

**“Developing E-Commerce Policy Within the Free Trade Area of the Americas”**

**Address by Senator Dale D. Marshall, Chairman, F.T.A.A. Joint  
Government/Private Sector Committee of Experts on Electronic Commerce at the  
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Distinguished guests, ladies and gentlemen.

In August of last year, I had the honor of being invited to visit this fascinating city to participate in your forum on eCommerce. On that occasion I spoke with you on the specific subject of **Tariff issues of Electronic Commerce**. At that time the work of the Committee of experts on electronic commerce had not yet begun; but by being here with you, I was able to get a good feel for how your business leaders saw eCommerce and it’s role in developing the potential of their businesses. I was also able to get a feel for the concerns that some of them had about this new frontier in commercial activity. Speaking with some of you then, has been to me as valuable as the discourse that I have engaged in with the many technical experts in the area of electronic commerce and for that I wish to thank you.

I am therefore especially honored to have been invited back to Sao Paulo by your Chamber and I am particularly pleased to have the opportunity to speak on, and to discuss with you, the subject **Developing eCommerce policy within the FTAA**.

I will first give you an idea of how the FTAA is approaching the development of eCommerce policy for the hemisphere and I will then touch on some of the issues of eCommerce.

As you may be aware, the governments of the countries in this hemisphere have agreed to put in place a Free Trade Area of the of the whole of the Americas by the year 2005. In pursuance of this objective, the Trade Ministers of the region have set up nine (9) negotiating groups and three (3) consultative committees to look at specific areas of action. The Joint Government / Private Sector Committee of experts on Electronic Commerce, is one of those consultative groups.

In agreeing to set up this committee, the ministers recognized the rapid expansion of Internet usage and of eCommerce in the region. It was clear to them that this new phenomenon would impact on trade in a way that was fundamentally different from the impact of other developments over the centuries.

It seems clear that the Internet growth has been exponential and the Internet has itself seen the fastest rate of adoption of any other technological development over the centuries. One famous software developer in a recent television interview said that the reason his company did not get involved in the emerging technology was because he held the view that eCommerce would not develop unless the issues such as privacy were resolved. He now openly admits how wrong his assessment of the situation had been. The consumer did not wait for a resolution of these issues, but plunged into the Internet and into eCommerce across the world. This is not to say that we do not need to grapple with the issues of electronic commerce, this is simply to say that the growth is continuing without abatement. This growth has continued even though the Internet is largely unregulated and it is driven in my view by the simple thing called **access**.

This growth, is not as you might think, limited to North America and Europe. In fact, I am pleased to state here, that in the Latin America and Caribbean region, the rate of growth of Internet hosts has been more rapid than elsewhere in the world. Between

January to July 1998, the number of hosts grew by over 60% as compared to 24% in the rest of the world. This is only one indicator, but it is a significant indicator nonetheless. In 1998, it was estimated that by the year 2003, eCommerce would generate in this region US\$ 170 million. That estimate has now been revised to US\$ 8 billion in the year 2003.

While there are statistics which indicate a boom for the region, the reality is that our eCommerce numbers are still quite small.

In North America, about 25% of the population are Internet users, while in L. America and the Caribbean the proportions range from 0.01% in Paraguay and 0.04% in Ecuador to around 6% on Costa Rica. One commentator recently offered the opinion that while there are a number of developed online markets in the region, led by Brazil and Mexico, in percentage terms, the online population rarely exceeds 1 to 3 %.

Within the Western Hemisphere, Internet Hosts are located primarily in the USA and Canada with 19 million and 1 million respectively. On the other hand, in the 19 countries of Latin America, there were 240,000 Internet hosts and in the whole of the Caribbean there were just over 2300 as of late last year.

It is precisely this imbalance in terms of infrastructure and access within the hemisphere and in the world for that matter, which should make the work of the FTAA committee on eCommerce of great importance for the businesses in the region.

The mandate of the committee requires that we

**“examine eCommerce (issues) with a view towards identifying the environment that will allow eCommerce to benefit (all) the countries of the hemisphere”.**

The Issues of eCommerce are being studied in many fora throughout the world. The subject is being studied by at least 14 international bodies - the World Bank; the World Trade Organization; the World Customs Organization; The World Intellectual Property Organization included among them. There are also numerous regional and sub-regional bodies studying eCommerce; the OECD; APEC; the EU; and of course, the FTAA .

The committee recognizes that it can't re-invent the wheel as far as the studies of eCommerce go and we have drawn on the work and the resources of some of those other bodies which are studying the subject. We have had input from the World Trade Organization and from The World Intellectual Property Organization. At our upcoming meeting in June, we will have representatives from UNCITRAL ( United Nations Commission on Trade Law ).

After examining these issues the committee is to make recommendations in October of 1999, to the Trade Ministers of the hemisphere on :-

**“how to increase and broaden the benefits of electronic commerce and, in particular, how electronic commerce should be dealt with within the context of the FTAA”.**

This report, prepared with the important contributions and assistance from the private sector delegates from across the region, will provide the Trade ministers with well thought out recommendations which will have received input not only from the developed countries of the hemisphere, but also from the least developed of our neighbors.

### **The Work Program**

Permit me to mention the modus operandi of the committee, as I am sure that when you are made aware of how the committee has been proceeding about it's mandate, you will

have a firm confidence in the end result. The Committee has adopted a work program which has divided eCommerce into the three broad heads of:

1. **Electronic Commerce and Business facilitation,**
2. **The Legal and Commercial Framework and**
3. **User Issues: Building marketplace confidence**

Under these broad heads, we have examined in much detail many specific subheads such as

1. Standards for Forms of Transmission
2. Implications for Small Economies
3. Implications for Small Business
4. Governments as Model Users
5. Business Users
6. Raising Skills and Awareness
7. Taxation and payment issues
8. Legal issues such as intellectual property protection, jurisdiction, and civil liability
9. International trade issues - WTO
10. Network Access and Reliability

We have looked at such areas as education and training and also access to the Internet, both in terms of availability of the hardware and also access to networks.

Our upcoming meeting will look at other issues such as privacy, security and encryption, authentication, and consumer protection.

The committee, as it is composed, ensures that the private sector experts in electronic commerce, drawn from across the hemisphere, participate fully in the substantive deliberations on the various subject areas. This serves to provide the full committee with the most up to date information about eCommerce, and with their recommendations on how it should develop, or be allowed to develop.

We have had experts from many sectors participating in the meetings as delegates. Experts from America on line; Experts from the accounting and business development fields; experts representing Argentina's music industry; and experts from government agencies. Indeed, you have just a few minutes ago been treated to a presentation by my friend Regina Vargo, on the role of governments can play in the development of eCommerce. We have had outstanding contributions from Private sector experts from Chile, Peru and other parts of the Latin American and Caribbean region.

Perhaps the most important feature of the committee however, is the fact that its experts are drawn from every country in the hemisphere. The insights provided by the expert delegates from across Latin America and the Caribbean help to provide a balance to the approach to the work program and serve to ensure that each country's perspective and /or special needs are taken into account.

The issues are complex and there are differing views on how they should be tackled. Consideration of the issues is critical as we cannot develop useful policies without a thorough analysis of all sides of the issues. Limitations on time will permit me to do little more than to give some of these issues of electronic commerce a brief mention.

## **LABOR ISSUES**

We know that eCommerce will have important implications for labor, not simply in terms of permitting more and more people to work from at home, but also in terms of the possible job losses if companies shift comprehensively to eCommerce. For example, if a retailer in Buenos Aires chooses to move away from the typical retail operation and instead sell his goods exclusively on-line. It is likely that there will be some job losses. Some of his workers may be able to retool, but the need for a large number of staff on the floor, cashiers, and so on, will be diminished.

I do not mean to suggest that eCommerce will render droves of people unemployed. Far from this, it will create many, many opportunities. However, governments will need to plan for this shift, for the many job opportunities expected to open up can only be taken advantage of, if there is a well trained labour force with the skills required by the industry.

## **TAXATION ISSUES.**

An important issue for Governments and businesses is how new telecommunications technologies will influence the collection of *Value Added Tax* and other indirect taxes. New technologies for secure electronic payments present an opportunity for governments to enhance their tax services to consumers. They also present a challenge to tax authorities with respect to :

- a) how a good or a service that is delivered electronically is to be classified for tax purposes, and
- b) how to determine the party to a transaction from whom taxes, such as consumption or sales taxes, shall be collected.

New technologies are challenging the traditional boundaries between goods and services, and between tangible and intangible goods. For example, computer software may either be viewed as a good, a service, or as intellectual property. This creates a characterization problem when attempting to determine the type of tax to be applied to its sale over the Internet, or if fact whether or not it is to be taxed at all!

The concept of **place of supply** is generally used to determine where a transaction is chargeable with tax. This is usually defined as the location of the establishment providing the good or service, or the place of performance or enjoyment, irrespective of where the supplier or consumer belongs. The Internet has created a situation where many

services can be supplied to a consumer without the supplier having a recognizable establishment in the country where the supplies are consumed. Cross-country service suppliers over the Internet have no need for staff, premises, or even equipment in the consumers country and this raises a serious jurisdictional issue for tax liability.

## **TARIFF ISSUES**

The issue here is very similar to the domestic taxation issue and so I will not go into much detail. Suffice it to say that this issue arises where there is a cross-border transaction and relates only to electronically supplied goods or services, such as the supply of software over the Internet.

The USA appears at this time to be the only country to have committed itself to a totally tariff-free Electronic commerce marketplace for the future. Other countries and trading blocks seem to favor a standstill on the imposition of tariffs for the short term, so as to allow for thorough consideration of the legal and social issues. Such things as privacy and encryption feature weightily as considerations. The WTO declaration on Electronic commerce calls specifically for a work program which takes into account the economic, financial and development needs of developing countries.

In terms of the prospect of lost revenue to the countries, there is some considerable division. Some experts argue that for developing countries, the potential loss of revenue through the non-imposition of tariffs is great, as electronic commerce replaces traditional methods of the delivery of goods and services. On the other hand, others argue that the potential loss of revenue is relatively small and is no more than 1%.

## **LEGAL ISSUES**

As an attorney by profession, I could go on for hours on the legal issues surrounding electronic commerce, but I shall resist the temptation.

Commercial transactions are today conducted on the basis of well conceived laws, regulations and conventions. eCommerce now challenges those traditional modes. In many of our laws the requirement of an individual's signature is enshrined and is a prerequisite to the creation of many contracts. Often, these signatures must be witnessed or notarized. These concepts are now becoming outmoded or at the very least are being drastically transformed. The concept of digital signatures and watermarks are the replacements created by eCommerce, however many of our laws were drafted at a time when eCommerce was not even contemplated. The adequacy of our laws must therefore be addressed so as to accommodate eCommerce.

The question of jurisdiction over the contract is also relevant. Which country's court will have jurisdiction where a consumer in Bahia goes online to a company's website which he assumes is in Miami, but unwittingly he is logging on to a site in Jamaica and placing his order in that jurisdiction? How will a consumer have easy access to a foreign court which may have jurisdiction over a dispute? Will the cost of obtaining a remedy, or redress, bear any reasonable relationship to the value of the item in dispute?

## **REGULATION OF THE NET**

Another very important issue is whether countries should enact laws to regulate eCommerce? Is there will be a need for government regulation, and if there is such a need, at what level should such regulation be set? This is an area in which great care must be exercised for there is much disparity among the nations of the hemisphere. Some countries may wish to avoid regulation of the sector, while others may be more

conservative. At the heart of this conundrum is the issue of consumer protection, for it is felt in many quarters that the main purpose of regulation would be to protect the consumer.

Many people are very concerned about the fact that there is no Central body in existence to govern the Internet and this raises consumer protection issues. Who protects the consumer? Can it be left up to businesses to so regulate themselves, that the consumer will be protected?

While I have sufficient confidence in the Internet to shop online and to transmit data online, I have met many people who have said to me that they do not feel comfortable making purchases on the net or even sending other than the most basic email. They see the potential in eCommerce, but they are simply unwilling to become participants. These people all have legitimate concerns about the extent to which their privacy may be intruded upon; concerns about illegitimate business practices; concerns about the security of their data. The stark reality is that eCommerce will only flourish if consumers can trust the integrity of the medium. Our countries must grapple with the issue of how to promote such trust. Do we protect the customers by regulating the industry through governmental action? Or do we promote the concept of an industry which regulates itself.

The private sector strongly advances the argument that that any government regulation should be minimal and should be limited to situations where the existing legislative framework is inadequate. The private sector argues that eCommerce is growing at such a phenomenal rate and in all different directions, that a rush to regulate would have the effect of curtailing the growth of the Internet.

On the other hand, the conservative element argues that we cannot trust businesses to voluntarily act in the best interest of the consumer. Moreover, those elements argue that the Internet is so wide open that the idea of self regulation is not only farcical but

impossible. Consider the fact that on many reputable Internet sites today, there are pirated movies music and software available for downloading.

### **ACCESS TO THE Internet**

It is the issue of access ,more than perhaps any other, which will determines whether we realise the full potential of eCommerce. Across the region we have a very diverse set of arrangements for telecommunications. In some countries the rates are low, with consumers paying a flat rate for usage of the phone line. In others, costs are assessed on a per minute basis. Internet costs are then added to these basic costs.

For both businesses and individuals, affordable access to the telecommunications infrastructure is becoming a necessary condition for effective participation in a knowledge based economy. It is a reality that unless the overall cost of Internet access is affordable, then the climate for necessary for eCommerce to flourish will not come into existence. People who engage in electronic commerce generally have a fairly high level of sophistication when it comes to using the Internet. As people use the Internet more and more frequently, their comfort level will increase and their own level of skill in navigating the web will increase. Making the transition into eCommerce will be so much easier. In an environment where users can only afford to log on for short periods of time, then this threshold will be further and further from reach.

There must be sufficient bandwidth coupled with a functioning and reliable telecommunications network. This of course is only part of it, for the consumer must have affordable access to the necessary hardware and software and to the infrastructure in order for business to consumer eCommerce to grow and flourish.

### **Conclusion**

In eCommerce, both business and policy makers have common interests.

eCommerce will only flourish where you have a large number of well educated, computer literate people. eCommerce will only flourish where there is a good telecommunications network, with high bandwidth. Governments have a vested interest in these areas, for these are key to any country's national development. It is precisely because such matters as these are interdependent, that both governments and businesses must work together to achieve success.

My committee is *only* a consultative group. We are charged with the responsibility to study eCommerce and make recommendations to the Governments of the region. The issues are many and perhaps, given the rate at which the technology is developing, our recommendations may be of academic interest only, over a short space of time. However try we must.

The possibilities for trade and education and the simple sharing of information are limitless. We can barely guess at what is in store for the industry in the next decade. We may find that buying music and movies as discs or tapes will give way completely to purchasing and downloading them over the Internet. The concept of a library as a place where books are stored and a place where the serious student must visit daily, will change. Consulting doctors will review x-rays sent to them from a remote location by e-mail and render a diagnosis.

The march of technology is inexorable. We alone can decide if we will be at the forefront of if we will play follow the leader, as we have so often done in the past. With eCommerce the old established rules change and for the first time the technology itself provides a level playing field. The rest is up to you.

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