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Fundamental Facets of the United States-Jordan Free Trade Agreement: E-Commerce, Dispute Resolution, and Beyond

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Abstract

Part I of this Article discusses e-commerce in the U.S.-Jordan FTA. Part I begins with definitions of basic issues in the e-commerce regime, such as electronic signatures. Thereafter, Part I highlights the ways in which some of the important international regimes have dealt with e-commerce, as in the GATS. Finally, and most importantly, Part I will provide a legal analysis of issues related to e-commerce, which are mentioned in the U.S.-Jordan Joint Statement on E-Commerce, such as privacy. Due to the fact that the World Trade Organization's ("WTO") dispute settlement system is the dominant one for trade disputes, Part II begins with a description of the WTO's dispute settlement structure. Part II then describes the dispute settlement system in the U.S.-Jordan FTA and examines how the latter overlaps with the WTO's system. Further, it outlines the legal questions that might arise through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

FUNDAMENTAL FACETS OF THE UNITED STATES-JORDAN FREE TRADE AGREEMENT: E-COMMERCE, DISPUTE RESOLUTION, AND BEYOND

*Mohammad Nsour**

INTRODUCTION

The U.S. government has a long history of involvement in the Middle East.¹ Due to Jordan's continuous adherence to peace, the United States has desired to advance Jordanian economic and political initiatives by entering into several commitments with Jordan. The first formal commitment was the Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment ("Bilateral Investment Treaty"),² signed on July 2, 1997, to "promote greater economic cooperation" between the United States and Jordan with respect to investment and to "stimulate the flow of private capital and the economic development between the two countries."³

* LL.M., Fordham University School of Law; LL.B., University of Jordan School of Law. I wish to first thank God for giving me strength and extreme luck. I am also very indebted to my beloved brother-in-law, Zaid Al-Dawaikat, and my sister Surat for their constant support and encouragement in all endeavors, without which I would not have accomplished many things. Moreover, I am grateful for my friends Steve Bocknek, Inna Nazarova, and Veronica Escobar for their unconditional love and true friendship. Finally, I would like to thank the brilliant editors and staff of the Fordham International Law Journal, particularly Editor-in-Chief Neil Dennis for his invaluable advice and suggestions while I was writing this Article.

I dedicate this work to my dearest friend and the example I follow, my father, Fahed Abul-Ethem.

1. See Alon Ben-Meir, *America's Deepening Involvement in the Middle East*, Essays on International Affairs, at http://www.alonben-meir.com/essay/why_america_resp.html (Jan. 30, 2000); Joel Singer, *The Qualifying Industrial Zone Initiative — A New Tool to Provide Economic Assistance to Middle Eastern Countries Engaged in the Peace Process*, 26 FORDHAM INT'L L.J. 547, 560 (2003) (stating "the U.S. government has long been involved in the negotiations in the Middle East . . .").

2. See Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, July 2, 1997, U.S.-Jordan, 36 I.L.M. 1498 [hereinafter *Bilateral Investment Treaty*]. The *Bilateral Investment Treaty* entered into force in 2003.

3. *Id.* ¶¶ 2-3.

In March 1998, the Al-Hassan Industrial Estate in Irbid, Jordan, became the first Qualifying Industrial Zone (“QIZ”).⁴ The QIZ initiative encourages investment in goods manufactured within the QIZ.⁵ Because goods produced within QIZs enjoy duty-free access to the United States, Jordan commodity exports to the U.S. market rose sharply during the past few years, reaching U.S.\$400 million in 2002, and were expected to reach U.S.\$650 million in 2003.⁶

The United States and Jordan signed the Trade and Investment Framework Agreement (“TIFA”) on March 15, 1999⁷, and the U.S.-Jordan Free Trade Agreement (“U.S.-Jordan FTA”) entered into force on December 17, 2001.⁸ Although the United

4. See Agreement Between the Hashemite Kingdom of Jordan and Israel on Irbid Qualifying Industrial Zone, Nov. 16, 1997, Jordan-Isr. The Agreement is reproduced by the Jordan Export Development & Commercial Centers Corporation (“JEDCO”) and is available at <http://www.agreements.jedco.gov.jo/> (last visited Jan. 16, 2004). See also History of U.S.-Jordan Trade Relations: History of Agreements: Qualifying Industrial Zones, at <http://www.jordanusfta.com> (2000) (“Pursuant to the United States-Israel Free Trade Area Implementation Act of 1995, the governments of Israel and Jordan signed a bilateral agreement on March 1998 designating the Al-Hassan Industrial Estate in Irbid as the first Qualifying Industrial Zone (QIZ) in Jordan.”).

In 1996 the U.S. Congress established the Qualifying Qualified Industrial Zones (“QIZ”) initiative to support the peace process in the Middle East. These zones are industrial parks in Jordan or Israel from which goods can be exported duty free to the United States. The QIZ initiative’s greatest advantage is that it provides duty-free access to the United States, the world’s largest consumer market. In addition, there are currently no U.S. import quotas on clothes or textiles manufactured in Jordan. See Jordan Commercial Center Washington, D.C., Qualified Industrial Zones (QIZ), available at <http://www.jordanembassyus.org/commercial/qiz.htm> (last visited Jan. 16, 2004). See also Singer, *supra* note 1.

5. See Singer, *supra* note 1.

6. See Fahed Fanik, *U.S. Replacing Iraq as Jordan’s First Trade Partner*, JORDAN TIMES, Oct. 6, 2003. See generally Fact Sheet: U.S.-Jordan Free Trade Agreement, at <http://www.usembassy-amman.org.jo/12FTA-FS.html> (last visited Jan. 16, 2004).

7. See Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the United States of America Concerning the Development of Trade and Investment Relations, Mar. 15, 1999, U.S.-Jordan, available at <http://www.jordanusfta.com/documents/tifa.pdf> (last visited Jan. 16, 2004). See also History of U.S.-Jordan Trade Relations: History of Agreements: Trade and Investment Framework Agreement, at <http://www.jordanusfta.com> (last visited Jan. 16, 2004) [hereinafter TIFA] (explaining that the Trade and Investment Framework Agreement (“TIFA”) established the U.S.-Jordan Council on Trade and Investment). In establishing the Trade and Investment Framework Agreement (“TIFA”), “[t]he Council’s major objectives include looking at specific trade and investment matters of interest to both Parties and improving the flow of trade and investment,” in addition to “develop[ing] further the United States and Jordan’s international trade and economic interrelationship.” *Id.*

8. See Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 41 I.L.M. 63 (2002) [herein-

States had previously entered into two other free trade agreements — the U.S.-Israel Free Trade Agreement (“U.S.-Israel FTA”)⁹ and the North American Free Trade Agreement (“NAFTA”)¹⁰ — the U.S.-Jordan FTA is the first free trade agreement which the United States has signed with an Arab country.¹¹

U.S.-Jordan trade has had a remarkable impact on Jordan. Jordan is outperforming its Arabic peers in building trade and generating business with the United States.¹² QIZs and the U.S.-Jordan FTA have substantially improved Jordan’s economy and created more bilateral trade relationships.¹³ For example, the Jordanian textile sector boomed in 2002, with exports reaching U.S.\$400 million.¹⁴ QIZs should also be credited for the increase in the Jordanian job market.¹⁵

Likewise, other Jordanian products — including cosmetics, food, jewelry, machinery, and marble — are being exported to U.S. markets by virtue of the U.S.-Jordan FTA.¹⁶ According to a

after U.S.-Jordan FTA]. The Agreement entered into force on October 24, 2000. For more information on the U.S.-Jordan FTA, see The U.S.-Jordan Free Trade Agreement, at <http://www.usembassy-amman.org.jo/FTA/FTA.html> (last visited Jan. 17, 2004).

9. See Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, 24 I.L.M. 653 (1985) (entered into force Apr. 22, 1985), available at <http://www.mfa.gov.il/mfa/go.asp?MFAH00ub0> (last visited Jan. 16, 2004) [hereinafter U.S.-Israel FTA]. The U.S.-Israel Free Trade Agreement (“U.S.-Israel FTA”) entered into force on August 19, 1985.

10. See North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA]. NAFTA entered into force on January 1, 1994.

11. See Overview of the FTA at http://www.jordanusfta.com/overview_en.asp (Nov. 2001).

12. See Fact Sheet: U.S.-Jordan Bilateral Trade, at <http://www.usembassy-amman.org.jo/12Trade-FS.html> (last visited Jan. 16, 2004) (“Much of the credit for this growth goes to the QIZ initiative and to the FTA, which have opened up new trade opportunities between Jordan and the U.S.”). See generally AMIR Program, *Access to Microfinance & Improved Implementation of Policy Reform: Economic Impact and Implications for Jordan of the U.S.-Jordan Free Trade Agreement*, Final Report (Feb. 2001), available at <http://usembassy-amman.org.jo/FTA-USAID.pdf> (last visited Jan. 24, 2004) [hereinafter Final Report].

13. See Fact Sheet: U.S.-Jordan Bilateral Trade, *supra* note 12 (“U.S.-Jordan trade statistics have shown strong growth in the past three years, due in large part to new opportunities created by the Qualifying Industrial Zones (QIZ’s) [sic] and the U.S.-Jordan Free Trade Agreement.”).

14. See *id.*

15. See Final Report, *supra* note 12, at 14 (“When fully operational, the QIZs are likely to expand Jordan’s Jordanian exports to the United States . . . [and] create job opportunities in Jordan . . .”).

16. See Fact Sheet: U.S.-Jordan Bilateral Trade, *supra* note 12 (“The FTA, meanwhile, is generating opportunities for diversification of Jordanian exports. Jordanian exporters of stone and marble, jewelry, machinery, food products, and cosmetics have all found eager U.S. markets for their goods.”); Final Report, *supra* note 12, at 10.

study conducted by the U.S. Department of Commerce, U.S.-Jordan bilateral trade is noticeably increasing.¹⁷ The FTA made it feasible for the majority of Jordanian exports to be exported to U.S. markets.¹⁸ The U.S.-Jordan FTA eliminates all legal and non-legal barriers to generating a favorable mutual trade environment.¹⁹ The U.S.-Jordan FTA can also be considered a creative version of free trade agreements because it contains provisions emphasizing the importance of a healthy environment and more just labor law standards.²⁰ Further, the FTA includes a provision on e-commerce.²¹ Services are also being liberalized in light of the General Agreement on Trade in Services ("GATS"),²² causing service providers on each side to be more reachable.²³

In Jordan, with the support of the United States,²⁴ TIJARA, "a private-public sector partnership of organizations," was formed to explain the U.S.-Jordan FTA to the Jordanian private sector and to international investors.²⁵ TIJARA, together with the U.S. Agency for International Development ("USAID"), has made substantial efforts to show all interested parties, domestically and internationally, the best means to benefit from the U.S.-Jordan FTA.²⁶

17. See Fact Sheet: U.S.-Jordan Free Trade Agreement, *supra* note 6 (stating "since its entry into force in December 2001, U.S.-Jordanian bilateral trade has increased 37%, according to figures released by the U.S. Department of Commerce").

18. See *id.* ("The United States is now Jordan's largest export market.").

19. See *id.* ("The Agreement eliminates duties and commercial barriers to bilateral trade in goods and services between the United States and Jordan.").

20. See *id.* ("The FTA also includes, for the first time ever in the text of a U.S. trade agreement, provisions addressing trade and environment, trade and labor, and electronic commerce.").

21. See *id.*

22. See *id.* ("[A] broad range of services is being liberalized on the basis of the U.S. and Jordan's existing commitments to the General Agreement on Trade in Services."). See generally General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 1167 (1994) [hereinafter GATS]. The full text of the General Agreement on Trade in Services ("GATS") is available online at http://www.wto.org/english/tratop_e/serv_e/gat-sintr_e.htm (last visited Jan. 17, 2004).

23. See Fact Sheet: U.S.-Jordan Free Trade Agreement, *supra* note 6 ("In addition, the Jordanian services sector is being liberalized to allow greater access to U.S. service providers.").

24. See *id.* ("The U.S. government supports a number of activities that help Jordanian businesses take advantage of opportunities under the FTA.").

25. See *id.*

26. See *id.* (explaining that the U.S. Agency for International Development ("USAID") aids in supporting the TIJARA initiative). See also U.S. Agency for Interna-

Specifically, the major provisions addressed in the U.S.-Jordan FTA include:

1. **Tariffs:** First and foremost, the U.S.-Jordan FTA gradually eliminates duties and tariffs on goods over a period of ten years, according to a mutually agreed upon time schedule.²⁷ Generally, the lesser the tariff is, the faster it is eliminated.²⁸ For example, if the tariff on a specified type of good is less than five percent, it will be eliminated over a two-year period. If the tariff is between five and ten percent, it will be eliminated over four years. If the tariff is between eleven and twenty percent, it will be eliminated over five years. Finally, any tariff greater than twenty percent will be eliminated in ten years.²⁹ Although tariffs on other goods, such as apples, cars, poultry, and goods currently produced in QIZs, have different timetables for elimination,³⁰ all tariffs will be eliminated in no more than ten years.³¹
2. **Intellectual Property Rights:** The U.S.-Jordan FTA addresses and adopts international standards for copyright, patent, and trademark-related commitments.³²
3. **Electronic Commerce:** The U.S.-Jordan FTA calls upon the parties to create a suitable environment for electronic commerce ("e-commerce") to develop in.³³ The United States and Jordan recognize that it is important to eliminate obstacles to electronic transactions.³⁴ Such obstacles might be unnecessary barriers to cross-border services or digital-related

tional Development ("USAID"), at <http://www.usaid.gov> (last visited Jan. 17, 2003) (providing general information on USAID).

27. See Jordan and the United States of America, at <http://www.jftp.gov.jo/usa.htm> (last visited Jan. 17, 2004) ("The FTA eliminates tariffs on all trade in goods between the two countries over 10 years according to a mutual time schedule."); Overview of the FTA, *supra* note 11 ("The FTA eliminates duties and commercial barriers to bilateral trade in goods and services originating in the United States and Jordan.")

28. See Jordan and the United States of America, *supra* note 27.

29. See *id.*

30. See *id.*

31. See *id.*

32. See Overview of the FTA, *supra* note 11. See generally Memorandum of Understanding on Issues Related to the Protection of Intellectual Property Rights under the Agreement Between the United States and Jordan on The Establishment of Free Trade Area, Oct. 24, 2000, available at http://www.jordanusfta.com/free_trade_agreement_text_en.asp.

33. See Overview of the FTA, *supra* note 11 (explaining that electronic commerce ("e-commerce") is one of the U.S.-Jordan FTA's major provisions). *Id.*

34. See *id.*

- goods. The two countries declared their commitment with the U.S.-Jordan Joint Statement on Electronic Commerce³⁵.
4. Trade-Related Environment: The U.S.-Jordan FTA also includes provisions for applying environmental protection laws.³⁶
 5. Labor Provisions: The U.S.-Jordan FTA contains provisions protecting workers' rights.³⁷ The U.S.-Jordan FTA briefly stated that labor laws ought to be consistent with international labor measures.³⁸
 6. Services: The U.S.-Jordan FTA liberalizes certain sectors of trade,³⁹ such as trade in services, as well as service aspects of all industries, including but not limited to tourism, transportation, and education.⁴⁰
 7. Consultation and Dispute Settlements: The U.S.-Jordan FTA has its own system for dispute settlement. It specifies certain deadlines in order to accelerate the process of resolving the dispute without unnecessary delays.⁴¹

The purpose of this Article is to invoke two vital issues that currently exist under the U.S.-Jordan FTA: e-commerce and the dispute settlement system. Both topics have become an essential part of any trade regulation among international, as well as domestic, business and trade communities.

By studying trade disputes and their resolutions, it becomes possible to understand the ever-increasing role of international economic law in various countries. Human experience teaches that a workable dispute settlement system can be the backbone of the economic and political success of any international trade.

In a similar vein, e-commerce is playing and will continue to play a noticeable role in any economy.⁴² Nevertheless, e-com-

35. See U.S.-Jordan Joint Statement on Electronic Commerce, available at http://www.jordanusfta.com/free_trade_agreement_text_en.asp.

36. See *id.* See also Joint Statement on Environmental Technical Cooperation, Oct. 24, 2000, U.S.-Jordan, available at <http://www.jordanusfta.com/documents/envir.pdf> (last visited Jan. 21, 2004).

37. See Overview of the FTA, *supra* note 11.

38. See Overview-Labor, at http://www.jordanusfta.com/overview_labor_en.asp.

39. See Overview of the FTA, *supra* note 11.

40. See Overview-Services, at http://www.jordanusfta.com/overview_services_en.asp. See also U.S.-Jordan FTA, *supra* note 8, art. 3. See generally GATS, *supra* note 22.

41. See Overview of the FTA, *supra* note 11. See also U.S.-Jordan FTA, *supra* note 8, arts. 16, 17.

42. See Thomas J. Smedinghoff & Ruth H. Bro, *Moving with Change: Electronic Sig-*

merce is not currently a prominent part of Jordan's economy. In the short term, e-commerce may be important for small businesses in Jordan, especially considering the restrictions that the United States imposes on the movement of individuals.

Part I of this Article discusses e-commerce in the U.S.-Jordan FTA. Part I begins with definitions of basic issues in the e-commerce regime, such as electronic signatures. Thereafter, Part I highlights the ways in which some of the important international regimes have dealt with e-commerce, as in the GATS. Finally, and most importantly, Part I will provide a legal analysis of issues related to e-commerce, which are mentioned in the U.S.-Jordan Joint Statement on E-Commerce, such as privacy.⁴³

Due to the fact that the World Trade Organization's ("WTO") dispute settlement system is the dominant one for trade disputes, Part II begins with a description of the WTO's dispute settlement structure.⁴⁴ Part II then describes the dispute settlement system in the U.S.-Jordan FTA and examines how the latter overlaps with the WTO's system. Further, it outlines the legal questions that might arise through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").⁴⁵

I. *E-COMMERCE IN THE U.S.-JORDAN FREE TRADE AGREEMENT*

A. *The Definition of E-Commerce and Related Issues*

1. Definition

It is by now a well-known cliché to say that we live in an era of rapid technological and social change.⁴⁶ This new generation of technologies⁴⁷ is referred to as the "Global Information Infra-

nature Legislation As a Vehicle for Advancing E-Commerce, 17 J. MARSHALL J. COMPUTER & INFO. L. 723, 725 (1999).

43. *See id.* at 733.

44. For more information on the WTO's dispute settlement system, see Dispute Settlement, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Jan. 18, 2004).

45. *See* Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]. The full text of *New York Convention* is available online at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm> (last visited Jan. 19, 2004).

46. *See Doe v. 2Themart.com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001) (describing the Internet as a "revolutionary advance in communication technology").

47. *See* United Nations Commission on Crime Prevention and Criminal Justice,

structure,” or the “Information Superhighway,” which includes the Internet.⁴⁸ With the rise of the “Information Superhighway,” new laws and regulations ought to govern the new generation of technologies, such as e-commerce, electronic governments, or electronic education.⁴⁹

E-commerce is simply the use of the Internet to conduct business transactions locally, nationally, or internationally.⁵⁰ The e-commerce regime is growing at an extraordinary rate and will become a long-term substantial force in the international economy.⁵¹ For example, in the United States alone, the value of U.S.-based e-commerce transactions was estimated at U.S.\$43 billion in 1998 and was projected to increase to U.S.\$3.2 trillion by 2004.⁵² Worldwide, according to projections by one research firm, e-commerce sales will grow from U.S.\$145 billion in 1999 to as high as U.S.\$7.8 trillion in 2004.⁵³

Governments around the world are increasingly launching initiatives to promote the use and benefits of e-commerce.⁵⁴ Indeed, governments themselves have benefited from the e-commerce revolution by building web sites for more efficient services and transparency.⁵⁵ The use of the Internet to conduct business

International Review of Criminal Policy — United Nations Manual on the Prevention and Control of Computer-Related Crime, 8th Cong. § 2 (Vienna, Apr. 27-May 6, 1999), available at <http://www.uncjin.org/Documents/EighthCongress.html> (stressing that today the Internet touches all aspects of life, irrespective of geographical location).

48. See Selected Tax Policy Implications of Global Electronic Commerce, U.S. Department of Treasury, 96 TNT 228-10 (1996), available at <http://jya.com/taxpolicy.htm#2>.

49. See Policy Issues Related to Access in participation in Electronic Commerce, United Nations Conference on Trade and Development, TD/B/COM.3/16 (1998).

50. World Trade Organization, Study from WTO Secretariat Highlights Potential Trade Gains from Electronic Commerce, WTO News, Mar. 13, 1998, at http://www.wto.org/english/news_e/pres98_e/pr96_e.htm (defining e-commerce as the use of telecommunication networks to produce, advertise, sell, and distribute products).

51. See generally Michael Pastore, *Latin American E-Commerce Showing Signs of Growth*, CyberAtlas, Apr. 26, 2000, available at http://cyberatlas.internet.com/big_picture/geographics/article/0,1323,5911_348161,00.html.

52. See *id.*

53. See *id.* By 2004, business-to-business e-commerce will represent 8.6% of worldwide sales of goods. *Id.*

54. See, e.g., Christopher T. Poggi, *Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation*, 41 VA. J. INT'L L. 224 (2000). See also David K.Y. Tang & Christopher G. Weinstein, *Electronic Commerce: American and International Proposals for Legal Structures*, in REGULATION AND DEREGULATION: POLICY AND PRACTICE IN THE UTILITIES AND FINANCIAL SERVICES INDUSTRIES 333 (Christopher McCrudden ed., 1999).

55. See, e.g., U.S. General Services Administration, Access Certificates for Elec-

is not without problems, however. Protecting privacy and personal information is one of the difficulties involved in using this new generation of technology.⁵⁶ The Internet also presents substantial challenges in contracting, dealing with an invisible party, or undertaking unanticipated obligations causing unnecessary legal and factual conflicts .

2. Electronic Records and Electronic Signatures

In many cases, the law requires that an enforceable agreement be in writing and signed by the party the agreement seeks to bind.⁵⁷ The question raised by electronic contracting with unseen parties is how one determines to whom the electronic signature in question is attributed in law. Particularly, the legal requirement in the Uniform Commercial Code's ("U.C.C.") Statute of Frauds might require certain agreements to be memorialized in writing.⁵⁸ There is no guarantee in electronic communications that the identity of each party will be known, or that the person in question is authorized to execute the electronic contract.⁵⁹

Typically, traditional agreements are memorialized with a written signature. This also happens in the electronic mode; however, the method of signature is changed. An electronic signature is a digital signature that can be digitized as a "fingerprint or retinal scan."⁶⁰ The more popular method of creating digital

tronic Commerce, available at <http://www.gsa.gov/aces> (last modified Oct. 6, 2003). This program is designed to facilitate public access to the services offered by government agencies through use of information technologies, including online access to computers for purposes of reviewing, retrieving, providing, and exchanging information. *Id.*

56. See Mozelle W. Thompson, *The Challenges of Law in Cyberspace – Fostering the Growth and Safety of E-Commerce*, Address at Boston University Law School, available at <http://www.bu.edu/law/scitech/volume6/presentation.htm> (last visited Jan. 17, 2004).

57. See Smedinghoff & Bro, *supra* note 42.

58. The Uniform Commercial Code's ("U.C.C.") Statute of Frauds provision § 2-201 requires "some writing sufficient to indicate that a contract for sale has been made . . . and signed by the party against whom enforcement is sought." U.C.C. § 2-201. Section 2-209 of the U.C.C. also requires a written signature.

59. See Holly K. Towle, *Advanced Issues in Drafting and Updating Online Contracts and Website Disclaimers*, 563 PLI/PAT 427, 435 (1999) ("Traditional agency laws are not very helpful in an electronic context because to the extent that 'apparent authority' is relevant, nothing is 'apparent' in an environment where humans are not seeing or talking with each other.").

60. Poggi, *supra* note 54, at 250.

signatures is the public key/private key technology.⁶¹ Digital signature technology enables us to prove the authenticity of the source and content of the message, and can provide evidence that the person who signed has authenticated the message.⁶²

Easing the use of e-commerce requires specifying what qualifies as a signature, and whether or not it meets the regulatory criteria. Unfortunately, it is difficult to be specific, and the answer to the question differs from one jurisdiction to another. In the United States, for example, almost anything can qualify as a signature; the current definition of signature in the U.C.C. includes "any symbol made with an intent to authenticate."⁶³ U.S. courts have found that a wide variety of marks qualify as authentications.⁶⁴ Even electronic documents without a signature, such as emails or instant messages, can be attributed to a particular person.

Internationally, the UNCITRAL Model Law on Electronic Commerce ("UNCITRAL Model Law") has adopted a broad position on electronic signatures.⁶⁵ Article 7 of the UNCITRAL Model Law provides that "a data message satisfies a signature requirement as long as some reliable method is used to identify the person who signed and to indicate assent."⁶⁶ The UNCITRAL Model Law intends to provide the flexibility needed to achieve a better atmosphere for the development of electronic signatures. However, reliability concerns may arise under this

61. Public key infrastructure consists of three parts: a public key accessible by recipients of a digitally signed document, a private key which is used by the signer of the document to encrypt the signature, and a digital certificate issued by an intermediate third party, which contains the public key and simultaneously decodes and authenticates the digital signature. *See id.*

62. *See* MICHAEL S. BAUM, ELECTRONIC CONTRACTING, PUBLISHING AND EDI LAW 200-01 (1991) (noting that the reliability of electronic signatures may exceed that of traditional, handwritten methods).

63. U.C.C. § 1-201(39).

64. *See, e.g.,* Hillstrom v. Gosnay, 614 P.2d 466 (Mont. 1989) (relaxing the signature requirement considerably to accommodate various forms of electronic communication). For example, a party's printed or typewritten name in a telegram has been held to satisfy the statute of frauds. *Id.* *But see* Pike Indus., Inc. v. Middlebury Assoc., 398 A.2d 280 (Vt. 1979), *aff'd on other grounds*, 436 A.2d 725 (Vt. 1980), *cert. denied*, 455 U.S. 947 (1992) (holding that the unsigned telegram was not an enforceable contract).

65. UNCITRAL Model Law on Electronic Commerce, U.N. Comm'n on Int'l Trade Law, 29th Sess., Supp. No. 17, U.N. Doc A/51/17, Ann. I (1996) [hereinafter UNCITRAL Model Law]. The UNCITRAL Model Law is available online at <http://www.uncitral.org/english/texts/electcom/ml-ecom.htm> (last visited Jan. 17, 2004).

66. *Id.* art 7.

approach,⁶⁷ bringing into question whether the technology is “as reliable as was appropriate for the purpose” under UNCITRAL Model Law article 7(1)(b).⁶⁸

National legislators worldwide have not uniformly followed the UNCITRAL Model Law.⁶⁹ In other words, UNCITRAL’s Model Law approach does not prefer any specific technology over another. UNCITRAL Model Law has left to the underlying domestic laws the question of whether a given electronic signature is sufficient for the purpose used.⁷⁰ As a final note, electronic signature statutes may fail to address the validity or reliability of electronic signatures issued outside of their jurisdiction. This problem may appear in jurisdictions that impose stricter conditions for recognizing electronic signatures.⁷¹

3. Electronic Cash and the Payment System

Electronic cash means a payment made through electronic means, or any method of payment that resembles money, such as credit cards, debit cards, or stored value cards.⁷² There are two

67. See Poggi, *supra* note 54, at 250.

68. UNCITRAL Model Law, *supra* note 65, art. 7(1)(b). See also Hillstrom, 614 P.2d 466; Pike Indus., 398 A.2d 280.

69. See A. Brooke Overby, *UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce*, 7 TUL. J. INT’L & COMP. L. 219 (1999). The Jordan approach will be examined in later discussion. See generally Smedinghoff & Bro, *supra* note 42.

70. See UNCITRAL: Electronic Commerce, available at <http://www.uncitral.org/english/texts/electcom/ecommerceindex.htm> (last visited Jan. 17, 2004).

The Model Law, adopted in 2001, is intended to bring additional legal certainty regarding the use of electronic signatures. Building on the flexible principle contained in article 7 of the UNCITRAL Model Law on Electronic Commerce, it establishes a presumption that, where they meet certain criteria of technical reliability, electronic signatures shall be treated as equivalent to hand-written signatures. In establishing that presumption, the Model Law follows a technology-neutral approach and avoids favouring the use of any-specific technical product. In addition, the Model Law establishes basic rules of conduct that may serve as guidelines for assessing possible responsibilities and liabilities that might bind upon the various parties involved in the electronic signature process: the signatory, the relying party and trusted third parties that might intervene in the signature process.

Id.

71. See, e.g., Washington Electronic Authentication Act, Wash. Rev. Code § 19.34 (1999).

72. See Laurie Law et al., *The Electronic Future of Cash: How to Make a Mint: The Cryptography of Anonymous Electronic Cash*, 46 AM. U.L. REV. 1131 (1997) See generally Bryan S. Schultz, *Electronic Money, Internet Commerce, and the Right to Financial Privacy: A Call for New Federal Guidelines*, 67 U. CINN. L. REV. 779 (1999).

basic categories of e-cash.⁷³ The first category is the traditional system, which is an “account-based” method where an audit report can be found.⁷⁴ The second includes “tokenized” systems, the high technology category which secures absolute anonymity.⁷⁵

The most obvious concerns in the electronic payment systems are privacy (eavesdropping protection); authenticity (integrity of identification and message);⁷⁶ and nonrepudiation (“prevention of later denying having performed a transaction”).⁷⁷ Scholars consider privacy to be the core issue of electronic cash. Privacy refers to the right to keep one’s financial information confidential. In other words, privacy provides protection from undue inspection by banks or other third parties.⁷⁸ User identification protection is the second core issue, followed by message integrity, or protection against substitution.⁷⁹ A fourth core issue is nonrepudiation, or “protection against later denial of a transaction.”⁸⁰ Scholars identify the last three issues as “authenticity” issues.⁸¹ A harmonized international authentication infrastructure is one tactic which ensures that privacy, or the integrity of the payment system, is maintained.⁸²

Generally speaking, regulators agree that electronic cash, in order not to be misused, should be subject to supervision.⁸³ Supervision has taken different forms. Nations must enact laws governing the supervision of electronic cash. Accordingly, many laws and regulatory and supervisory agencies exist to secure com-

73. See Sarah N. Welling & Andy G. Rickman, *Cyberlaundering: The Risks, The Responses*, 50 FLA. L. REV. 295, 321 (1998).

74. *Id.*

75. *Id.*

76. See Law *supra* note 72, at 1132. See generally David Chaum, *Achieving Electronic Privacy*, SCI. AM., Aug. 1992, at 96, available at <http://ntrg.cs.tcd.ie/mepeirce/Project/Chaum/sciam.html>; David Chaum, *Security Without Identification: Transaction Systems to Make Big Brother Obsolete*, 28 ASS'N COMPUTING MACHINERY 1030 (1985).

77. Law, *supra* note 72, at 1132.

78. See *id.* at 1135-36.

79. See *id.* at 1134.

80. *Id.*

81. *Id.*

82. See *id.*

83. See generally Henry H. Perritt, Jr., *Legal and Technological Infrastructures for Electronic Payment Systems*, 22 RUTGERS COMPUTER & TECH. L.J. 1, 30-31 (1996) (providing that the law must respond to the risk of dishonor and forgery in electronic payment systems).

pliance with laws and regulations.⁸⁴ Thus, the regulation of electronic cash — anywhere — should not be based solely upon the actual technical implementation of an electronic cash product, but also on its potential future designs and forms.

B. *E-Commerce in International Trade Regimes*

1. World Trade Organization

The WTO recognized the importance of e-commerce in international trade prior to the Doha Declaration.⁸⁵ At the second Ministerial Conference, the WTO issued a Declaration on Global Electronic Commerce.⁸⁶ This Declaration directed the WTO's General Council to "establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce."⁸⁷ Further, the Declaration required the General Council to "recognize that work is also being undertaken in other international fora."⁸⁸ The work program of the General Council began in 1998;⁸⁹ it encourages the bodies in charge of the major trade agreements, such as the General Agreement on

84. *See, e.g.*, 15 U.S.C. § 1601 (1994) (providing that Congress intended to strengthen financial institutions and to give consumer protection regarding various credit terms available by informed use of credit); 31 U.S.C. § 5330 (1994) (requiring registration of any money-transmitting business with Secretary of Treasury even if licensed in state).

85. *See* Ministerial Conference, Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Ministerial Declaration]. Ministerial Conference, Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter Doha Declaration].

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

87. *Id.* The Declaration also directed members to continue the practice of not imposing duties on electronic transmissions.

88. *Id.*

89. *See* Work Programme on Electronic Commerce, WT/L/274 (Sept. 30, 1998) (outlining the functions of the work program with respect to the relevant World Trade Organization bodies, i.e., the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS, and the Committee for Trade and Development); John Gero & Tom Oommen, *The Impact of Technological Change in the Canada/U.S. Context: Electronic Commerce and Trade Policy — The Government's Role*, 25 *CAN.-U.S. L.J.* 323, 324 (1999) (discussing the work program and the two fundamental issues before it — classification of an electronic transmission as a good or service, and WTO disciplines on domestic regulation related to electronic commerce and its impact on trade).

Tariffs and Trade (“GATT”),⁹⁰ as well as the Committee on Trade and Development, to discuss issues relevant to regulating e-commerce.⁹¹ As a practical matter, the relevant Councils of the WTO (Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property and the Committee on Trade and Development) were commissioned to develop a better approach to analyzing all trade-related aspects of e-commerce.⁹²

The main goal of the foregoing initiatives was to help countries adjust to growing e-commerce usage among businesses, and among cross-border businesses in particular.⁹³ The WTO considered the following problems for governments and regulatory authorities: first, congestion on the Internet; second, distorted pricing policies; third, inadequate legal frameworks; and fourth, the security and privacy of transactions.⁹⁴ Another problem involved the means by which the WTO can help to facilitate e-commerce and integrate it into the existing rules governing world trade.⁹⁵

According to the WTO, there has always been particular attention and concern paid to developing and under-developed countries. Therefore, the WTO has encouraged exploiting e-commerce to enhance participation in international trade.⁹⁶ The WTO believed that e-commerce might be employed to

90. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. For more information on the General Agreement on Tariffs and Trade, see *GATT and the Goods Council*, at http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (last visited Jan. 17, 2004). See also Multilateral Agreement on Trade in Goods, ann. 1A, 33 I.L.M. 1154 (1994); GATS, *supra* note 22; Agreement on Trade Related Aspects of Intellectual Property, ann. 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. These three trade agreements are annexed to the Agreement Establishing the World Trade Organization, and are administered by the Council for Trade in Goods, the Council for Services, and the Council for Trade Related Intellectual Property. See Agreement Establishing the World Trade Organization, 33 I.L.M. 1144 (1994).

91. See WTO Secretariat, *Work Programme on Electronic Commerce — Background Note*, C/G/W/128 (Nov. 5, 1998) (outlining a list of issues to be discussed by the Council for Trade in Goods, such as classification of goods for international trade, custom duties, import licensing, and market access to products related to electronic commerce).

92. See *id.*

93. See Australian Department of Foreign Affairs and Trade, *Electronic Commerce in International Organizations Outside APEC* (n.d.) (on file with author).

94. *Id.*

95. *Id.*

96. See Committee on Trade and Development — Electronic Commerce in Goods and Services — Communication from the Delegation of Egypt, WT/COMTD/W/38

bridge the information and technology gap between developed and developing countries.⁹⁷

The Doha Declaration issued on November 14, 2001 calls for the reinvigoration of the e-commerce program.⁹⁸ It declares: “electronic commerce creates new challenges and opportunities for trade for members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce.”⁹⁹ The Doha Declaration requested a report on any further progress to the Fifth Session of the Ministerial Conference in 2003.¹⁰⁰

2. General Agreement on Trade in Services (“GATS”)¹⁰¹

It is important to consider that the GATS is particularly significant to e-commerce. E-commerce is conducted through the Internet, which is substantially considered a communication tool.¹⁰² The GATS also governs all the inputs needed for conducting an e-commerce operation.¹⁰³

The GATS provisions apply to all services, including medical, legal, consulting, and finance.¹⁰⁴ Article I of the GATS governs services conducted by electronic means, and even services conducted by governmental entities.¹⁰⁵ Two of the Annexes in GATS deal with financial services and telecommunications, which are the pillars of international e-commerce. Nevertheless, the establishment of international rules in the areas of electronic

(Mar. 3, 1998), available at http://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm.

97. *Id.*

98. See Doha Declaration, *supra* note 85, ¶ 34.

99. *Id.*

100. See *id.* The Fifth WTO Ministerial Conference at Cancun ended on September 14, 2003, after failing to produce any explicit consensus between Member Nations. WTO, Ministerial Conference: Fifth Session — Cancun, WT/MIN(03)/W/21 (Sept. 14, 2003) (on file with author). Members remained entrenched, particularly on the “Singapore” issues. *Id.* In the closing session, the Ministers asked the General Council Chairperson to continue consultations on when and where the next Ministerial Conference will be held. *Id.*

101. See History of U.S.-Jordan Trade Relations, *supra* note 7.

102. See GATS, *supra* note 22, Annex on Telecommunications, ¶ 1, 33 I.L.M. at 1192.

103. See *id.* art. XI.

104. See Smedinghoff & Bro, *supra* note 42.

105. See GATS, *supra* note 22, art. I, 33 I.L.M. at 1168-69.

services has always been difficult.¹⁰⁶

3. Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")¹⁰⁷

The boom of the digital world is significant in the protection of intellectual property, including hardware, trademark, and copyright. TRIPS came into being during the Uruguay Round of GATT in the mid-1980s and early 1990s.¹⁰⁸ In this context, both TRIPS and the Paris Convention for the Protection of Industrial Property ("Paris Convention") can be seen as flip sides of the same coin, although both agreements follow similar approaches in protecting intellectual property rights.¹⁰⁹ The major difference appears in protecting trademarks and domain names. First, TRIPS provides greater protection to trademark owners by expanding the meaning of goodwill. Second, TRIPS provides that "[i]n case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed."¹¹⁰

Along with the GATT and GATS, the TRIPS Agreement is one of the three pillars of the WTO-order.

4. UNCITRAL Model Law on E-Commerce

The UNCITRAL Model Law was drafted in 1996 and is a model for other e-commerce laws around the world. The UNCITRAL Model Law might also assist in harmonizing the principles and concepts of e-commerce internationally.¹¹¹ The UNCITRAL Model Law asserts the validity and enforceability of information traded though electronic means, without specifying any one

106. See, e.g., Christopher T. Marsden, *Cyberlaw and International Political Economy: Towards Regulation of the Global Information Society*, 2001 L. REV. M.S.U.-D.C.L. 355 (2001).

107. TRIPS AGREEMENT, *supra* note 90.

108. See WTO, *WTO Legal Texts*, at http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Jan. 28, 2004) (stating that Uruguay Round negotiations took place between 1986-1994).

109. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1629, 828 U.N.T.S. 305, *last revised*, Sept. 28, 1979 [hereinafter Paris Convention]. See generally Mark A. Urbanski, *Chemical Prospecting, Biodiversity Conservation, and the Importance of International Protection of Intellectual Property Rights In Biological Materials*, 2 BUFF. J. INT'L L. 131 (1995).

110. TRIPS Agreement, *supra* note 90, art. 16(1), 33 I.L.M. at 1203. See generally Michael V. LiRocchi et al., *Trademarks and Internet Domain Names in the Digital Millennium*, 4 UCLA J. INT'L L. & FOREIGN AFF. 377 (1999/2000).

111. See UNCITRAL Model Law on Electronic Commerce, *supra* note 65.

means.¹¹² The UNCITRAL Model Law merely highlights what it intended to be the best approach to regulating e-commerce and left the details and procedures to the governments.¹¹³ Thus, governments can enact laws that fit their needs and capabilities.

The UNCITRAL Model Law has generally been in use among the drafters of national e-commerce legislation even though it was not chosen as the main source for domestic law.¹¹⁴ For example, in the United States, the proposed uniform laws have been heavily influenced by the UNCITRAL Model Law.¹¹⁵ In the European Union, the Electronic Commerce Directive and the Electronic Signatures Directive were also influenced by the UNCITRAL Model Law and the draft Uniform Rules.¹¹⁶

a. General Principles

The U.S.-Jordan Joint Statement on Electronic Commerce (“U.S.-Jordan Joint Statement”) introduces the importance of e-commerce by stating: “Electronic Commerce will be the engine of economic growth in the twenty-first Century.”¹¹⁷ It became clear that in order to succeed in its mission, it was vital for Jordan to have a modern and high capability information technology sector. The private sector in Jordan formulated a strategy

112. See *id.* art. 5.

113. See UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, 34th Sess., ¶ II-7 (2001), available at <http://www.uncitral.org/english/texts/electcom/ecommerceindex.htm>.

114. See generally Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931, 1933-34 (1998).

115. See generally Draft Uniform Rules on Electronic signatures, UNCITRAL, 33rd Sess., U.N. Doc. A/CN.9/WG.IV/WP.76 (1998), available at http://www.uncitral.org/english/workinggroups/wg_ec/dig-sign-bckdocs/wp-76.htm.

116. See, e.g., Council Directive No. 2000/31, O.J. L 178/1 (2000). In practice, Singapore became the first country to enact the UNCITRAL Model Law in its passage of the Electronic Transactions Act on June 29, 1998. The State of Illinois has also adopted the UNCITRAL Model Law. Other governments also support the principles contained in the UNCITRAL Model Law. See also Joint Statement from Australia and the United States of America on Electronic Commerce, 34 Wkly. Compilation of Pres. Documents, Dec. 7, 1998, at 2392 (on file with author) (joint statement of United States and Australia encouraging adoption of Model Law); President William J. Clinton & Vice President Albert Gore, Jr., A Framework for Global Electronic Commerce, at 5 (stating the U.S. government’s position supporting principles of UNCITRAL Model Law).

117. U.S.-Jordan Joint Statement on Electronic Commerce (Oct. 2000), available at www.jordanusfta.com/documents/joint_statement_on_e-commerce.pdf [hereinafter U.S.-Jordan Joint Statement]. The U.S.-Jordan Joint Statement goes on to provide that e-commerce has “the potential to invigorate economies by enhancing productivity, streamlining distribution, and revamping corporate structures.” *Id.*

aimed at launching Jordan's information technology sector. A group of members of the Jordan Computer Society orchestrated the REACH initiative, an attempt to create an environment leading to development and enhancing the abilities of human resources in the information technology sector.¹¹⁸ It also aimed to build foundations that would help to place Jordan in the knowledge-based international economy. The REACH initiative examined Jordan's policy and proposed a plan for both the private sectors and the government.¹¹⁹ The REACH initiative argued that active and sustained support by the government was also a key prerequisite for success.¹²⁰ It further attempted to produce a national strategy for increasing the quality and quantity of the Jordanian commodities and services.¹²¹

However, the REACH initiative did not take practical steps on important issues, steps which might have made it more useful. The private sector in Jordan must recognize that a serious private sector can draw strategies and propose model laws for the legislators to adopt. The government, as a public sector, ought to create a mechanism in partnership with the information technology industry to ensure that positive intentions and healthy schemes are translated to concrete actions. This includes enforcing existing laws and adding suitable provisions to existing regulations.¹²² Moreover, activating a comprehensive e-government initiative will stimulate information technology services and the educational sector. In other words, focused assistance and more innovative approaches to providing capital and

118. REACH, *Strategies for Jordan ITC's Development*, at http://www.reach.jo/About_reach.htm [hereinafter REACH initiative].

119. *Id.*

120. *Id.*

121. See generally REACH, *Launching Jordan's Software & IT Industry, An Updated Strategy & Action Plan For His Majesty King Abdullah II*, Economic and Commerce Bureau (Jan. 2001), available at <http://www.jordanembassyus.org/new/commercial/initiatives/>.

122. As part of its strategy to promote the development of the information technology industry in Jordan and to develop customer confidence in the Internet as a commercial medium, the Cabinet passed the Electronic Transactions Law, Temporary Law No. 85 of 2001 [hereinafter Electronic Transactions Law of 2001], effective as of Dec. 31, 2001, available at <http://www.bmck.com/whatsnew-ettransactions.htm>. The Electronic Transactions Law is based, to a large degree, on the UNCITRAL Model Law on Electronic Commerce that is currently being used by various States to modernize their existing legislation. The Electronic Transactions Law also regulates digital signatures, electronic cash, and conducting online contracts. It equates the information traded electronically with any other traditional information. It also provides for the illegal practice that might occur from electronic transactions.

marketing assistance to the industry is always a focal element.¹²³ Although the Jordanian government has taken remarkable steps towards a modern e-commerce law system, there are still holes in many important e-commerce fields, such as electronic signatures, online payments and online trade regulations, which all directly affect the further development of the domestic e-commerce industry. In this context, the Jordanian government might consider working in three dimensions. The first dimension involves increasing enterprises' awareness of e-commerce's role in lowering cost, improving efficiency, and promoting trade. It will also launch trainings to cultivate e-commerce talents. The second dimension involves focusing on improving enterprises' computerization level and increasing information exchange and e-commerce training, especially in the southern regions of the country. The third dimension involves including e-commerce in trading conferences and fairs.

b. Major Policy Issues in the Joint Statement on
Electronic Commerce

i. The Social and Regional Challenge

In the information society, low-cost information, data storage, and transmission technologies are publicly reachable. In order to succeed, the generalization of data use has to parallel comprehensive legal and social innovations that will profoundly enrich the quality of life.¹²⁴ In this context, both the U.S. and Jordanian governments intended to take the view that the challenges of global e-commerce over the Internet should be met through rational mechanisms of powerful regulations. U.S. Trade Representative Charlene Barshefsky explained:

[The United States is] seeking extension of the WTOs current moratorium on application of tariffs to electronic trans-

123. In a recent progressive amendment, the concept of Information Technology was introduced within Temporary Law No. 8 of 2002 (Amendment to the Telecommunications Law), effective as of Feb. 17, 2002, *available at* http://www.reach.jo/legislative_changes.htm. This was defined as "the creation, analysis and storage of information through electronic means." *Id.* The Law stipulates that the Ministry of Telecommunications and Information Technology as well as the Telecommunications Regulatory Commission are the public bodies responsible for the provision of the general policy, setting the investment plans and regulating the telecommunications and information technology sector.

124. *See* European Commission, Building the European Information Society for Us All: Final Policy Report of the High-Level Expert Group (Apr. 1997).

missions. [The United States] will also embark upon a program to ensure that our trading partners avoid measures that unduly restrict development of electronic commerce; ensure WTO rules do not discriminate against new technologies and methods of trade; accord proper treatment of digital products under WTO rules; and ensure full protection of intellectual property rights (IPRs) on the Net.¹²⁵

In Jordan, enhancing e-commerce or e-services use requires overcoming cultural obstacles, such as attitudes towards adopting new technologies by businesses and consumer trust towards the medium. Boosting consumer confidence in e-commerce is indispensable to overcoming the cultural barrier. A dispute resolution system might be vested in the private business associations as the first resort, and other regular tribunals as a second or last resort. Such a system would have the capability to function in a language understandable to consumers and businesses. Businesses, and e-businesses in particular, should take the leading role in establishing such a project.

Ultimately, popularizing the use of the Internet for doing business would surely result in savings in travel, personnel, legal, and other costs.

ii. Government Services and Information

E-government refers to using the Internet technologies (such as Wide Area Networks, the Internet, and mobile computing) to provide governmental services online.¹²⁶ The fruits of e-government can include reduced corruption, cost reduction,

125. Charlene Barshefsky, *Services in the New Round*, Text Submitted to the Senate Banking Committee, available at <http://hongkong.usconsulate.gov/uscn/trade/general/ustr/1999/1102a.htm> (Nov. 2, 1999).

126. See The World Bank Group, *A Definition of E-Government*, E-Government at <http://www1.worldbank.org/publicsector/egov/definition.htm> (last visited Jan. 28, 2004). It is important to define e-government as it will be used in this Article. Some authors use the term very broadly to include even internal government activities. See, e.g., Jessica M. Natale, *Virtual Legal Presence in State Government*, 1 J. HIGH TECH L. 157, 159 (2002) (describing the use of technology to enable virtual meetings between elected officials). Within the American E-Government Act, however, the definition of e-government is narrower, primarily encompassing the government's external communications with constituents. See E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2902 (2002) [hereinafter E-Government Act] (stating that "electronic Government" means the use by the Government of web-based Internet applications and other information technologies . . . to enhance the access to and delivery of Government information and services to the public").

greater convenience and revenue growth. With regard to international trade, e-government can promote exports and international investments.

In the Joint Statement from Australia and the United States of America on Electronic Commerce, a call for e-government activation was initiated.¹²⁷ The impressive processing power of computer tools can now be used to make paper documents available online. This process is now taking place with the introduction of e-government.¹²⁸ E-government applications require significant actions and strategies by governments and by Jordan's government in particular. However, from a legal perspective, Jordanian governmental entities are not required to present services online. Jordan's e-government project will not be persuasive unless the telecommunications sectors are reformed.

In the United States, on the other hand, the U.S. Congress passed the E-Government Act of 2002.¹²⁹ In brief, the Act is intended to "enhance the management and promotion of electronic government services and processes."¹³⁰ Under this Act, federal agencies are required to utilize the Internet more fully in their service to the public, including¹³¹ making public records available online.¹³² It also establishes a federal Chief Information Officer who will head the new Office of Electronic Government within the Office of Management and Budget.¹³³ Additionally, the E-Government Act requires agencies to extend services to those who do not have access to the Internet.¹³⁴

On the other hand, Jordan has amended many statutes and regulations to adapt to the age of technology. For instance, the concept of information technology was introduced within the Telecommunications Law.¹³⁵ Information technology was de-

127. See Joint Statement from Australia and the United States of America on Electronic Commerce, *supra* note 116.

128. See OECD, Symposium, Knowledge Management in the Government: An Idea Whose Time Has Come, Jan. 29, 2003, GOV/PUMA/HRM(2003)1.

129. E-Government Act, *supra* note 126.

130. *Id.*

131. See *id.*

132. See *id.* at 2911-21 (requiring, among other things, that federal courts make contact information, local court rules, docket information, written opinions, and court documents available online).

133. *Id.* at 2902-03.

134. *Id.* at 2911.

135. See, e.g., Temporary Law no. 8 of 2002, *supra* note 123.

defined as the creation, analysis and storage of information through electronic means. The Telecommunications Law stipulates that the Ministry of Telecommunications and Information Technology, as well as the Telecommunications Regulatory Commission, are the public agencies responsible for the provision of the general policy, setting the investment schemes and regulating the telecommunications and information technology sector.¹³⁶

In order to be an e-government, Jordan must overcome the non-legal obstacles, including the cost of Internet access, which especially influences the ability of individual consumers to use computers and Internet services. Providing public computers so that individuals can get online is only part of the solution to the digital divide.

Unfortunately, the information technology capability currently found in Jordan exists mainly in Amman (the capital city). Although most government ministries in Amman that provide business services are computerized, very few have an online presence. Government agencies in other municipalities are outdated and in many cases are not even computerized.

iii. Taxes

Questions of how the Internet and e-commerce will affect taxes have received much attention.¹³⁷ Due to the fact that it is possible for e-commerce to be conducted across borders between anonymous parties from different jurisdictions,¹³⁸ challenges to taxes on e-commerce transactions will appear. For instance, buyers may not have to pay sales tax on goods purchased from a seller in a different tax jurisdiction, putting non-e-commerce merchants at a disadvantage and reducing overall tax rev-

136. *See id.*

137. For a discussion of this treatment in the United States, see Austan Goolsbee & John Zittrain, *Evaluating the Costs and Benefits of Taxing Internet Commerce*, 52 NAT'L TAX J. 413, 413-28 (1999) (calculating a loss over the next few years of less than 2% of sales tax revenues). For a discussion of the full range of countries around the world, see Susan Teletscher, *Revenue Implications of Electronic Commerce: Issues of Interest to Developing Countries*, UNCTAD (Apr. 2000) (reporting a loss of tax revenues of less than one percent overall, although the figure is higher for some countries).

138. *See generally* Reuven S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 TAX L. REV. 507 (1997); Peter A. Glicklich et al., *Internet Sales Pose International Tax Challenges*, 84 J. TAX'N 325 (1996).

enues.¹³⁹ It can also be harder to estimate the income that is subject to taxation. In e-commerce it is also essential to have practical means available to enable tax agencies to revise their e-business books.¹⁴⁰ Lastly, it is important for e-businesses to know about the taxation systems they will be subject to.

The U.S.-Jordan Joint Statement calls upon the parties to “actively participate within, and coordinate with the Organization for Economic Cooperation and Development (OECD) and work toward achieving a consensus regarding the taxation of electronic commerce.”¹⁴¹ In 1998, the OECD approved a report entitled *Harmful Tax Competition: An Emerging Global Issue*.¹⁴² The OECD Report’s goal, as its title suggests, is to root out “tax havens” and “harmful preferential tax regimes” that are responsible for “reducing the tax that would otherwise be payable to them.”¹⁴³

In summary, this Report, which binds no one, has three chapters.¹⁴⁴ Chapter one gives a brief description on the taxation vis-à-vis globalization.¹⁴⁵ Chapter two defines what is considered to be “harmful” taxation practice.¹⁴⁶ Chapter three sets forth nineteen guidelines and recommendations,¹⁴⁷ it also cre-

139. See generally Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 TAX L. REV. 425 (1997) (providing background on the parallels to international taxation problems raised in State taxation within the United States).

140. Report by the Committee on Fiscal Affairs, OECD, *Electronic Commerce: Taxation Framework Conditions*, OECD Ministerial Conference, at Box 4(viii), available at http://www.oecd.org/LongAbstract/0,2546,en_2649_201185_1923249_1_1_1_1,00.html (Oct. 1998) (“With regard to the OECD Model Tax Convention, clarifying how the concepts used in the Convention apply to electronic commerce, in particular to determine taxing rights, such as the concepts of ‘permanent establishment’ and the attribution of income.”). See generally OECD, Ministerial Conference on Electronic Commerce (1998), available at <http://www.ottawaoecdconference.org/english/information/outcomes.html> (Feb. 26, 2002) (providing a full listing of Fiscal Affairs (tax) documents prepared for the conference).

141. U.S.-Jordan Joint Statement, *supra* note 117.

142. See OECD, *Harmful Tax Completion: An Emerging Global Issue* (1998), available at <http://www.oecd.org/dataoecd/33/1/1904184.pdf> (last visited Jan. 24, 2004).

143. *Id.* at 19-22, 37.

144. See *id.*

145. See *id.*

146. *Id.*

147. There are actually twenty-nine Member States, but Luxembourg and Switzerland abstained. They could have vetoed the agreement, in which case the remaining Member Countries’ ability to vote on the OECD’s recommendations would fall. See *id.* at 78.

ates a body (the Forum on Harmful Tax Practices) to scrutinize the Member States' tax practices and to encourage non-Member States to "associate themselves with" these guidelines.¹⁴⁸ Finally, the OECD Report has three annexes.¹⁴⁹ The most relevant annex is the first, which contains recommendations on how to deal with harmful taxation practice within the antitrust arena.¹⁵⁰

iv. Electronic Authentication /Electronic Signatures

The U.C.C. defines an electronic signature as "any symbol executed or adopted by a party with a present intention to authenticate a writing."¹⁵¹ Similarly, the Jordanian Electronic Transactions Law defines an electronic signature as:

Data in the form of letters, numbers, codes, characters or in other forms, incorporated in, attached to or logically associated with a data message, in electronic, numeric, optical, or other similar means, whereby it enables [authentication] identifying the signatory and distinguishing such from others by virtue of the signature, and for the purpose of indicating the signatory's approval of the content of the data m[e]ssage.¹⁵²

The U.S.-Jordan Joint Statement encourages the parties to adopt a "common legal approach" towards electronic signatures and authentications.¹⁵³ In this context, the U.S.-Jordan Joint Statement provides that the proper electronic signatures should be honored among parties, governments, and tribunals.¹⁵⁴

When e-commerce became part of our everyday lives, it became crucial to establish trustworthy electronic signatures. Abuse of electronic signatures might be a serious threat to all e-commerce components,¹⁵⁵ making the validity of most e-signa-

148. *Id.* at 57.

149. *Id.* at 63-79.

150. *Id.* at 63.

151. U.C.C. § 1-201(39) (2000).

152. Electronic Transactions of 2001, *supra* note 122, art. 2. Basically, the Jordanian definition is taken from the UNCITRAL Model Law on Electronic Signatures. See UNCITRAL: Electronic Commerce, *supra* note 70, art. 1(a) (defining an electronic signature as "data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message").

153. U.S.-Jordan Joint Statement, *supra* note 117.

154. *Id.*

155. See generally John R. Michener et. al., "Snake-Oil Security Claims" *The Systematic*

tures technically questionable. A troublesome issue raised by the expansion of e-commerce is the problem of authentication.¹⁵⁶ Many approaches for dealing with electronic signatures have been proposed.¹⁵⁷ First, the *prescriptive approach* involves enacting specific rules and standards for each method of technology (i.e., e-mails and cell phone messages).¹⁵⁸ A second approach, a *two-tiered approach*, does not create specific rules for each technology, but rather approves all authentication techniques. Nonetheless, certain approved methods of authentication are favored.¹⁵⁹ Lastly, the *minimalist* or *enabling approach* is a broad approach that makes no significant standards for recognizable authentication means.¹⁶⁰

Jordanian legislation of electronic transactions follows the *minimalist approach*.¹⁶¹ It does not set out specific criteria to which all documents must comply to be considered authentic. Rather, it begins with the governing principle that all electronic information is legally valid, and then it makes sure that those principles are consistent with other existing regulations.

v. Privacy and Security

Since no entity currently controls the information that passes over the Internet,¹⁶² the United States and Jordan must cooperate to ensure that the e-businesses do not acquire personal information through unlawful or unfair avenues. One important goal of cooperation is uniformity in the privacy concept of relevant laws. The benefits of uniformity exist in multiple dimensions. For example, uniformity aids e-commerce participants by allowing for a degree of predictability in the kinds of laws and enforcement mechanisms available when a violation of

Misrepresentation of Product Security in the E-Commerce Arena, 9 MICH. TELECOMM. TECH. L. REV. 211 (2003)

156. *See generally id.*

157. *See* Survey of International Electronic and Digital Signature Initiatives, Internet Law & Policy Forum (1999), available at <http://www.ilpf.org/groups/survey.htm> [hereinafter ILPF Survey].

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* Electronic Transactions Law of 2001, *supra* note 122.

162. *See* William Crane, Legislative Update, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. 267, 267 (2001).

law occurs over the Internet. Furthermore, uniformity builds confidence in conducting business on the Internet, making the e-commerce regime a fruitful business.¹⁶³

Modern data privacy protections are often based on the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data ("OECD Guidelines").¹⁶⁴ The OECD Guidelines have many important principles. Those principles include but are not limited to: (1) notice, which means that consumers shall be aware that they are giving up personal information; (2) purpose, meaning that the personal information acquired shall be used solely for the purpose the consumer agreed to and not for other transactions or purposes; (3) security, meaning that personal information collected should be kept secure from potential abuses; and (4) access, meaning that consumers shall have the right to access and correct their information.¹⁶⁵ The United States adopted the principles of the OECD Guidelines implicitly.¹⁶⁶ In contrast, the European Union's Data Protection Directive explicitly adopted the privacy principles suggested by the OECD Guidelines.¹⁶⁷

Jordan's policy makers can benefit from OECD efforts in enhancing privacy protection in the e-commerce sphere. The OECD has, over the last six years, placed high priority on work on the global information infrastructure, the global information

163. A 1998 Business Week Survey noted that consumers who were not at that time using the Internet "ranked concerns about the privacy of their personal information and communications as the top reason they have stayed off the Internet." *Business Week/Harris Poll: Online Insecurity*, *Business Week*, BUS. WEEK, Mar. 16, 1998, at 102. See Federal Trade Commission, *Privacy Online: A Report to Congress* (June 1998), available at <http://www.ftc.gov/reports/privacy3/toc.htm>. Thus, if uniformity in laws helps to curb instances of identity theft and compromise of consumer information privacy, Internet commerce will be positively affected.

164. See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980) (on file with author) [hereinafter OECD Guidelines] (establishing guidelines that governments often consider when addressing protection of personal data).

165. *Id.* arts. 7-14.

166. See, e.g., The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (1978), amended by Pub. L. No. 108-177, 117 Stat. 2599 (2003); 18 U.S.C. § 2510 (1995); Online Privacy Protection Act of 1999, S. 809, 106th Cong. (1999).

167. See Council Directive No. 95/46/EC, O.J. L 281/31 (1995) [hereinafter Data Protection Directive]. For a discussion of what other Council Directives say regarding Internet transmissions and e-commerce, see generally European Commission Working Party on Privacy on the Internet, at http://europa.eu.int/comm/internal_market/privacy/index_en.htm (May 7, 2003).

society, and e-commerce. Based on the work achieved by OECD member countries to fulfill the 1998 Ministerial Declaration on the Protection of Privacy on Global Networks,¹⁶⁸ this Declaration is an attempt to unify the international approaches with respect to privacy matters.¹⁶⁹

A website's privacy notice or policy is often located at the very bottom of the home page as a small link. To legitimize their e-commerce practice, e-commerce sites might have to explain clearly what information they collect about their customers and how they use it. This can be ample evidence of a private entity's commitment to respect consumer privacy.

vi. Intellectual Property Protection

Balancing the need for technology and intellectual property rights protection has always been a challenge for architects of intellectual property laws.¹⁷⁰ The digital economy and the Internet have produced different types of legal challenges to the protection of intellectual property rights. Accordingly, both Jordan and the United States have been adapting their intellectual property laws to provide adequate protection to intellectual property rights in the current era.¹⁷¹

For example, in 1998 the U.S. Congress passed the Digital Millennium Copyright Act ("DMCA") in order to balance the need for copyright protection on the Internet with the growth of e-commerce.¹⁷² The DMCA encouraged copyright owners to publish their work on the Internet by providing new ways of protecting the published work.¹⁷³ The DMCA also emphasized the importance of cooperation between copyright owners and Internet service providers to minimize violations of the copyrights

168. See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, *supra* note 164.

169. See OECD, Directorate for Science Technology and Industry, Privacy Online, Policy and Practical Guidance, available at http://www.oecd.org/document/58/0,2340,en_2649_33703_19241914_1_1_1_1,00.html (Jan. 21, 2003).

170. For a more in depth discussion of the nature of public goods in the Internet marketplace, see Catherine L. Mann et al., *Government Guidance and the Economics of Imperfect Markets for Information*, in *GLOBAL ELECTRONIC COMMERCE: A POLICY PRIMER* 37-41 (2000).

171. See U.S.-Jordan Joint Statement, *supra* note 117.

172. See Digital Millennium Copyright Act, H.R. 2281, 105th Cong. (1998) [hereinafter DMCA].

173. See generally Laura L. Mendelson, *Privatizing Knowledge: The Demise of Fair Use and the Public University*, 13 *ALB. L.J. SCI. & TECH.* 593 (2003).

of the products published on the Internet.¹⁷⁴ Again, balancing expanding knowledge and technology with protecting copyrights was a priority for the U.S. Congress. Accordingly, the U.S. Congress bans the misuse of technology to create loopholes and avoid restrictions that serve to protect the rights of copyright owners.¹⁷⁵

Not long after the U.S.-Jordan FTA entered into force, and as a response to the increasing number of companies that invest in the software development sector, an amendment to the Jordanian Copyright Law was made. One of the main features of the Jordanian Law is the acknowledgement that copyright ownership of all works created by employees shall rest with the employer if such works are related to the business of the employer and if the employer's equipment and facilities were used for production of a copyrightable work.¹⁷⁶ In any event, world-wide copyright protection will not be achieved without work from all [N]ations. Sure enough, "the ability of a single Nation-State to implement autonomous cultural and information policies is diminishing; national policymakers need the cooperation of other [N]ations if they wish to realize a particular goal (such as to ensure a secure environment for the creation and distribution of copyrighted works)."¹⁷⁷

vii. Consumer Protection

The U.S.-Jordan Joint Statement briefly mentioned the importance of consumer protection.¹⁷⁸ Consumer protection concepts overlap with privacy; consumer interests within the e-commerce sphere include but are not limited to issues that deal with unfair terms, misleading advertising, consumer credit or investment services, protection of personal data, and product safety.¹⁷⁹

Consumer privacy is complicated because of the numerous people, institutions, and companies using the Internet for un-

174. *Hendrickson v. e.Bay Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (citing 17 U.S.C. § 512 (2000)).

175. See U.S.-Jordan Joint Statement, *supra* note 117, § 1201.

176. Temporary Law No. 52 of 2001 (Amendment to the Copyright Law), effective Oct. 1, 2001, available at <http://www.agip.com/laws/jordan/c.htm>.

177. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 479 (2000).

178. See Joint Statement from Australia and the United States of America on Electronic Commerce, *supra* note 116.

179. See generally Council Directive No. 2000/31/EC, 2000 O.J. L 178 (2000).

limited purposes. The consumer is indeed the central point regarding the issue of Internet privacy. It is worth noting, in addition, that a growing number of consumers have made shopping online part of their routine.¹⁸⁰ However, many consumers using the Internet are not experienced users in terms of privacy issues, or the consequences of privacy violations. For instance, in a 1998 survey conducted by the Georgia Institute of Technology, 74.3% of the Internet users polled thought that web sites were prohibited from reselling personal information collected on them to third parties.¹⁸¹

In Jordan, the consumer may be surprised to discover that no law or regulation prohibits this practice. The sole avenue for relief is contingent upon the entity violating a general consumer law or an industry specific law concerning unfair or deceptive commercial practices. Indeed, Jordanian policy makers must initiate more influential regulations that discipline those practices. In the absence of this type of legislation, it becomes necessary to apply traditional consumer laws, regulations, and other existing rules to consumer transactions on the Internet.

Non-governmental organizations are the backbone to providing invaluable help and advice to governments, e-businesses and most importantly to consumers. Consumer-protection associations can play a role similar to their peers in the United States. Consumer-protection associations in Jordan should be able to provide consumer alerts, consumer advocacy, and even conflict management services to help the parties in e-commerce transactions.

C. Thoughts and Reflections on the Impact of E-Commerce and the U.S.-Jordan Free Trade Agreement

Evidence of the Internet's economic impact can be found not only in statistics, but also in the experiences of individuals, companies, and governments. For instance, General Motors recently announced a U.S.\$1.6 billion effort to restructure its business around electronic commerce which has already resulted in

180. See Press Release, Intelliquest Inc., Intelliquest Research Foresees a Coming Explosion in Ecommerce (Nov. 19, 1998), available at <http://www.intelliquest.com/press/archive/release62.asp>.

181. See Center for Democracy and Technology, *Behind the Numbers: Privacy Practices on the Web*, Data Privacy, July 27, 1999, available at <http://www.cdt.org/privacy/990727privacy.shtml>.

cost savings of U.S.\$800 million annually.¹⁸² General Motors also predicted that, by 2003, its Internet-based supply and manufacturing system would enable consumers to receive a custom-ordered car in ten to fifteen days.¹⁸³

Currently, governments ought to avoid unnecessary regulations and undue restrictions on electronic commerce conducted over the Internet. By using the remarkable impact of the U.S.-Jordan FTA, Jordan can be an example to other countries. Jordan also has to exploit the opportunity to get introduced to the unique practice of e-life in the United States.

II. DISPUTE SETTLEMENT IN THE U.S.-JORDAN FREE TRADE AGREEMENT

A. Dispute Settlement in the GATT/WTO

1. Background

The WTO plays a critical role in international economic management. The WTO has always been involved in international trade in terms of trade negotiations and dispute settlements.¹⁸⁴ The WTO has also been working closely with governments and other international organizations such as the International Monetary Fund and the International Bank for Reconstruction and Development to maintain a international trade-growth policy.¹⁸⁵ The new WTO dispute settlement system is predominantly based on Annex 2 of the Agreement Establishing the World Trade Organization (“WTO Agreement”) entitled Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).¹⁸⁶ The appellate proceedings of the

182. See *Why GM is Going E-Crazy*, WIRED NEWS, June 22, 2000, available at <http://www.wired.com/news/business/0,1367,37155,00.html>. See also U.S. Federal Reserve Bank of Dallas, *The New Paradigm: 1999 Annual Report*, at 13 (1999) (“In 1985, when Ford Motor Co. wanted data on how cars withstood accidents, it spent \$60,000 to slam a vehicle into a barrier. Today, Ford’s supercomputers can simulate the same collision in 15 minutes for \$200. By 2001, the cost of a frontal ‘crash’ in cyberspace will be down to just \$10.”).

183. See *Why GM is Going E-Crazy*, *supra* note 182.

184. See Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments — Results of the Uruguay Round vol. 1, art. 3(1), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

185. See *id.* art. III, ¶ 5.

186. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, Legal Instruments — Results of the Uruguay Round vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU]. The WTO Agree-

WTO dispute settlement system have been governed by the Working Procedures for Appellate Review, which was drafted and adopted by the Appellate Body of the WTO.¹⁸⁷

The main goal of the WTO dispute settlement system is to resolve problems faced by the flow of trade. The dispute settlement bodies will establish a precedent that will unify, to some extent, international trade regulations. The WTO's dispute procedure provides opportunities for professionals, specifically, for lawyers, to advise international businesses with respect to their new rights and commitments and ways in which the new dispute resolution system can be used to uphold these.¹⁸⁸

2. Legal Basis

Rulings are first made by a panel and are then endorsed or rejected by all members of the WTO. The priority is not to make rulings but to settle disputes, if possible through consultations.¹⁸⁹ WTO members agreed that the dispute settlement system is a tribunal for settling trade disputes rather than taking retaliatory steps.¹⁹⁰ This requires honoring and respecting the judgments of the WTO tribunal.¹⁹¹ If a third group of countries declares interest in the case, entry as a third party is permissible.¹⁹²

Briefly, comparing the GATT dispute settlement system with the WTO's, the procedures in the GATT had no set timetables.¹⁹³ Therefore, procedures were easier to manipulate.¹⁹⁴ The WTO system, on the contrary, has clearly defined steps and

ments covered by the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") consist of all multilateral agreements listed in the WTO Agreement Annexes 1 and 2, and all plurilateral agreements listed in Annex 4 of the WTO Agreement.

187. See WTO, Working Procedures for Appellate Review, WT/AB/WP/3 (Feb. 28, 1997), available at http://www.wto.org/english/tratop_e/dispu_e/ab3_e.htm.

188. See Mark Clough QC, *The WTO Dispute Settlement System — A Practitioner Perspective*, 24 *FORDHAM INT'L L.J.* 252, 252 (2000).

189. See *Understanding the WTO: Settling Disputes, A Unique Contribution*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 29, 2004).

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.*

194. See *id.*

timetables.¹⁹⁵ Also, under the previous GATT procedure, rulings were more easily blocked because they were adopted only by consensus. On the contrary, the WTO system rulings are endorsed unless there is a consensus to reject a ruling.¹⁹⁶

3. WTO's Dispute Settlement Stages

The process begins when a Member petitions the Dispute Resolution Body ("DRB") expressing a good-faith desire for consultation.¹⁹⁷ The subject matter of the petition can be a violation of the WTO Agreement by another Member. Non-governmental organizations can also get involved in the dispute. For example, in the Import Prohibition of Shrimp and Certain Shrimp Products case, the Appellate Body held that NGOs could submit an *amicus curiae* brief stating their position on the dispute.¹⁹⁸

The WTO Agreement ensures that any consultations will be confidential.¹⁹⁹ If the consultation is ineffective after sixty days, the Member(s) may go to the next step in which the plaintiff files the complaint.²⁰⁰ However, the party who claims urgency may request the timetable of the consultation to be twenty days.²⁰¹ Although, at this stage, the dispute settlement process is starting, mediation or other similar means may be commenced.²⁰² Diplomacy has always been a way to settle dis-

195. *See id.*

196. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 186, art. IX; Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules — Towards a More Collective Approach*, 94 A.J.I.L. 335 (2000); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999).

197. *See* Understanding on Rules and Procedures Governing the Dispute of Settlements, *supra* note 186, art. 2(1) (establishing the Dispute Settlement Body ("DRB")). *See also id.* art. 25(1) ("Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."); *id.* art. 4(3) (explaining consultation request procedure). For more information on the WTO's DSB, see *Dispute Settlement*, *supra* note 44.

198. *See generally* United States—Import Prohibition of Shrimp and Certain Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998).

199. *See* Understanding on Rules and Procedures Governing the Dispute of Settlements, *supra* note 186, art. 4(6).

200. *See id.* arts. 4(7), 6(2). *See generally* Richard O. Cunningham, *Sovereignty Revisited: Settlement of International Trade Disputes — Challenges To Sovereignty — A U.S. Perspective*, 24 CAN.-U.S. L.J. 103 (1998).

201. *See* Understanding on Rules and Procedures Governing the Dispute of Settlements, *supra* note 186, art. 4(8).

202. *See id.* art. 5(1), 5(5).

putes.²⁰³

The panel members, like any tribunal, should be independent and disinterested in the dispute.²⁰⁴ After the panel's decision,²⁰⁵ any party may seek review for the interim decision.²⁰⁶ The request for review does not prohibit the parties from continuing mediation or any other side negotiations. If any of the parties are not pleased with the review result, appeal of the interim decision is available,²⁰⁷ but only on legal, not factual, issues.²⁰⁸ The panel's timetable is forty-five days.²⁰⁹

On appeal, the Appellate Body may "uphold, modify, or reverse the legal findings and conclusions" of the panel.²¹⁰ The DRB afterwards endorses or reverses the Appellate Body decision.²¹¹ Ultimately, if a party refuses to concede to the DRB's ruling, the WTO may request voluntary compensation from it, and/or temporarily suspend concessions that benefit that party.²¹² Generally, the timetable for this stage is sixty days,²¹³ and the appellate body has no more than thirty days to issue the appellate decision.²¹⁴

The parties are expected to comply with the appellate decision within thirty days. More time will be granted in cases where compliance is impractical.²¹⁵ Otherwise, the party subject to the

203. See generally Thomas Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, 35 COMMON MKT. L. REV. 325 (1998); Pierre Pescatore, *The New WTO Dispute Settlement Mechanism*, in REGIONALISM AND MULTILATERALISM AFTER THE URUGUAY ROUND 661 (Paul Demaret et. al. eds., 1997).

204. See Understanding on Rules and Procedures Governing the Dispute of Settlements, *supra* note 186, art. 8(1)-(2). Citizens of members involved in the dispute may not serve on a panel involved in the dispute unless the parties to the dispute agree. *Id.* art. 8(1).

205. See *id.* art. 14(1). The panels meet in closed session and deliberations and documents are kept confidential. *Id.* app. 3, ¶ 2.

206. See *id.* art. 15(2).

207. See *id.* art. 16(4).

208. See *id.* art. 17(6).

209. See *Understanding the WTO: Settling Disputes, A Unique Contribution*, *supra* note 189.

210. See Understanding on Rules and Procedures Governing the Dispute of Settlements, *supra* note 186, art. 17(13).

211. See *id.* art. 17(14).

212. See *id.* art. 22(1).

213. See *Understanding the WTO: Settling Disputes, A Unique Contribution*, *supra* note 189.

214. See *id.*

215. See *id.*

decision will have to negotiate with its adversary to agree upon compensation.²¹⁶ If the parties reach a dead end, the complainant will be authorized to “suspend” its commitments to its counterpart, as a sanction.²¹⁷

4. Examples of Cases

The dispute settlement system has examined a diverse array of trade-related cases. Complaints before the WTO have addressed anti-dumping measures, such as the American Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products case,²¹⁸ the Indian case imposing importing restrictions on European goods,²¹⁹ and the European Communities case concerning importation of hormone-treated beef,²²⁰ the Japanese case regarding restrictions on the distribution, pricing, and marketing of film,²²¹ and the European Communities case regarding customs classification on computer equipment.²²²

5. Evaluating the System

From the WTO's establishment on January 1, 1995, the WTO adjudicated more cases than the GATT's dispute settlement system adjudicated in over four decades.²²³ No one can deny that a mechanism able to process such a large number of complaints and resolve of more than half of them without resorting to formal adjudication proceedings can be considered extremely helpful. The WTO dispute settlement system's main weakness is compensation. The only remedies that the WTO

216. *See id.*

217. *See id.*

218. *See* United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Dec. 15, 2003).

219. *See* India-Import Restrictions, Request for Consultations by the European Communities, WT/DS149/1 (Nov. 12, 1998).

220. *See* European Communities-Measures Affecting Meat and Meat Products (Hormones), WT/DS26/13, WT/DS48/11 (Feb. 19, 1998).

221. *See* Japan-Measures Affecting Consumer Photographic Film and Paper, WT/DS44/5 (Apr. 23, 1998).

222. European Communities—Customs Classification of Certain Computer Equipment, Appellate Body Report and Panel Report, WT/DS62/11, WT/DS67/9, WT/DS68/8 (July 1, 1998).

223. *See generally* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 417-585 (1991) (counting 207 complaints from the founding of the GATT to 1989).

grants are retaliation and compensation.²²⁴ Retaliation is a useful tool to push the offending party into compliance, but it does not represent the objectives of the systems.²²⁵ Scholars suggest replacing retaliation with monetary compensation to be paid to injured WTO Members.²²⁶

B. *Dispute Settlement in U.S.-Jordan Free Trade Agreement*

1. Structure and Operation of the Dispute Settlement Mechanisms

The U.S.-Jordan FTA's dispute settlement mechanism is the first free trade accord to include enforceable environmental obligations in the body of the agreement.²²⁷ The disputes that arise under the U.S.-Jordan FTA can take many forms. A dispute may arise "concerning the interpretation" of the agreement:²²⁸ (1) if a party believes that the other party has taken extremely harmful standards that "distort" or "substantially undermine" the goals accorded by the agreement²²⁹ or (2) by any failure to "carry out" the obligations of the agreement.²³⁰ The U.S.-Jordan FTA dispute settlement system gives special attention to transparency and encourages negotiations during all steps of the process, just like the WTO system.²³¹ The United States and Jordan signed the Memorandum of Understanding on Transparency in Dispute Settlement, obligating the parties to "solicit and consider the views of members of their respective publics in order to draw upon a broad range of perspectives."²³² According to this

224. See generally Clough, *supra* note 188.

225. See generally *id.*

226. See generally *id.*

227. U.S. Environmental Protection Agency, *Environment, Trade and Investment*, available at <http://www.epa.gov/international/trade/geninfo.html> (last updated Apr. 21, 2003).

228. U.S.-Jordan FTA, *supra* note 8, art. 17(1)(a)(i).

229. *Id.* art. 17(1)(a)(iii).

230. *Id.* art. 1(a)(ii).

231. See Paul Thanos, *U.S.-Jordan Free Trade Agreement*, EXPORT AMERICA, NOV. 2001, at 10. See also Memorandum of Understanding on Transparency in Dispute Settlement Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, art. 2, available at <http://www.jordanusfta.com/documents/memodis.pdf> (last visited Jan. 24, 2004). See generally U.S.-Jordan Joint Statement on WTO Issues (Oct. 24, 2000), available at <http://www.jordanusfta.com/documents/WTOstmt.pdf> (last visited Jan. 24, 2004).

232. Memorandum of Understanding on Transparency in Dispute Settlement Under The Agreement Between The United States and Jordan on The Establishment of a Free Trade Area, *supra* note 231.

Memorandum, if a dispute panel is established, any submission made to it shall be made available publicly; oral presentations before the panel shall be open to members of the public; the panel shall accept and consider *amicus curiae* submissions by individuals, legal persons, and NGOs; and the panel shall release its report to the public.²³³

Initially, disputes that cannot be resolved through consultation within sixty days may be referred to a panel of independent experts for a non-binding opinion. It is unclear how these independent experts will be chosen or what the nationality of the experts will be. Accordingly, experts may be nationals from countries other than the United States and Jordan.

Second, if consultation is not fruitful, the case is referred to the Joint Committee.²³⁴ The U.S.-Jordan FTA established a Joint Committee whose functions are not only to get involved in disputes, but also include supervising the agreement in general — for example, reviewing the agreement, amending it, and explaining it.²³⁵ The Joint Committee will be headed by the U.S. Trade Representative and by “Jordan’s Minister primarily responsible for international trade” and will make all decisions by consensus.²³⁶ The Joint Committee will “seek the advice” of non-governmental organizations (“NGO”).²³⁷ On these grounds, the NGOs within the U.S.-Jordan FTA will be able to play the same role they play within the WTO sphere now. This will strengthen the legal and economic nature of the U.S.-Jordan FTA.

If the Joint Committee does not solve the dispute within ninety days, the dispute may be referred to a specially appointed three-person dispute settlement panel.²³⁸ The dispute settlement panel can only issue non-binding decisions.²³⁹ The Joint Committee “shall endeavor to resolve the dispute, taking the re-

233. *See id.*

234. *See* U.S.-Jordan FTA, *supra* note 8, art. 17(1)(b).

235. *See id.* art. 15; Mary Jane Bolle, *US-Jordan Free Trade Agreement*, CRS Report for Congress, July 19, 2001, available at <http://www.fas.org/man/crs/RL30652.pdf> (last updated Jan. 23, 2001).

236. U.S.-Jordan FTA, *supra* note 8, art. 15(3).

237. *Id.* art. 15(3)(b) (“The Joint Committee may establish and delegate responsibilities to ad hoc and standing committees or working groups, and seek the advice of non-governmental . . . [organizations] (“NGO”).”). In this sense, NGOs may play an important role.

238. *See id.* art. 17(1)(b).

239. *See id.* art. 17(1)(d).

port into account."²⁴⁰ Parties may also refer the dispute to a settlement panel.²⁴¹ The parties have the discretion to form the panel.²⁴² If agreement on the formation of the panel is not feasible, each party picks a Member for the panel, and thereafter the two Members agree on a third Member. The third Member will chair the panel.²⁴³ The panel has ninety days to issue a non-binding decision and may suggest a solution for the dispute before it.²⁴⁴

In any event, if the Joint Committee fails to resolve the dispute within thirty days,²⁴⁵ then "the affected Party shall be entitled to take any appropriate and commensurate measure."²⁴⁶ The party taking the action may not act in a manner that is inconsistent with its WTO obligations.²⁴⁷ Unquestionably, this point is very critical to prevent severe harm to a simple economy, like Jordan's, as compared to the U.S. economy. In other words, the dispute settlement provisions of the U.S.-Jordan FTA seem to permit the use of trade sanctions as an enforcement mechanism. These trade sanctions may be called retaliations. Retaliation is a means of exercising pressure on the offending government to implement the panel or Appellate Body ruling, and in this sense is indirectly beneficial to businesses.²⁴⁸ If the parties were not obliged to respect the obligations and commitments under the WTO scope, article 17(2) (b) of the U.S.-Jordan FTA would be an open-ended avenue. And as noted above, one of the factors that makes the application of the rules and recommendations of

240. *Id.* art. 17(2)(a).

241. *See id.* art. 17(1)(c).

242. *See id.*

243. *See id.*

244. *See id.* art. 17(1)(d).

245. *See id.* art. 17(2)(b).

246. *See id.*

247. This principle applies to all sections of the FTA. *See* U.S.-Jordan FTA, *supra* note 8, art. 1(4).

248. In *Blacks Law Dictionary* retaliation refers to *lex talionis*, which is defined as: "The law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another." *BLACK'S LAW DICTIONARY* 913 (6th ed. 1990). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU. *See generally* ELAGAB OMER YOUSSEF, *THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW* (1988); LAURENCE BOISSON DE CHARZOURNES, *LES CONTRE-MESURES DANS LES RELATIONS ECONOMIQUES INTERNATIONALES* (1992); LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 570-71, ch. 11 (1993).

the dispute settlement bodies feasible is the broad language. However, unspecific language may create more loopholes.

Commentators provide that even though it is unlikely that trade sanctions would be imposed under the U.S.-Jordan FTA, “the U.S.-Jordan FTA could become, in effect, an important and unwelcome precedent for future trade negotiations.”²⁴⁹ The U.S.-Jordan FTA was intended to be an example of free trade cooperation between a developed country with a large economy and a developing country with a simpler economy. Thus, under the Clinton Administration, the United States attempted to insert provisions relating to labor and environment similar to those in the U.S.-Jordan FTA in its free trade negotiations with Singapore.²⁵⁰ Fortunately, the former WTO Director General, Mike Moore, addressed that point in a speech ruling out the practice of using trade sanctions to enforce environmental and labor standards. Moore stated that: “WTO members will never agree to trade sanctions to enforce labor standards. It is a line in the sand that developing countries will not cross. They fear that such provisions could be abused for protectionist purposes.”²⁵¹ He also distinguished NAFTA stating that unlike NAFTA, “the U.S.-Jordan FTA includes provisions on labor and the environment in the main text of the agreement.”²⁵² Accordingly, any matter that might affect labor or the environment may be presented as a dispute if it harms trade between the United States and Jordan.²⁵³

2. Jurisdiction

It appears that the U.S.-Jordan FTA’s dispute settlement section applies to all U.S.-Jordan FTA provisions, including those regarding labor and environment. Theoretically, any party can invoke another international dispute settlement system. In fact, the U.S.-Jordan FTA permits such invocation more than once.²⁵⁴

249. Timothy E. Deal, Statement to the Senate Finance Committee (Mar. 20, 2001), *available at* <http://www.uscib.org/index.asp?documentID=1738>.

250. *Id.*

251. Mike Moore, Director-General of the WTO, Address at the European Business School in London (Mar. 12, 2001), *available at* http://www.wto.org/english/news_e/spmm_e/spmm54_e.htm.

252. U.S. Congressman Chaka Fattah, Trade Issues, *available at* http://www.house.gov/fattah/issues/i_tr_iss.htm.

253. *See id.*

254. *See* U.S.-Jordan FTA, *supra* note 8, art. 17(1)(e).

As the foregoing discussion reveals, the WTO dispute settlement process would be the best choice to invoke.

Article 17(4)(c) of the U.S.-Jordan FTA does not allow any party to invoke the U.S.-Jordan FTA dispute settlement mechanism and any other international dispute settlement system with regard to the same claim.²⁵⁵

3. Enforcement

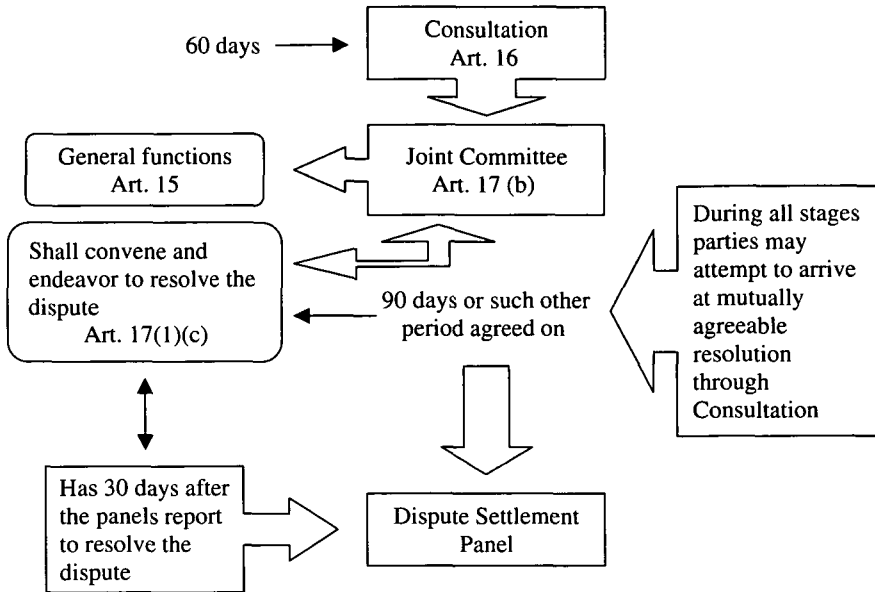
Since the U.S.-Jordan FTA is a relatively new agreement, there appear to be no cases involving formal disputes. The U.S.-Israel FTA became effective September 11, 1985, and on January 1, 1995, all eligible reduced-rate importations from Israel were accorded duty-free treatment. Thus far, there have never been any formal disputes under the U.S.-Israel FTA.²⁵⁶

In any event, within the U.S.-Jordan FTA, if the panel finds that a party did not carry out its commitments, it may, at the request of the Parties, make recommendations for resolution of the dispute. The report of the panel is non-binding.²⁵⁷ Thus, the dispute settlement system becomes solely a mediator. It is clear that the dispute settlement system in the U.S.-Jordan FTA does not have the authority to impose its opinion on the parties. Any party can simply withdraw from the process and take any other measures. However, at all stages the parties are strongly encouraged to consult each other to settle out-of-court. The following flow chart clarifies the process of dispute settlement in the U.S.-Jordan FTA:

255. *See id.* art. 17(4)(c).

256. *See generally* Sherman Katz, Remarks at the Weidenbaum Center Forum, *Finding Common Ground in Trade Policy* (Oct. 23, 2002), available at <http://csab.wustl.edu/cg/>.

257. *See* U.S.-Jordan FTA, *supra* note 8, art. 17(1)(d).



4. The New York Convention and the U.S.-Jordan FTA

As a party to the New York Convention,²⁵⁸ foreign arbitral awards are recognized and enforceable in Jordan. The Arbitration Law in Jordan considers all arbitration agreements and/or arbitration clauses that are incorporated in binding contracts, thus giving them an effect similar to that which was given to the Jordanian tribunals.²⁵⁹ Parties are not allowed to withdraw from such arbitration agreements unless there is mutual agreement, or unless the court approves such withdrawal, provided that the contract does not include any provision to the contrary.²⁶⁰

Because the U.S.-Jordan FTA dispute settlement system has no binding effect, one might think that the New York Convention can be used to enforce the FTA's dispute settlement decisions. This argument cannot stand. First and foremost, the decision of the dispute settlement body of the FTA is neither a foreign nor a non-domestic decision. Article I of the New York Convention explicitly identified its jurisdiction over the "arbitral

258. See New York Convention, *supra* note 45.

259. See generally Michael H. Strub, Jr., *Resisting Enforcement of Foreign Arbitral Awards under Article V (1)(E) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031 (1990). In the international arena, these awards often must be reduced to judgments in the enforcing jurisdiction before they can be executed.

260. See the Arbitration Law of Jordan No. 31/2001.

awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.”²⁶¹ In other words, the New York Convention explicitly excluded the domestic arbitral awards from its jurisdiction.²⁶² Likewise, the U.S.-Jordan FTA dispute settlement bodies may not be considered foreign bodies. As noted above, the dispute settlement body of the U.S.-Jordan FTA is composed of both American and Jordanian persons.²⁶³ Further, the award or the decision would be “non-domestic” if it was made under the “legal framework” of a foreign country.²⁶⁴ In that light, neither the American nor the Jordanian courts have a role in the U.S.-Jordan FTA disputes. In other words, the FTA’s dispute resolution opinions do not fall in the foreign “arbitral awards” category. Second, the dispute settlement system is not an arbitral body; it would be if it could render binding opinions.²⁶⁵ The legal definition for the U.S.-Jordan FTA dispute settlement system is that it is a mediation regime and not an arbitration one.

As a result, the New York Convention operates in a sphere

261. New York Convention, *supra* note 45, art. I(1).

262. *See id.*

263. The persons here include legal persons. *See* BLACK’S LAW DICTIONARY, *supra* note 248, at 1190 (defining a person as “1. A human being 2. An entity (such as a corporation) that is recognized by law as having rights and duties of human being”). As we have seen, the U.S.-Jordan FTA gives NGOs a vital role in the dispute settlement arena.

264. *See, e.g., Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998), *cert. denied*, *Nitram, Inc. v. M. A. N. Gutehoffnungshutte GmbH*, 525 U.S. 1068 (1999). The appellant system designer brought a third-party action against appellee turbine manufacturer, a German corporation, after appellant’s customer filed a lawsuit against it and claimed that its system was negligently designed. The matter was submitted to arbitration pursuant to the contract between appellant and appellee, and the arbitrators ruled in appellee’s favor. In affirming the denial of appellant’s motion to vacate the award, the court held that the arbitral award, which was made in the United States, under U.S. law, fell within the purview of the New York Convention and was governed by Chapter 2 of the Federal Arbitration Act, 9 U.S.C.S. §§ 201-08 (2003). The court found that because appellee was a German company, the award granted to it by the panel was non-domestic within the meaning of § 202 of the Federal Arbitration Act and article 1 of the New York Convention. The court found that the award was not against public policy, and that appellant’s arbitrary and capricious challenge was not one of the specific defenses against enforcement that were listed in Article V of the New York Convention.

265. *See* New York Convention, *supra* note 45, art. I(2). Article I(2) states that “[t]he term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.” *Id.*

other than the one the U.S.-Jordan FTA functions in. The parties to the New York Convention committed themselves to the advancement of two primary goals: the promotion of arbitration as a practical form of alternative dispute resolution and the unification of national laws relating to the enforcement of arbitral awards.²⁶⁶ The New York Convention accomplishes these goals by requiring national courts to recognize and enforce foreign arbitration agreements and awards (subject to certain exceptions) and to refer parties to arbitration when they have committed themselves to do so under a valid arbitration agreement.²⁶⁷ It also imposes a strong presumption of enforceability on both agreements and awards, subject to the exceptions listed in articles V and VI of the New York Convention.²⁶⁸ Unlike the Geneva Convention, the New York Convention places the burden of proving that the agreement is unenforceable on the party against whom recognition or enforcement is invoked.²⁶⁹

C. Thoughts and Reflections on Dispute Settlement in the U.S.-Jordan Free Trade Agreement

A few things stand out when analyzing the U.S.-Jordan FTA system. First, it is apparent from the foregoing that decisions of the dispute settlement panel are non-binding. If a party knows that a mechanism lacks the teeth to enforce its rulings it will soon become impossible to resolve disputes through consensus, as neither party would compromise, knowing that there would be no serious consequences. The U.S.-Jordan FTA's dispute resolution provisions allow parties to invoke other international dispute settlement mechanisms in addition to the FTA dispute settlement mechanism. Indeed, any free trade customs union or common market agreement must have, at a minimum, vital institutions and a dispute settlement mechanism capable of resolving disputes.

Second, the U.S.-Jordan FTA should have an appellate body capable of reviewing the lower panel's rulings in addition to supervising compliance with the rulings. The flexible nature of

266. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974), reh'g denied, 419 U.S. 885 (1974).

267. See 9 U.S.C. § 201 (2003).

268. See *id.*

269. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 21 (2d ed. 2001).

the dispute settlement process could become more of a liability than an asset. Granting the Joint Committee the power to set its own timetable could be an obstacle in resolving the dispute in the shortest time possible.

Third, because the U.S.-Jordan FTA recognizes the significance of non-governmental agency participation in resolving disputes, panels ought to combine members chosen for their expertise with professional full-time panelists. This would introduce more effective exchange of information, particularly among parties to a dispute.

In practice, Articles 16 and 17 of the U.S.-Jordan FTA have not been tested so far. The evaluation criteria of this dispute settlement system requires commonly used guidelines, for instance, numbers of cases, and rates of compliance with timelines and rulings. The unique dispute settlement system would be infrequently used, and all parties would need to abide by the process guidelines, and by panel decision and/or recommendations.

At the end of the day, one might think that if a dispute settlement system was not used, the parties have complied with the U.S.-Jordan FTA. The frequent use of the dispute resolution system may instead reflect situations of incomplete and imperfect implementation. Nevertheless, with the increase in trade covered by the U.S.-Jordan FTA, it is probably natural for a significant number of disputes to arise. Therefore, side agreements and well-balanced directives, for instance, can be convenient alternatives to trade sanctions.

CONCLUSION

This Article has attempted to analyze e-commerce and the dispute settlement mechanism in the U.S.-Jordan FTA. It has sought to explain the Joint Statement on E-Commerce, and has proposed some potential suggestions that might compensate for any future lacks. The legal system must evolve in response to changing circumstances in order to most effectively serve their changing constituencies: the growing legitimacy of a novel system of dispute resolution depends in part on its ability to adapt itself to changing circumstances in scope and jurisdiction. At this juncture, Jordan's regulations system faces the challenge of responding to the rapidly changing circumstances.