

INTERNET LAW & POLICY FORUM 1999 ANNUAL CONFERENCE

JURISDICTION: BUILDING CONFIDENCE IN A BORDERLESS MEDIUM

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CONSUMER PROTECTION

Ms. RUTH DAY:

Good morning, welcome back to our second day.

You know, for at least the last decade, probably fifteen (15) years, twenty (20) years, the U.S. Department of Commerce has taken an activist role in fostering the growth of international trade. In the last maybe five years, a little bit more than that, the efforts have included international trade moving from technology into E-Commerce. So right now, the Department actively fosters that kind of growth of trade, and they're lucky to have Andy Pincus, the General Counsel, in the legal role to support that.

Andy is a graduate of Columbia University. He tells me he was safely and happily ensconced in private practice, at his desk, doing appellate work, when he received the call from Secretary Daley to serve as General Counsel at Commerce. And since that time, he's given Daley advice on the full range of issues that touch on E-Commerce, including E-Commerce itself, international trade, telecom, intellectual property rights and export controls and technology.

We're very glad he's here to give us a key note this morning and to start our second day in Consumer Protection. Andy?

Mr. ANDREW J. PINCUS:

Thank you, thank you very much for inviting me here, it's a pleasure to see so many friends whom I've been with at other discussions relating to E-Commerce, and to meet a lot of new people who are involved in this very interesting issue.

I thought I would begin today by looking at the issue that's posed by the title for this conference. Building Confidence in a Borderless Medium, clearly, I think we all recognize that's critical for E-Commerce to realize its potential, and I think we all recognize the confidence as a two-way street. For buyers, they have to know that it's safe to engage in E-Commerce, that they will be able to get what they bargain for; for sellers, they have to know that it's possible to engage in E-Commerce legally, they have to know that the rules that apply are rules that allow one to do business, not rules that are so complex, so unknowable, so multi-layered that it's impossible to operate one's business in a practical way.

The part of the title on the other side of the column, Jurisdiction, seems to me to be one means to this end. As lawyers, we're always interested in it. I think it's the basis for application of a nation's rules, whether in the form of judicatory jurisdiction, whether one can be held before a court or legislative jurisdiction, what rules will apply when one is before that forum. And we're taught in law school, at least in U.S. law schools, that the first part of every legal problem is to answer the jurisdictional questions, that they have to be resolved at the outset.

But I think in this context, we have to ask some questions about whether the jurisdiction part of the title is the best way to answer the challenge that's posed on the other side of the title.

Are jurisdictional standards the most effective way to achieve the end of confidence, are they likely to be the fastest way of promoting confidence, and is pressing for speedy resolution of jurisdictional issues likely to lead to confidence promotion as a result? And I submit that at least in the short term, the answers to each of these questions is no.

As interesting as jurisdictional rules are for us as lawyers, they're not necessarily meaningful for everyone else, and I know it's often hard for lawyers to believe that other people aren't as fascinated with legal conundrums as they are. But as someone said yesterday, it's the rare consumer who buys a product or service knowing the jurisdictional rules that are associated with that transaction. The most the consumer wants to know is whether or not he or she is going to be safe; can they be sure that they get what they bargained for.

Also, going the jurisdictional route seems to me very unlikely to be quick. Someone who's been in the private sector, and now has been in government for approaching two and a half years, our governments don't move that quickly in adopting new rules, especially rules for a medium such as this, that have to be different if they're going to be effective. It's just hard for governments to grapple with that; it's hard for us to understand the realities of the technology, the realities of the market place and to translate that in a venue where one has to achieve consensus, at least in the United States, really, to move ahead with anything of significance in our legal system.

And I think it's also true that a fast solution is much more likely to be a conventional one. I guess a corollary of what I've just said is, if one is going to move ahead speedily, the easiest thing to do is to say: well, we'll just apply the same rules that we've applied everywhere else, and slap them on top of this new medium, and hope it all works out. It's much harder to quickly say we're going to trash or discard rules that have been developed over many many years and come up with an entirely new system, and to do that on anything that approaches the Internet time at which business is evolving on the Internet.

Ultimately, as people said yesterday, and I think will continue to say today, harmonisation is going to be a key element of the solution to the conundrums that we're discussing here, but that is going to be something that takes a lot of time.

The fact of the matter is, within the United States even, and certainly across the world, different solutions have been developed to the problems of consumer protection, privacy, and other things that go to consumer confidence. And those different solutions will take time - are routed in different countries' legal

systems. And so, figuring out how to harmonise them in a way that's acceptable to people across borders is a project that will be quite a difficult endeavor. I think we just have to recognize that that will take time, not only to do as a matter of substance, but also to sell, if you will, to the governments and people of different countries as a reasonable solution to this problem because one part of the harmonisation is solving the substantive problems - how do we create rules that actually protect people across borders.

But another problem is convincing people that those rules should be acceptable to them in light of their very different cultural and legal traditions. And that, as I said, seems to me something that's going to take a lot of time.

I don't mean to say that the discussion of jurisdiction is unimportant. Ultimately, of course, it's very important. Ultimately we do have to resolve these legal issues. We have to have a bedrock of principle, legal principle on which this systems rests. And it's important to engage in the discussion from the beginning, to educate people about what the issues are, to begin to debate the issues, and frankly, to stop bad

things from happening, because there is immediate reaction in governments across the world to regulate. There's a new thing, let's figure out what rules should apply, and apply them. And I think in our country, the President made a conscious decision in 1997 to take a different approach and to let the private sector lead, as we've said, to be minimalist in regulation and to stop, look and examine before going down the road of government regulation. But that instinct is not necessarily uniform around the world, and it's important to debate it.

But, as I say, I think in the short term the best way to build confidence is to live with some ambiguity rather than pressing hard for some solutions.

For example, I know there's a debate about across-the-board rule of origin rules, across-the-board rule of destination rules. It seems to me, and I think Bob Pitofsky talked a little bit about this yesterday; each of those extremes probably doesn't work, certainly in the consumer context, putting aside for the moment business-to-business transactions. I don't think it's possible for our government or any government to say everything should be governed by the rule of origin

because that clearly is going to promote a race to the bottom. On the other hand, as a matter of pragmatics, a standard that says the rule of destination applies to everything creates something that an environment where doing business is probably impossible. So, we're to have to figure out something in the middle, and I guess figuring out what that something in the middle is, is going to take time.

But I think a key ingredient of reaching an acceptable solution is to have some real working models out there of what those alternatives might be because governments, like other conservative institutions, and they're basically conservative, I think, are very reluctant to buy a pig in a poke, they're very reluctant to sign up to some system that they haven't seen working. I think one example of that may be, in another area of confidence, in the privacy area, when our discussions with the European Union started about how the United States would deal with the privacy directive, I think many commentators, and even many people in the Commission thought it was extremely unlikely that the Commission ever would accept a regime of self-regulation as something that was adequate in terms of satisfying the directive standards.

But we've clearly come a long way, although we haven't come all the way, we've come a long way toward that goal, and I think that's because self-regulation got up and running. In the United States it was really, you could touch it, you could see what the rules were. Companies were implementing it, and I think that gave some assurance to people on the Commission that this wasn't some kind of a dodge to avoid real privacy protection. It really was what we said it was, which is another method of having real privacy protection, but one that was more consistent with our legal traditions, and one we thought frankly would provide better privacy protection than simply passing a law.

So, I think here too, the discussion about jurisdiction is important and has to continue, we need an essential second track; we have to develop alternate means of promoting consumer confidence; we have to develop self-regulation, self-regulatory approaches and we have to show that they can work.

So, my basic message here is a simple one. There's been a lot of discussion here, and I think in other forums like this, about jurisdictional rules, self-regulation, what are the different possibilities, and I

think it's important really to get on with the nitty-gritty, hard work of creating something that is self-regulation, really drilling down to the next level and constructing a system, putting them in place, having a level of detail so that as part of the continuing debate there's something concrete, real, that can be pointed to, that can be touched, that shows that self-regulation isn't just something that people talk about at conferences when it comes to consumer protection, but it's something that actually can be implemented, that can work, and that can provide consumers with real protection.

Let me suggest briefly a few elements of how such a system might be constructed, or at least some things that might be important to take into account.

The first step, it seems to me, in thinking about consumer protection, is to separate out the very different elements of what falls under the rather large umbrella that is consumer protection, and I know the next panel is going to talk a little bit about that. But it seems to me, advertising regulation, fraud prevention, disclosure rules, remedies, credentialing of people to provide particular kinds of services, all

of those things fall under consumer protection, but different approaches may be appropriate for different elements of that. For example, probably ensuring a home court for real garden variety fraud for consumers is going to be important to consumer protection regulators around the world, and important to consumers too. On the other hand, in the world of disclosure, and there may be a lot of room for harmonisation.

I think another element that's very important in constructing a system like this is to show how the technology allows more protection for consumers, more real-life protection for consumers, because part of the debate is going to be about, caricatured perhaps, taking away people's remedies: why are you taking away the remedies that I have in the physical world? And while one answer to that is: it's not true, we're not taking away remedies, we're supplying different remedies in the self-regulatory system.

But another answer is: in cyberspace we can do things differently. And differently means that, for example, with respect to disclosure, the ability to click continually and get more information means much more disclosure can be provided for consumers because the technology allows a multi-level disclosure system.

It means that you can create an online dispute resolution system that's quick and easy and cheap, and it allows through contractual obligations real remedies in a way that may not be possible for cross-border transactions in a world where all we do is rely upon courts.

And I think in that context it's important to look at advertising rules, disclosure rules, cooling-off periods, and try and come to some harmonisation of what are, call it best practices, call it good practices, but rules that provide an adequate level of consumer protection and not just adequate in terms of the lowest common denominator, but adequate in terms of something that everyone; governments, companies, consumer advocates can sign onto as something that provides real protection for consumers.

I think this two-track approach, continuing to talk about jurisdiction but really making a major push to develop a real-life self-regulatory system has two benefits.

First of all, I think it actually will promote consumer confidence, I think if companies that are doing

business on the Web are in a self-regulatory system that consumers can identify through use of a seal or other kind of signal, consumers are going to be more willing to do business with those websites. And while brand name websites may not have a problem with consumer concern about safety, I think less well-known websites probably do, and to the extent they can be in a program that gives consumers confidence, that's probably going to enhance business.

The second, and I think just as important a factor, is the creating of this kind of self-regulatory system that's up and running, as I said, will tremendously inform the jurisdictional debate. It will provide a real alternative to point to in discussing what rules there may be in the mid-point of that spectrum that I was talking about between complete rule of origin on the one hand, and complete rule of destination on the other.

Now, I recognize that going down this road and not having a clear concrete resolution to the jurisdictional conundrums does prolong uncertainty, and as some people were saying yesterday, lawyers don't like uncertainty. But I guess the short answer to that

1 is it can't be helped, and I think since the alternative to
2 uncertainly probably is in the short term bad rules rather than
3 good rules, it seems to me uncertainty is definitely the lesser of
4 two evils here.

5
6 So, I think it does require companies to take a leap of faith to
7 go down this road, but I think it requires consumer advocates and
8 governments to do the same thing as well and I hope that we're all
9 willing to take that leap of faith together.

10
11 One question is where this kind of work can be done. There are
12 some preliminary discussions in other places. It does seem to me,
13 although as I said we believe in private sector leadership, that
14 the ILPF, which is a neutral form, and a forum that's been
15 committed to self-regulation, may have a real role to play in
16 facilitating these discussions, bringing people together to, as I
17 say, really begin to do the nitty-gritty work of putting these
18 systems together.

19
20 So my message is simple. We have to get the second track moving
21 and I think moving quickly. I think it's essential to building
22 the kind of confidence in this medium that we all want and that
23 will allow it

to realize its tremendous potential. And I hope next year, at the third annual meeting, we'll be able to have some real systems under construction and we'll be able to debate the pros and cons of them together and continue to move this process forward. Thanks very much.

(APPLAUSE)

I think we have some time, I'd be happy to answer questions on this or anything else that people have questions about. We can actually be ahead as opposed to yesterday.

Ms. PHILIPPA LAWSON:

Hi, I'm Philippa Lawson with the Public Interest Advocacy Centre.

I meant to ask you, and I can say right at the beginning, that one of the reasons I'm here is because I'm excited about the idea of trying to find some compromise to the issues where business and consumers are quite wide apart on. The key one versus the country of origin and the country of destination conundrum.

But I really have trouble with the idea that -- and a

number of people suggested that it's just impossible for business to live with the country of destination rule. I mean, businesses are doing that to some extent right now, and it seems pretty obvious to me that you can limit your website, you can limit your business to the countries that you are comfortable doing business with. If you're interacting digitally with people, you can ask them where, for instance, you're not delivering the product to a geographic address, you can at least rely on the consumers' attestation of their location and you can see what is going on, and that's a different issue, we'll deal with that one when it comes up.

But it seems to me that business is going online, and this idea that suddenly they should accept to be able to sell in every country in the world, simply because that's what the Internet permits, is a bit much. I mean, you're already getting a tremendous increase in your coverage, in your marketing by going online, even if it's simply within the same jurisdiction that you started out in.

So I guess, I don't accept that it's impossible for business to live with the country of destination rule. I do accept that it's not the most desirable outcome

from a business perspective, but I appreciate your comment.

Mr. ANDREW J. PINCUS:

Yes, I don't know that I can cast a vote between impossible or really difficult. It seems to be that one of the great potential benefits of the Internet is enhancing cross-border commerce. It really allows that to be done in a way it's never been done before, and especially allows it to be done by small and medium-sized companies which really before didn't have a real opportunity to trade outside their limited geographic area or certainly outside the borders of whatever jurisdiction they're in because they couldn't afford the distribution network, the outreach network and all the things that large companies had to promote that kind of distant trade.

So my concern is that for large companies, it probably is possible to figure out what the rules are in different jurisdictions to either tailor website so that you enter where you are and then various -- whatever the rules are for the country in which the consumer is located pop up, but my concern is that assuming for the moment that that's possible for large

companies to do, it's probably not for small and medium size companies. And so I think we shouldn't be -- given the Internet's potential to really expand that commerce, and I think with those kinds of cross-border interactions come not just economic benefits, but all kinds of social benefits, and the benefits of having a world that's more closely tied together, we should really look closely at figuring out how we can promote that kind of trade.

And I think promoting that kind of trade requires that we figure out whether there's another way to deal with these issues. And I think, to me, that's part of the Internet realizing its potential, and we shouldn't, just at the outset, say, we're so committed to rules of destination that we don't even want to engage in the exercise. Because I think with respect to a lot of these rules we will find out, as I say, we have to start to do the work, but it seems to me that they're may be ways, relatively easy ways to harmonise them. And as I say, provide consumers with real remedies that may be much more realistic than just the disclosures with respect to doing business in country X aren't much good if you're a consumer in that country and you have no practical way to bring a lawsuit or to get redress

if you're ripped off.

If someone is part of a contractual system, and you have online dispute resolution, that's a real benefit to consumers, and so, if you can construct a system that has those real benefits, getting them may be worth some trade offs on the other side because ultimately, not only are consumers better off because they actually have real redress, but we've gone farther to realizing the benefits of the Internet as a truly global medium for commerce.

Mr. BILL POULOS:

The GBD is discussing the very issues that you talked about, and we certainly see the value in quick, easy, cheap remedy, the focus on remedy for consumers. So we strongly support those views that you've just expressed.

Now, while we're trying to figure out how to do that, and the ILPF, and a number of other organisations are engaged into discussion about how to provide remedies to consumers, quick, easy, cheap from any place in the world, would you comment on how these private groups and business groups are going to be able to interact

with governments and international organisations, some of which are moving to judgement to put in place laws and to put in place the results of regional conventions, which in fact have made the choice between country of destination and country of origin.

We're quite concerned about the quick implementation that is going on in a number of areas. Could you comment how are we're going to work with these organisations?

Mr. ANDREW J. PINCUS:

Oh, we're concerned also. As I said, we're very concerned about rushing to judgement in any of these areas, and I think what we can do is to, you know, use our seat at the table to say that studying these issues, looking at alternative solutions, makes a lot more sense than rushing down the road to put in place rules that may have quite a stifling effect, and in addition, as I said, may not be the best way to protect consumers.

I truly believe that one of the saddest things about a rush to judgement is that the technology provides a lot of new ways to protect consumers and dispute resolution

is only one, and to put in place rules that just reflexively apply physical world standards to the Internet doesn't allow for the possibility of developing those, and I think that's a real loss.

So, all we can do is say, in our view, rushing is not the right result, that it's not the way to best protect consumers, it's not the best way to develop commerce on the Internet and try and convince other countries that going slow and looking at alternatives makes sense. So we're trying to do that. Anything else?

Okay, well thank you very much.

(APPLAUSE)

**COMPARATIVE OVERVIEW OF CONSUMER PROTECTION LAWS: SCOPE,
ENFORCEMENT, JURISDICTION**

Mr. RONALD PLESSER:

We are two minutes ahead of schedule so far, and we will use it up in this extremely substantive panel.

My name is Ron Plesser, and I'm with a Washington law firm, and I have a background in privacy and jurisdiction Internet issues, and have done a fair amount in self-regulatory activities, if that's the right word, for companies and organisations, and I've written several codes and enforcement schemes over the last couple of years, and it is just fascinating for me to be here at ILPF to work on these issues.

We really have an extraordinary panel, an international panel to talk about consumer protection laws and the kind of comparative analysis. I've asked each of them and including myself, to try to keep our initial comments somewhat limited. I know, everyone has come from far places and has a lot to say, but we would like to have a discussion among ourselves and with the audience at the end. We do have an hour and a half for this panel. I'd like to quickly introduce the panel.

We have Roger Tassé, who's a partner with Gowling Strathy and Henderson in Ottawa, and he is, I think, a lawyer with much general experience but has worked a great deal with Industry Canada on electronic commerce issues and we look forward to his comment.

The second presentation is going to be very interesting, we're going to see two speakers work together. I don't know if it's going to be a soft shoe or go back and forth, but we have Sven-Erik Heun who's a partner with Clifford Chance, in Frankfurt, with wide experience in telecommunications and Internet law, and a main contact for telecommunications law. I've worked a great deal with the Clifford Chance office in London, and they certainly have a lot of expertise in this area. He's co-author of a standard legal treaty on cross-border data flows and published numerous articles on legal questions of telecommunications.

Kai Westerwelle is an associate in the Frankfurt office of the law firm of Bruckhaus Westrick Heller and Löber. He concentrates his practice in the area of intellectual property, in multi-media law, including Internet law, and has done a lot of publishing on those issues as well.

Ching-Li Liu is an assistant professor of law at the Graduate Institute of Industrial Economics at the National Central University in Taiwan. She is starting in the summer of 1999, so I guess congratulations are in order. Prior to joining the interdisciplinary institute, she has toured as an assistant professor of law at Tangshan University for two years.

And then finally, we have Michael Geist, he's a law professor at the University of Ottawa, specializing in law and technology area with a particular focus on Internet law.

One of the two things that I've been working on the last several months has been the ABA Project that's been mentioned a great deal, and some of the some work, some of the focusing that we do here will be from that. And also, we have been working with a group of eight multi-national companies in the U.S. that is trying to find the right answers and solutions to this, and let me say that I think that it's not just about industry self-regulation or industry action. This area is a little bit different than privacy and other areas, the

mutuality of interest between the consumer and the company is very close. Companies will only do well on the Net if consumers have confidence in the Net, if they feel that they're protected on the Net, and so that Net activities. If you go back to the catalogue days, there was a lot of resistance and people did business by mail, and certain industry leaders like L.L. Bean took on policies that, if you're ever unhappy with the goods, you could return it.

In fact, I think, you can even return a shirt five years later that you've worn once a week, if you think that it faded not quite the way you thought it should or are not happy with it. And that's a policy, that's the price of their doing business so the people have confidence in dealing with catalogues and buying through the mail. And it's worked. Catalogue sales, I think, are somewhere in the trillion dollar range in the United States, it's a major element of retail sales.

So consumer satisfaction, consumer protection, is very much in the interest of industry.

What we don't want to happen, and which we'll show a little bit is, in the early 1930's in the United States, there was some commerce clause cases where one

state, North Carolina ,required different size mud flaps; as you drove your truck through the state, you had to stop, and truck drivers had to stop and change those mud flaps to a different size. There was no, the court felt, legal reason, there was no recognizable reason why the State of North Carolina could really do that other than to interfere with commerce, and under the commerce clause, the U.S. Constitution held those laws unconstitutional.

So, while we want to protect consumers, we want to resist the development of mud flap laws around the world so that commerce will be interfered with for non-legitimate reasons. States can enforce gross tonnage laws, they can protect their roads, they can do legitimate things in protecting traffic, but they can't do things that simply block trade. And that's what I think we want to focus on.

I want to acknowledge Stu Ingis who's worked with me at the law firm on all of these projects and has been very helpful in working with us. Again, he's learned under Hank Perritt, and he's continuing the process.

What I also very strongly support what Chairman Pitofsky said yesterday. I think the idea that there are some alternatives here in the approach is not right. I think we have to look at legal convergence, we have to look at treaty possibilities, and we have to look at self-regulatory activities, and again, self-regulatory activities have to be done very closely with consumers to come up with a consistent approach.

The scope of consumer protection (Andy did some of this that we're talking about), is fraud is at one end, and we'll talk about that a little bit, advertising which has some fraud elements in it, but also has trade and fairness issues; disclosure, billings, chargebacks are all consumer protections. We'll talk about the chargeback process, but how you can use the credit card company or your payment mechanism, in the nature of this dispute is something that I think has not been spoken about and which is a consumer protection law worth talking about.

Other regulated services, professional licences is perhaps the most important in this area. A major element of consumer protection is professional licences and you know, the obvious, the question that many

people have been discussing is, you know, can an architect in New York deliver plans through the Internet to a client in Istanbul? Now, this is not consumer protection -- well, it is consumer protection, the licensing laws apply for everybody. It doesn't make any sense to say that architects have to be licensed always in the place of residence. You have to get a building permit so that at some point those plans will have to be acceptable, but if an architect is sending renderings or plans to a client, do they also always have to be licensed by the law of residence of the recipient?

In the U.S., there's state licensing of doctors, doctors are tested on a national basis but licensed on a state basis. Does the Internet force us to look at such fundamental issues as state licensing of doctors?

Traditional Bases of Personal Jurisdiction in the U.S., and I want to go through this extremely quickly, because I think a lot of this has been touched yesterday.

Two-step analysis; is defendant amenable to suit under state's law long-arm statute? Is exercise of

jurisdiction consistent with the constitutional due process requirements?

They have a concept of minimum contacts which essentially get into the area of fair play and substantial justice. Certainly the purposeful availment of privilege of conducting business in a forum gets you there immediately. The problem sometimes relates if you're dealing in a forum in the related activities but not the direct activities, and of course the nexus between the acts and the forum such as the exercise of business in a particular state.

The Sliding Approach in Internet Jurisdiction, it's interesting to me, yesterday these two words passive and active have, really didn't come up much in the conference. But when we're talking about jurisdiction, often the word, particularly in Internet application, is that passive activity; simply having a website there often is not enough to bring in the jurisdiction of the recipient. But certainly active, as you go into actively conducting business in the jurisdiction, it gets you over and there's always the grey area of intermediate.

This, I think is the framework that I'd like to talk about and maybe have some questions on for the panel. We have strong argument for the law of the consumer, and then we have the weak argument for the law of the consumer. And I think fraud is a strong argument, and I think the discussion before of, is it always one way or is it always the other, is neither helpful nor realistic because I think there's gradations here of the interest.

So if we look at fraud, I think we would all agree that the local jurisdiction of the recipient of the consumer almost would always have a jurisdiction if they can pass those active passive thresholds we discussed, that I just discussed. Not only theoretically, but politically, we're never going to get attorneys general at the state and federal level to agree that they can't protect their consumers against fraud. I think it's an issue that we live with, and probably will be fine.

Then we have the issue of disclosures which, after all, is somewhat related to fraud. When you have a disclosure requirement like cigarette notice or security disclosures, that's really a regulation that's making sure that the consumer kind of knows everything that

the consumer needs to know. It's kind of prescriptive anti-fraud, it's preventive, so make sure that things have to be disclosed so that argument kind of goes a little bit toward a strong argument.

As you get into advertising and particularly issues of advertising that deal with things like comparative advertising we heard about yesterday, that has very little to do with fraud or disclosure, it has maybe more to do with protecting markets. And so, if you prescribe comparative advertising which is truthful, comparative advertising is legal in the United States, it's not legal in the UK and Germany. What happens to a website that says that the Chevy, the Chevy website that says: we have a better engine than the Ford car; that's certainly legal in the United States. There are some rules that they have to demonstrate that they tested it, that they looked at it, that there's a substantiation for those claims, but as long as they can do that, it's not only legal, in fact I think it's somewhat encouraged by public policy. But it's illegal in another country. Does Ford not put that website up knowing that a German or somebody from the U.K. can get access to it? I think that's where the argument gets weaker for the law of the consumer. And then I think

as we get into content, professional licensing and other activities, indeed we get weaker still.

This slide I want everybody to look at, because this is what this whole discussion is about, this is done with the permission of IBM, but this is a very good, a very reasonable approach by IBM under current law. If you want to go on to IBM home site to buy products, you have to identify your region and country of origin, you then click that -- I'm not, this is Powerpoint, I'm not, can't go through it, but you then click on and they will talk to you in the consumer protection language of about 20 countries, the compliance costs are very expensive. So here's a very well-known product the company that is selling, but they are selling strictly to the country and region.

We had a discussion over this the other day, the ABA project and the security lawyers in the group thought this was great, and said: "You know, if you're going to sell securities, this is the way it should be."

Well maybe that's true, maybe if you're going to sell securities, this kind of approach is good. I think, to me this is a nightmare if you're talking about global

and economic commerce. I think this really destroys the promise and technology of the Net, and this is what -- I don't say that in negative -- IBM, I think IBM did the right thing in terms of its compliance, but if all of these discussions in five years forces everybody doing business on the Net to have a screen like that, I think we've lost the battle, in my view.

I've just put up some websites, here's the Amazon in the U.K. with a 50% discount on U.K.'s best sellers. Whose rules apply in terms of how that 50% issue is determined; here's the Drugstore Online which Professor Geist wrote; we talk here about some pornography online, and you can see my associates who helped put this together did a little censorship of themselves on this. We were somewhat humored by that and leave the screen in.

In the ABA project, and this is a work in progress, this is not in any sense finished, we're talking about consumer variables, merchant variables in making a jurisdiction issue, this goes to -- we just collapsed here in the electronics.

Anyway, let me finish in saying that we have hand outs. I've some copies of this and it will be on the website. But if you look at the variables on the left and the variables on the top, the merchants, and then we're trying to develop a system of grading the answers from a scale of one to five or maybe from color, somebody made a suggestion, colors from blue to red to get a sense of the intensity of the answer. I think we all go into this knowing that there's no kind of ultimate answers but there are gradations that we have to deal with.

One of the last consumer protection laws that I had up on the screen, and somehow I can't, is the Fair Credit Billing Act, and I wanted just to talk about that for a second because it talks about a concept of chargeback which we really have not talked about before. The Fair Credit Billing Act in the United States requires prompt written acknowledgement of billing complaints, investigating billing errors by the credit card or payment mechanism; prohibits creditor action adversely affecting consumer credit standing until completed investigation. It requires creditors to promptly oppose payments to consumer's accounts and refund or credit overpayments, and it also has global

applications.

This is not a system that is in place, really, I think any place other than the United States. Sally can correct me, Cowan, from American Express, but I think chargebacks is really kind of a unique U.S. consumer protection issue, but I know American Express, and I think other card companies, Visa, they're structured slightly different, but are extending this to Internet sales globally so that if a consumer has a complaint, if they haven't gotten a good, if the good wasn't described correctly, there is a mechanism to go back and to challenge that. They don't have to go to court, they don't have to go to seek law enforcement, the charging mechanism itself gives them some opportunity.

Well, I'm going to complete on that conversation and hear the panel, and hopefully we'll have a little time left for some questions. Thank you. Roger?

(APPLAUSE)

Mr. ROGER TASSÉ:

Thank you very much, Ron. Let me first say how much I'm grateful for the opportunity come and speak to you

on some aspects of Canadian law relating to advertising on the Net. But before I do, I have a little story that I want to tell you, it's a lawyer's story.

There was a man in a hot-air balloon who had lost his compass, and he didn't really know where he was. So he climbed down, if I may use that expression, and there he saw a man working in his garden and he said: "Hey man, I have a question for you." - "Sure, please, ask your question, I'll see whether I can help." - "Well, would you please tell me where I am?" And the man said: "Well, you're in a hot-air balloon." The response was: "Well, you must be a lawyer." - "Well how come, how would you know that I am a lawyer?" - "Well, you're absolutely right, and too, you're absolutely useless."

I don't pretend that I'll be absolutely right, but I hope that my remarks will be helpful, of interest in your consideration of some of these issues.

I think that Ron has provided the conceptual framework that will suit well the remarks that I'm about to leave with you. I propose first to discuss the substantive provisions of the Competition Act dealing with false or

misleading advertising. The Act is not the only one that we have in Canada relating to false and misleading advertising, there is legislation as well at the provincial level, but that will not be the focus of my remarks this morning.

Looking at the substantive provisions of the Competition Act, I will examine whether these provisions apply to Internet service providers. I will first deal with the prescriptive jurisdiction that Dean Perritt referred to yesterday. And then I will, in the second part, deal with the conditions under which our courts will affirm their jurisdiction with respect to those provisions. That's the adjudicative jurisdiction, or the courts jurisdiction.

So the provisions of the Competition Act, as I said, prohibit advertising that is false or misleading, as well as a number of other marketing practices, for example, pyramid selling. Now, pursuant to amendments that were adopted by Parliament in March of 1999, the Act now contains two streams by which to combat misleading advertising. There is first the traditional

criminal misleading advertising provision. The second stream, which is new, creates reviewable matters by which the Competition Bureau, that's the equivalent of the FTC in the USA, can counter misleading advertising by requiring corrective action without criminal sanction. I underline that this is the exclusive prerogative of the Commissioner to enforce.

Now the first stream creates an offence for anyone who, for the purpose of promoting directly or indirectly the supply or use of a product or for the purpose of promoting directly or indirectly any business interest by any means whatever, knowingly or recklessly - these are the words that make it a criminal offence - do make a representation to the public that is false or misleading in a material respect.

The second stream contains the same description of reviewable matters, except that the reviewable conduct need not to be engaged in knowingly or recklessly.

Now, there is a section in the Act that provides that the making of a representation includes 'permitting' a representation to be made in the case of both criminal or civil matter. I'll come back to that question of

'permitting' and try to see what consequences of that new provision might be for ISPs. Advertising is not otherwise defined in the Act. As you can see, the provisions address the substance of advertising and not the means by which advertising is carried out.

The March amendment was specifically meant to apply to electronic commerce; it was meant to apply to general misleading advertising - I'd say - in the paper world. The question I would like to discuss is whether these provisions are likely to apply to the Internet.

First, let me note that there's nothing in the Act that limits the application of these provisions to persons located in Canada. A plain reading of the Act suggests that these provisions apply to anyone, whether located in Canada or not. I'd add, subject to adjudicative jurisdiction rules that I will deal with later. In the result, foreign vendors that come to Canada and make representations in Canada about the products they sell in Canada would be caught by

these provisions.

Are ISPs covered by these provisions? In general, as we all know, there are two types of ISPs, those hosting contents and others acting merely as conduits, basically allowing customers or consumers to access content.

In Canada, the Criminal Code supplements the Competition Act by virtue of the offence of aiding and abetting the commission of a crime, and in addition, as I've just mentioned, the Competition Act provides that making a representation includes 'permitting' representations to be made.

So the question arises as to whether an ISP by providing online access could be viewed as permitting a vendor to engage in misleading advertising. The answer to that question I must say, is not clear although a more plausible interpretation of "permitting" in the context of the provisions I've mentioned, would rather cover a situation where it is the vendor that permits, not an intermediary like an ISP.

In any event, in light of the high degree of intent

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envisaged under the Criminal Code and the criminal deceptive marketing provisions of the Competition Act, it seems unlikely that a passive ISP that acts as a mere conduit of information would be caught by these provisions.

The position of the ISP that hosts the content is likely to be different. In hosting a representation an ISP might become a party to the prohibited conduct depending on its role in the development of the information.

In the case of a reviewable conduct, it's interesting to note that an ISP would benefit from a publisher's defense which provides that the reviewable conduct provisions do not apply to a person who prints or publishes or otherwise disseminates a representation on behalf of another person in Canada, if the publisher obtained and recorded the name and address of that other person and accepted the representation in good faith in the ordinary course of the business of that person.

That defense would likely apply to an ISP if they complied with the provisions I've just mentioned.

However, this defense only applies in relation to information received from a person in Canada, thus placing a higher onus on the publisher of the ISP to ensure accuracy when the information is received outside Canada.

So thus overall, I'd say that there are a number of issues that remain unclear and will need to be addressed eventually by our courts, particularly as to how these provisions would apply to ISPs. Judicial developments in other jurisdictions particularly, but not only, in the USA are likely to influence jurisprudential developments in our country.

There are questions as to whether our courts will, or under what conditions will our courts affirm, assert their jurisdiction in cases involving a vendor from another country.

In the case of penal legislation, our courts have adopted what I would call a relatively liberal approach to asserting their jurisdiction. For example, in the context of the application of the Criminal Code, there is a section, Section 6(2) that provides that subject to the Act, or

any other Act, no person shall be convicted of an offence committed outside Canada.

Well, that needs to be better circumscribed, what is an offence committed outside of Canada, and where will an offence be committed in Canada?

These questions have been the subject of an important decision of the Supreme Court in 1985. The accused had been charged with fraud. Persons located in Ontario phoned residents of the United States and under false pretences induced them to send money to addresses in Panama and Costa Rica. The accused argued that Parliament could not have intended the Criminal Code to apply to an activity that occurred primarily outside the country.

Well, the court didn't agree, didn't accept that argument and I quote here from Mr. Justice La Forest, he said that: "(...) all that is necessary to make an offence subject to the jurisdiction of Canadian courts is that a significant portion of the activities

constituting the offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" " - or connection - "between an offence and this country, a test well known in public and private international law (...)"

And later he said: "(...) in considering whether a transaction falls outside Canadian territory, we must (...) take into account all relevant facts that take place in Canada, that may legitimately give this country an interest in prosecuting the offence."

The application of this test to the Internet would, in appropriate circumstances, allow for the assertion of our courts' jurisdiction over a foreign vendor. This test, by the way, has also been accepted in contract and tort cases by other Supreme Court decisions. Would mere access by a Canadian resident to a foreign website not conforming to the provisions of the Competition Act be sufficient for the purpose of meeting the real and substantial connection test? I wouldn't think so. But the test might however be met, for example if the vendor's goods were sold or were serviced in Canada or if the vendor had a physical presence in Canada.

So it's not entirely clear how our courts will apply these provisions to the Internet.

So my conclusion is that generally speaking, the Competition Act will not generally present significant problems in its application to online transactions where the vendors or the websites are located in Canada. And the effective application and enforcement of these provisions in Canada will bring benefits both to Canadian and foreign consumers when transacting with Canadian vendors as it would help to create an atmosphere of confidence. Problems would occur however with respect to our courts' jurisdiction and enforcement when the vendors are located outside Canada.

I hope that these remarks will be helpful, of assistance in your deliberations. Thank you.

(APPLAUSE)

Mr. SVEN-ERIK HEUN:

Thank you very much, Mr. Chairman, as we said before, we are drawing together, this is not a law firm merger. Nevertheless, we will revert back and forth, hopefully create an atmosphere of movement. What we'll be trying to do is talking a little about consumer protection laws from Germany, in particular from two angles, one from the contractual side and mandatory laws from Germany as well as the tort law side on the other hand. And that should be it for the beginning, and I'd like to correctly move over to Kai to go on.

Mr. KAI WESTERWELLE:

Yes, thank you for inviting me to this conference, and I'd like to take a word from Agne Lindberg, he said yesterday that Europeans love regulations, and he said: "What truth is not very good to repeat." Let me show you why.

So, consumer protection laws in Germany, what you see in red is mandatory law. I'd like to just fly over the laws to give you a brief overview. First of all there's the General Civil Code which is interesting for us in the electronic commerce case, the requirement of the statutory written form, which of course the

electronic commerce did not meet because it's requiring a signature which we cannot do. But right now there is a draft of the "Adjustment of Form Requirements in the Civil Code to the Modern Legal Transactions", this is the name of the law.

Our Ministry of Justice of May 19 this year to prevent the electronic forum which will be the electronic signature, that we don't know when that will be law in Germany.

The second part is the Section 138 saying that illegal activity which highlights general stand truth (...) of policies is void on business activity, the strongest in consumer protection you have in the Civil Code.

The second part of the General Civil Law is the Act on Standard Terms, and you will find in Section 10 and 11 of the (?) of Germany, along with clauses which are void within German law. And if all those clauses are not enough, we have Number 9 which is the general clause saying that clauses not abetting loyalty and good faith are void and null.

So there's a very long list of laws on activity to

offer freedom such as EC directives, but there will be, I guess, a speech afterward on these developments.

The next part is Consumer Credit Act. Consumer Credit Act is not only for loan agreements but also for periodically delivering of goods of the same kind which is for example newspapers, online newspapers delivery.

And also for any contract obligation that the consumers buy regularly if the value is more than 400 DM, which is not very much.

If this law is applicable, you have to face a right to withdraw for the consumer for one week, as well as some disclosures: you have to inform the consumer of any substantial facts of the deal, including his right to withdraw. And again if a problem, the consumer has to countersign that information. And that again does not meet the requirements of electronic commerce, but it's a mandatory law.

The next one is the Act on Door to Door Transactions which I wanted to show you, but I'm not too sure, and to solve an ongoing argument I'm going to show you, whether this act is applicable to electronic commerce

because the scope of that law is to prevent the customer from being taken by surprise by typical door to door protections.

We need to look at the electronic commerce, the consumer is going to pay any time he wants to have to look at the page, to look at the offer which is not comparable to the classic door to door selling. Nevertheless, there are policies in Germany saying that this is applicable to electronic commerce as well, and again, the consumer has the right to withdraw within one week, and he has to be informed of a lot of details on the contract.

The next is the Competition Law, and that's all about advertisement. I have prepared, I'm just going through that, Section 3 of this Unfair Competition Act, and that's what Roger just told us about Canada. It's the same in Germany: any person who, in the course of business activity for purposes of competition makes deceptive statements, and there's a long list right now, may be enjoined from making such statements.

This is a very wide range you have in Germany to forbid any advertisement, false advertisement or misleading

advertisement.

May I just correct one thing. We've just heard that, in Germany, comparative advertisement is not allowed. We just changed that or we're about to change this according to EC Directive, to start two months ago. We are inventing it in Germany because the Federal Court of Germany, ruling out that even though EC Directive is not valid, is not chanceworthy to German law until now. We have to obey it. So if you want to comparative advertise in Germany, you're allowed to if the advertisement is true, and you have to give the consumer any details allowing him to make his own comparison. So it's not just to compare one point of the advertisement, you have to give all details of the deal.

And, I'll just go back. We have as well the Data Protection Law, as you see on the right side, I don't want to talk a lot about it because it's a public law, but if you collect consumer data, you have to obey very strict rules especially when you pretend to transfer the data from a German collector to outside the E.U., but that's again a point, we will hear about it later in the day.

Last but not least, I want to show you the EC Directive on the Protection, just to tell you that this will have a big influence on German law as well, that since we've got, I think, the most very strong protection of consumers in Germany, we don't have to change a lot. But there is the Long Distance Selling Act, right now we have a draft from February this year, I guess, or March, changing some laws. But basically the laws we have will stay the same and that should be it about an overview, and I give the ball back to Sven-Erik.

Mr. SVEN-ERIK HEUN:

Thank you very much. We have seen the acts which are mandatory law, now what does that mean when it comes to German territorial jurisdiction and when it comes to the issues of choice of law. With regard to consumer protection, it actually means a lot. Even though there's a principle, when we look at the jurisdiction rules as to what law is applicable, we would have the laws of the seat of the supplier, which usually where, that's according to the German law of conflicts, and that is more or less the general rule as far as I know. And we even have the possibility of a choice of law including a choice of law in consumer contracts and even in general terms and conditions.

You have heard that our German law and German terms and conditions are very restrictive.

Just to give you maybe a very short idea of how restrictive, but I don't want to elaborate on that too much, is you have, for example, no right to any price increases whatsoever; and what is even worse, and that's most of the time very surprising for Americans, there's practically no limitation of warranties or liability in general terms and conditions. Which means that if you actually want to sell your goods, and that is applicable under German law, if you do have a problem, you cannot really restrict your liability.

So coming back to what that means for the mandatory law question, it is pretty clear that even though we may have the possibility materially of a choice of law, it does not work when it comes to consumer contracts. You clearly have the country of destination rule for the choice of law question in Germany, which means that wherever the consumer lives and has received an offer, and wherever he ordered basically, so more or less the clicking in front of his screen, that's where the Consumer Protection Law of Germany, whenever it's mandatory, will apply. And it's easy to say, being a

maximum regulation country as has been said before, that almost the entire set of consumer protection laws in Germany apply. No matter what choice of law has been taken, the law is mandatory and therefore we don't really have a choice, in that case, those laws have to be obeyed, and if not, then these clauses will be void and there will be other kinds of remedies.

And before we talk about choice of law issues, I'd like to give you Kai again, to talk about the side of the Tort Law.

Mr. KAI WESTERWELLE:

Yes, thanks. What I'd like to show you is the enforcement of the German law, especially the example I'd like to choose is the Unfair Competition Act. And that's the Personal Class Action, that's what I want to show you.

It's not only the consumer to claim violation of his rights, it's also different organisations. And as you may see here is, the possible claims are any person who violates can be, may be enjoined from violation acts. And what you have first of all is any competitor can claim for violation of Section 1.03 of the Unfair

Competition Act, which is for example false advertising. So you see, Number 1: "By business persons distributing goods or promotional services of the same or similar type that can claim for infringements."

And the same holds true for associations having legal capacity, whose purpose is to "promote", and I choose the word "promote", commercial interests. These private organisations to prevent unfair competition, we call them "Wettbewerbszentralen" are very busy in here. If you have any false advertising, you will face claims of them, I guess you will, if not the competitor is being the first to claim you. So these are special private organisations, these are not public organisations like FTC, as far as I understood the principle of FTC.

And the next one is by association having legal capacity, whose chart of purposes includes safeguarding and so on. This is about the same, this is also private organisations which have been built up in Germany especially by lawyers, I'm pretty sorry for that, just to sue and to get fees. It can't sell wares, it's just a combination of lawyers to make money in some parts. Which is more interesting is the

private organisations to safeguard the fair competition.

So what remedies are you facing? The same holds true for the enforcement Class Action on standard terms, also the same organisations have the possibility to claim against invalid clauses.

The remedies of this, I call them Class Actions, I don't know whether I can choose one word to work with it because I'm not very familiar with American law, are, first of all, the elimination of clauses, for example in standard terms, which is very important. When you have important standard terms of banks for example, it's almost the private organisations to claim them against it because it's just a question of how much money are you able to spend in the claim. And if they have the possibility to get your claim up to the Federal Court, this clause will be invalid in any conflict of any bank. So anyone, any consumer can claim based on this decision of the Federal Court.

The same holds true for elimination of misleading advertisement. There are many lawsuits, as I've told before, and in the future it's planned that protection

of consumers should be in other legal areas so there's more class action in Germany, but I can't tell you how that works in the future, especially when it comes to civil law issues.

So I can just go through Territory Jurisdiction in Class Action. As you see "Applicable Law" I'm not sure, I'm really not sure about that. I guess if, this is law of tort, so if it comes to Germany and advertisement in Germany, for example, I guess German Law will be the applicable law if the German customers are the target of the advertising.

There's some indications, and I was very surprised yesterday hearing about these aspects which are exactly the same German courts are now ruling out, which is the language, for example, the German language, to order possibly from Germany, or is it not possible to order from Germany, is there a delivery into Germany, and so on. But I guess you've heard about that yesterday, in the Asahi case, or I may refer to that.

Let me just say one word for this Class Action applicable law because it is the link. We have a very interesting court ruling of the Regional Court of

Munich saying that German advertisement, advertisement law, is applicable because of a link on the home page of a German subsidiary of a Japanese company to the home page of the sister company in America, which had comparative advertising, which was not allowed two months ago or three months ago. So they said just to have that link on your home page through your sister company is that you have incorporated the advertisement of your sister company in America to your German home page, so German courts can rule this out by German law, which is strange in my opinion. But I don't know, it's just a regional court, there's lot to do.

And the place of jurisdiction poses the same problem. I guess that will be the place of tort, the locus delicti, that's wherever the offence against the Unfair Competition Act takes place within Germany. We can't be sure, right, that this is if you infringe something on the Internet, wherever you are in Germany, wherever the terminal is, or wherever you have the possibility to go to the Internet, that's everywhere.

I'm not pretty sure what it will be when it comes to international cases because there's no court rulings on this subject right now.

So this again is mandatory law, and now is time to go back.

Mr. SVEN-ERIK HEUN:

As you can see, it's really fun doing business in Germany, especially going to courts. What does that look like from a contractual point of view?

Now, to make it very short, we have statutory laws possible in contracts; however, when it comes to consumer contracts, particularly when you also look at choice of forum, which is the question of how you actually get your remedies and enforce it, the rule usually says that, well, this is all fine, but when already this creates a legal position for the customer which is not that good then it won't work, and that is, of course, when you look at German customer protection laws is usually the case.

Which means that from the point of view of the venue again, you would look at jurisdiction and being in Germany, and the court being able to have jurisdiction over consumer protection issues whenever a consumer contract is involved; from the European side, you have that principle laid down in the Brussels Convention

anyway, so you end up with the domicile of the consumer. However, if you're not in the area of application of the Brussels Convention, like in the example of the U.S., it looks a little bit different but also very interesting when it comes to the concept of mandatory law.

Now, what the customer can do on his side is pretty clear. He can sue at the court of his domicile or abroad, of course if he wants to do that, or he simply doesn't pay, which is the easiest way of remedy if he actually ordered something over the Internet. It does not, however, solve the problem if payment has already been made, for example, through a credit card or even through electronic payment systems. Here there is some kind of a blank also on the German legal system.

Whenever this is done in Germany, of course, you have enforcement through the international instruments, which is also not necessarily very helpful for the customer, given the fact that everything that crosses has to be served abroad, for example in the U.S., it takes quite a while and is not very helpful.

The customer, of course, on the other side may be sued

always at the court of his domicile, and the question of what's going to happen if he's sued abroad is more a question of how do you enforce foreign judgements in Germany, which is again quite difficult because what we need to have is, we have to have a judgement in Germany which would be called something like an Enforcement Judgement of the judgement that has been obtained abroad.

And for that judgement, another test is being run by the German courts which is that there has to be proof of jurisdiction of the foreign court under German law, including German law of conflicts.

That's one thing. So we would be looking at German law of conflicts for a judgement that has been obtained, applying the rules of long-arm statute for example in the U.S.

And secondly, we have what we call an Ordre Public reservation which is again the mandatory law issue, and even though formulated slightly different in our Classes Law, it basically means, and there's a very common opinion on that, that all consumer protection laws will have to be observed to any judgement obtained abroad against a consumer in Germany that violates consumer protection laws, for whatever reason, is not going to be enforceable under German law. Thank you.

(APPLAUSE)

Mr. RONALD PLESSER:

That was extremely well done and exactly on time. When I heard that there was -- the German Minister of Industry several years ago said that the electronic commerce is great and they wanted electronic commerce but they had to figure out how to apply the Sunday closing laws to the Internet, and I just wanted to make sure if you guys had any further intelligence on that. Professor Liu?

Ms. CHING-YI LIU:

Good morning. I'm from Taiwan, but I'm not going to speak in Taiwanese or Mandarin, don't worry.

It's a great honor to speak at the conference. I would like to thank Chairman, Mr. Katoh's invitation to the conference, and help offered by Ruth and the conference staff. In this presentation, I would like to offer a comparative brief from the perspective of some Asian laws and then maybe a quick policy overview on international harmonisation.

E-Commerce has become one of the most topical consumer

protection issue in the late 90's. As increasing number of people around the world are using the Internet, many companies have utilized the Internet as a venue for advertisement and sales. It seems clear that all online entities hope to profit from E-Commerce. However, it's also true that E-Commerce won't realize its full potential until consumers have confidence in its efficacy.

In many aspects, I think the issues raised by E-Commerce are not different from others, from those for any other forms of commerce.

On the other hand, some distinctive characteristics of the online environment indeed complicate consumer protection issues. As the electronic marketplace is a place where a wide range of industries can do their business at great speed and operate with a much greater degree of anonymity. I believe informed decision-making, security, reliability, and the protection of online process to help consumer confidence would be indispensable.

It's also noticeable that although there is a great increase in the use of the Internet in Asia, the uptake of E-Commerce in these regions seems much more limited

while the development of E-Commerce in North America is very speedy. As a matter of fact, the number of online users engaging in E-Commerce in Asia is only a very small percentage. It might have something to do with the customers' buying habits, and might have something to do with the consumer protection concerns we have just identified a moment ago.

Generally speaking, in traditional consumer protection laws we have minimum safety standards, minimum information standards and requirements, and a minimum standard for data privacy. We have an extensive range of laws and regulations and there's no single government agency responsible for consumer protection. Most local consumer protection regulations have been tailored to address national concerns. In the States, the consumer protection laws is the Common Law of Contract, the U.C.C., they afford traditional safeguards to consumers. In addition, many specific consumer protection statutes supplement the general protection offered by the common law and U.C.C.

For instance, both federal and state legislation prohibit unfair trade practices. Furthermore, Congress has enacted a number of statutes addressing specific

consumer protection concerns. Both in the States and in Taiwan, regulators of banks and insurance companies have the responsibility to protect consumers. In addition, regulators in the field of consumer protection arrange from FTC, FDA and countless other agencies in the States. Similarly, the scope of government agencies responsible for consumer protection matters covers many different governmental entities from, in Taiwan and China, as well as many other Asian countries, as I believe so.

The Application of laws rooted in the real space to online transactions would be treated as a process of translation. In translating real-space laws into the virtual space, several factors should be considered very carefully to help us determine whether more regulations, or even more new laws are indispensable.

First, why is it necessary to regulate online entities? Second, how different is the online industry to be regulated from the traditionally regulated industries in the real space? And what would the result of the regulation be and therefore to what extent would the application of the real-space laws become appropriate?

As far as consumer protection is concerned, it seems

fair to say that online businesses should not be treated differently from other entities in the real space. Furthermore, online consumers do not deserve less protection than they have in real space. Also, it is noticeable that how everyone will benefit from application of real-space consumer protection laws is crucial. In other words, an optimal regulatory model is the key to the future of E-Commerce in cyberspace.

To have a better idea about how difficult it is for an optimal regulatory model of consumer protection to emerge, I will offer some Asian perspectives, and here following are some general descriptions of consumer protection regulations in Taiwan and in China, two nations.

Both Taiwan and China have consumer protection statutes for only a short period of time compared to western countries. In Taiwan, Consumer Protection Law is the major consumer protection statute; and in China the law of the People's Republic of China on Protecting Consumers' Rights and Interests, it's called PCRI, governs most of their consumer protection issues.

First, fraud. In Taiwan, Consumer Protection Law does

not address consumer fraud issues specifically. If a specific fact pattern was not covered within the articles of Consumer Protection Law, the general default rule in the Civil Code of Taiwan would apply. According to the default rule, the defrauded party will have the right to rescind the contract.

In China, business operators would be fined in the amount of the doubling prices that consumers paid for the goods and the services. It's in PCRI, Section 49. If the specific conduct constitutes any of the items listed under PCRI, Section 50, it's called the "Law of the People's Republic of China on Qualities of Domestically Produced Products" and other relevant laws and regulations will apply. Otherwise, the business operator would be fined, confiscated or suspended.

Second: "Advertisement". In Taiwan, Fair Trade Law, Section 21 regulates the conduct of business. If a business falsely advertises its products and the services, it will be fined successively until the conduct is discontinued. According to Consumer Protection Law, Section 22, the content of the advertisement will constitute part of the contract. If not specified in the contract, the protection to

consumers shall not be lower than the content of the contract.

The advertisement agent will be jointly or severally liable with the business if the agent knowingly places untrue advertisement, it's in the Consumer Protection Law, Section 23. Matters regarding commodity labelling is governed by Consumer Protection Law, Section 24, and other specific laws and regulations.

In China, PCRI, Section 19, requires business operators to provide truthful information regarding their products or services.

Business operators will be punished according to the "Laws of the People of China on Qualities of Domestically Produced Products" and other relevant laws. Similar to Taiwan's Consumer Protection Law, PCRI, Section 22, requires business operators to guarantee the products and services they provide are compatible with what described in advertisement. As for who shall be liable for untrue advertisement, the advertising agent will not be liable for the losses that consumers suffer unless they cannot provide the true name and address of the business operator. The ad agent will be punished by the administrative agency if such a complaint is brought by a consumer.

Third, Dispute Resolutions. In Taiwan, a special consumer dispute resolution procedure is provided under Consumer Protection Law, Sections 43 to 46. The procedure includes three steps: complaint, reconciliation, and administrative dispute resolution mechanism. The final ruling delivered by the administrative agency shall be approved by the court, and Consumer Protection Law, Section 47 introduced consumer class action.

In China, PCRI, Section 34, does not provide special consumer dispute or mechanism. Consumers can utilize various procedures such as reconciliation, consumer association mediation, litigation, arbitration, or administrative procedure.

Now, I would like to do a summary.

First, Structural Differences. There are some structural differences between local regulations on consumer protection. Unlike the States, Taiwan and China apply a more centralized approach and incorporate a general consumer protection law into their legal systems. And the many other consumer protection regulations supplement the general consumer protection

law. Viewed from this perspective, the consumer protection regulatory approach adopted in the States seems more decentralized.

Second, Fraud. Even in the centralized legal system, different types of default rules in fraud regulation still exist. In China, a fine with a sum doubling the prices paid by consumers is used to prevent fraud, but in Taiwan, the default rules in the Civil Code regarding fraud only involve cancellation of contracts.

Third, Liability Allocation Between Business and Agents. The allocation of liability between the agent and the business also presents some differences. In Taiwan, the ad agents will share the liability with business operators if it knowingly publishes untrue advertisement. In China, the agent would be fined by the administrative agency and would only share the compensation when it cannot provide the identity of the business operator.

Four, Administrative Dispute Resolution Mechanism. Several alternative dispute resolution mechanisms are available leverages at least in Taiwan and China for

consumers to resolve their disputes against businesses with which they transact. This approach for consumer protection disputes might not be available in some other countries.

The fifth one is Enforcement and its Future. It's noticeable that the general consumer protection laws both in Taiwan and China were not introduced until very recently. It's only five years old in Taiwan and six years old in China, I think. Also, their enforcement, in my opinion, is weak. The reasons why the enforcement seems not quite effective include the immaturity of the laws, the lack of experiences of the regulatory agencies, as well as other cultural and social factors. This aspect of consumer protection regulatory schemes in Taiwan and China adds some uncertainties to the future of E-Commerce in this region.

We have some difficulties about consumer protection here, and to save some time I just skip.

And most legal systems protect consumers in many different ways as we have seen before. Most countries have their own laws and regulations on many consumer

protection matters. However, this does not eliminate the lingering consumer protection problems. Online entities can shop around for the most permissive regulatory scheme while consumers who conduct online transactions can establish virtual residents anywhere in the world. For local governments, how to make cross-border enforcement for consumer protection effective seems a mission impossible. And on the other hand, there are a lot of discussions about whether current consumer protection laws are out of date.

For example, in Asia, there are almost no special rules in their legal systems to regulate online transactions although I think Singapore has an Electronic Transaction Act passed in 1997, '97 or '98. As a matter of fact, people are beginning to debate about whether it's necessary to create more consumer protection laws for E-Commerce. And it seems impossible and an undue burden for online entities to comply with all the potential consumer protection regulations enforced by many different local governments.

In this sense, I think that the development of internationally uniform rules seems to be one of the

potential propositions for consumer protection in cyberspace.

Consumer protection issues are complicated by the Internet, but in my sense, the Internet should facilitate the globalization of consumer protection. In addition, it should be a key issue for accountable Internet governance and the empowerment of Internet users. Therefore should identify general principles and should make international coordination possible seems to be a critical step for consumer protection in the regulation of cyberspace.

And as for the choice of regulatory approach, and the discussion about self-regulation and identification of key principles, I just skip and give it through the speakers for the rest of the filing.

The Development of Uniform International Rules for Consumer Protection. On the level of international norms, there should be a set of core protections for consumers. In this sense, government cooperation in enforcement and information sharing among consumer protection agencies globally seems very necessary.

On the other hand, it's also undeniable that the development of globally uniform rules for consumer protection would be an extremely difficult process. First, we can predict some controversies brought by the conflicts of different social, economic and cultural contexts. And because we, as an international community, have very limited experiences in the internationalisation or harmonisation of Internet regulatory schemes, it might be more difficult than any other harmonisation of legal rules. However, we do have some models to follow in this respect. We have witnessed the achievements of WTO in the enforcement of intellectual property rules through TRIPS and we have seen some transnational effort to resolving difference of privacy protection rules between Europe and the States. More importantly, we could also learn from some existing models of organisation or organisations made by WIPO, OECD or APEC in similar regulatory matters.

Okay, some concluding remarks.

For a better consumer protection scheme to emerge for a transnational cyberspace, we need more in-depth comparative studies on local rules of consumer

protection, which is only in its very beginning stage right now. Second, we'll need a set of global standards for consumer protection. And third, more efforts both in the private sector and the public sector are required in the harmonisation process. The fourth point is we need an efficient and accountable mechanism for dispute resolutions and, of course, finally, international cooperation on enforcement is critical for a proper consumer protection scheme in the E-Commerce age.

Thank you for your patience.

(APPLAUSE)

Mr. MICHAEL GEIST:

Good morning. Ron opened this morning's panel by noting the issue of licensing within states, and he particularly noted the issue of licensing with regard to the medical profession, and so I'm going to spend a couple of minutes talking about where things stand in one jurisdiction, that is the United States. I'm a law professor here in Canada, but I come to this issue through the American Bar Association's Internet Jurisdiction Project, I am Chair of the Sale of

Services Working Group. And what our group quickly realized as we embarked on this issue about one year ago, was that Sale of Services as a sector is rather a huge sector and that the prospect of analyzing each and every service simply wasn't going to be feasible. And so what we sought out was to find a service that might provide a model for many other services, so that if we could find something that was highly regulated and already on track with regards to the issue of electronic commerce in the Internet, it might well provide the model we were looking for, for assessing issues in other services which might not be quite as regulated.

The group has quickly evolved into the telemedicine group as we found that it was in fact telemedicine that was perhaps the most regulated of the services, and provided a really good example of where things are going in this area and where some of the issues arise.

Our analysis actually developed into three different types of services. There was the no-regulation services which of course don't mean no regulation, they just don't mean a lot of regulation, I suppose. We considered business consulting one such service where

there certainly is regulation if you're consulting particularly in an international framework, but there is little regulation in terms of who can be a business consultant, and what exactly they can do.

The next sort of service that we identified was the Certifying Only, and the Certifying Only services were services that regulated who could practice but they didn't really regulate much about what you could do. And so in the engineering context for example, many states include provisions which stipulate who can become an engineer, or who can hold themselves out as an engineer, but once you've met the standard, usually some educational and testing requirements, what you do after that is largely your own business. The ongoing areas were the areas that were of most interest, law and medicine were the two areas that really covered, that were most interesting there. There are of course some services which fall into all three. Education was an area that we started to look at and found that depending on what sort of education you're talking about, it might well cover any of these issues.

Onto telemedicine though, and let me just very quickly note that from a adjudicative jurisdictional

perspective, things pretty much follow on the same lines that Professor Gedid covered yesterday so effectively. There are not that many cases involving Telemedicine along the Zippo line of cases yet, but the Mayo Clinic v. Jackson case was one case involving at least the health care profession: the Mayo Clinic had a website or has a website, and that factored into the overall analysis as to whether or not there would be jurisdiction but didn't play a key role in the overall analysis.

There's actually a couple interesting cases in the legal field in this area where there is actual practice taking place and the courts have said: listen, we can still assert jurisdiction over you, even if you are not within our jurisdiction physically.

The Birbrower case is a California case in which California courts quite clearly stated that practice of law within the State of California does not require physical presence. And so, if you're doing it electronically and you meet the standards of the practice of law, they can assert jurisdiction over you for those purposes.

The Parsons case is the case that attracted quite a lot

of attention earlier this year. It involves Parsons' Technology which is a software maker and the distributor and manufacturer of the Quicken Family Lawyer program. It's one of the software programs that allows you to replace all of us supposedly by creating your own wills and other sorts of documentation. The Unauthorized to Practice Committee in Texas brought an action against Parsons suggesting that the software program itself was violating the law as a means of practicing. And the committee there actually ruled that yes, it did violate the standards that were in place at that point in time, and sought to ban the program from the state.

Within the last month or so there's been a reversal of that position, both the case itself was appealed and the decision was vacated in a large measure because Texas passed an amendment to the legislation in which they stated that for this sort of electronic type of practice, if there's a disclaimer that suggest that this is for information purposes only it won't qualify under the Act. In some respect, that may be going too far.

There is an attorney out in British Columbia here in

Canada who has established a virtual law practice and he will incorporate a company for you in BC, he will do an assortment of other legal services for you, and he has no physical place. If he puts up a mere disclaimer, I don't know that he should be able to contract out of other jurisdictions from a practice perspective.

But in any event, from an adjudicative perspective, there is ample reason to believe that, that the same sorts of analyses will apply.

The prescriptive jurisdiction perspective is where things get most interesting. What I'm going to do is take you through how the analysis at the moment plays out within several states because what we find is that there are some states in the United States that have actually addressed the issue and provided for the issue of telemedicine within their licensing statutes. Others have not addressed it within the licensing statutes but have addressed it within their practice of medicine definition and as such are well positioned to, or at least somewhat positioned to deal with the issue. Yet, other states haven't dealt with it at all. And so, what it falls to is an examination of the actual

activity that's taking place online to gauge whether or not it might fall within the language of the statute unless jurisdiction might be applicable.

There are some states, and it's rather difficult to see here, but there are some states that require regular contact within a telemedicine venue for jurisdiction. Indiana, Oklahoma, South Dakota are three examples, and this is an excerpt from the Code which discusses the fact that as used in this article, the practice of Medicine includes medicine or the practice that is transmitted through electronic communications and, and this is important, or on a regular routine or non-episodic basis or under an oral or written agreement.

And so here they're looking for some sort of regular contact. So for those that might be practising telemedicine on a very sporadic basis, you just happen to do it, to provide some sort of telemedicine service to a person within that state on an occasional basis. At the moment, those states seem to have opted out regulating that sort of activity.

It's also worth noting there is a provision also in here that deals with the issue of consultations by a

non-resident physician to another physician. Ron, on the spectrum of where licensing falls, placed it at the sort of far end of less compelling. I don't know that I'd agree with that, but I can recognize the fact that there is a concern that we don't want legislation to block the possibility of having an important doctor or a well known doctor in one jurisdiction providing his or her advice or a second opinion on a matter.

And some states have recognized that, and the way to do that is not to say that we don't need any legislation at all, the way is to simply provide an exception for that sort of activity as these states have done. So they say, if you're providing that sort of a second opinion to another physician, so not to an individual who isn't in a position necessarily to be the best judge of what's taking place, but to another physician. They exempt that from their jurisdictional reach.

Other states have taken a somewhat broader play. Nevada and Texas for example don't require that regular contact and so they've provided that services that are provided through an electronic medium will constitute the practice of medicine within the state, and those people who do so need to meet the licensing

requirements.

And as I mentioned, some other states don't provide for it at all.

For those states that don't provide it within the licensing portion of their statute, we often take a look at the practice of medicine definition because if they provide it specifically for telemedicine with the context of practice of medicine well then you're covered that way, so that if you're practising medicine clearly you need to be licensed because the statutes provide that practising medicine needs a licence. Colorado, for example, includes telemedicine under its practice of medicine definition and as such is covered that way.

For those states that don't provide this sort of language, and for even states that do generally, it still raises the question, well what exactly is practice of medicine online? And to speak to the futurists about this issue, they talk about surgeries that are taking place jointly between people in different jurisdiction and things of that nature. That's a bit too far in the future for me, but what I wanted to do was focus on some things that are taking place on the Internet right now through, you know, more

simplistic websites, and just to get a sense of would these websites fall under the current statutory framework.

Probably the most obvious one that might would be actual diagnosis online, and interestingly there are sites that will now provide you with diagnosis online.

This is Mediconsult.com and they have a service called Mediexperts in which they have lined up a series of experts in a wide range of fields and can scroll down. There is no, they know the field, but interestingly they don't know which jurisdiction these various physicians are from. And what a person can do is provide a history, provide their own history and indication of what their symptoms are and what sort of resolution they're looking for, and within two to five days, they say they receive a completely confidential and private correspondence from the physician in their area which provides some advice and the language they use here is some treatment recommendations. At the same time, you fork over \$195 dollars for the consultation.

Now, if this network managed to establish physicians in

every state so that the person providing the advice was located in the same state as the individual, that doesn't really raise some significant jurisdictional problems. But of course, there's no indication here that they're doing that, and so, once you start getting physicians who are providing advice from their home state, from their home jurisdiction into another state, they would probably run into these various jurisdictional statutory provisions.

Ron alluded to pharmaceutical sales as well at the beginning of the presentation, and that's become one of the hotter areas on the Internet. Some statutes provide for, most statutes provide for some language in terms of prescribing pharmaceuticals. This is the Oklahoma statute and it provides prescribing or administering a drug or treatment without sufficient examination and the establishment of a valid physician/patient relationship would be seen as a violation of the Act.

Of course, the question on the Internet becomes what does sufficient examination mean and what is the establishment of a valid physician/patient relationship.

The American Medical Association has said they'd like to see face-to-face prescribing. So they haven't completely banned the practice, they're in no position to do so, but it's their view that it should only be face-to-face prescribing, and the online prescribing that's taking place shouldn't be taking place. Some states, Connecticut and Nevada and several others have actually tried to ban online prescriptions.

To give you a sense of what they're concerned about, these sites are very easy to find. This is Netdoctor.com or Net-Dr.com and it allows you to buy Viagra, Propecia and a couple of other drugs directly online, they suggest with a consultation, but all it really -- there doesn't seem to be much here about a consultation other than you need to pay \$50 for the consultation, and that they'll provide you with free overnight delivery.

You can see that this is all about price, and there are no shortage of sites that are selling these sorts of pharmaceuticals online, and it's all a matter of who's selling it for the cheapest.

This raises obviously issues beyond just in-state, it raises international concerns. Here in Canada, Viagra was not approved at the same time that it was approved in the United States, but there was a rush of Canadians anxious to get it, and many were going about trying to buy it through the Internet. This became a regulatory issue in California. This is Dr.Propecia.com, and Dr.Propecia.com part of the Harman Group was selling Propecia online, it's a baldness drug, and was ordered in June of 1999, you now see that he's got a little note, this is going to be very difficult to see, a little note that he has been told that don't do that. And so, he stopped selling it through the online forum, but now requires face-to-face prescriptions.

Of course, there are no shortage of people that are not complying with these sorts of issues and from a jurisdictional perspective, it certainly raises issues and would in all likelihood under the current statutory framework.

Even further along the spectrum is the issue of advertising. And here you find a lot of statutes which haven't yet contemplated the issue of advertising medical services online, and there's certainly a lot of

relevance for this in the legal field as well, where a lot of law firms have gone and established websites and the lawyers may participate in chat room and things of that nature, and the question arises, well, are they violating the relevant statutes.

In Oklahoma for example, there is a requirement, unprofessional conduct includes any advertising other than in a newspaper. Well, there is A, the question as to whether an online newspaper would qualify, and B, the question as to well, does a website then violate these provisions. Texas, on the other hand, just deals with the issue of false or misleading information, they don't actually cover the problem that there is going to be some restrictions on the actual advertising itself.

And so this is one area where clearly some of the statutes are in need of updating.

To just conclude then, so we'll have a couple of minutes for discussion. The area of telemedicine is clearly and very rapidly evolving one and what's interesting is that some states have recognized the issue and taken steps to try to bring their statutory framework into the Internet age as it were; many others

have not, and what, regardless of whether they have or haven't, we're clearly heading for a situation whereby multiple jurisdictions are going to be looking to regulate the same sort of activity. On a personal level, I don't think that that's, certainly in a medical context that that's so bad. But nevertheless, that appears to be where we're headed.

Thank you very much.

(APPLAUSE)

Mr. RONALD PLESSER:

Well I just feel like I've been to Epcot Centre and if any of you have been to Epcot, you know, you go around that big lake and you kind of go from country to country to country and get a little cultural fix, and then you kind of, you've done your hour and a half at Epcot and you've become global. And so I feel we've had this wonderful survey and I think it really, Ruth has done just a terrific job in getting this variety together, and when I went and consulted with Ruth on the time she said: "Well, this is really good because it just shows how difficult harmonisation really is going to be."

But the question I'd like to ask the panel is, you know, I was very happy to be educated on the developments in German comparative advertising law, and maybe that shows, maybe that is a good example of maybe there's some convergence and these issues are focusing some reexamination of laws.

Without taking the mud flap metaphor too far, I mean, obviously there are laws that states or countries need to do to protect their highways, they can't allow trucks to go on the highways that are too heavy and that will crumble those highways, and so we accept that there are restrictions. But we also understand that there are states that may put mud flaps regulations in and make people change them and customize them, and there's no real interest being served.

And I guess the first question or the way to get around that, it seems to me in this environment is a discussion of safe harbor, and this is where, I don't think we're just talking about industry self-regulation because we're talking about government, we're talking about consumer and we're talking about industry coming together to develop a set of best practices or a set of safe harbor practices, that if people follow them they

can have some legal certainty, some assurance that they're not going to be in violation of a series of country laws.

And I'd like to kind of go down the panel and just get a comment on whether or not you think a safe harbor approach working together would be a fruit in your particular jurisdiction or is the rule so rigid and so set that that kind of approach may not be effective. Roger, can you start?

Mr. ROGER TASSÉ:

I think that as insofar as fraud is concerned, I think that this is a different category of fish, but with respect to reviewable transactions, yes, the kind of false and misleading advertising I was talking about, I think that it's to be remembered that the enforcement of these provisions is in the hands of the Commissioner. I think the Commissioner - one can expect - would use his wisdom and - you know - his good wits to enforce and really in situations where it matters I think it might have an influence on him if in effect there were general principles, broad principles agreed to by the private sector and companies that are potentially of interest to him, and that could show that in effect

they are complying with broad principles to which hopefully Canada would have subscribed.

So I think that a safe harbour approach might influence the way that these provisions would be enforced as they leave great discretion in the hands of the enforcer.

Mr. KAI WESTERWELLE:

Yes, very interesting is the safe harbor approach because it's very -- in my country when it comes to terms of the print media, we have the print media relation with Germany which is pretty strong, and it takes part of the unfair competition, that means violating the self-regulations, it's also violating the Unfair Competition Act. So there is the possibility to get through that difficulty in Germany by self-regulation but let me say that we have a new approach from the European Community. We're not in America, we have smaller countries in a big continent.

So, the first step that we are taking, and I think you will hear more later is to have a consensus within the European Union over the nation states of Europe, so that's the first approach they're right now taking and maybe the second step will be all over the world.

Mr. SVEN-ERIK HEUN:

Well, I think I agree. I believe it's all about harmonisation again, particularly when you look at the issue within the European Union, that's where the regulatory aspect will have to be resolved, instead of having a common set of rules that are applicable.

Safe harbor altogether is also something that raises concerns on the German side because we'll... Here we have all these nice laws, and now we start the race to the bottom. What's the safe harbor going to be? Is it a safe harbour for the German consumer? The German government has very often taken the position, particularly within the European Community, that this is not an approach it would like, that it is not harmonisation again on a certain level which is certainly not the bottom level you could possibly have.

Self-regulation is something that is not commonly used yet in Germany, and we have seen the first aspects of it, maybe it's something that's going to become law. However, I don't think it will work in the framework of consumer protection because the legal structure that we have here is too much developed already, we can't turn

off the clock on that, unfortunately, in order to move away from that.

Mr. RONALD PLESSER:

Let me just add that the EU Directives, particularly in privacy and other areas, do call for the acceptance and development of industry codes to supplement. So it's a concept that I think at least has gotten some application. Professor Liu.

Ms. CHING-YI LIU:

Yes. The idea might work in some areas, but maybe in privacy or content regulation - I'm not quite optimistic about that.

Mr. RONALD PLESSER:

Good. Michael.

Mr. MICHAEL GEIST:

I would just echo some of the same comments that you're making. Certainly looking -- fraud is probably the easy one, it's probably the equivalent in consumer protection of the child pornography that was referenced yesterday in terms of there's an area that we probably could come to some agreement. But the mud flaps

issue that you raised earlier, it's one person's issue that seems to be just a trade blocking mechanism; it's another person's important issue that they feel is an integral part of their consumer protection framework. And looking at how difficult it's been to come to agreement just between, on a bilateral basis, between the EU and the United States on a privacy safe harbor proposal, to extend that worldwide on issues where again there's going to be widely different perspectives on the level of importance for these sort of things, strikes me as difficult as the same approach to harmonisation on a treaty basis.

Mr. RONALD PLESSER:

Well, thank you. I think my view of privacy is somewhat different because I don't think, at least I think industry is not, there's some provisions of privacy that it's been resisting, I think, in consumer protection, maybe that's not case so much, but I think it's a very interesting debate.

I'll take one question from the floor, I don't want to keep people from the coffee break, but if there's a question, we'll certainly entertain it. Oh, my wishes have been met.

A VOICE:

I'm going to follow up on the harmonisation point because a lot of people have raised it. What, the OECD, we all know, is working on consumer protection principles, but beyond the OECD, if we want worldwide harmonisation to the extent that we can achieve it, what is the appropriate forum?

I mean, we established WIPO to deal with the intellectual property issues as Jenny mentions, I think some people have talked about trying to raise this issue within the WTO, maybe along the same track as the multilateralisation of competition policy more generally. I've read in two places it calls for a new world organisation, a world consumer protection organisation, WPCO. I don't know, that's just totally a pie in the sky. But what is the appropriate forum for these kinds of efforts involving governments?

Mr. RONALD PLESSER:

Well, I'm not sure there's an answer to that, Andy. And Andy, do you have the answer? I think we're going to have to really find our way, but I think it's true efforts like ILPF and Ruth Day who's done a fabulous job in pulling this together, that I think we'll come

to the answer. Maybe we ought to do an organisation, maybe there becomes a virtual coming together that other organisations pick up the idea. I mean, I don't think we always have to think about a new organisation, but we have to think about new ideas in trying to solve these issues with ideas and maybe the organisations will come.

Anybody else have a response, I don't want to necessarily take the last word.

Mr. SVEN-ERIK HEUN:

I think there's very good point to that. Apart from all these international organisations that already exist, I think this is particularly the businesses to take the lead, not necessarily to achieve self-regulation or only self-regulation, but actually to make a proposition to ask all the governments whenever they are facing the issues, ask them to try to give some guidelines on their side, and one of them is for us to make the transnational business dialog who's actually doing this at the moment.

I've been looking at electronic commerce issues and I've been trying to see what kind of trade barriers are

there and what is justifying consumer protection because we should never forget, and let me a little provocative here, when we talk about these trade barriers, it's basically, or sometimes it very often boils down to the issue that there are some countries that want to have completely free trade without or with as little rules as possible, and there are other countries that come from a more different legal and regulatory approach where they say: well, there are some issues of protection on the customer's side but not necessarily only on the customer's side.

And these approaches have to be discussed and have to be harmonised, and I believe as using terms and business dialog, specifically the North American approach and the European approach which is going to be quite different.

Mr. RONALD PLESSER:

Well, that is the last word, I want to thank this panel for, I think, an excellent survey of laws, and we look forward to the rest of the conference. Thank you.

(APPLAUSE)

CHOICE OF LAW FOR CONSUMER CONTRACTS AND DEVELOPMENTS IN THE EU

Mr. MATTHEW YEO:

We have the agreeable task of holding on the panel challenges. So if you could kindly return to your seats we'll get started and try to keep Ruth somewhat content.

There has been a slight change in the line up here. We've decided to blend the next two panels together, that is, the panel concerning Choice of Law and whether or not jurisdictions recognize choices of law in consumer contracts, and the panel on Recent Developments in the EU. As we'll see shortly, those two topics are very closely interrelated.

I'm Matthew Yeo. I'm a lawyer with the Washington law firm of Steptoe & Johnson. I work in the E-Commerce area generally. Our panellists today are Susan Crawford and Scott Blackmer who are partners at this law firm in Washington, I've just heard of its name, Wilmer, Cutler & Pickering; then we have Mike Pullen who is an associate with the Brussels' office of Dibb Lupton Alsop. He's been very active in EU electronic

commerce matters; then we have Mark Bohannon who is the Chief Counsel for Technology and Counsellor to the Under Secretary at the United States Department of Commerce, he's been active in a wide array of matters at the international level and within the U.S. relating to electronic commerce and policy initiatives of the United States in that area.

One of the interesting things about being an American lawyer practising in the area of electronic commerce is, and particularly in the area of electronic commerce policy, is the extent to which so much of our focus right now is on developments in the European Union. It seems like we spend a lot of our time thinking about developments there and how those developments will affect things at the broader international stage.

I think there are a number of reasons for this. The first, as several people have alluded to, is simply that I think the Europeans have a penchant for regulation that is perhaps not shared by some of their major trading partners, and so it means that there's a lot of regulatory activity over there that we have to keep our eyes on for better or for worse.

But I think the second and somewhat more charitable explanation is that, because of the imperative of creating internal market because there are fifteen member states with different languages and different legal traditions, they've had to address a lot of these jurisdictional issues much earlier on, even in the sort of pre-cyberspace world, and so have had some greater experience in thinking about how to address conflicts of law issues; how to address harmonisation of substantive principles in consumer protection laws; how to think about different kinds of jurisdictional principles. And in that respect, I think we can perhaps draw some lessons both positive and negative from the European experience and think about how those lessons might address efforts at the broader international level to address some of these problems.

I think there are both positive and negative aspects of that. As I've alluded to, I think the positive aspect is simply that Europe has a lot of experience in this issue, has numerous conventions and directives, including the Brussels and Rome Conventions which we'll hear about; the Distance Selling Directive; the proposed Financial Services Distance Selling Directive; a variety of other

directives in this area. They've had a lot of time to think about this, and we can look at some of those ideas.

I think the negative concern, though, is simply that, as Europe goes forward to address some of these issues, I think there's a risk that they will create an immovable baseline that will make it difficult in some respects to address these problems in the broader international context, and I think what's going on over there, we should watch with concern, lest it create a list that preclude certain kinds of resolutions at the international level, particularly of a self-regulatory nature to the extent that some of these proposals and some of these directives and conventions provide for certain non-waivable rights, or certain kinds of provisions from which there are no derogations. I think there's a risk that that's going to foreclose the range of possibilities at the broader international level.

So with this sort of preparatory remarks I will hand it over.

Mr. SCOTT BLACKMER:

Thank you, Matthew. Ron Plesser and the last panel gave, by the way, a very good introduction for this one and so gave us an idea of the range of consumer protection sorts of issues that are controlled by law, and now we want to focus on what if anything we can do about selecting consumer protections or remedies for consumer questions contractually. Ron gave a good description of that panel as having taken you to Epcot Centre, travelling from country to country, and I think we're going to take you now over to the Magic Kingdom where we're going to visit Tomorrow Land. And I just hope by the end of the panel you haven't decided it's Fantasy Land, because something must be done.

If you look at what kinds of -- and the circumstances in which we make contracts between consumers and businesses that are selling things in the offline world, it's important to remember that an awful lot of consumer transactions are not with written contracts at all and are not legally required to be. There may be some consumer protections that apply as a matter of law, but when I walk down to McDonald's and order a hamburger, I'm usually not engaged in extended

negotiation with the young person behind the counter. There are posted terms, there's a picture of a hamburger up there, there's a price posted and if I go -- that's treated traditionally in Common Law countries as an invitation to trade -- and if I go in there and say: "I'd like to order one cheeseburger", then I'm taken legally as offering to buy a cheeseburger at the posted terms for the described product.

When we get into certain kinds of contracts or above a certain monetary value, then it's wise for the parties that want to do it as a matter of their own prudence but also often required (and typically required according to the category of goods or services that are being purchased or the monetary value of them) that there must be a written agreement or there must be a signature. And that usually is going to include either stated or statutorily provided default terms with respect to warranty, liability, payment terms, et cetera.

And then we have to remember that so many consumer transactions offline and the majority of consumer transactions online are handled with a form of payment other than cash, so that often the rules that apply

through a credit, the use of a credit intermediary, credit cards or debit cards, stored-value cards, smart cards, whatever is being used, often there will be an intermediary involved, and there are agreements between the intermediary and the merchant, and between the intermediary and the person who holds the card. So that often there are additional procedures, and Ron alluded earlier to the chargeback investigation procedures in the credit card industry in the United States, and increasingly in other countries. So that even if it's a low dollar value transaction, very often the method of payment brings with it ways of resolving disputes and basic provisions that make it difficult for someone to engage in transactions in a way would be considered unfair or deceptive in the offline world.

The last panel, and I'll just go quickly through this, because the last panel really talked about quite a number of public law constraints. The general principle of course is the freedom to contract, but freedom to contract in the consumer sales context is always going to be subject to additional public law constraints -- first of all, with respect to the legality of the transaction itself, and probably a good

example of that is Internet gaming sites.

In addition, there is fraud, which may be treated -- in fact, in most jurisdictions seems to be treated -- both as a matter of living up to contractual promises or advertised promises but also potentially as a tort or a crime. And so those are public law constraints where it's not possible, for example to have consumers waive their protections against being deceived and entering into the transaction itself.

In the United States under the UCC, there's this notion that unfair or unconscionable terms, especially in contracts of adhesion which are directed by one party and not really negotiated between the parties, will be unenforceable. And then, there are often rules of the sort which say: we won't tell you what the term has to be, but we will tell you that it must be disclosed. And in some cases -- think of interest rates, for example, on credit arrangements or instalment sales, we'll tell you that it must be disclosed in a particular way, and with rules of conspicuousness.

We haven't talked much about conspicuousness, but that's been quite an issue in several legal areas where

disclosures are required and there is a conspicuousness requirement. It almost always has been stated in terms on how conspicuous terms must appear on a written contract. It's very hard to translate onto the presentation of webpages to people's own PCs, Internet screenphones, or kiosk terminals where you don't know exactly how it's going to appear in the final version.

And then, finally, there are public law constraints as to what kinds of remedies are allowed or must be allowed, and that includes in what sort of courts they must be enforceable, what sort of regulatory agencies may be able to step in and offer -- as in the United States the consumer protection agencies at state level often provide for -- additional procedural remedies.

And then there's the separate issue of the regulated industries and the professions that require licensing because they often bear with them their own minimum standards, ethical codes of conduct and regulatory bodies.

So those are all public law constraints on the freedom of contract. Just so we're clear, there's only a certain range of activity that is going to be possible

to determine by contract between consumer and vendor in any event, and that essentially has to do with the commercial nature of the dispute. In choosing the law that will apply and the forum in which the law will be enforced, there are a couple of general constraints. The concept which we'll discuss a little bit later - the choice of law, choice of forum even in contracts of adhesion in the United States -- there's the possibility of that application, but there are still some rules that courts tend to look at. They still want to see a nexus of the forum to the transaction and to the parties, and they want to see that the choice of law and the choice of forum are not going to be contrary to notions of fundamental fairness. And as Susan will explain in the adhesion contract context, that that brings with it even more constraints.

And to the extent that the terms are being enforced through public law -- consumer protection acts are consistent with the principle of anti-fraud -- then the choice of law and choice of forum between the parties is probably not going to be respected.

In the case of the regulated industries and professions, and we had the good example of

telemedicine a few moments ago, those laws themselves will often import their own jurisdictional concepts so that they will define the territory in defining the acts to which they apply. And to the extent that the jurisdiction can claim that those acts are within its jurisdiction and there are no limiting constitutional principles or international comity that apply there, again, that's not something that can be altered by contract.

Another good example related to consumer protection is privacy, where one of the issues with the Data Protection Directive in Europe is whether Article 4 creates a separate jurisdictional basis for asserting that European privacy rules apply to people outside of Europe who are using facilities in Europe to collect data, even though they're not established there in the regular sense for business.

And finally, there are mandatory consumer protection laws. You had the example from China and Taiwan and Germany in the last panel, where there are fairly comprehensive regimes, centralized regimes, for consumer protection law, in which many of the provisions on their face are mandatory within the territorial scope of the jurisdiction.

The kinds of consumer protection laws we're talking about, and that are being discussed in the OECD context now - I will just give a few examples. At the federal level in the United States, the Magnuson-Moss Warranty Act, and there are several other federal acts especially with respect to investments and depository institutions. And there are a lot of other acts which are primarily at the state level and they're quite varied. Some of them have to do with the use of credit cards, some of them have to do with buying mobile homes or with telephone service; often they are very selective in the activities that they apply to. They sometimes leave gaps, they don't always use consistent terminology, and it is done state by state. All of those are problems, of course, for those offering goods or services online.

In the European Union, there's been -- we'll talk about two or three of the directives specifically today, but just to make clear that there are actually several harmonising directives that have an impact on consumer protection law in the member states - a directive on unfair terms, advertising directives, the distance sales directive (and now the draft directive for distance sales of financial services), a directive on package travel which applies to tour packages, and, of

Course, the proposed E-Commerce directive that we'll be talking about in more detail later. And all of those are interesting examples of trying to harmonise disparate consumer protection rules amongst the Member States.

And then I'd like to point out that there are at least two different kinds of consumer protection rules that you get in these statutes and directives. One is providing default terms for terms and conditions that have not been explicitly agreed between the parties, but where the parties could have agreed to different terms. The other is in establishing minimum standards; they sometimes are exclusive, sometimes they say what the rule is, sometimes they say it must not be more than, or less than this. An example would be usury laws that establish interest rates so that you know what the top level of interest is that you can charge. In an instalment sale or a credit agreement there's typically no restriction on the bottom level, there's no prescribed interest amount, but there is a cap that's set. So very often there are floors or caps that are established in the consumer protection laws, but sometimes they only provide the default terms. Now obviously, anywhere the law is

only providing default terms, we still ought to be within the zone of things that consumers and vendors can contract about, so that vendors ought to be able to include those sorts of terms in their agreements - as long as they meet minimum standards wherever they are prescribed.

There is an activity right now at the OECD in connection with trying to establish online consumer protection guidelines. Last week the OECD circulated a preliminary list of topics for consideration in the context of mandatory consumer protection laws, and the activity going on right now is asking the OECD member states to come back and provide a list of the laws that apply in their jurisdictions that fall into these categories. They list the possible mandatory laws such as minimum standards for warranty terms, for liability and limitations on liability, for packaging and labelling, marketing and advertising rules such as truth in advertising, disclosures, special rules about gifts, contests, and lotteries, comparative advertising rules and special rules with respect to dealing with children. And then distance selling rules which have to do often with additional disclosures, confirmation periods, cancellation periods, cooling off periods,

warming up periods when you're selling at a distance, whether it's by telephone or by television advertising or over the Internet.

So this is an inventory process that's going on right now, and one thing we can take away easily from this conference is to say: let's gather the information we have here and make sure it gets into the process so that there's as complete an inventory as possible, because then you start to see where the similarities are, and what are the things that most need to have harmonisation or mutual recognition.

Once you go to cross-border consumer sales, then you have the issues that I won't delve in depth now because I think they've been covered by earlier panels: U.S. constitutional limits on how far state consumer protection laws can apply; in the European Union, the Brussels Convention which is present basically says that it's going to be the home court forum for the customer who is targeted at his residence, and the Rome Convention as to the applicable law for consumer products, which talks about not derogating from the mandatory consumer protection laws, again of the jurisdiction in which the consumer is resident when the customer has

been targeted there. And the question that everybody has been trying to resolve is how to apply those rules and in the case of recent activities by the Commission, how to amend those rules to specifically apply to online commerce.

And then, just keep in mind in the trade context, that in case you're ready to run off with a WTO complaint, remember that both the GATT and the GATS (trade in goods and trade in services) recognize that countries can maintain non-discriminatory domestic regulation, and in the case of the GATS Article XIV, it's much more specific about saying that this can include regulation with respect to warranties, privacy, public order, public morals, and certain other areas that we would think as of being related to consumer protection. So the concept there is this: unless the regulation is applied in a way that is disproportionate and discriminatory, in a way that acts as an unjustified barrier of trade, the fact that there are restrictive regulations in a country that says it allows cross-border sales and services is not going to be enough by itself to create a WTO complaint.

Applying these principles to E-Commerce, we have the

traditional problems of figuring out when has a consumer been solicited in his or her own country -- because that's often relevant under the existing laws -- and when has the contract been completed online? And then there are the questions of who's come to whom first, and whether it takes an email or simply a website to be 'targeting' customers, the uncertainty of applying the 'effects' test to regulatory jurisdiction, and the desire to create a scheme in which there is greater predictability and transparency, both for consumers and for vendors.

And then, what we're looking at here today especially, and that Susan will be discussing, as you know, in greater in detail, is how you provide effective remedies.

Now, where are the fora where this is being discussed? Of course, first at the national legislatures and provincial and state legislatures (and the EU is a good example, because it's already having to deal with cross-border sales) the OECD, the World Trade Organisation and The Hague Conference, which we've spoken a little bit about, and some of the private industry or private industry and public sector dialogue fora where this is being discussed as well. The ICC project

in which I'm involved is identifying existing barriers, best practices and organisations on a self-regulatory basis such as coming under the umbrella of the advertising associations in the UK where there are already some trust seal and self-regulatory dispute resolution procedures, and then with recommendations to governments as to how to treat those. And there is the ABA jurisdiction project that, of course, you've heard about.

Where all this is leading is that we don't expect, I think, any of us, to see harmonisation across the board in all the contracts choice of law issues, much less the public order issues, but there may be ways, even before there is harmonisation in many of these sectors, to be able to create a zone in which consumers and vendors can have greater confidence. And we have some suggestions for what courts and legislatures might do to defer to that, and what standards or conditions they might set for such remedies.

And having laid out the problems, this is where I'd like to turn to Susan Crawford for some potential solutions.

Ms. SUSAN CRAWFORD:

Thank you, Scott. Well, there clearly is no magic bullet for choice of law problems in consumer contracts with online vendors.

Harmonisation is a long way away, but because human beings, in which category many people include lawyers, are naturally cheerful and resilient, I think we should try to work on frameworks through which we can work, even short of harmonisation.

I'm going to touch extraordinarily briefly on conflicts theories in the U.S.; I'm going to propose a new theory that could be applied internationally to form contracts between online consumers and vendors; and I'll point out all the many, many questions that are raised by the application of this theory.

First, this is a time-honored practice. You look back at conflicts jurisprudence, and say it's all chaotic, nothing can be done. Looking back at the first restatement in U.S. conflicts, the idea was the law of the place of the last act that gave rise to liability should be applied to a particular case.

Then we moved on in the 20th century to another multilateral approach where we're considering interests

from outside the U.S.; this is the interest analysis theory under which state interests have primacy; the problem of course is that courts can manufacture interests at their will and find it very easy to do so.

Dean Perritt talked about this yesterday, that we have a mixture in the States of territorial and interest analysis factors that courts use to decide choice of law questions. What about the interests of private parties and their expectations? And that's what we're here to talk about today.

What is our vision of how choice of law decisions ought to be made by local courts? We're in search of what Professor Lea Brilmayer calls the "Holy Grail of Conflicts Jurisprudence," finding a choice of law system that's built on uncontroverted assumptions.

The recently appointed CEO of Hewlett-Packard, Carla Fiorina, told the New York Times last week that the reason she dropped out of law school after the first year was because of the singular focus on precedent that she saw in her classmates and in her teachers; she couldn't stand it, she dropped out, she became wildly successful and a great corporate leader. So perhaps

it's time for an Internet-based conflicts theory that takes into account the special characteristics of the Internet of which we are all enamored, the personalisation, the easy dissemination of the information to both consumers and vendors, the almost unlimited information and availability of choice, and the total absence of sales pressure.

What's the solution? As Andy Pincus said earlier today, and as Ron repeated, there has to be a middle ground, it cannot be that we will choose one way, country of origin or place of the consumer as the default rule, there has to be a new solution.

Harmonisation will take too long, we know that we're going to have multiple legal regimes that will apply, and we want to balance all the interests that are engaged in E-Commerce. We have multiple goals.

The proposal I'd like to discuss is called Deference Analysis and I've been pumping this during the coffee break, so I hope you all recommend the terminology. It fits in with Andy Pincus' two track system. I'm proposing this in a single context: When courts consider choice of law elections made by online vendors and consumers on the Internet, with all its

availability of choice and absence of pressure and opportunity for comparison shopping.

The first principle under U.S. law that provides a background for this theory is that adhesion contracts (which you could call form contracts, a less lurid term), are enforceable unless they are unfair or unconscionable, and the forum selection and choice of law selections made in those contracts are enforceable.

The other assumption I'm making in this presentation is that we're assuming the presence of personal jurisdiction. So here's the question: should a court defer to a choice of law made by a consumer in a contract with an online vendor, a form contract; under what circumstances should that court defer? And the answer I'd like to propose is that yes, the local court should defer in certain circumstances which I'll line up for you, if a meaningful choice of law has in fact been made. Here's the first assumption on which this theory is based.

We'd have to show the consumer extraordinarily clearly where they were. It would have to be almost as clear as it would be if you were travelling to Greece or France or

England, that you had indeed entered a different place by going to work with a particular online vendor. We have to talk about what kind of disclosure would be necessary. This could be accompanied by rich information for the consumer about the laws of the particular country that has been chosen by the vendor.

The second assumption. There's got to be a convenient online forum, it cannot be that the vendor is allowed to preclude availability of a convenient forum in order to avoid litigation. In the context of the Internet, an online forum may be the appropriately convenient place, and this is the big next move that was suggested by Andy Pincus and many other speakers at this conference, that we need to facilitate, accredit, and set up reasonably administered online forums through which consumers can find the kind of redress to which they're entitled, with adequate notice, opportunity to be heard. You know, I spent an entire term on *Goldberg v. Kelly*, I remember, you've got to be there, and this would be an online forum that would embody those procedural rules.

The third assumption, and this is the tricky one, is that we need to create a club of countries who respect

one another's law. By this I'm not talking about necessarily full scale harmonisation; I'm talking about a set of minimum baseline characteristics that the members of this club would all have; they would have to have a concept of unconscionability in their law. Remember that the question the court is answering is not the ultimate question of liability in the case, but simply is it reasonable to defer to the law of country X that's been chosen by the consumer, whose contract is in front of me? This may require some convergence, there's got to be something more than mud flaps and Sunday closing laws, our new two favourite examples of legislation, and less than absolute coherence, complete agreement on consumer protection laws; something that's good enough so that the court can be assured that the local consumer is in fact protected by the law that's been chosen.

The fourth assumption is that the consumer has actually made a meaningful agreement, a meaningful choice of the law of the online place that he's visited, knowing that he's gone to a different place. On the Internet, I posit, choices will be more meaningful because there will always be more information that the consumer can quickly click to, comparative shopping, the FTC, an ability to go very

quickly with one click away to third party intermediaries who can help you understand where you've gone and what you're about to sign up to.

So the proposal is that if all four of these conditions exist, the local court of the consumer's country should in fact defer to the law chosen knowingly, meaningfully by the consumer and the online vendor.

Now. But you're saying, what about fraud? Oh, don't worry, we're not trying to include fraud in this proposal. Consumer protection agencies always have to have the ability to reach out and protect their constituents. Of course, where do we draw the line, what is fraud? Also, we would exclude from this proposal contractual terms that have effects on third parties, such as importing illegal substances or otherwise affecting other people. But what fits in this category and how does this fit with mandatory law, that's a big question, and a big subject.

So what the proposal is aimed at is run-of-the-mill consumer/vendor issues governed by contract and deferring to the choice of law made. Deference analysis promotes the interests of all countries and

protection of E-Commerce, and protects party autonomy more importantly. I believe that online consumers are by and large more sophisticated because they've had exposure to more information than most other consumers. And we will have a chance to permit them to choose a law and abide by it in a knowing and meaningful way with real redress provided through an online forum.

Next steps. Well, there are a lot of next steps, what's fraud, how -- this is part of our convergence harmonisation, harmonic convergence process that we're all going to go through over the next few years; how do we set aside what is fraud, what are these third party effects other than the very easy cases that should be excluded from the analysis? What are these necessary minimum characteristics; what we can come up with as a set of baseline protections that would enable the club to form and to defer each other's law; and how do we set up a true convenient online forum that has enforceable mandates and is trusted by consumers who are dealing with it? Thanks very much.

(APPLAUSE)

Mr. MIKE PULLEN:

Good afternoon, good morning, ladies and gentlemen, should I say.

It's actually six o'clock in the evening in Brussels, so forgive me for being confused. Just to prevent any confusion amongst you, I am not Margot Froehlinger. Margot is fighting a good fight in Brussels and was unable to come at the moment, so she asked me to come along and to give you an overview of current developments in the EU. I will say that I am speaking as an attorney in private practice, and you will gather from my speech that I'm definitely not speaking on behalf of the European Union.

I was asked me to come as an expert in the area of EU E-Commerce.

I always have great difficulty with the term experts, but a Lithuanian colleague of mine, after seeing ninety Western lawyers and economist come to give presentations to the Lithuanian government, basically said that she had a definition, and she said: the definition of an expert is a guy from out of town with a power point presentation. So, under that definition I'm an expert.

So I want to do two things. I first want to give you a quick run through of the proposed E-Commerce directive,

and the people who know something about the directive, please bear with me, but I'm taking a zero level of knowledge as my base point.

I have forty-one slides here, so for those who don't speed read, they're posted on the Internet, and I will go through this very quickly because I've got literally fifteen minutes. Then I want to talk in a little bit of detail about amendments to the Brussels Convention, proposed amendments to the Rome Convention, and a proposed Rome-II convention and non-contractual liability which basically will have the effects of setting back E-Commerce in the European Union by twenty years.

To give an analogy, when cars were first invented in the UK, we passed a law which said if you are driving down the road, you ought to have a guy with a red flag walking in front of the car. It was mandatory, you could do three miles an hour, you needed this guy with the red flag. The proposed amendments to Brussels and Rome are that red flag.

The overview. The E-Commerce directive was designed to create a European internal market framework in

E-Commerce by the year 2000. Now, as a preliminary point, I should say, we don't need a directive for this. The right to provide E-Commerce services is already there, it's been there since 1957 because Article 49 of the EU Treaty gives you the right to provide services across borders. The only reason that we actually need directives as secondary legislation is that most member states don't understand or won't comply with their obligations, so we actually need them put in a framework in order to get people to understand them.

One of its aims is to strengthen the competitiveness of European industry and to reinforce the position of the EU in international discussions, that's quite interesting. It's set to establish a clear framework that will allow E-Commerce to benefit from the advantages of the internal market. And I'm flying through this, in particular it's based on the country of origin principle.

Now, country of origin in a EU context is very simple, it means that if you are a company established in the UK, and you comply with UK law, any new law as implemented in the UK, you can trade freely throughout

the other fourteen member states, notwithstanding the fact that their laws may be different or more strict. It doesn't matter what the German law says, as far as a company which is established in Germany is concerned, that there may be stricter requirements, but the German government must accept that the law in the UK offers an adequate level of protection.

The directive will remove legal uncertainty by providing a definition of the place in which you're established. The reason for this definition is to stop several member states trying to take jurisdiction over an E-Commerce service provided so that a clear framework of what establishment means and where you're established.

It prohibits prior authorization regimes by member states, specifically aimed at targeting online service providers. It establishes certain transparency requirements. Now, what that means is, if you're a service provider or you're an E-Commerce trader, you're required to put your name, your address and your contact details on your website so consumers and other business parties know exactly who they're dealing with.

It has a lot of provisions on what in EU speak is called Commercial Communications. And what we actually mean by that is advertising direct marketing and sponsorship. It sets a benchmark for the free movement of those types of communications. It also authorizes the use of commercial communications by regulated professions subject to national self-regulatory codes. So, for example, it allows lawyers to advertise, and that's not the case in many EU jurisdictions at the moment.

It has fairly detailed provisions dealing with online contracts. First of all, it establishes the fact that you should be allowed to contract electronically, which is currently not the case; under the laws of many member states you need a paper contract.

It also sets provisions for the point that when the online contract is concluded, it -- this is contentious at the moment, but it limits the liability of Internet service providers, it establishes a mere conduit exemption. There's an argument over that, what the copyright will be. At the moment there are some legitimate concerns about copyright, but it's my personal view that a lot of concerns stem from the record companies trying to protect their traditional

distribution systems, and they don't like people like E-Music, who they think they'll just come and circumvent them.

Implementation. It encourages codes of conduct to be drawn up at the EU level. It also encourages alternative dispute resolution, particularly in the context of consumer protection.

It attempts to provide better legal redress which is appropriate to an online environment, and to establish quick and efficient administrative corporation between the member states to try and identify and solve problems before they get to litigation.

What's in it for you? The E-Commerce directive sets out a clear light regulatory framework for the internal market at the time when in Europe the internal market is being threatened by all sorts of protectionist interests. It also identifies areas where the internal market doesn't work, either online or offline. It gives opportunity, if it goes through, to say: "Well, I can trade in this method online, why can I not do this offline?" The idea is that the E-Commerce should just be seen as another commercial trading medium

rather than something of a special issue. We'll forget about Mr. Daley's quotes.

The E-Commerce initiative is being undermined by the adoption of the Brussels regulation on jurisdiction, and the proposed adoption of the draft Rome regulation on non-contractual liability. Now, I'll explain these, and I should take a couple of moments to explain what happened.

The Brussels Convention was never part of the body of EU law, it was an international treaty between the member states. Last year the member states got together, or their ministries of Justice got together and they decided to amend the convention. They didn't consult anybody to my knowledge, they certainly didn't consult industry. They had a series of nine meetings in which they came up with an amended text. They then froze their discussions, and rather than going on to ratify the convention in the normal way you would ratify a treaty, they asked the European Commission to propose it as an EU regulation pursuant to new powers under the Amsterdam Treaty which brought justice issues within the body of EU law.

The Commission has got a constitutional obligation to consult widely before proposing new legislation. Because this measure had been agreed by the member states, the Commission ignored that duty completely as a result of a strong lobby. And at the back of the room there's an article from the Wall Street Journal on letters we sent to the Commission on this issue which set out the position. They've now agreed to hold hearings on the convention in the autumn.

Now, the original text of the convention said that the consumer's courts would have jurisdiction when you were dealing cross-border if you actually targeted that consumer, you had to solicit him.

In an official report on the convention, the example that was given was if you are a French company and you put an advertisement in a German newspaper in German aimed at German consumers, you are caught by the rules. If that advertisement appears in an American periodical, The Economist, Wall Street Journal, whatever, which is circulated in Germany, but that advertisement is not targeted at German consumers, you're not caught.

The new text says you're caught if you direct your activities towards one or more member states. The recital to the new text, Recital 13 says that you are deemed to be directing your activities towards other member states if a consumer connects at your website.

So that means that you could have a website and have no intention whatsoever of dealing with foreign consumers, but your website can be accessed from another member state, that makes it easier for a foreign court to gain jurisdiction.

So you say: "Well, what's the problem, it's only a jurisdiction issue." If a consumer, say, we have freedom of movement in the EU, say for example we've got a British consumer who lives in France; he accesses a website in the UK, and he contracts on the basis of English law, standard form contract with a UK company. There's a dispute. The French courts have jurisdiction because he's accessed the website from France. Under the existing Rome Convention on Applicable Law, you cannot by a choice of law clause take away the mandatory protection that a consumer would have under his national consumer protection laws. It's a mandatory rule of French law that all consumer contract

should be written in French, so I've got a Briton living in France who understands English perfectly, the French judge, and this is going to be a court of first instance, this is not a major arbitral centre or whatever, can then throw that contract out, null and void. That means that all your standard forum contracts with French consumers are also null and void.

Now, you can say, a lot of the multinationals say: "No problem, we'll put a disclaimer upon the site, and we'll have a different website for each country, we'll have a disclaimer: this is only opened to residents of country X." That would be fine, but most of the companies that are part of this forum are dominant for the purpose of antitrust law. You start fragmenting the market by using different websites, put up disclaimers, you'll probably find yourself abusing your dominant position.

Okay. Now the Brussels regulation is going to be voted on by the Council of Ministers on the 11th of December. I've been taking a leading role in the lobby. We've had some success, the European parliament is now getting involved, you've got one month; Brussels closes down in August, if you want to stop this, you've got

one month to get involved and do something about it.

I'll talk a little bit about the Rome Regulation on Non-Contractual Liability. The Rome Regulation has all sorts of nasty clauses about label and product liability. But the worst one is Article 6 which relates to the Continental European Concepts of Unfair Competition Law. And it says: "the law applicable to obligations arising from unfair competition or unfair competitive practices shall be the law of the country where the competitive action or unfair practice affects competitive relations or the collective consumer interest."

And what does that mean? To give another example from the UK, if I got a website based in the UK or Holland, I can offer three for the price of two consumer discount quite legally, it's lawful under UK law. If that website can be accessed by German consumers, the way this reads at the moment, I can file with German Unfair Competition Law where this sort of thing is not allowed.

The Commission pointed out in its explanatory memorandum to the draft E-Commerce directive that the

whole concept of Continental European unfair competition law will have a significant detrimental effect on the development of E-Commerce within the EU. And I can give you an analogy of how this works.

I used to work in the Commission, and I drafted a complaint against Germany, and the complaint was on the basis of a complaint which the Commissioner had received from Polygram. Polygram wanted to get into the German CD market, and the only way they thought they could do it feasibly was by using CD clubs, and they were based in Holland, so they were direct marketing into Germany.

The standard CD club format, you have to buy four CDs a year, but if you bought six, Polygram would give you one free as a loyalty bonus.

The German Consumer Association took Polygram to court in Germany and got an injunction and also got damages from Polygram under the German Unfair Competition Law.

This case is now going to the European Court of Justice. But I drafted the original complaint five years ago. So Polygram has been kept out the German market using those techniques, for six years.

So, don't think this is an hypothetical situation where what are these guys are going to do, this looks like, you know, this is a law, but nobody is going to enforce it. It's not your average consumer who's going to come after you, it's the consumer associations pursuing class actions. That's where you're going to get your problem.

Now, I'm just about finished because I'm running out of time, but I just want to make two more points.

One, when you see consumer protection or protection of national culture flagged up in Europe, if you scratch the surface, you will usually find trade protection behind it. There's many times we're doing -- you know, in England we have these dogs in the back of cars and they nod like this. In industry, when consumer protection is mentioned we all seem to do a nodding dog act.

Now, we're not talking about protecting consumers because the Brussels Convention doesn't work. In many European jurisdictions, there's no contingency litigation, you can't recover your court costs effectively. That means that by the time a consumer has gone to one attorney, they've gone to court,

they've got a judgement, it's been enforced by a second attorney, the cost of going to court and going to the attorneys, it just far outweighs the remedy which the consumer is looking for.

What the consumer wants is a quick effective cross-border remedy.

That is not the case with the Brussels Convention. The Rome Convention is simply a piece of trade protectionist legislation designed to fragment the internal market.

I've now run out of time, so I will stop there, ladies and gentlemen, but I'm prepared to take any questions later. Thank you.

(APPLAUSE)

Mr. MARK BOHANNON:

Ruth and Matthew, at the risk of subjecting the audience to my rendition of the Man in the Federal Express commercial, how much time do I have?

Mr. MATTHEW YEO:

I think you're looking at about ten minutes.

Mr. MARK BOHANNON:

Okay, thanks. I wish I could say it was a pleasure to be here to talk about what are developments in the European Union today; that is not a reflection on either ILPF or the many good folks who are here, many of whom I work with closely, I think it's the result of two things.

First of all, while I spend a great deal of my time following developments in the EU, I do not hold myself out as an expert in European law. Thus, I'm a little anxious to get engaged in the details which many experts here are much more familiar with.

The second reason why I wish I were more thrilled to be here is that, in fact, what I believe are some, maybe by perception, developments in the European Union that I would like to reflect on. I would also like to make it very clear that, in fact, on many issues related to electronic commerce, I and my colleagues in the executive branch are engaged in very constructive, very fruitful discussions to get a deeper understanding of the need for proposals in the European Union and how we can ensure that those proposals are consistent with what I think are all of our objectives in creating a

global environment for electronic commerce that facilitates all of us participating in an effective way.

So with that caveat, I would like to leave you with, I think, a few observations. Reflecting on what has been said yesterday and this morning, that I would like to categorize as thinking about developments in the EU as raising the risk of revitalizing the law of unintended consequences. And I say this with a very clear, another caveat, that some of these observations may be entirely predicated on perception, and I stand ready to change my perception if the facts prove otherwise. But I say this because I think that there are going to be some unintended consequences that we all need to think about - how we want to approach both our discussions and our approach to the changes that are going on in the European Union.

I, of course, have to start by recognizing that, of course, this month is the two-year anniversary of the release of the Framework For Global Electronic Commerce issued by President Clinton. And it is, of course, through that policy prism that I will review what I think is going on in the European Union.

To restate what has been said today, and on many other occasions, those principles included the affirmation that the Internet and global electronic commerce depend on private sector leadership; the government should refrain from action; that when it is necessary for governments to act, they should be acting based on the principles that their action should be transparent, minimalist, predictable; that we should not discriminate between the online and offline environment.

And I would have to say that while I think many of you here will find examples where the United States government as well as other governments may have violated those principles, I think on the whole, the United States government has stuck to those principles, and we still believe they are the right basis for action internationally.

I have to say also that I think it is difficult for someone in the United States government to truly understand the immensity of the complexity of what is involved in making an internal market work in the European Union. And all one has to do is look at the list of proposals that might affect electronic

commerce, some of which have been mentioned today. This morning, while waiting for the program to start, I, in my own mind, listed all the ones that of course we are familiar with. As you just heard, there's a directive on electronic commerce proposed by DG-15, or the commission formerly known as DG-15; there is a proposed regulation that would implement the Brussels and Rome conventions.

I have to say I can't comment on it substantively because I and, to the best of my knowledge, no one else in the executive branches has been able to receive a copy of it yet.

There are proposals to the changes in the Rome and Brussels conventions; there's a direct selling directive; there's a financial services directive; there's an electronic signature directive; there's a proposed directive on the details of encryption; there's a long standing council directive on possible ISP regulation; there's a directive on the protection on data bases which of course is to be distinguished from a proposed directive on the protection of personal data; there are working papers on the harmonisation of taxation, convergence, and as Scott suggested, there is also a proposed directive on package travel.

The context, of course, of all of these directives are really quite immense changes going on in the Common Market and in the European Union, most important of which is probably telecom liberalisation which is changing the fundamental economics for Internet access and making it more accessible for individual Europeans to benefit from the global Internet. There's also the challenge of doing all of this in the context of an expanded membership; there's also the process over the next year of having a common currency; and, of course, changes to the fundamental treaties such as Amsterdam where questions such as the competency, with a small "c" of the European Commission to address areas such as jurisdiction are also going to be examined.

So, it is with all of this in mind that I think I would make the following three observations which I think can be summarized in the possibility of the risk of unintended consequences as all of these policy objectives try to be achieved all at once.

The first is, I think there is a risk that, in fact, we will have a less predictable environment, certainly in the short and medium term within the European market. And I say this with the backdrop that one might argue

that in fact there has been a relatively predictable environment, particularly as it relates to the transatlantic relationship that North America and the European Union have.

Now, primarily that was because that relationship was inherently commercial. And going back over a number of decades, that predictable, albeit not always minimalist, not always streamlined, but certainly predictable environment allowed, I think, one of the most, perhaps the most intensive investment relationship to occur with any other region in the world between North America and also throughout substantial sales of goods. But as I said, that was predicated primarily on the fact that you had inherently commercial activity going on to facilitate that relationship.

In this post World War II, up until the early 1990's, the role of the individual, the consumer was not the dominant relationship, and therefore you could establish, in a general sense, principles by which these commercial relationships, which were heavily investment oriented could work. We see the principles of the Rome Convention about allowing party autonomy and choice of law. Similar provisions can be found in

international agreements such as the UN Convention on the contract sale of goods which virtually all members of the European Union have signed onto.

But, of course, what we see in all of the proposals is, while we now are beginning, like all governments, -- the United States government is not excepted here - to begin focusing on the challenges of what it means to provide confidence for the consumer in this environment, there are, in fact, proposals, and I would say that the changes in the Rome Convention being the most notable and the regulation, where the possibility of changes in the commercial legal framework might also be affected as well. I say this because I think it is important that, as we address the critical issue of ensuring in this borderless world effective consumer protection, that we not inadvertently affect what has been a very very deep commercial relationship which is going to become more dependent on the Internet, more dependent on electronic commerce, and more dependent on the borderless mediums in which transactions can prevail.

But I also have to posit the possibility that in fact, even for consumers, we may have a less predictable

environment in the short and medium term. And I say this based on my own reflections of what I've heard yesterday and today and in other presentations prior to this conference, that what we might be seeing through the mechanism of the European Union and the various treaties under which the member states operate, is, and this issue was brought up yesterday, we're not necessarily seeing the convergence of substantive consumer protection law inside the European Union across the board. Now I think there will be, in fact, some of the directives that do provide that, but they were not necessarily seeing that across the board in a way that in an idealistic world might in fact be assurances of broad consumer protection. Instead what we might be seeing is, in fact, the formalization of harmonisation that in fact may create more of a double chess board than in fact a level playing field in which all of it is known. Again, this may be my perception but it is an observation based on, I think, the discussions yesterday and this morning that suggest that this is a distinct possibility.

The second unintended consequence, and I do believe it is unintended, is that I think through the plethora of directives which suggest that the government needs to

act first rather than wait is that we will probably be experiencing an environment in which we see the reduced possibility for self-regulation.

I want to emphasize that I do not personally believe that the directives add up to a rejection of self-regulation. In fact I think what we are seeing through discussions, through the data, personal data protection directive, and through other means is, in fact, a growing understanding on both sides of the role of self-regulation. But I do believe that in all of these directives, we are seeing the possibility that a framework for consumers and industry or other private sector groups who have stakes in the outcome of global electronic commerce will be inhibited from building together non-governmental mechanisms that assure confidence and that there might not be room to flourish those kinds of environments.

And I don't think this is an academic discussion because I also believe that as I've grown to understand the complexity of the legal framework in which all member states in the European Union operate, that, in fact, I think there is a growing awareness of the role of what I would call intermediaries who are not

governmentally connected in assuring the confidence that I think we are all seeking. I think we are seeing proposals from countries like Ireland, many of the Scandinavian countries; I think we will be seeing discussions of very interesting proposals in the Netherlands with regard to this. The consultation paper issued by the United Kingdom in March -- Jim Norton ,who serves as a key person in Prime Minister Blair's cabinet on this issue, asked directly for comments about the role of intermediaries to provide confidence in a world in which governments may not be able to either have the resources or to act effectively.

So it's not just in the perspective of, I think, a North American predisposition towards self-regulation that I think has, in many ways, empowered our economy for many years, but I think it's also a question about whether European versions of these non-governmental self-regulatory mechanisms will, in fact, be allowed to flourish if, in fact, the assumption of the European directives taken as a whole that the government must act first.

So with that, I leave you with some possibilities of the effect of directions taken by the European Union

over the last couple of years. We look forward to continuing the discussions to reach a deeper understanding of how the complex policy objectives that the Commission is seeking to come together on in the European Union can work and our hope is that, in fact, my perceptions (which I am perfectly prepared to say may not be accurate), we hope they are disproved, and that in fact we do work together toward a role in which governments are of, course, a key participant but are not, in fact, directing at every level how global electronic commerce in the Internet is evolving.

With that I thank you and if we have time for questions, I look forward to taking them, otherwise see you at lunch.

(APPLAUSE)

Mr. MATTHEW YEO:

We are right up against the limit of our time, but I think that meant that we have five minutes for questions, is that okay?

In case there was any doubt that Mike is an advocate for a particular point of view, he did ask me to

announce that there's a meeting in Brussels on September 9th for groups that have an interest in the revisions to the Brussels and Rome conventions. Questions from the floor, yes.

Mr. CHRIS REED:

Can I make a brief observation on Mark's comments, I think, and then leading to a short question.

I disagree that the European developments that Mark has talked about will lead to greater uncertainty or may lead to greater uncertainty because the certainty that he talks about was in business-to-business transactions. I think the Internet offers the opportunity, for the first time, of large scale business to consumer transactions across the Atlantic, and that's really why these issues have come to the floor.

And the reason I felt I ought to make an observation is I have some special knowledge on the electronic commerce directive because I ran the research project, the last one that was done before the directive was drafted. And I looked at the laws of all fifteen member states, and essentially there is nothing new in the electronic commerce directive, everything there was

there in one member's state already. And what's quite remarkable about it, is that in general, taking the disagreement across fifteen member states, almost everywhere the electronic commerce directive has opted for the least onerous possibility. It's not quite true, but almost true, and if it goes through as it stands, it will be quite a remarkable change.

So in many ways there will be more certainty, certainly in my law firm practice, advising multinational clients at the moment, we are reviewing intensively the regulations of all fifteen member states. It's a very expensive and longwinded activity, and they need to know this before they can do business. As Mike said, what ought to happen is that now we will have to review the electronic commerce directive which will be a much shorter and less profitable job, but these things have to be done.

I think therefore the question is, the problem is actually at the consumer protection level because the difficulty I see worldwide is that most countries appear to assume or to start from the proposition that their citizen should be protected by their own consumer protection laws. And I wonder, is this also true of

the U.S., would U.S. law and policy start from the presumption that a U.S. citizen, sitting in the U.S., buying from a foreign company should get the protection of U.S. law, because if so, that's the fundamental problem everywhere in the world, and that's what we've got to overcome, that kind of reluctance.

Mr. MARK BOHANNON:

Let me thank you Chris. Let me make sure that my point about a possibly less predictable environment in a short and medium term is not directed at any one directive, but in looking at, I think, a quite extensive list of both actual directives and proposals, when taken together, suggest the possibility that we may be in an environment in the short and medium term in the Common Market where it is less predictable.

And I say that, leading to your question, because I think that by comparison, U.S. legal experts have actually taken a much more cautious approach to reexamining all laws that would affect. I mean, I think there's been a very incremental approach to examining, starting with the principles of minimalist approach, the Uniform Electronic Transactions Act being a good one, where you start with the basics, then you

start reviewing all the other codes to see how they could be updated and adopted, but not rushing toward a whole panoply of laws that suggest a very different framework in which we are working. But again, as I said, this may be as much perception as it is anything else.

With regard to your question, I do not hold myself out as an expert on all consumer law, but I do have to say that based on the information I get, that the concept of a consumer in general being able to rely on one's domestic legal framework for redress is, I think, a general principle.

I cannot say that it is in fact the case in every law in the United States, and I use my credit card agreement as a very good example where I may have certain rights if I have conflict with my issuing bank, in my domestic law, but I'm fairly certain that many of my merchant agreement, I mean, my card issuing agreements would subject me to the laws in another state under certain circumstances.

So, I think it really depends on the kind of consumer protection we are talking about, and in fact the nature

of whether we are talking about say, criminal, you know, where I am the victim of a fraudulent crime versus a situation where I, as a consumer, may be a part of a transaction where I might have, as was discussed earlier, basic protections that I was not forced into a contract unreasonably but that I may still in fact be having to deal with other jurisdictions depending on the kind of dispute it is.

So I don't think there's a categorical answer to your question, but I think as a general principle, particularly when we're talking about criminal enforcement or law enforcement kinds of things, probably right, but not necessarily the case. I could actually be in a situation where, you know, being a resident of Washington, D.C., I could easily contact, you know, a law enforcement official in California if that company was subject to that law. So it's not a yes or no question.

Mr. MIKE PULLEN:

Can I just make a point to something that Chris said. What interests us in Europe at the moment -- we've got an agenda which says, you know, we're going to have a Federal EU with an European army, but we don't trust

each other, with each other's consumers.

There's this real dichotomy in the, I won't call the consumer protectionist lobby because the consumer lobby has been used as a vehicle to hijack the internal market which was inadvertently a liberalising force by law protectionist forces within the EU. And we say we need harmonisation clauses, a very high level of protection, but there's no such thing as a European consumer. We're not going to have harmonised laws across the EU to protect consumers if there's no such thing as a European consumer. There seems to be a duality of position.

There are a lot of issues we've engaged here, and as Chris has pointed out, the electronic commerce directive take to a very low level, great light flexible approach. If you look at what's happening in Brussels, when you take several small pieces of things that I brought on and put them all together, you'll find that certain more protectionist member states, notably led by the current French administration, are actually trying to use Rome and Brussels as a way to push back the electronic commerce venture. They realize that they shouldn't have signed into this, and they now

are trying to pull it back into some sort of a more protectionist measure.

Mr. MATTHEW YEO:

I think we've run up against our time limit, and it's time for lunch, but please join me in thanking this excellent panel.

(APPLAUSE)

LUNCHEON WITH SPEAKER

Mr. J.C. RENDEIRO:

Ladies and Gentlemen, if I may have your attention. My name is J.C. Rendeiro, I'm the Vice-President and Associate General Counsel of IBM, responsible for global services as part of IBM, that brings you e-business services, the logo that we saw outside.

IBM is happy to sponsor this lunch, we obviously consider the subject matter of this conference, and E-Commerce and E-Business generally, to be extremely important in that regard. I'd like to compliment the speakers on the overall quality of the presentations.

We are talking about the right thing if the rule of origin versus destination, convergence, solutions by category of activity, the role that bilateral or multilateral treaties can play, private law, the challenges and opportunities of self-regulation, the importance of a pragmatic approach that accommodates some and may be a lot of ambiguity in the short terms in the thoughtful proposal advanced before lunch by Susan Crawford, which I found very interesting -- as a

disclaimer, I have to say that upon occasion Wilmer, Cutler & Pickering does represent IBM, so I'm a little biased.

And while we're a long way from consensus, I personally am optimistic about the future, if only because the technology which, as we all know is driven by consumer demand, the technology has thus far proved more than able to outrun the many forces that would slow it down.

It's now my pleasure to introduce Colm Dobbyn, Vice-President, Senior Counsel of Mastercard International who will in turn introduce Nigel Hickson, our luncheon speaker.

Mr. COLM DOBBYN:

I'm Colm Dobbyn of Mastercard International. It's my pleasure to be here today to introduce Nigel Hickson. The ILPF is truly privileged to have Nigel to talk to you today about the new UK Electronic Communications Bill which was just released last Friday, and he'll give you details in URL later on in this talk.

For those who don't know Nigel, Nigel is with the UK

DTI, Department of Trade and Industry, he's been there since 1982; he's an electrical engineer by training from Hartfordshire, and he attended City University in London. Since joining DTI in 1982, he's worked on encryption and financial service regulation; among other things he's been in charge of the UK legislation development for the last four or five years.

It was my pleasure to go to dinner last night with Nigel where he told me some of the twists and turns that this piece of legislation has gone through. But having heard some of the details, I think many of our companies were very pleased with the substance of that legislation.

In addition to his work on the electronic authentication legislation, he also deals with the EU directive on electronic signatures, and the accreditation of certification schemes for BS-7799. He's also a member of the Institute of Electrical Engineers.

Again I'd like to welcome Nigel and to thank him. I think he'll be a very informative speaker.

(APPLAUSE)

Mr. NIGEL HICKSON:

Good afternoon, Ladies and Gentlemen! Thank you very much indeed for that introduction, Colm, and indeed we did have a lovely meal last night. Isn't Montreal a fantastic place, really, what a great place!

(APPLAUSE)

It's a real real pleasure to be here, it really beats London in the summer, I can tell you that. And that's why it never fails to amaze me why there are so many Americans in London during the summer, but there we are, perhaps Washington is so hot.

I'm glad to be here, I'd like to thank the ILPF for inviting me to come along; it's on very short notice that I decided that I'd like to come along. We, as Colm said, published our legislation on Friday, which I'll tell you a bit more about in a second, and until then, it was very difficult to know whether I would be allowed out of London, but I'm very glad I was allowed out of London because it's good to be here. And thank you very much indeed, Ruth, for giving me a

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slot to speak in today.

I suppose I have good news and bad news as in the case of all speeches, I suppose. I mean, the bad news is that I'm a civil servant I suppose, you know, I work for government, but you know, some of us have to work for government because if we didn't work for government then you couldn't tell jokes about us. And in the same vein, the good news is that I'm not a lawyer, and I'm very grateful that there are lawyers, because if there weren't, we couldn't tell jokes about them. So, no, it's a real privilege to speak to you at lunch time.

I want to cover two subjects, very briefly indeed. The first is just really to make a few observations on what we've talked about in the last couple of days. It's certainly been absolutely fascinating for me because firstly, as I said, I am not a lawyer, and secondly, this isn't really my area. So when I go back and I have to report to the office what we've been discussing, I can't tell them we haven't been discussing encryption, electronic signatures and key-escrow, because if I go back and say we've been discussing jurisdiction, consumer protection and issues like that, they'll say: "Well, why did you go?"

But I think these subjects are absolutely vital and absolutely fascinating, and I want to just say a few words about some of the things I've gained from the discussions in the last couple of days and then go on to say a little about the Bill.

To start with I have a few observations. We are all heading for the stars, it may seem a peculiar phrase, but it's something that came up right at the beginning of this conference, and something that comes up in every single conference I go to. Whenever you get a government speaker these days, they have to start by saying:

"We want to make our country the best place to do electronic business, or we want to make our country the best place to do electronic business." And it's very difficult actually being a room with fifteen EU member states, because they all have to say this and it becomes rather boring.

But I think the significance of this is, and I mean, and Canada to a large extent, I think, has lead the way. I mean, it was Canada through their own sort of light touch regulation that really enabled some of the electronic commerce services from government to take off.

But we all have this common goal, and I think it's very important indeed, because although we might all sometimes be rather negative about legislation and I heard Mark, before lunch, say: "Oh God, the European Union, there's directives here, there's directives there, they're coming out all over the place." Well, I could say the same about the U.S. Congress: "There's legislation here, there's legislation there." I mean, how many Bills do you have to have on encryption before the House and the Senate to get anything sensible?

(APPLAUSE)

There are a few years to go yet, I suppose, but I think the important thing is, the important thing because our administrations are all trying to encourage electronic commerce, I think that the sort of light regulation, the 'light touch' and libertarian economics will prevail in the end because the electronic commerce on the Internet is all so important to us.

And also, I think the other observation is that we're beyond first the step, we take the Internet for granted now, we take electronic commerce for granted.

All the discussions we've had in the last couple of days haven't been to say: "Oh, the Internet is a terrible thing, oh, this electronic commerce is dreadful, we shouldn't get involved, you know, it's so terrible, it's going to change our lives, consumers aren't going to know what to do." I mean, that talk is gone. Only a few years ago, one could go to conferences, not so much on this side of the pond, but certainly in Europe I could go along to conferences, and people, even from governments, not from France of course, people even from governments would stand up on the rostrum and say: "Well, this Internet, you know, this Internet thing, you know, perhaps it will be around for the next couple of years and then we'll forget it, won't we, and get onto something more serious." But that's gone. We all take it for granted that it's a fantastic tool, that electronic commerce is going to be vital for all our lives, and I think that's incredibly important.

And so the conversation here, the discussions here are not on how to, not if you like, how to suppress it, but how to use the Internet, how to use it for our own advantage, and at the same time on how to find solutions to the difficult problems that we've been

discussing. Just a few observations on some of them.

The jurisdiction discussion that we've had, the discussion on jurisdiction has raised some really important issues. It's not simply a host and home state issue, this demarcation, this problem that we've had in the last couple of days in deciding whether it should be the rules of the host country or it should be the rules of where the service is delivered has become, has tended to overshadow some of the more I think important aspects of the discussion.

And I think it was very salient indeed at the beginning of our discussions yesterday morning, Mr. Perritt said - quite fundamentally for me as a sort of newcomer to some of this scene - that we wouldn't really have to worry too much about all these jurisdiction issues if we had some sort of common framework for dealing with the problems, if we had a base regulation to build upon and some of the extreme issues, there wouldn't be such a problem. And I think that's where we are heading to a large extent.

The difference between the European Union and the U.S., and I won't say much on that, but I mean, clearly we do

have cultural differences, perhaps we do have differences in the way we address problems, and we have differences in the European Union, don't you believe it, I mean, just because we come out with all of these hundreds of directives doesn't mean to say that we all agree on them, not at all.

I mean, in the European Union we had to build a tunnel between France and the UK and perhaps that's we'll need to do across the Atlantic or something to bring ourselves a bit closer together because I think it is important that we do try and share some of the common goals that we've been talking about.

And I think the direction is positive. If I can sort of reflect on some of my experiences in the discussions on cryptography and the discussions on electronic signatures which have taken place in the last few years, certainly the process between the U.S. and Europe, and the OECD, and the UN to an extent, have shown that we can work together as countries, we can find common solutions, and I think that's all important.

Self-regulation, a lot of talk about self-regulation.

And indeed, as I will explain when I just touch on the Bill in a second, and I promise not to go too much overtime, clearly I think self-regulation in most areas is the way that we're going to move forward because governments, governments can't hide behind the fact anymore. I mean, there was a time when we all thought we could do things as governments without talking to the industry, I mean it's much easier really, isn't it. I mean, dear me, now we just pass a few laws for that industry. But unfortunately the industry can read. I think it's all the fault of the lawyers actually, but no, self-regulation I think, as Chairman Pitofsky said yesterday, really does have its place.

But we have to be very careful about self-regulation and we have to talk about how we're going to develop it, and I think some of the speakers this morning were thoughtful on this subject. But if you are going to have this self-regulation regime, specially for consumer protection and other issues, then you do need to build upon some sort of baseline of common agreements, otherwise you tend to go all over the place.

Organisations. A lot of international organisations, I

mean, you're obviously the ILPF here, we've heard about the ICC, we've heard about other international organisations in the last couple of days. For governments, one of the most important thing is, is that business organisations come to government with a consistent voice. It's all too easy, and it happens in the UK and I'm sure it must happen over here in the States -- by the way, over here, how many speakers have said over here when they're talking about the US; we're in Canada by the way!

But I'm sure it's a common problem for a lot of governments or a common issue that if business organisations and business organisations have made a significant difference, the ILPF, the ICC, the Global Business Dialogue, if these organisations are going to make a fundamental difference, then they've got to talk to government, I think, with a consistent voice. It's all too easy for us, civil servants, to sit in our offices and pick off the differences between these organisations. And I mean, there's something called the, is it the Transatlantic Alliance or something like that, I mean I don't know, I won't be rude about them, but I think it is important that organisations do, where possible, try and approach government with a

common theme.

And so, onto the legislation itself. Well, the UK legislation is called 'The Electronic Communications Bill', it's gone through many different titles; it was called the Electronic Commerce Bill, and then -- no, first of all it was called the Secure Electronic Commerce Bill, and then, because they didn't have that much security, it was just called the Electronic Commerce Bill, and then, the lawyers that drafted it didn't think it had much to do with electronic commerce, so it became the Electronic Communications Bill. And after it goes through Parliament, it'll probably be called something else entirely.

But the UK government had been struggling in the area of cryptography and encryption for some time. And it's interesting because I think the debate on encryption and electronic signature has gone a long, quite a long way, that, as I say, some of the experience is perhaps helpful in our discussions of jurisdiction.

We, in the UK, have gone through a hell of a battle on encryption, especially in law enforcement, and I know the United States haven't exactly had things their own way either

in this issue.

I mean, only three years ago, we were going to have legislation introducing mandatory licensing for the provision of cryptography services where everyone would have had to be, had a licence for issuing a public certificate. We've gone from mandatory licensing with mandatory key-escrow, to voluntary licensing with voluntary key-escrow, to voluntary licensing without key-escrow.

So, all the time we've gone down this slope of becoming more liberal. On electronic signatures, we've gone from a state where we would were going to give legal presumptions to only certain types of electronic signatures that were backed by certificates from regulated bodies; we've now said that for the future of electronic commerce, we've got to give admissibility to all electronic signatures, whatever their color, and shape, and size, et cetera.

So I think, we in the UK and other countries as well, have seen the direction of legislation become much more liberal in this area. It's become much more of a light touch. Self-regulation has come into it although the

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legislation that we're going to introduce allows the Secretary of State to introduce a voluntary accreditation scheme for those bodies offering cryptography services to the public, the so-called voluntary licensing regime. The Secretary of State is minded at the moment and the UK government is minded to allow self-regulation for that scheme, to allow an industry scheme to take the place of that statutory regulation but with the backup of legislation.

So, what's in the bill? Well, the first part of the bill covers, as I said, this approval scheme for providers of cryptography services, it just lays out that the government could introduce a scheme to give approval for those providing certificates.

We think this is important because one of the problems we have in Europe, and I think it's the same elsewhere, is there are a lot of people who don't trust public certificate. They say, what, you know: "What backing does this certificate have, what happens if I use this certificate and the person at the other end sort of just says he didn't issue it or whatever." So we think that bodies that are trusted in providing these

services are important.

The second part of the bill gives, as I said, legal admissibility to electronic signatures. It puts electronic signatures on a sound footing, if you like, and it shows that no court is going to overturn a case simply because there's electronic signatures being used rather than manual signatures.

The third part of the bill deals with electronic government. Electronic government is very important for us, I'm sure it's very important for other countries as well.

Our Prime Minister - our Prime Minister - makes a lot of promises, new ones every day. But one of the promises he made was, first of all he said that 25% of government services should be able to be delivered electronically by 2002, and if that wasn't bad enough, he then said that 50% of government services should be available, should be able to be delivered electronically by 2005. And we said: "Well, you know, we can just about cope with that." And then he said: "By the way, 100% of electronic services should be delivered electronically by 2008."

And this poses real problems for government if we're going to deliver services electronically, then we have to update a lot of existing legislation, and part of our bill is aimed at that.

The fourth part of the bill deals with law enforcement and legal access to encryption keys. As I said before, this notion of key-escrow, the storage of encryption keys with providers - has been one of the great sources of controversy in recent years. But what our legislation will do is firmly put on a legal footing the ability of the law enforcement authorities to go and access a key or to go and access a technology that will allow an encrypted message to be decrypted by legal access methods. Now, whether the key is being held by the suspects themselves, or whether the key is being held by a third party or a second party is not material.

So that's what the bill does. As I said, the bill was published on Friday, we were going to introduce it into Parliament by the end of this session which ends in a couple of days time, but unfortunately we couldn't, so we published it instead, it's in the form of a consultation document. No doubt we'll get a lot of comments on it, and we'll reflect on those comments,

and the legislation will be introduced into Parliament in October.

I would give you a reference which I'm sure you want to take down as you're eating your lunch.

By the way, it was a good move to, you know, have the speech over the main course, wasn't it, so I like that, yes. But they do say they're going to save my dessert for me, that's very good. But you know, us Brits don't eat much, so it's all right.

Anyway, what I intend to do, I've just got one sheet of paper, I've got lots of sheets of paper, but I've got one sheet of paper here, and perhaps we might be able to copy this because it has got the reference on the summary of the bill, but for those of you who have got pen in hand, the whole document, and this is the document, and I'll be raffling up, raffling off a copy of this in a minute -- paying for the plane fare home, you think the government is generous with flights, you know, to get here, I flew London/Detroit, you know, as we were flying over Montreal, you know, I said, so five hours later back in Montreal, and tonight I have to fly

back to Amsterdam and I'll be flying over London again, but you know, this is, keeps us in the air, I suppose, you know, taxpayers' money, anyway sorry, yes.

The legislation is at www.dti.gov.uk/cii/elec/ecbill. And of course, when you access it, you'll find some massive file and you won't be able to read it anyway. But no, seriously, hopefully I'll get some of these, I'll get some of these copied, and I've got two copies left of this, so the first people to approach me with a suitable offer can have them.

So to finish, Ladies and Gentlemen, I'd just like to say again that I'm very pleased to have been invited to speak to you at lunch time, and I think the issues that you've been tackling in the last couple of days are extremely important indeed. Consumer protection is one of the issues that gets people all wound up in lots of directions but clearly, if we're all going to get the take off in electronic commerce, which we all want as businesses, as governments, then we have got to be able to instill a sense of confidence in the people that use these services. And I think that some of the work that the ILPF are doing will lead in this direction. Thank you very much indeed.

PROTECTING THE CONSUMER OVER A BORDERLESS MEDIUM

Mr. ROGER COCHETTI:

My name is Roger Cochetti, I'm with IBM. It is my pleasure to welcome you to the panel discussion this afternoon. The panel, as you know, is entitled Protecting Consumers Over a Borderless Medium.

I think it's not difficult to understand or conclude, after the last day and a half worth of discussions, that sorting out the questions of consumer protection are among the most difficult, complicated, and yet most important in all of the discussions about jurisdiction on the Internet. And that's for the obvious reason that in many cases there are laws, regulations and practices that affect activities and transactions in which consumers engaged are treated differently from those that occur in business to business transactions.

In IBM, we are keenly aware of this, quite aware of the fact that 90% of the value of electronic commerce today occurs in a business to business environment, and yet, 90% of the regulatory and policy issues, legal questions that arise, occurs in a business to consumer environment. And yet, what happens in a business to

consumer environment affects everything else that occurs in the entire medium, so that discussing what happens in consumer protection on the Internet, I think, is important to everyone, and even to those who are not themselves focused on business to consumer transactions.

In order to do that, what we've structured in this afternoon's discussion is three parts to our conversation and review. The first will consist of three government officials who are going to talk with us about the specific areas of law enforcement with which they are familiar.

Hugh Stevenson is the Associate Director of the Division of Planning and Information in the Bureau of Consumer Protection of the Federal Trade Commission. In that position, he's one of the leading officials in the United States government and in the U.S. Federal Trade Commission who is thinking about consumer protection on the Internet, and what kind of regulations and activities can be constructed to ensure that consumers are protected on the Internet as they are off the Internet. And he spent, I know, a lot of time dealing with the recent FTC workshop on the subject as

well as many of the international negotiations that are under way.

He's going to talk about the experience of the Federal Trade Commission in enforcing, on a transnational basis, consumer protection regulations and rules that arise in the United States.

He'll be followed by Natalie James; Natalie is the coordinator of the Australian Competition Consumer Protection, Consumer Commission's Internet Commerce and Competition Project. She's held this position since March of this year and in that capacity their task is to enhance the welfare of Australians by fostering consumer confidence and participation in E-Commerce. She, like Hugh, is going to talk about their experience from an Australian perspective in enforcing consumer protection laws on a transnational basis and tell us about what she feels have been both some successes and some non-successes.

The third government speaker is Barbara Wellbery; Barbara is a Counsellor to the Under-Secretary for Electronic Commerce in the U.S. Department of Commerce. Barbara is going to talk about the transnational enforcement of U.S. laws in areas other than consumer protection to give us some depth to what issues arise

and what successes the United States government has experienced and what non-successes it's experienced in its effort to enforce U.S. laws where there's a transnational element to them.

I will come back in a few minutes after our first three speakers review their presentations with you and introduce the second part of the panel, but just to explain the structure of this: after we review the status quo of government law enforcement, we will then go on to a presentation of existing and new consumer protection activities that are either under way today or planned for the future as illustrations of what kind of activities occur supplemental to the government law enforcement activities described in the first part of the panel.

So, without any further delay, let me ask Hugh Stevenson to talk with us about his experience and the experience to the Federal Trade Commission enforcing consumer protection regulations.

Thank you.

Mr. HUGH STEVENSON:

Thanks very much, Roger. We, at our workshop, considered the concerns of business and consumers and of government law enforcement agencies, technical concerns, involved in the Internet and international jurisdiction as far as consumer protection issues are concerned. I'm focusing right now on the concerns of law enforcement agencies and I'm speaking to you as someone who is admittedly a civil servant and a lawyer, and I have no power point to make me an expert. But I think, if you can just pity for a moment the poor regulator or at least descend into the mind for a moment of the poor regulator, to see what the world looks like from there in terms of what we're seeing as we get into this brand new world of E-Commerce.

Just a little background for those of you who unfamiliar with the U.S. Federal Trade Commission. We are a general jurisdiction consumer protection agency; our organic statute prohibits unfair deceptive acts and practices; we also enforce a variety of other statutes and rules, a lot of them pertaining to disclosure issues and some others that mandate certain conduct.

There are two things in the world of Internet

enforcement that are relatively new to us. One is transactions involving the Internet and the other is transactions that are international, business to consumer cross-border international transactions. As far as the Internet is concerned, as Chairman Pitofsky mentioned, we brought about ninety cases involving the Internet in some way, and there are some new issues that are raised from a law enforcement point of view with Internet cases, anonymity issues, the possible speed at which harm can be done, the velocity of the consumer protection problems that can arise, the ease of entry into the market mandating swift and sure action.

We've also started looking at cases with international transaction components. So far, our experience is predominantly in the area of fraud or very serious deception, but I think that there are some lessons that can be drawn here in a broader sense. We heard earlier this morning, I think, that there's no one in favour of fraud here, and certainly not on the panel, and certainly not very vocal, maybe sitting way in the back, but even there, we have a consensus issue arguably.

Cross-border enforcement can be quite challenging and we are all aficionados of jurisdiction here being lawyers. Other aficionados of jurisdictional difficulties are people who take advantage of those jurisdictional difficulties to evade or frustrate enforcement and I think that if you bear in mind that even when there is more of a consensus principle that enforcement can be difficult, this is something to bear in mind in thinking about how the market might be ordered.

I think as a general proposition, we would all like to see a simpler regulatory landscape but it's also important to have an effective one. And we talked a lot about mud flaps, and nodding dogs, and double chess sets and so forth, but you can be a little overcome by the matrix of complexities here and it's important to bear in mind that there should, at the same time, be some effective vehicle for consumer protection.

And at the risk of sounding a little retro, in response to some remarks made this morning, I think that governments have a legitimate interest in ensuring that their consumers are protected. Now, does that mean that inevitably the choice of law goes in one direction

or other, no, it does not necessarily. But I think it's very important to bear in mind that the rules of the game that are established are ones that are effective in terms of providing consumers with a protection.

Now, what has been our experience in the international front. We've had, although the Internet has really given rise to the possibility of broad scale, cross-border business to consumer transactions, we've had a dress rehearsal of sorts in the area of cross-border telemarketing. In the 90's the United States enforcement against telemarketing and distance selling consumer fraud became more aggressive. The FTC brought more actions, the states became more active, the law enforcers coordinated their actions better, there was more extensive federal criminal actions brought, there was a telemarketing sales rule put into place.

And then, what happened was that we saw an increase in the incidents of cross-border telemarketing between the United States and Canada. There was a dramatic rise in the number of cross-border complaints, 20% of the complaints in the consumer fraud database that we maintain together with some of our Canadian

counterparts, 20% of them involved cross-border transactions. So this was not a small issue and in fact, this gave rise to the creation by Prime Minister Chrétien and President Clinton of a task force, a U.S./Canada task force to address some of the problems that this raised.

Well, what are some of those problems? There are problems for both the enforcers and the country of origin, if you will, and the country of destination. One of the problems is the authority to take action. We, consumer protection agencies, often have the mission to protect consumers from the world's businesses to the extent that they are not engaged in fair business practices, and then, the other alternative is to protect the world's consumers from one's own business.

This latter formulation is a little less intuitive, I think at least to people in this area, which is not to say that it does not have a place, but it is I think less the model, now partly because, I mean, if you're just dealing domestic transactions you are in essence doing both of those things.

Now, legal authority is not always a foregone conclusion for law enforcers. There has been some litigation for example in British Columbia about whether there was authority to protect people from the jurisdiction's businesses as opposed to protecting the jurisdiction's own consumers. There are also just issues of who has the evidence, who has the incentives to act, who gets the information and complaints to move ahead. The chairman mentioned the Dominica example where people were basically tricked into calling a phone number in Dominica, and the consumer reaction is not: "This is outrageous, I am calling the government of Dominica right now." They think of calling their local people. I don't know anything about Dominica except someone mentioned yesterday they're the first government to establish an online casino which, I guess, didn't inspire confidence entirely, although I suppose you could have the complaint form on the website, but that is an issue.

And even with Canada, where you have a country which has a lot of common traditions, legal traditions and enforcement approaches, and obviously both countries have respected judicial systems and so forth, even in those situations you have problems of collecting the

appropriate information, you have problems of law enforcement priorities because obviously the first priority tends to protect one's own consumers, and this is an area of limited resources. And you have the issues of needing assistance to coordinate the conduct.

The second problem you have, and this is more for probably the country of destination if you will, is enforcement jurisdiction. And you go in, supposedly, I think of one case we brought, we went in and we got an order, we got a tough order, it froze assets, it enjoined further conduct, it imposed monitoring provisions and so forth, and we got this issued by a U.S. court against a defendant in Canada. It felt like a touchdown, except that the other player, the other team was not actually on the field, and it was unclear whether they were going to be interested in playing the game. And so we had that order, and we had to go and see what can we do with that order in another country.

Now, we've had some experience in enforcing orders in other countries through the use of a Moreva injunction which is essentially an order that is in aid of a proceeding elsewhere, and we've done this in, I believe, Canada, Belize, Antigua and the Bahamas,

although we didn't get to go to all those places, we had to hire a counsel.

There are -- and actually as one of the several limits on that kind of enforcement, it only applies really to certain kinds of cases, it really applies essentially to the monetary relief, and it is expensive: you have to hire a counsel, it's unpredictable, there are differences and vagaries with various other countries' laws which affect how successful that can be and one not does always know whether there's going to be something there that makes it worth the candle to spend the money on pursuing.

Does this leave us otherwise paralysed, well, no, we do have ways of acting on for example intermediaries that might be in the United States. Federal court orders may affect those in an act of concert of participation; there are maybe delivery services or suppliers; or there may be money in transit that we can use our orders to have some effect on.

The other thing that we have tried is parallel suits. We worked for example on one case where we filed a case and coinciding with the case by the British Columbia

Attorney General's office against the same company seeking to effectually relieve to deal with, from both sides of the border, but this again is not without cost, is not a simple thing to do. And sharing information itself can be a challenge given that countries' consumer protection laws were, many of them are developed with domestic concerns in mind and may not provide, at least easily, forced sharing of information across borders.

We have worked, as I say, with the Canadians quite extensively. There was a report produced on U.S./Canada Cross-Border Fraud Issues and what needed to be done. The Canadians have moved forward with certain legislation, we moved forward with information sharing, there are things that we had to do, but there are I think more things that need to be done in order to make this an effective mechanism, even in these cases which, the cases I'm talking about are relatively straightforward cases, and I think as you get to subtler cases the problem becomes more difficult. And there is an issue that Susan Crawford referred to: "What is fraud?" And the line is not necessarily a bright one, and there may be cases of a serious deception and finding sort of an agreement on how to

approach that is not always an easy thing.

What is necessary -- I think one of the lessons also in this process is that it is very important to have greater agreement on enforcement and recognition and so that the rules, how the rules of the game will work here or clearer for the agencies.

It's important to have increased systematic cooperation. In the examples I'm talking about with Canada, we had two countries working together; as you get to a multiplicity of countries, those problems multiply and these are things that we need to coordinate better in order to have effective relief for consumers.

Thanks.

Ms. NATALIE JAMES:

Good afternoon. If we can have the Powerpoint running, thanks. My name is Natalie James, and like you, my perspective in this area is enforcement. I work for the Australian Competition and Consumer Commission which is basically the equivalent of the FTC, and enforcement is what we're all about.

When you have a consumer on the other end of the file

or, and these days it's more often the hoards of E-mails that you get, you can't tell them: "Wait a few years till we get this harmonisation of international law thing together", you have to deal with it there and then. And that's the situation we're dealing with at the moment.

Now, in Australia we haven't had hoards of consumer complaints from aggrieved consumers; partly this could be because E-Commerce hasn't taken off in a big way in Australia yet, although a lot of Australians are on line, there seems to be a hesitancy about taking that extra step, and sending your credit card via the Internet or purchasing goods or services via the Internet. But it is happening, it's getting bigger all the time as more Australian companies particularly go online. E-Bay is about to come to town in Australia, so no doubt we'll be getting a lot more information from consumers in respect of those sorts of things.

We do however get information from consumers who may not be aggrieved but have received E-mails or identified websites that they think use, contain information that should be of concern to us. Lots and lots of pyramid games, all the time we get people

forwarding us pyramid games, saying: "Here's another one, please do something about it." They usually originate from the United States and the Australian consumers forwarding the information to us haven't been done either by them, but that doesn't mean Australian consumers aren't being done either by them, and I'm sure that they will come out of the woodwork as time goes by.

Now, in terms of our environment, we administer and enforce the Trade Practices Act. Perhaps the simplest and most relevant provision of that act is Section 52 which basically and quite simply prohibits misleading and deceptive conduct, or conduct which is likely to mislead or deceive in the course of trade and commerce. So it's a pretty simple provision, and there's an awful lot of case law obviously on that. But that is the one that we would use the most when it comes to consumer protection. We have parallel, our states have parallel legislation, it's pretty much identical so there's not a lot of conflict there, but obviously that does raise issues of jurisdiction within the country as well.

We don't have a heap of case law yet on issues where the Internet site of concern is like hidden out of that

jurisdiction. That's the bottom line at the moment. The Trade Practices Act does say that it applies to foreign corporations and it also technically extends to conduct by Australian companies or persons, ordinarily residents in Australia, and even if they're outside Australia at the time. So there's the scope there, and in fact if we came across a website and we thought it was in breach of the Trade Practices Act and we believed that it impacted on Australian consumers, we would take that up and we would argue to the court that we did have jurisdiction to deal with that, even if the only presence in Australia was the website. How far we'd get is another matter.

There have been cases in other areas, I was going to touch on that today, but maybe I'm limited on my time so there's some of the stuff that I'm actually skipping over, but please, if you want to talk to me about it afterwards, feel free. But anyway, we'd like to broaden the scope of our act, and we'd like to increase remedies that are available to consumers, and so we would certainly in those circumstances attempt to do just that when it comes to Internet sites.

Now, I'm just going to skip a few of these slides here,

which should make Roger very happy, and start talking about our actual experience when it comes to cross-border stuff. I'm going to talk about a couple of cases, the first was, in my view, quite successful, Internic. It was an Australian company that maintained a website in Australia called Internic, it was the name of the company, it created a site called Internic.com and it registered domain name strangely enough, for quite a bit more than what you pay if you're registering your domain name with Network Solution Internic.com, Internic.net, sorry, which is the official domain name registering authority in the U.S.

It was referred to us by the FTC. It came to their attention because the company was Australian and the information was hosted by an Australian ISP. We were, in this case we were the appropriate body, we believed, and I believe the FTC believed, to deal with this matter. So a referral was a good option.

We entered negotiations that didn't work; we filed proceedings against them, that started to look like it was working. And eventually we settled and part of the settlement was refunds, \$250,000 Australian dollars, which isn't quite so much in American dollars, but

should be enough to cover the difference for consumers who were misled, who thought they were going into Internic.net and paid that money and weren't getting the service that they thought they were getting in paying that extra money. So, in addition to the refunds, we obviously also stopped the conduct. The company is no longer going to trade under the name Internic, and any money that's left over is going to go into consumer education for compliance with consumer protection laws on the Internet.

And the way we have administered the refunds is everyone who registered a domain name with Internic.com received an E-mail saying: "You may be entitled to a refund, let us know, express an interest with us." They have to fill in a set dec. saying they were misled, and off they go.

So far, we've had, the last I checked out, 700 E-mails from people who believed they were misled. Most of them are from North America. We've got some Australians in there, we've got some people in the UK and in Iceland, believe or not. But in our view, this is a case of a very successful example of cross-border enforcement. We got remedies

for consumers all over the world, and it was something that we were able to do for them.

However -- then again if you think about it, it's not that complicated. The person responsible was in Australia and so was the content, and so, once we started to take the matter up, there weren't really big jurisdictional issues involved. We had comparable law to the United States, we could get an appropriate remedy, so all of those consumers, and so there weren't too many difficult problems there.

So I want to move on from Internic now and talk about a case that did have some different problems. This isn't actually an Internet case, it involved a pyramid scam, it was being run out of Australia, but the company who was responsible for it was actually based in Vanuatu, they used Australian agents.

We went to court where the matter was defended. Although the judge commented that Pamela Reynolds, one of the defendants, was a pretty unsatisfactory witness, we won, and immediately after we got our orders, Pyramid Pan (is now I believe in Vanuatu), fled back to Vanuatu and the \$550,000 we were hoping to have in

trust for consumers, well a large amount of that appeared to go with them. So that's, it was \$550,000 that was in the order. We had already secured about half that through injunctions earlier on in the case, and what we tried to do initially was lodge those injunctions in Vanuatu and that was refused at that point.

After we were successful in receiving our order, we decided to go back and try and get the order executed in Vanuatu, and this is where the problems really started. At first we weren't successful, and then we were, and then while our officers were en route to Vanuatu to execute the order, a decision made by a different judge in chambers, an ex parte decision, reversed the decision. And so we were on our way to execute it, and when the people got there, our officers got there, there was no order to enforce after all. And so that made things a little difficult.

And part of the rationale for this, it appears, was that the Vanuatu judge in this case interpreted, the fact that the respondents had 90 days in which to pay the money into a trust fund, they interpret that as meaning that the judgement didn't crystallise for 90

days, which isn't our view. So we waited for the 90 days to pass and tried to enforce the order again. And it was defended or is being defended, there are a number of reasons for this, a number of claims, not including that the (?) has no standing in Vanuatu, that we cannot invoke the jurisdiction of the court, and that the conduct which gave rise to our judgement doesn't give rise to a cause of action that's enforceable in Vanuatu. They've filed motions seeking to have the proceedings struck out and --

Initially we had a hearing scheduled for March 1999, it was adjourned until June, and that's been adjourned till September. Since then, Pyramid Pan has come back to Australia to file for bankruptcy.

Now, I mean, this is a prime example really of the difficulties in enforcing orders in other jurisdictions, particularly jurisdictions that aren't the same as ours. When we're dealing with the U.S. or Canada, we have similar legislation, we have organisations there who we can talk to about how to go about doing this. In Vanuatu, finding counsel was difficult enough. We had to get an expert in Australian law to file an affidavit, to be available

for cross-examination in Vanuatu because there's no video conferencing, and this expert had to explain the trade practices that does exist and is real genuine law and that the order was valid.

At this stage, we still haven't actually made it, and of course, there's always the question as to whether the money is still there anyway. So that is, I think, an example of difficulties faced when you're dealing with this sort of jurisdiction.

So I mean, in our view, the main problems in this case is a lack of familiarity with Australian law by the Vanuatu courts; the privacy laws over there which prevented us from finding out much about the company's gall and sphere in Vanuatu; finding legal advisors that could help us out; and of course, all this conflict of cost, particularly when you have to get experts and counsel ready to go at any notice to Vanuatu; and the delays, the case is continually being delayed and so that's causing us added problems.

So now that I've talked about those two examples, I'll quickly go through some of the basics that touches on what we've already really talked about throughout the

last two days.

Carrying out investigations from afar, we talked a lot about courts and jurisdictions and orders, but actually carrying out the investigation from Australia when you're dealing with U.S. companies and what have you, I mean, poses a whole heap of problems, and that's where the cooperation becomes very important.

This is the kind of stuff that we've been talking about over the last couple of days, I won't dwell on that.

Difficulties in referring matters. A lot of the time we talk about, or we refer the matter to the FTC or the appropriate authority, but what if there is none, what if it's not part of their priorities, what if it hasn't impacted on their consumers, it's hard for them to justify resources in that sort of situation.

Referral is not always the answer, it is an answer to a solution, but it's not always going to work.

In terms of strategies, enhanced international cooperation. Formal agreements are obviously necessary, but again, we need to deal with a situation now. Informal methods I think, are what we're relying on at the moment, and they do seem to be working;

things like we're investigating a U.S. company, we can contact the FTC and get them to do the company search and get them to send us the relevant documents, and get them to tell us about what they know of the company rather than trying to do it ourselves. Just that kind of knowledge helps out immensely when you're investigating a matter or when you're deciding whether or not to pursue a matter.

Alignment of priorities. We, being a government organisation, have to justify spending funds, and so we have a set of priorities, enforcement priorities. One of the things that we could look at doing is actually developing specific priorities for electronic commerce enforcement and trying to align them, if that's possible, so that when we are referring matters or investigating matters, that we're working in the same direction. Learning about enforcement of orders in other jurisdictions is obviously important.

Test cases is something that we want to start doing to test and hopefully stretch the law in our jurisdiction, and in some case legislative change is called upon at the domestic level.

In terms of alternative strategies, education is obvious. Codes of practice is something that we see a bit of in Australia. Under the Trade Practices Act, there is provision for voluntary or mandatory codes of conduct. They're almost all voluntary, but the mandatory code of conduct is sort of like the big stick. If industry doesn't get its act together, if business doesn't get together and develop some rules, then -- they're now in the background and signals can and often are sent that something will be written for them, and we all know what they prefer.

Harmonisation of consumer protection standards is a long-term goal. We're all working towards that, but until then, some of these other methods have to do. Thank you.

APPLAUSE

Ms. BARBARA WELLBERY:

Good afternoon, I'm Barbara Wellbery, and I'm with the U.S. Department of Commerce. I'm going to talk about cross-border enforcement efforts outside the consumer protection, or at least the conventional consumer protection area. I've looked at areas of

cross-border enforcement in the antitrust area, the securities area, which is a subset of consumer protection, and then the hi-tech and computer crime area to see what we could learn from the cross-border enforcement activities that have been going on there and what lessons we could take away.

First, I need to also thank my colleagues in those different agencies. I am not an expert in any one of these areas, and I very much appreciate the time and information that my colleagues in those agencies provided.

What can we learn from that activity, particularly with respect to the questions that Hank Perritt posed yesterday morning in terms of what should we be doing first, is should we be focussing on self-regulation, should we be looking at substantive conversion, or should we be working on international treaties or agreements? And I guess the succinct answer is yes. Either fortunately or unfortunately, I think we need to be doing all three at the same time. I don't think we have the luxury of proceeding one at the time.

As I surveyed these areas a few things became clear. The first, and this should come as no surprise, is that increased international commercial activity leads to increased international criminal and regulatory enforcement activity. It's no surprise that the more international commercial activity there is, the more problems there are - the more crime and the more regulatory infractions internationally there are.

I also should add that I did not limit my overview to just what's happening on the Internet. I think we all know that we're in an increasingly more global economy, and I think the same issues that come up offline are pretty pertinent to what comes up online in terms of international enforcement. But the fact is that there's much more now going on internationally on the enforcement side. The Department of Justice Antitrust Division estimates that about a third of its enforcement resources for this year will be spent on international enforcement efforts with respect to international cartel activity, and that a huge part of the fines that were collected last year came from international cartel activity.

Similarly, the Securities and Exchange Commission has

seen a big increase in the amount of international enforcement that they're doing. In 1997 they made 240 requests to other securities agencies abroad, and this year - in 1998 rather - they made 275 requests. The number of requests that they have received from other agencies has increased even more. In 1997 they received 363 requests and in 1998 they received 412 requests.

I think another clear operative principle is that increased international enforcement means that there needs to be increased international cooperation which takes a whole bunch of different forms. Obviously, increased cooperation happens both in terms of enforcement activities in terms of going after crimes. It also happens in terms of pre-merger cooperation, since there's now a lot more of that as we see more in the way of international merger activity.

Also, now that there is Internet there's much more going on in the way of computer crime. And so now for the last three years, the G-8 - the Group of 8, which consists of the major industrialized countries and Russia - have actually set up a subgroup that's devoted just to dealing with crime that's done on the Internet.

When does international cooperation and enforcement work best and what kind of factors need to be present for it to work? I think there's at least two factors that need to be present. One, there needs to be some sort of consensus on the substantive law, so in a sense we've come almost full circle. There needs to be some sort of common understanding that the activity in hand is considered bad by both governments. That's not a legal requirement, for example, in the U.S. we don't have a requirement of dual criminality, our Justice Department is permitted to cooperate with other law enforcement agencies, even where the activity is not necessarily illegal in the U.S.. But as a practical matter, this is one of the constraints that both Natalie and Hugh identified. Priorities are going to be determined by what each government considers to be bad or problematic.

So there is probably most cooperation in the antitrust area of international cartel where, as Chairman Pitofsky said yesterday, there is among our major trading partners pretty much universal agreement that this is a bad activity. But it also points up some difficulties. For example, when our Justice Department started to investigate computer

crime and tried to get cooperation from other governments, if those governments had not passed laws making it criminal to access other computer systems on an unauthorized basis, the Justice Department had trouble getting any kind of cooperation from them on that point.

Similarly, when the Securities and Exchange Commission tried to deal with a Ponzi scheme that was originating out of Italy, it had the problem that Italy doesn't consider Ponzi schemes to be illegal. And so it took a while, and it took coordination with other governments whose consumers were also being affected before they could move forward on that investigation.

Another factor that seems to be a prerequisite is that there needs to be some sort of trust and confidence these governments have for each other, and, of course, as Natalie pointed out, there needs to be another responsible government on the other side, and that's not always the case. For example, we certainly see more cooperation occurring, certainly in the criminal area in computer crime among the G-8 where there are

similar approaches. In the antitrust area we've seen most cooperation occurring with Canada and with the European Commission, and to some extent Australia and Japan, where there are major industrialized countries which have faced some of the same issues that we've had to face.

The other point that I find interesting (and this I've heard from a number of the folks that I've talked to), is that cooperation begets more and better cooperation. It seems that one way to achieve cooperation is through cooperating. Probably the area that seems to have the longest-term international cooperation is the securities area, where's there's an international organisation of securities commissions called IOSCA which has over 90 countries which belong to it. They've actually been able to reach agreement on a code of principles that should govern securities regulation.

I think it's astounding that 90 countries were able to agree on something like this, having sat through many many OECD meetings where we've only got 29 member states.

The tools that are used cover a wide range of different

Areas. They're very informal tools: just plain information sharing, both in the form of technical assistance, which can be very helpful in bringing less developed countries along and developing some sort of consensus and uniformity in views. Then there can also be information sharing among major trading partners and that can be very helpful in terms of helping to broaden and develop consensus on issues like market definition. There are also multilateral organisations where governments work together; I think we're probably all familiar with those. There also are formal treaties as in the multilateral assistance treaties which are mostly designed to foster criminal investigations.

And there's also a new approach which Natalie has touched on and which I find interesting. It suggests to me that the idea of deference - taking me back to Susan Crawford's presentation earlier today - may be gaining some ground. It's the idea of positive comity in the antitrust area, where one government will bring to the attention of another government behaviour that it views as violative of the antitrust laws. It often works best where there's one market, where there's a company in one country that's

been kept out of another market. They refer the matter to that country for investigation and then, depending on how the investigation proceeds, they may defer to the other country's enforcement actions.

In closing, and I can see that Roger is getting nervous here, I think that there's a couple of things we can take away. I think, just as in the private sector, in the government sector there needs to be some basic trust among governments, and there basically needs to be a responsible government on the other side.

There also needs to be convergence of some kind on the substantive law; I don't think it needs to be harmonisation, but there needs to be some broad overlap on what the standards or the benchmarks are.

And I think the other point that we need to recognize is that government activity is just necessarily going to be very limited for a whole variety of reasons that there's no time to go into right now. And so I think we really do need to look to the private sector to develop self-regulatory codes and to develop online dispute resolution mechanisms that will help us get beyond this jurisdictional issue. Thank you.

(APPLAUSE)

Mr. ROGER COCHETTI:

Thanks to the three of you. We're now going to look at four different perspectives on activities that can supplement the enforcement of national laws. This is by no means the full range of tools that are available to strengthen consumer protection on the Internet in addition to the enforcement of national laws but it touches on four of what we think are the most important areas.

First, Steven Cole who is the General Counsel and Corporate Secretary for the Council of Better Business Bureaus and the Better Business Bureau OnLine in the United States, a leading organisation that has offered already a wide range of consumer protection, private sector consumer protection programs in the United States and Canada. He's going to talk about the potential for industry self-regulation.

Lynne Nostrant who is a Vice-President of Visa International and responsible for their Consumer Electronic Commerce Group, one of the managers of their Consumer Electronics Group is going to talk with

us about voluntary intermediary dispute resolution programs which is a longwinded way of saying that, in the Internet today, consumer dispute resolution is a matter of working things out through your credit card or charge card issuer. It's a very important part of the overall picture, and she's going to tell us how it works and what's happening today.

Laurie Labuda, who works for the OECD Committee on Consumer Policy, is going to discuss the emergence of international codes of conduct, or international guidelines and the role that they can play in addressing consumer protection on Internet questions.

And finally, Mary Wong, who is a visiting attorney with Morrison & Foerster, as well as a professor at the National University of Singapore Law Faculty, is going to talk with us about a key element that's come up throughout the discussion, and that is a consumer dispute resolution facilities, and new, and innovative online and similar dispute resolution mechanisms that are emerging, and what we can learn about them to date.

So, we're going to go in order as they appear at the table, each of the panellists has agreed they're going

to try to give us a snapshot of their presentation in about five minutes.

So with that introduction, let me ask Steve if he'll tell us about industry self-regulation. Thank you.

Mr. STEVEN COLE:

Thank you very much, Roger. I'm going to use Powerpoint. I'm a lawyer, I'm an ex-state regulator in consumer protection in securities, but I've seen the light, as Roger's indicated, I'm here to advocate for self-regulation.

The Council of Better Business Bureaus is the umbrella organisation for 132 BBBs in the United States and 15 in Canada. The Better Business Bureaus is a business membership organisation and we've promoted an ethical marketplace through self-regulation, dispute resolution and consumer and business education since 1912.

We have about 300,000 local business members in the U.S. and Canada and about 350 large corporate members at the national levels.

There's been an important discussion in the past two days; my message this afternoon is sort of a reality

check. In my judgement, success in the effort, success in the effort to develop a coherent international legal framework won't be sufficient. Trusted self-regulation is going to be needed, and there are two main reasons I say this.

First of all, judicial remedies will not be enough even they if are fair and convenient. In my mind, our work here may in part be irrelevant to most web users, I'll explain that briefly. And also, as everybody said, these new procedures, new modes of operation are going to take too long to develop. Complex treaties involving multiple issues or requiring possibly different solutions. These are marketing issues we're talking about now as much as legal and political issues, and the business community needs and wants to build trust and confidence now and doesn't have the time to wait for the development of all those remedies.

Now, I said that judicial remedies are not enough. The reason I say that is they're not responsive for most consumer difficulties, even domestically, let alone in an international environment. The amounts are often too small to make the courts a relevant mechanism; the issues are not always strictly legal or resolvable

through judicial remedies. If you get a defective product, do you want a Magnuson-Morse Warranty Act enforcement suit in federal court, or do you want to go to someone and get it repaired or replaced? I think we know the answer.

So it's very important that we have out-of-court remedies, these are clearly needed. Someone mentioned Goldberg v. Kelly, I think it was Susan earlier today, and it brought back memories. It was the first case I ever worked on as a practising lawyer, so I'm very sensitive to the need for effective and fair consumer remedies. I'd be very cautious about mandatory models however, and if there's time in the question/answer period, I'll discuss that. And even if choice of law solutions can be found, and reasonably soon, they won't be accepted unless there are practical remedial approaches that will go along with them.

In any event, the legal remedies may miss much of the point to the Internet. Trust and confidence, as I see it, requires much more than fighting fraud or perfecting contractual relationships. Information environments such as the Internet need sorting out mechanisms, in particular consumers need help finding

reliable companies, help in sorting out the fancy websites that may not deliver as promised from those that can deliver and will deliver.

The absence of the kind of physical cues in the tangible market place make choice very difficult, yet the Internet allows us to get needed information to allow consumers to exercise the choice and the sorting out so to speak, at the very right time and right place, precisely when they're reading advertising and perhaps making a transaction. And private sector self-regulation perhaps through, say, a seal mechanism and I'll mention that briefly later, will be the proper way to accomplish this right time, right place education.

Now, consumer trust and confidence must also be built on accepted minimum fair business practices and I don't think we need to wait for officially sponsored convergence or harmonisation or whatever the right word is. It seems we can begin creating minimum and adequate online business practice standards now that are widely accepted and not a race to the bottom.

Now, we think that the Better Business Bureau model is a good self-regulation model for the Internet. The BBB

or others, or coalitions including the BBB would be a good way to use this model. And we think there are two core attributes for effective self-regulation.

First, it should be built on brand recognition as a basis for consumer trust. Let's remember, we're trying to build trust and confidence, we're not writing law review articles, and so we need to find a way that consumers can say: "Ha, ha, I get it, I could rely on this."

And second, for regulation truly to be self-regulation, it must be developed and implemented by the relevant business communities, not in their name. It's not done to them, it's done by them, and they're representative and accountable organisations. And that's the way you get by and that's the way you get compliance and participation.

Now, the Better Business Bureaus are well under way developing the working models that Andy Pincus alluded to or encouraged this morning, I should say. And ours is a multifaceted approach. Our dispute settlement program is the largest consumer dispute settlement program in the United States, it's flexible, it's free

to consumers. On an annualized basis now we're receiving online approximately 200,000 complaints a year, that's the tip of the iceberg, it's growing dramatically.

We set and enforce voluntary standards. Chairman Pitofsky mentioned yesterday the efficient self-regulation program for the advertising industry -- we administer and enforce that for the advertising industry. And we also are embarking on an online code of conduct, a standards program that I'll mention very briefly.

The Better Business Bureau system also administers two of the most respected seal programs on the Internet. Our reliability program is the largest seal program on the Internet, and our new online privacy program is one of those certification programs you heard other speakers talk about.

Now, the reliability program is a seal program, and that helps the sorting out process; companies that need standards, including dispute resolution participation, display a seal and then we use the verification technology to minimize phoney seal display.

Now, notice the very simple but important eligibility requirement, this needs to be a simple process for both the businesses and consumers, and we think this could be a prototype for the sort of global self-regulation that could be extended elsewhere. We use a multiple approach, we set standards, we enforce the standards, we require participants to agree to cooperate in a dispute resolution system, and we use a recognized seal to build consumer choice and confidence.

Now I mentioned this online code of fair business practices. I don't see this as the end of harmonisation or even the beginning of harmonisation, and I don't see it as the end of a safe harbor or maybe not even the beginning, but it begins to have us create an approach that's not the lowest common denominator but it's a very reasonable common denominator of voluntary standards of what we do in the United States and Canada. We'll start there with an eye that it needs to be portable, it needs to become a global set of standards eventually, that others could borrow and expand on and use.

We expect however that a minimum, tens of thousands of Better Business Bureau members throughout the country

will follow our code if we do this right. And remember, I said that self-regulation is done by business with public input. We will have a very open process, no single group would be anointed as "the business advisors"; we will seek active input from those who want to give it and wide comment on the work product from others.

Let me close in this whirlwind five minute tour, Roger, I'm actually doing reasonably well.

We are not fixed on a global model for our organisation, we're taking preliminary steps to maximize our options. Our own programs and organisations can be replicated in other countries. We're starting a Better Business Bureau with the cooperation of the local business community in Malaysia for example. Or, we can develop alliances and partnerships with other sorts of business organisations on particular products, whether they're privacy products or dispute resolution products, or on a full range of the private sector self-regulation activities.

What we know at the Better Business Bureau is that we need to do something soon and we want to take advantage

of the growing recognition and trust that the BBB name is developing worldwide. Thank you.

(APPLAUSE)

Ms. LYNNE NOSTRANT:

Thank you very much. I'm going to talk about chargebacks and since I am from out of town and I do have a Powerpoint presentation, I guess that makes me an expert.

One of the things that -- in talking about voluntary intermediary solutions, I wanted to explain how the Visa system works and at the same time I'll be explaining how the Mastercard system works because they're very similar, and I hope there's no one from the Department of Justice here to hear me say that because we do compete furiously. There are some additional, there are other card companies that don't go through the association model such as Diners and American Express, and where there's a difference, I'll point that out to you.

The reason to call it voluntary is because no one's forcing any of the member banks to join these to be

able to issue Visa cards, there's no one out there who is telling merchants that they're required by law to accept American Express cards, you know, it's basically a situation where there are benefits to belonging and playing in this game, and so people come to us and they want to play. But then, because they want to play using our marbles, we say: "You've got to follow our rules." And those rules are this, for Visa, a set of by-laws and operating regulations that are in essence the contract between the member banks and Visa and spell out all the rules and requirements.

It does require once they do belong, as an association member they are required to follow all the rules, and that includes having rules for merchant websites and so forth, and I'll talk a little bit about that on the next slide.

The benefit to all of this is that it does provide a consistent global trusted payment method that has been in existence and it works. Most of you who have travelled here to Montreal to attend this conference have come from perhaps another country, you have some kind of a payment card in your wallet I'm sure everyone of you; you probably used it to check into the hotel

where you're staying. You didn't stop to think, well, I don't know, maybe you did because you're lawyers, but those of you, for those normal people there, when you use your card and you pull it out, you don't stop to think about what jurisdiction applies here.

If I give them my card, what -- you know, and if they put extra charges on my account, do I have to worry about that? I mean, basically you just know that if it's on your payment card that there's some remedy available to you in case there's a problem. And we want to extend that same trust into the digital world.

Now, let me explain just a bit more about how the contract works, and again, this applies for both Visa and Mastercard, for Amex, Diners, JCB, et cetera. You can just, you know, X out the banks, the issuer requirer because they are both sides of that, they don't go through the financial institutions.

So there's a set of these operating regulations that spell out what the requirements are for members, and by extension there are certain things that have to be, for example, in a merchant agreement, that the acquirer actually contracts with a merchant, so the acquiring bank makes the decision as to whether or not they want

to do business with that merchant and they want to do some kind of a background check because in essence they're giving that merchant a credit line because they could give them the money for the sales drafts and then have a bunch of chargebacks come in. So it's, you know, there's some safety mechanisms built in to try to make sure that there's some quality in the system.

Some of the things that are required to be in the merchant agreement, you know, that Visa operates require are things where we think it makes good business sense to let consumers know that up front before they decide to make a purchase from an online merchant. And that would be things like where the merchant is domiciled; we want there to be an adequate disclosure of any limited or no-refund policy; if the merchant will not ship to certain countries because of, you know, legal restraints or because they've had bad business experiences with having things never arrive there, whatever. They should list that on their website so that the consumer doesn't think that if they tried to purchase, that for some reason that merchant is not accepting that consumer's card or won't sell to that consumer, that you know, that it's a really, it's a different situation. And these are all things that

are actually required to be in there.

The Card Holder Agreement is a little bit different, there's not too much that Visa requires to be in the Card Holder Agreement, but typically this is where the issuer would spell out whatever finance terms were involved. It would be things like under what circumstances the consumer could dispute a transaction, and these are usually mandated by whatever consumer rights apply.

Now, going on just a little bit further, I want to talk about chargebacks, and I want to make the distinction between chargebacks and consumer rights because consumers do not have chargeback rights. They have consumer rights, whatever has been mandated by the jurisdiction wherein they live, but only Visa members, Mastercard members and so forth have chargeback rights. And that is a mechanism that's provided where -- and in this case, the bank is the intermediary where they provide the mechanism to debit one side and credit the other side.

Now, and the reason I make that distinction is, is that there may be more chargeback rights available than

there are consumer rights in a given jurisdiction, or there may be fewer. If there were a case where there was some consumer rights that we didn't happen to have a corresponding chargeback right, that doesn't let the card issuer off the hook for crediting the consumer, it merely means that the issuer of the card has nowhere to, you know, they can't toss that monkey back over the fence, they've got to absorb the loss themselves, but they still have to credit the card holder. I really don't know of any circumstances that exist right now where that would qualify, but hypothetically that would be the situation.

And in coming up with the chargeback rights, what we've tried to do is to think, you know, what would be reasonable, and try to have a balancing act between what's fair to consumers and what would be fair to merchants, where they would, you know, want to be able to accept Visa cards. And that's where the issue of competition comes in, to keep us honest, because if we were to decide as Visa that we were going to subtract some chargeback rights from the issuer so that the merchants liked us more, then what would happen is that the consumers would start preferring Mastercard or American Express because they have more

rights attached to that and vice versa. So we have to pretty much keep them in check.

Now, we actually have 41, Visa has 41 chargeback rights, I'm not going to go through them, we don't have time, and it's boring anyway, but pretty much everything that needs to be covered is there, so. And if you do have questions, we can go over them.

Let me walk you quickly through the process, this is a lot simpler than having to take someone to arbitration or file a lawsuit. If you have a consumer who has purchased a widget from an online store and the widget doesn't arrive, and you have there a charge for it, we would encourage them first to try to contact the widget seller and find out what the situation is, and it could be, you know, whatever that is. We don't want to step into that relationship between the buyer and the seller, but we do want to be there if that breaks down.

So let's assume that the consumer can't reach the widget seller or whatever, and so, in that case they would contact their card issuer and explain what the circumstances were. At that point, the card issuer would credit the consumer right away and send the

debit, if it's a Visa or Mastercard it goes through our system, which is with the Visa logo they represent, and it goes to the merchant's bank, and so, that's how the issuer, you know, they've got the debit that offsets the credit, so they're okay now, the customer is happy. The merchant's bank, or if this is Amex, Diners, JCB, it would go directly to the merchant and debits the merchant's account. So, it's all very efficient, there is an opportunity to, you know, to go back around if one party wants to dispute it, but generally this works pretty well.

So in conclusion, payment cards are a natural for the Internet, it's pretty difficult to shove cash or cheques into your PC, you know that floppy slot or that CD slot just doesn't, you know, take it in, so it is a very good way to pay, the fact that it is tried and true and trusted, it does work, it's convenient, and we think that, you know, that that hopefully should be adequate. Thank you.

(APPLAUSE)

Ms. LAURIE LABUDA:

My name is Laurie Labuda, and I am a consultant to the

OECD Consumer Policy Committee, and probably you've -- well, everyone has heard the OECD bantered about a bit in the past couple of days, but maybe it would help if I gave you a quick overview of what the OECD does and how it works, and then I'll give you a little more specific information about what the Consumer Policy Committee is doing.

Basically, the OECD is an international, intergovernmental organisation comprised of 29 member countries. It has no governmental powers but it's a forum for governments to get together and also invite in business and consumer representatives, labor groups, to join in discussions and formulate policy decisions, exchange information.

One thing that the OECD does is develop policy recommendations that are formal OECD instruments. These instruments are non-binding, they have no legal power in any of our member governments, but because they're developed on a consensus basis amongst member countries, there's sort of a moral obligation for the countries to implement them and use them on a national basis.

Some examples of these kinds of instruments include the 1980 Privacy Guidelines which I'm sure a

lot of you are familiar with, and some recent guidelines on security and cryptography.

We're also, within the Consumer Policy Committee, developing and working on a set of guidelines for consumer protection for electronic commerce. A lot of you are involved, I can recognize faces and E-mail addresses. A lot of you are involved in that process and we're very happy to have business and legal input, and it's a process that began in April of 1988 or 1998, sorry, and with luck and keeping according to our plan, we'd like to finish it within 1999. So by the end of this year hopefully we'll come up with some sort of a consensus agreement.

The guidelines are basically a set of core recommendations of basic fair business and marketing practices; it includes descriptions of what would be fair business practices, fair marketing practices. This is the current draft as a matter of fact, nothing has been, we don't have any consensus, any kind of final decision on any aspect of the guidelines at present. We also include information disclosures and information about the business, information about the product or services being offered.

And we are working

with both business representatives and consumer representatives to develop the guidelines.

The process generally works by the OECD releasing a draft to our member delegations, the delegations then circulate and vet the draft on a national basis, invite comment from national business groups, national consumer groups and then return some sort of consensus opinion, some consensus national opinion to the OECD and we redraft and send out draft number, we're working on Draft Number 5 at the moment.

And just to be a little more specific about that, I had a comment period close on the 20th of this month. As with most deadlines, they are meant to be broken, at least my deadlines seem to be, and we are, we've been extending that to most of our delegations, and I don't expect to close out my comment period 'till the end of this month.

There will be a new draft released the first week of August, and I would invite you to get a copy of the draft and comment to -- there are a number of different ways to get a hold of it. For a lot of different reasons, you can't get them from me

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but you can get them from some business groups that we're working with or from national delegations that are members of the Committee, and you can return comment to the national delegations and they would also appreciate your input.

With respect to jurisdictions specifically, we have, I'm sure you can imagine, spent a lot of time discussing the issue within the Committee. It's -- the only consensus we've reached so far is that we won't be attempting to determinate definitive recommendation for consumer-related jurisdiction issues within the guidelines themselves. It's such a horizontal issue and it touches on so many different aspects of electronic commerce that all of the delegations understand that and agree that to try and decide an instrument would be impossible for one thing, and probably not particularly helpful in the long run.

So what we are trying to do, we can't ignore the issue completely, what we are trying to do is find a way to address, to make sure that in considering jurisdiction and other form, for example, in The Hague conference, that the consumer, consumer concerns and the consumer aspects of jurisdiction are not forgotten in those

forums and the Committee would like to make a recommendation to certain aspects of consumer policy that shouldn't be forgotten as jurisdiction rules are considered, another forum.

Roger is giving me this signal. But I might also mention two other things that are going on. One is with relation to chargebacks. We also have a project, a recommendation to try and provide a more international perspective on chargebacks and that's a process, an ongoing process that should be going on through the end of this year and perhaps until next year. It's going to be headed up by the U.S. delegation and the Federal Trade Commission. I'm sure they'll be happy to hear from you on that.

The second project is the inventory that Scott Blackmer mentioned earlier today which will be my summer vacation project and I'll be happily working on that all through August. So any input that anyone would like to submit on that regard is more than welcome as well. And that will be a publicly released document to help everyone to try and determine what the various international consumer policies and regulations are

throughout the OECD member countries. So that should be available some time -- a preliminary draft should be available some time in the early fall. Thank you.

(APPLAUSE)

Ms. MARY W.S. WONG:

Good afternoon everyone. Roger, despite the fact that I'm a law professor in my second life and therefore can go on for hours and hours, I promise to stick to my time limit insofar as that's possible.

I think we'll probably all agree that one of the developments in the legal area or quasilegal area that parallels the phenomenon of E-Commerce in terms of explosive growth, is probably the exploration of alternative methods of dispute resolution. And I've been asked to speak for a few moments on something that the WIPO has been working on for a while, which is an online dispute resolution mechanism.

Unfortunately as I said, they've been working on it for a while, and Francis Gurry assures me that it will be ready for testing and launched pretty soon. So what I intend to do is spend a couple of minutes just

explaining what that is, and maybe looking quickly at the possible benefits for consumers that something like that could offer and then I'll move to some examples of other types of dispute resolution mechanisms that we could perhaps consider would aid in consumer protection.

The WIPO online dispute resolution mechanism aims to be essentially a uniform facility, a repository. It will enable parties to dispute, who employ, say, mediation or arbitration to conduct everything online, that is, all communications, all transmissions, data storage, archiving, payments for the services and so on can all be conducted online through the WIPO facility. And this can be quite important. Obviously there are various other initiatives, there are also proceedings being conducted right now where people use video conferencing, teleconferencing and various other forms of technology assistance.

But what WIPO hopes to provide, I would think, is that as a neutral third party, it would provide the facilities for full online dispute resolution as well as a trusted method of, say, document transmission, dating and delivery, as well as archiving.

So, in terms

of representing a step forward, and at least a mechanism of dispute resolution, it promises to be fairly significant.

In terms of benefits to consumers, I think one of the major things, as was pointed out by Mr. Simpson in his presentation yesterday, is that when you do things online, it's quicker and it can also be a lot cheaper. So, in terms of cost, it can actually be beneficial to consumers, and this obviously has a flip side that I'll come to, but that's one potential benefit as well as the quickness and the ease of communication and transmission. I think those are some fairly obvious benefits.

But there are also some things that we should bear in mind and some potential problems and disadvantages. So, for example, one question would be cost again. It can be quite expensive to conduct, say, arbitration or mediation at various centres and facilities, including WIPO, and I have with me here a schedule of fees for WIPO mediation and arbitration. And we don't, at this point, have any idea what the charge for using the online dispute resolution mechanism will be. But obviously the scale of charges will be one important

factor for a consumer.

Another important factor would probably be the nature of the dispute. And the history of the development of the online dispute resolution mechanism is really in the domain name dispute area, that was the impetus for working on a project such as this. And I think we'd all agree that in terms of a domain name dispute, online dispute resolution is probably something that fits pretty well with a domain name dispute, but not all disputes and certainly not all consumer-related disputes would necessarily benefit from just going online. For example, a consumer who buys a widget that's worth \$50 or \$500, which can be a significant amount, when something goes wrong or when he discovers a defect, one of the first things he's going to think of is not going to be going to WIPO or necessarily what sort of dispute resolution mechanism he wants to use. It's really just going back to the store where he bought it from and asking for replacement or a refund. And as we've seen over the past two days, this can create a problem when the transaction is conducted online.

Similarly, it does raise the question as to what would

be the appropriate forum or the appropriate body for the consumer to approach if he has a problem with an online transaction. And again, an organisation such as WIPO might not necessarily be the automatic response nor would any other international body be an automatic idea, and it might not necessarily even be the appropriate forum for an individual consumer who's purchasing an individual item.

The nature of the proceedings in dispute resolution can also be a factor. I mean, essentially we're still talking about concepts of litigation, arbitration and mediation as well as assisted negotiation in the appropriate case. And we don't have time during this presentation to go through the benefits as well as the limitations of each method and we've heard a lot about the problems of litigation and enforcement. But I'd also like to point out that when you use arbitration and mediation, one important factor is that the parties have to agree to arbitrate or to mediate, for example, by way of an arbitration clause in the contract or by way of a mediation agreement.

And in relation to a consumer, in you're dealing with a standard form, for example, the consumer might not know

what he or she has gotten himself or herself into by agreeing to such a clause; for example, AAA rules for arbitration might not mean anything to a consumer. So, although we talk of agreement in terms of going to arbitration or agreeing to mediate, it may not mean as much to a consumer as to a business.

One thing that has emerged, though, I think, that's quite interesting, and several speakers have alluded to this and a few people who have spoken during this conference have also mentioned it, is that one thing we might look at in terms of ADR might be to encourage the development of cooperation between various national bodies that are responsible for dispute resolution, be it mediation or arbitration. And at this point, I'd just like to spend a couple of minutes talking about a development in Singapore.

In Singapore we have several centres for dispute resolution, one is the Singapore International Arbitration Centre which obviously deals with arbitration; there's also the Singapore Mediation Centre that deals with mediation as well as a couple of other bodies.

The reason I mention these two is because they have come together with the National Computer Board of Singapore, which is the statutory body that's charged with implementing Singapore's master E-Commerce IT Plan, to form a body called SITDRAC which stands for Singapore Information Technology Dispute Resolution Advisory Council. This is a body that's responsible for formulating policy in terms of dispute resolution for information technology-related disputes and various companies and industry have been supportive of its efforts. So far, it has not come up with any guidelines or any policy regarding consumers in relation to the IT industry, but that's one development I wanted to highlight to you because it's possible that in the future they will look at consumer disputes in relation to IT and the IT industry.

And just to finish up my example of Singapore, and I see that the time is quickly running out too, the Singapore Mediation Centre has teamed up with various other mediation centres in other countries, for example, in the UK, the U.S., Australia and Hong Kong, to form something called the Millennium Accord, and this is a cooperative effort amongst the various mediation bodies in these countries that I've

mentioned, to deal with disputes arising out of the Y2K issue.

And the idea is that when there is a Y2K dispute, parties who refer their disputes to any one of these centres - for example, an Australian company and a Singapore company that's engaged in a Y2K dispute - if they go to the Singapore Mediation Centre, or if they went the Australian equivalent that's also part of the Millennium Accord, the procedures and the rules for resolving that dispute would be the same, whichever centre you go to.

And although this has not anything to do directly with consumers, I feel that that's a fairly interesting development in the sense that it does show that the ADR bodies can and do take it upon themselves to enter into cooperative efforts in relation to either the specific industries and sectors or specific problems. So, it can be an encouraging sign for those of us that are looking towards developments in consumer protection, and it may well be that cooperative efforts amongst these bodies may be one way to go in terms of aiding and protecting consumers.

Thank you very much.

(APPLAUSE)

Mr. ROGER COCHETTI:

Thank you, Steven, Lynne, Laurie and Mary. We'll now go to the last part of the presentation, and in this part of the discussion, we're going to hear comments on the comments that you've already heard from two different perspectives.

First, Bill Poulos is the Director of Electronic Commerce Policy at EDS Corporation in the Government Affairs Group in Washington DC. He provides EDS officers and business unit leaders with advice on national and international public policy areas that relate to the Internet and electronic business. He's a very active member of the business community that is dealing with electronic commerce policy issues.

Following Bill's comments, Philippa Lawson will be providing comments from the point of view of a consumer advocate. Philippa is a counsel of the Public Interest Advocacy Centre in Ottawa, Canada, and she's a very active advocate for consumer interests in

telecommunications and other policy issues before the Canadian federal and provincial governments.

Each will spend about five minutes telling us what they think about both the government enforcement solutions we've heard about, and some of the ideas that we've heard about for -- that would build on the practice of governments today.

Following their comments, the entire panel will have opportunity to comment on what others have said, or ask questions of each other. Bill.

Mr. BILL POULOS:

Thank you. I have to admit to be highly influenced by the comments of the speakers before me on this panel and on other panels because what brought me to this conference, and what has really attracted my interest is that I'm chairing the effort to draft the GBDe jurisdiction paper to be presented by the GBDe CEOs in Paris in September. And as I think back on that work, it's interesting to note that we started off from a very rigid position: country of origin, freedom of contracting, these were the essential things that businesses needed to do business on the Internet. But

as I said, I've been highly influenced by this conference and by the speakers.

And I'm reminded of a short story. When President Clinton was merely a candidate for office, he had a very effective campaign team that plastered across their campaign office a big sign that said: "It's the economy, Stupid!" I'm going home and put up a sign in my office when I get back, and the sign is going to say: "It's the remedy, Stupid!" because the thing that I'm, the idea that I'm most drawn to in the comments of the previous speakers is that they're focusing on providing remedy to consumers who have some consumer issue in the course of doing business.

At the GBDe, one of the major conclusions that we have drawn is that consumer protection laws alone may not fully provide the consumer confidence that's necessary when we recognize that electronic commerce is being done in a global medium and therefore subject to all of the conflicts of law that you are all aware of.

I'm just learning what they are because I'm not an attorney.

So we believe that continuing government focus solely

on trying to decide which law is applicable, which court is competent to hear the case and apply which law is really, it just doesn't go far enough to provide the kinds of resolutions that consumers need.

Even when it's possible for a government to require that a buyer's consumer protection law be in full force, even when it's possible, or even when a court decides in favour of the buyer in the buyer's location, the enforcement of such laws and court judgements outside of the jurisdiction of the buyer is difficult. You all know that as attorneys. We're certainly learning the realities of that as business people.

So in the end, we agree that customers must trust that when a problem occurs, a remedy will be timely, easy, cheap and available from any location in the world. The online technology that we're dealing with might make that much easier in the future than it's ever been in the past.

So we believe that governments and businesses and consumer groups need to cooperate, work together to provide consumers with more efficient remedy mechanisms while we continue the debate and the discussion about

whether country of origin or country of destination and how much freedom should consumers have to engage in contracts with businesses. These discussions will continue as Andy Pincus pointed out in his comments today.

So in the end we believe that alternative dispute resolution mechanisms, such as arbitration, mediation, conciliation, as well as creating new online self-regulatory mechanisms such as codes of conduct, trust marks, seal programs such as the one we heard about today are really the right approach. While governments and businesses continue to discuss all of these other jurisdictional issues, businesses have to take the leadership to put self-regulatory programs in place that work, that are effective, that are timely, that are cheap and which solve the customers problem.

The term self-regulation I don't think is moving away from responsibility. I think, in fact it is a, it's a phrase or word that says: "We are taking responsibility" and we certainly learned our lesson in the great privacy debate over the European data protection directive because we continue to say self-regulation is the way to go, but there were times

before we finally came up with something that was real and something that was working when government officials said: "Where's the beef, where is it, you said you wanted self-regulation, but where is it?"

We can't make that mistake again, we have to move fairly rapidly and put systems in place that work and that will satisfy the needs of customers to resolve minor issues in Internet transactions. Thank you.

(APPLAUSE)

Ms. PHILIPPA LAWSON:

Thanks. Well, I think there's a lot of agreement here at this conference and on this panel, and maybe I'll start with that.

I think it's clear that we -- well, you can divide the problem really into two parts from a consumer angle, the bad guys on one hand and the not-so-bad guys on the other hand. And I think we can all agree that we need to go after the bad guys - we've got to stop them - and that governments play a critical role here in cooperating across borders to enforce laws and to develop common standards, again across borders so

that we don't tolerate consumer fraud or deceptive marketing practices.

But as I mentioned, it's the other side of the problem that seems to be a little bit more difficult: The well-intentioned businesses who sometimes get in trouble. Here again I think we have a lot of agreement - and I really like the make-up of this panel because I think what we've seen are a number of critical components. Each is necessary; none is sufficient on its own. And I think Steven mentioned in his presentation that self-regulation is a critical component of the solution and that government regulation is not sufficient on its own.

I would agree, I think that in the area of electronic commerce, all of these players have a critical role. So government is still there setting the minimum standards, enforcing and providing where possible for reciprocal enforcement of judgements. I'll come back to that in a moment. And government is going to play a critical role in establishing common standards, internationally as well as domestically, although we recognize that's going to take time, we can't wait for it.

Industry is going to play the key role in self regulating, and again in establishing standards among themselves internationally and in providing and promoting effective dispute resolution mechanisms. But I think we've heard of the limitations of each of those. I mean, clearly self-regulation is limited, it doesn't cover everyone. Clearly, dispute resolution mechanisms are limited insofar as the two parties have to agree. So, if you don't have a cooperative vendor, you're not going to be able to take advantage of these online dispute resolution mechanisms.

Intermediaries play, or are going to play, a key role here as they are doing right now through the chargeback mechanisms, and we want to see that continue and indeed expand. And consumers obviously play a key role themselves in informing themselves, acting prudently online and pursuing bad actors where they can across borders.

Now, where we seem to be disagreeing are on a few points here. I think I'll talk about three. I don't want to ignore this key jurisdictional issue that discussions at this conference have revolved around: country of origin, country of destination - I agree

there's no point of being fixated on that, it's not going to get us very far. However, I want to make sure the consumer's position is presented to you on that point.

I guess one way of approaching it is, if what we want to do here is rely more on market forces and less on direct government regulation, then you've got to make it easy for those market forces to do the job. Consumers are market forces, you've got to make it easy for consumers to enforce their rights across borders.

Now, the first step of that is going to be, I think, this self-regulatory online dispute resolution. But when that doesn't work then the consumer has to have recourse to the default system, which is the judicial system. And there, as it's been pointed out already, a country of origin rule is essentially a barrier, a complete barrier. It's just, there's no way the consumers have the ability, or in a normal consumer transaction that it's worthwhile for a consumer, to pursue a business on their own across borders.

So, I think we're at a point here where we've got to address the issue as a policy question really. Again

you can try to argue through it as courts have done, on, you know, "Is the merchant moving to the consumer's jurisdiction by setting up a website?" or "Is the consumer going to the merchant when they go online? ". I don't think that's going to get us anywhere. I think ultimately we've got to address this as a policy issue.

What do we want the result to be? What is the fair reasonable result here? What are our values? And this is where I have some difficulty because I just can't believe that from the consumer perspective, being able to choose among more commercial options online is more important fundamentally to us than being able to pursue a legitimate complaint and get redress. From the business perspective, I mean, how can we say, there are people here who really think that's it's more important that a business is able to sell in more jurisdictions than otherwise, than it is that a consumer who has a problem and can't get redress otherwise, is able to do so through their own court system. I think we really need to question that.

Now, acknowledging all the time that that's not the end of the story because even once the consumer does get some kind of judgement against an uncooperative

merchant, they still have to enforce that. And that's where again I think we can all agree governments in particular are going to play an important role facilitating cross-border enforcement.

I think, just responding to the innovative suggestion made by Susan Crawford earlier on today, which I think is a really interesting proposal that should be pursued, I think there are, as she suggested really three areas that need to be worked on before the deference analysis approach can be adopted successfully. One is the agreement on the minimum standards that we're talking about; two is the establishment of an effective online dispute resolution system and industry self-regulation; and three is the effective warning to consumers that they are in fact entering a certain country for the purposes of that transaction.

[TIME SIGNAL]

So I'll just wrap up saying once again, no group here can do it on their own, industry can't do it on its own through self-regulation; government can't do it on its own through cross-border enforcement, there are practical limits; intermediaries, financial intermediaries can't do it on their own and consumers

clearly can't do it on their own. We're all part of the solution together. Thank you very much.

(APPLAUSE)

Mr. ROGER COCHETTI:

We are running short on time but what I'd like to do at this point is give the members of the panel an opportunity to comment on what others have said or on the comments that have been made. If anyone has a -- Steve?

Mr. STEVEN COLE:

Thank you, Roger. I want to jump off on a comment Bill made: "It's the remedy, Stupid!" and his advocacy that business needs to get behind self-regulation, and that was very closely related in my mind to a comment that Phillipa made for another purpose, I'll admit, but what she said was that we need to make this easy for consumers, and Mary before then, referred to the possibility that the WIPO system may not always be à propos because of the course in certain kinds of dispute resolution for this environment for consumers, and I think all these comments have a very important related thread.

And I'd like to caution my friends and the BBB supporters in the business community who are cheerleading for self-regulation. For most of the problems that consumers are going to find in international transactions, and they're the same as in domestic transactions, there can't be a significant cost attached to their remedy or it's not a real remedy.

The model that you lawyers, we lawyers are comfortable with in the commercial setting, the AAA, WIPO, whatever, simply is not going to work in my judgement in the consumer field. And I was worried about commercial lawyers thinking we can transport this into the consumer model.

Let me just remind everyone, about 30 years ago, the Federal Trade Commission in New York, investigated mandatory pre-dispute arbitration clauses in consumer contracts, and at that time, without a rule, they wrote much material indicating that these were terribly unfair to consumers, they were dealing with companies writing in the AAA to arbitration clauses and then finding out that the cost of filing with the AAA exceeded the cost of the problem that the consumers

were trying to deal with. Bottom line, that didn't serve anybody, the business community, AAA, or anyone certainly wasn't served by that.

And I guess the message is, if we all mean it, and we think self-regulation can be one of the many effective tools, it's going to need to be structured and paid for in a way that the consumers can get it and get it quickly and fairly and inexpensively.

Mr. ROGER COCHETTI:

Anyone else on the panel want to offer a comment, if not, I'm going to open it to the floor. I think we really have time for one question, if there is one. Please identify yourself.

Ms. MARGO LANGFORD:

Thanks, Roger, my name is Margo Langford and I'm with IBM Canada, and I also serve on a number of trade association committees working on these issues.

I just think, I would be remiss since we're in Montreal not to mention one of the remedies and it's not too stupid. Based here in the University of Montreal is a cybertribunal and I wanted to mention it because it's

up and it's running, and it's operating both mediators and arbitrators in French and English. And we welcome your comments either through various members of the ILPF panel or anybody else who is working on GBDe or anything else.

The committee actually that's advising the cybertribunal is looking for input, and so, please go to the website, it's www.cybertribunal.com, it's actually at the moment free, so you can't get much cheaper than that. It's a bit of a competition for you there, Bill or Steve, but it's free to both merchants and to users at the moment.

So it's an experiment but it's also working with the Europe Canada Consortium on Conflict Resolution, and so, the more that we can learn and the more that we can get input to making this a viable alternative, not just in Canada, but obviously across borders, the better. Thanks.

Mr. ROGER COCHETTI:

Thank you, Margo. I think at this point I'm going to ask the audience to give our panel a thanks for their presentation and on point discussion. And let me also

remind you what most of the panellists have said is that they'd also be available to discuss some of your ideas in the hallway afterwards in greater detail.

Ruth, I think that the fact that we're running behind, do you still want to go ahead with the coffee break or go right to -- you do want to have a coffee break, so we're breaking for coffee now.

No wait, wait, we may not be breaking for coffee, so hold on a second.

Ms. RUTH DAY:

We've just had a short arbitration on the notion of a break, we are not having to call in any dispute mediation at this point in time. If you take ten minutes, ten minutes only, be back here, lots of people have planes and trains and automobiles to catch and our last panel has a lot of important things to say, so please join us in ten minutes.

EXPERTS' RESPONSE

Mr. JACK L. GOLDSMITH:

I'm Jack L. Goldsmith, I teach at the University of Chicago Law School, and this is the final panel of the conference, somewhat implausibly entitled the "Experts' Response".

Before we get started, each of us are going to speak for just five minutes and maybe we'll have time for questions after that.

Before we get started however, I think we should all thank ILPF and Ruth Day and Masanobu Katoh for putting on an extraordinarily well organized, well executed conference from which we've all learned a lot. Thank you very much.

(APPLAUSE)

The three panellists need no introduction because they were on the first panel: Hank Perritt, Agne Lindberg and Kazunori Ishiguro. I'm going to just offer a few reflections, first on my reflections to the conference and then turn it over to each of the panellists.

I basically have six general reactions to the different panels at the conference. My specialty is conflicts of law in real space, and sometimes in cyberspace.

The first reaction that I have to this conference is that the goal of eliminating regulatory conflict in the Internet context is a false aim. Regulatory conflict is going to be to some extent inevitable whenever there are the following two things: a) decentralized law making by national or subnational governments, and b) transnational transactions. If you have those two conditions, it's simply impossible in my opinion to get rid of conflicts of regulations.

Nations have, for often good reasons, sometimes bad reasons, different regulatory commitments, and these different regulatory commitments are going to be implicated in clashes when there are transnational transactions, including those transactions on the Internet. So the aim of jurisdictional, of jurisdictional harmonisation should be to reduce these conflicts not to eliminate them. It's always a question of degree, not elimination.

The second point is that harmonisation of different

regulatory regimes is really really hard, it's easy to talk about and very hard to do. As a matter of fact, with the exception of the special case of the European Union, we see very little substantive regulatory harmonisation in the world in any context.

Most of the important international commercial treaties such as the Commission on the International Sale of Goods, the Rome Convention, the New York Convention related to arbitration, The Hague Conventions, they all have so-called mandatory law or regulatory exceptions precisely because it's so hard to get agreement on, and compromise on matters of regulatory difference.

So it's very hard, it's always proven very hard to do, and I think it's going to continue to prove hard to do.

The third point is, in my opinion, that -- many of you have said this and I agree, that conflicts of regulations will not make an E-Commerce impossible, it's not going to destroy the Internet, it's not going to destroy Internet transactions. That claim has been belied by the experience in the last five or seven years with the Internet in which there's been significant potential regulatory conflict and massive growth of the Internet and E-Commerce.

Another way of putting the point is that the elimination that that which promotes the growth of the Internet and E-Commerce, if we're going to be realistic, that that is not sacrosanct, the goal of promoting E-Commerce and making it as an inexpensively as possible from a regulatory standpoint to do business on the Internet, that can't be a sacrosanct goal, that's one value, one very important value to be traded off against the values that underlie regulatory difference.

The fourth point is that despite all that I've just said, it's quite clear that many, perhaps most of the significant regulatory differences will be overcome through, for lack of a better term, private ordering, and it is not going to be done in the details by treaty or by unilateral regulation.

We've already seen Internet practices and customs far outrunning governments in dealing with these jurisdictional problems, many of the presentations in the last panel were devoted to this. This is going to be inevitable for a lot of reasons. The value of transactions on the Internet are low; it's not going to be cost effective for government to regulate them, at

least in the minutia; Internet transactions are so fast that it won't be cost effective for governments to regulate them; and importantly, because trust and reputation are so important on the Internet; companies will, as they have done, have powerful incentive to provide dispute resolution mechanisms and legal mechanisms that instill trust.

The fifth point is that some have posited a distinction and I've done so thus far which I want to now back away from, between private ordering and international harmonisation. These are not analytically distinct concepts for the following reason. Private ordering, another way of thinking of private ordering is government by contract, by private parties.

Government by contract only works, private ordering only works to the extent that governments permit it to work, by which I mean, for example, Susan Crawford's proposal of opting out, of letting private parties choose the law to govern their consumer contracts, that only works, that private ordering only works to the extent that governments don't permit lawsuits if they're cost effective in derogation of that contractual regime. We shouldn't think of private

ordering and government regulation or international harmonisation of government regulation as analytically distinct concepts, they have to go hand in hand.

The last point is, and I think this is a lesson that many of the speakers have taught us, is that resolution of the jurisdictional conflicts presented by Internet should proceed on the micro level and not the macro level. I did a lot of Internet conferences and this one has made especially clear to me how much progress we've made I think in the last two or three or four years because in this conference people haven't been talking about general theories of jurisdiction, how we're going to solve the problem of Internet jurisdiction. People have been focusing on concrete context, concrete problems where progress might be slow, but might be sure as well.

The way to deal with jurisdictional conflicts presented by consumer protection problems and Internet gambling and encryption, and privacy might be completely different. Harmonisation might be achievable, but technologically and in terms of agreement in one area but not in another, and we shouldn't think that there's a global solution to the problems of jurisdiction. The

Internet is not an undifferentiated medium, and the problems of jurisdiction presented by it aren't undifferentiated either.

With those thoughts, I'll turn it over to Hank.

Mr. HENRY PERRITT:

Thanks, Jack. At the conclusion of my remarks in the opening panel, I asked whether we should focus first on working out a treaty on jurisdiction and choice of law, or whether we should work on substantive harmonisation or convergence, or whether we are to work on self-regulation. Chairman Pitofsky said at lunch time yesterday that the answer was we should do all of those things, and I agree with him.

Let me just say a word about each one of those, and how I think we might proceed next to build on what we've learned over the last couple of days.

First, the question of some kind of treaty on choice of law and jurisdiction. We actually have two vehicles for engaging that possibility: one is a draft of a convention on the enforcement internationally of civil judgements that has been

generated by The Hague Conference on Private International Law and was reviewed in June of this summer, and I expect another draft will result from that meeting. It doesn't say anything specifically about electronic commerce or the Internet, but there is a group also associated with The Hague Conference that will be meeting in September to consider the relationship between electronic commerce and the Internet and this draft convention. So I think that there is already a drafting process under way for a convention on jurisdiction, and that's so because even though the title of the convention talks about enforcement of judgements, it covers jurisdiction as well.

On choice of law, there is a somewhat more limited vehicle there that you've heard a good bit about in the last couple of days, and that's the European Union proposal to make some changes in the Rome Convention on choice of law, covering contractual choice of law in Europe.

While Americans don't have standing to participate in those discussions, I think we at least can interest ourselves in them and provide comments that we think may be helpful. And the reason I suggest the European

vehicle for choice of law is that I think that there is no comparable vehicle in the United States. There was a discussion at the last Association of American Law Schools, - the law professors convention - last January about the possibility of a third Restatement for conflict of laws, and it's fair to say that there is no agreement whatsoever and that it's extremely unlikely that such a thing will move forward within the near term or even in our lifetimes.

I like Susan Crawford's very interesting proposal for deference, what she called deference analysis, what I think of as a kind of safe harbor for choice of law, contractual choice of law. I think that's very interesting, and I think it might be pursued further within the context of the discussions over the Rome Convention.

Second, work of substantive harmonisation and convergence. I hope that most of us are convinced that we must do that, as Jack Goldsmith just said, on a micro level instead of a global level. And I would like to suggest to you a prime candidate for that process of harmonisation and convergence. I think it should be consumer protection, I think that is the best

candidate for a variety of reasons.

First of all, there is some natural convergence as Hugh Stevenson said, no one is in favour of fraud, and I think Kai Westerwelle helped us understand that even some of the differences that we thought were important between German and American approaches have begun to evaporate because of unilateral decisions by Germans and others to reduce some of these differences.

Second, there is a robust institutional mechanism for consumer protection already, and that means that unless we do something to work on harmonisation, we're going to have North Carolina mud flap problems all over the place, and that's what's going to begin to pinch unless we do something about it by working on harmonisation.

The best prospects for success draws upon Jenny Clift's observation that one can harmonize at different levels. And I think it's important that we not try to undertake discussions over harmonisation and convergence with detailed provisions or with especially difficult provisions. For example, I would start with fraud which ought to be easy because there's so much

agreement already and it's at least a relatively simple concept until you get to application, and I would leave hard questions like pharmaceutical regulation and - Ron Plesser, I'm sorry - but probably professional licensing until later because I think those are likely to be much more difficult.

But I think we can make a great deal of progress if we begin - and by we, I mean groups like the ILPF, to some extent perhaps the ABA Jurisdiction Project with the help of the Commerce Department, the Federal Trade Commission, and other public and private groups in the U.S. and elsewhere - to try to develop a statement of good practices, or a statement of best practices, for consumer protection which I think is likely to bear fruit. I think it would make solving some of these other problems easier.

Fourth and finally, self-regulation. I think it may have not always been clear what self-regulation has to do with jurisdiction. So first of all, let me say what I think it has to do with jurisdiction. You'll remember, yesterday morning I talked about there being three kinds of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction.

It seems to me that self-regulation can help with all three of those things.

With respect to prescriptive jurisdiction, if you have a private group that agrees on a code of good practice, that is a kind of legislative act. In other words, it is prescription and it is inherently transnational, at least to the extent that the membership of the group is transnational.

With respect to adjudicative jurisdiction. We've had a lot of talk, and appropriately so, about dispute resolution because self-regulatory programs are not likely to be perceived as effective unless they contain some kind of dispute resolution mechanism for consumers and sellers. Dispute resolution can be inherently transnational; international commercial arbitration of the New York Convention is a prominent example of that. But what's important, and I think what we've learned over the last couple of days is that we ought not to stop when we have understood the arbitration model or the mediation model.

There are some much more interesting new models. We heard about credit card chargeback mechanisms. I think

we should learn a lot more about that, about their strengths and weaknesses, and about the important differences among the U.S., Canada and Europe with respect to chargeback.

We haven't talked nearly enough about EBay, which has on its own, as an intermediary in electronic commerce, offered an escrow system, an insurance system, a dispute resolution system in the form of mediation, as well as a mechanism for, if you will, a kind of consumer black listing of merchants who don't behave themselves. All those forms of dispute resolution are available and have been developed in terms of entrepreneurial private spirit in the EBay context. I think we should understand more about how well that model is working.

WIPO, which you've heard about, is an interesting model. Another that might seem far fetched, but at least to an American lawyer is I think potentially interesting: there's been a lot of debate in the United States Congress about how to resolve patient care disputes with managed care companies. There is a long history in health care delivery in the United States of a hybrid system of dispute resolution that

begins within a private entity like an insurance company and eventually ends up in an appeal process in a public entity. And I think there might be some interesting structures that we could adapt from that area as well. It would provide the simplicity of a private mechanism at the first level but also would have some type of appellate review or control at the top level.

Finally, enforcement jurisdiction. Here I think is the rub. This is the hard part for two reasons: first of all, Andy Pincus said that self-regulation was coming to be perceived as a new method of real protection. Now he said real protection, and that means that the private schemes have to be enforceable. That's a political reality. The legal reality that makes enforcement jurisdiction challenging is what Jack Goldsmith just said: it only works, self-regulation does, to the extent that government permits it to work.

Now, that's both a challenge and an opportunity with respect to self-regulation. On the one hand, it means that if we go off and concoct all kinds of fancy self-regulatory schemes and don't talk to the government and don't explicitly link those schemes to the public

authorities that exist in abundance with respect to consumer protection, they aren't going to work because the governments around the world won't let them work.

On the other hand, if we do link them to the public institutions, there is the possibility for real protection because we can legislate and resolve disputes privately and then, to the extent that it seems appropriate, rely on the government apparatus for enforcement. And I think that's a possibility of great promise.

Now, my final point is to urge you to recognize the importance of something that's going on right now with respect to the future of the self-regulatory concept.

Before I do that, let me mention the huge contribution that Roger Cochetti consistently has made year in and year out in providing leadership in getting people from the private sector to come together with people from the public sector and otherwise, to have an open minded exploration of new techniques for regulation. I think that's the kind of private sector leadership that is really needed if we're going to realize the benefits

that some of these new concepts offer us.

If you really believe in self-regulation as a part of the answer, then you ought to be cheering and rooting for success in the current efforts to negotiate a safe harbor for self-regulation under the European privacy guidelines. Those negotiations are difficult, there are a lot of people that question whether they're worthwhile, but I would submit to you that that is the best chance for private self-regulation to prove its viability. If those negotiations are not successful, there's a very real possibility that self-regulation as a part of the solution to these Internet jurisdiction problems will be dead, and that we will have missed a great opportunity.

So, give all the help and support you can to Barbara Wellbery and her people who are working so hard to make this thing a reality and to move the ball forward. Thanks a lot.

(APPLAUSE)

Mr. AGNE LINDBERG:

First of all, I know that I speak on behalf of all the

participants in the ABA Jurisdiction Project, including the ones we recruited over these two days, when I say that this has been an extremely valuable conference both to give some of our ideas out to you from the work done already in the project and definitely also to get some input from all of you to continue the project. And as you know, time flies when you have fun, so I'm going to make some very short remarks to end with.

First remarks. Two Swedes at an international conference held in Canada, what's that an indication of? My personal guess is that there is secret work going on to create the Nobel prize in law, and that's going to be handed out to the one who's going to give the solution to the problems we've been discussing these two days, but we'll keep that to ourselves so far.

Other conclusions drawn, I think we all agree now, that the nature of Internet by itself makes it impossible to use the traditional rules for a jurisdiction which apply to international trade. Maybe to some extent we've discovered that we don't even have common rules today to provide the solution we need. So we definitely need solutions specific for the Internet.

These solutions will look different for different use of E-Commerce and there's definitely not one single solution at all.

A worry has come up with me when we've been talking about all the different solutions and the problems, and that's a worry I also had the last time I went to Canada, which was as a part of the Swedish delegation to the OECD Ministerial Conference last year, and that is that we are maybe concentrating ourselves a little bit too much on consumer protection. Don't throw any tomatoes on me yet.

I think that consumer protection is extremely important, but as we've heard this afternoon, 90% of the volume of E-Commerce is business to business. We must remember that business to business have other problems, maybe other goals for the work we're doing and definitely we'll need other solutions. We must keep that in mind when we work. And that's something that struck me, as I said, already at the OECD Conference which was very much, in my view, concentrated on the consumer issues.

Over to the solutions then, and I think back to the ABA

Jurisdiction Project, one of the most important results of this project I think we all hope will be some sort of a map or maps over possible solutions, possible venues for the jurisdictional problems for Internet, and we'll all meet in July next year in London to hear what those maps will look like.

I have a few remarks to make already, personal remarks after these two days regarding a few of the ways to go; maybe we can stake out at least three main ways to go: harmonisation we've talked a lot about, regulation, self-regulation. And as you've heard this afternoon, and the two days, it's to quote a few of the speakers, none is enough, they have to go hand in hand. I believe that as well.

Harmonisation of substantive law is probably a very very strong and efficient way to get rid of the jurisdictional problem, at least for consumer and public law areas. It does however, it will create a lot of problems. I think I saw some surprised faces when my German colleagues drew a picture of how substantive law in Germany looks, and it looks about the same in the Scandinavian countries, it's totally different from the way you have it in the U.S.

It will make it difficult to harmonise.

Regulation. An efficient way to create a legal predictable framework definitely, but it's slow, it's difficult to reach it globally, and I have, my colleagues from Europe to some extent have made some jokes about Europeans always wanting to regulate. But I'd also like to end up with saying that regulation does also create a very legally predictable framework for E-Commerce. I think that actually Europe will have the world's most predictable legal framework for E-Commerce in the world once all the directives are in place. The problem is that we are limited to the fifteen member states. But regulation is a powerful means.

And finally, self-regulation. There are openings in the EU regulation about self-regulation, but as a general remark I would say that governments in Europe are skeptic about it. At the same time, I am very positive, it's a very flexible solution, it's quick and it can offer us solutions in many of the areas we've been discussing these two days.

Just a final remark however about self-regulation, and

that is my second worry here today. That is, we might want to ask ourselves the question who is self, who is the self? If we have the oneself, we're not going to build trust; if we have too many selves, we're not going to build predictability.

And not having any further words to say, I would like, once again to say thank you to all the organisers for a great conference.

(APPLAUSE)

Mr. KAZUNORI ISHIGURO:

It's my honor to be here to make my presentation again. Now I begin. People in Common Law countries, especially American people tend to use the word jurisdiction in a broad meaning which covers almost all conflict of laws problems, treating applicable law in civil cases at the same level as the legislative jurisdiction or extraterritorial application of public laws. Indeed, conflict of laws covers problems of public law areas too.

However, as I mentioned yesterday, American way of intermingling of civil and non-civil matters which also

forms the background of so wide a definition of the word jurisdiction is quite unique. That causes deep theoretical confusion, especially since Hartford Fire Insurance case of the U.S. Supreme Court. Such a trend is, from the Japanese perspective, quite regrettable.

Hideo Tanaka, Emeritus Professor of the University of Tokyo, a leading professor in Japan in the field of comparative studies on Anglo-American Law, states in his very famous book that in the U.S. there is still not enough academic basis of real comparative legal study, criticizing the works of Professor John Haley of Washington University and other U.S. professors who are specialized in Japanese Law.

Comparative law has its long history based mainly on efforts of specialist in European continental countries. Savigny, who established the traditional system of conflict of laws, can be seen as the father of such comparative studies followed by Ernst Rabel, Andre Tunc, von Caemmerer and others.

In the U.S., according to my understanding, only Professor Arthur Taylor von Mehven, one of the revolutionalists in conflicts of laws who

proposed functional analysis keeps such European-based tradition of comparative law.

Now if American people tell something about the present stage of the U.S. law, then it is of course natural that they discuss on the basis of the U.S. legal system and its tradition.

However, if they want to be, in a sense, the leader in harmonising legal systems of countries in our world, European style of real comparative legal study is essential or inevitable.

The most important aspect of the European-based comparative law which is the real one is to analyze the legal system or individual legislation of other countries, not at their surface level but in the depth of their social, cultural, historical and other backgrounds.

I dare say that superficial comparison and superficial harmonisation would be the cause of numerous misunderstandings and even harmful.

In reality, we may have already too many treaties or

international agreements which sometimes contradict each other. In such cases, those who worried about the divergence of each legal system, now worries about the so-called conflict of conventions which is a very complicated problem at the level of public international law.

On top of that, to take the example of the United Nations Convention on International Sales of Goods of 1980, we can find there not a few legal terms the meaning of which are far from clear, such as substantial, reasonable, adequate, et cetera, which are used quite frequently again and again in that convention.

Whether the interpretation of such words or terms can really be the same, for example, between the U.S. and the People's Republic of China, is highly questionable to me.

Of course, we have discussed very important legal issues in cyberspace throughout our forum. However, as I said yesterday, we must analyze the reality, differences, the real features of each legal system as deeply as possible.

That's the reason why my paper discusses the very basic problems which would not perhaps be able to be overcome in our life. As Professor Perritt said yesterday, it might be still quite reasonable to do our best in harmonising legal rules with regard to cyberspace as soon as possible, even if it is only at the surface level.

However, please think of Asian countries. There are quite a lot of varieties of religion, culture, ethics, language, history, social background, political regime, et cetera, et cetera which form the background of their individual legal culture or even the fundamental notion of justice.

Supply-side voices would say that such situations are too dangerous or even trade barriers for everyday's business activities. But such varieties as seen in Asian countries may function in the long-term, as some sort of safety bulb if wisely managed. A phenomenon, in a sense, similar to the freedom of expression under the constitutional laws of major industrialized countries.

In other words, it would be dangerous for us to have only one way of thinking on the basis of rejecting

other value standards for the sake of harmonisation.

Electronic Commerce will surely have huge impacts, not only on economy, but also on society of each country and therefore we should go step by step very carefully. We must see the reality of our world. We must learn much from our history, especially when we are going to enter the new world, namely cyberworld.

In this sense, it is quite sure that we have done something very important throughout this forum. I hope that such deep and at the same time quite neutral discussions will be held in government-based international forums too with regard to the Internet or electronic commerce.

That's my expression of my -- that's my response as an expert for the purpose of this closing session. Thank you.

(APPLAUSE)

Mr. JACK L. GOLDSMITH:

A few minutes for questions if there are any. Everyone is cyberspaced out. I think that'll wrap it up.

Thank you very very much, thank you, Ruth.

(APPLAUSE)

Ms. RUTH DAY:

Just to say to all of you, you've been fabulous, just fabulous,
and there's no topping what has been said over these two days, so
we are adjourned.

I, the undersigned, JEAN RIOPEL, Official Court Reporter, do
hereby certify under my oath of office that the foregoing pages
are and contain the exact transcription of the proceedings of
ILPF, taken by means of stenotype and according to the law.

AND I HAVE SIGNED:
