more than a partial solution, which will require co-operation rather than enforcement.

[134]E Le Lievre, "Cross-border commerce and the Fair Trading Act" (1998) 7 *Compliance* 2.
[135]Reidenberg, "Governing Networks", note 64 above.
[136]Tassé and Faille, "Online Consumer Protection in Canada", note 26 above.
[137]Compare *Yahoo! Inc v La Ligue contre Le Racisme et L'Antisemitisme*, note 34 above, and *Dow Jones & Co Inc v Gutnick*, note 46 above.