

### E-Commerce in Light of International Trade Agreements: The WTO and the United States-Jordan Free Trade Agreement

Malkawi, Bashar H.

Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

#### Empfohlene Zitierung / Suggested Citation:

Malkawi, B. H. (2007). E-Commerce in Light of International Trade Agreements: The WTO and the United States-Jordan Free Trade Agreement. *International Journal of Law and Information Technology*, 15(2), 153-169. <https://doi.org/10.1093/ijlit/eal017>

#### Nutzungsbedingungen:

Dieser Text wird unter einer CC BY Lizenz (Namensnennung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier: <https://creativecommons.org/licenses/by/4.0/deed.de>

#### Terms of use:

This document is made available under a CC BY Licence (Attribution). For more information see: <https://creativecommons.org/licenses/by/4.0>



# E-Commerce in Light of International Trade Agreements: The WTO and the United States-Jordan Free Trade Agreement

5

BASHAR H. MALKAWI\*

## Abstract

E-commerce offers economy-wide benefits. World Trade Organization (WTO) members recognized the benefits e-commerce offers and have developed a work program to facilitate the development of e-commerce. However, WTO efforts to facilitate e-commerce have stalled, leading to a slower than anticipated progress. As fundamental differences continue to stall progress in the WTO's program on e-commerce, the United States concluded a free trade agreement with Jordan. This agreement was the first ever to incorporate explicit provisions on e-commerce. This article analyzes how existing trade agreements have dealt with e-commerce. The article gives an overview of the situation in WTO. The article then examines the e-commerce provisions in the United States-Jordan Free Trade Agreement (US-JO FTA) and how the parties have tackled the obstacles that stalled the WTO work on e-commerce. It concludes that the US-JO

\* Bashar H. Malkawi is Assistant Professor of International Trade Law at the Hashemite University. He holds S.J.D in International Trade Law from American University, Washington College of Law and LL.M in International Trade Law from the University of Arizona.

Correspondence: Bashar H. Malkawi, Accounting and Commercial Law Program, Faculty of Economics and Administrative Sciences, Hashemite University, Zarqa 13115, Jordan. Phone Number: 962 (5) 390-3333 Ext. 5038. E-mail: bmalkawi@gmail.com



FTA approach regarding e-commerce did not move beyond what the WTO has already done. It is argued that although there are specific provisions dealing with e-commerce in the FTA, the parties left many loopholes to be filled.

# 1 Introduction

25

The advancement of technology has aided international business. Millions of people worldwide use the Internet to do everything from research to purchasing products online. One of the many uses derived from the Internet is the development of e-commerce. E-commerce lends itself to distinctive issues. The question this article addresses is how the World Trade Organization (WTO) and the United States-Jordan Free Trade Agreement (US-JO FTA) support and deal with e-commerce.

30

This article briefly discusses the historical advancement of the Internet, defines the concept of e-commerce and its development in the international market. The article next examines the WTO jurisprudence concerning e-commerce. In addition, the article analyzes the US-JO FTA provisions on e-commerce and highlights some the challenges Jordan face that would prevent it from fully taking advantage from e-commerce. Due to differences among WTO members, the WTO program on e-commerce has stalled. The article argues that the US-JO FTA, being the first trade agreement to include specific provisions on e-commerce, seemed to advance the issue of e-commerce. The FTA is far from perfect and there is much work to be done. The article develops a course of action that will develop strong global e-commerce.

40

45

## 1.1 *Development of the Internet*

The rise of e-commerce is based on the revolution of the Internet. The development of the Internet has evolved from a tool of communication to one of economic utility. The Internet facilitates electronic business transactions both nationally and internationally by permitting businesses to have easy access to large consumer bases at lower costs.

50

The modern structure of the Internet developed from a United States Army experiment more than thirty years ago.<sup>1</sup> The term Internet derived from the terms "interconnection" and "network." The term Internet meant the network formed by the cooperative interconnection of computing networks.<sup>2</sup> Today, the Internet exists in no physical realm. Instead, it is a giant network which interconnects innumerable smaller groups of linked computer networks.<sup>3</sup> This network is referred to as the World

55

<sup>1</sup> See 47 United States Code § 230 (e)(1) (Supp. 1998).

<sup>2</sup> Glee Harrah Cady and Pat McGregor, *Mastering the Internet* 5 (Sybex Inc: California, 2ed edition, 1996).

<sup>3</sup> See *Reno v. ACLU*, 117 Supreme Court 2329, 2334 (1997).





Wide Web (www). The Internet has the ability to disseminate information 60  
to a large number of people quickly and with minimum costs.<sup>4</sup> Because of  
the inexpensive nature of the Internet, the start-up cost to a company  
desiring to have a place on the Internet is minimal.

In its early inception, the Internet was used mainly as a tool for  
people to communicate with one another through e-mail or in chat 65  
rooms. Early utilization of the Internet for business focused mainly on  
direct business to consumer transactions. Some businesses, realizing the  
risk of surviving in the Internet environments, have moved away from  
consumer based transactions to the business to business (B2B) model  
which means the use of the Internet by one business to market his prod- 70  
uct to another business.<sup>5</sup>

### 1.2 Importance of E-Commerce in the Global Market

E-commerce can be defined as the use of the Internet to conduct busi-  
ness transactions nationally or internationally.<sup>6</sup> The Internet is pro- 75  
foundly affecting almost all businesses. The various uses of the Internet  
by business entities include the ability to advertise, generate, or otherwise  
perform regular business functions. Therefore, many firms are embrac-  
ing the Internet for many of their activities.

Numbers can indicate the importance of the e-commerce boom. In 80  
1999, global e-commerce was worth over \$150 billion.<sup>7</sup> Around eighty  
percent of those transactions were between one business and another.  
The influence of e-commerce stretches farther. It is used more as a trad-  
ing system in which buyers and sellers could establish a genuine market  
price. Surveys suggest that in 2005 eBay has around 150 million regis- 85  
tered users worldwide who are set to buy and sell goods worth more than  
\$40 billion.<sup>8</sup> The number of Internet users reached one billion worldwide  
and is growing.

Traditional companies cannot ignore the importance of e-commerce.  
Most companies must become e-firms if they are to survive. However, 90  
merely adding a website to an existing business is not enough. The whole  
business for companies needs to be redesigned around the cost-saving,  
communication-easing properties of the net. One impact for e-commerce  
is thus to intensify competition and producing benefits to consumers in  
lower prices and more choices. 95

---

<sup>4</sup> See David M. Cielusniak 'You Cannot Fight What you Cannot See: Securities Regulation on the Inter-  
net' (1998) *Fordham International Law Journal* Vol 22, pp 612-616.

<sup>5</sup> See Barrett Schaefer 'International Taxation of Electronic Commerce Income: A proposal to utilize  
software agents for source-based taxation' (1999) *Santa Clara Computer and High Technology Law Journal*  
Vol 16, pp 111-120.

<sup>6</sup> World Trade Organization, *Study from WTO Secretariat highlights potential trade gains from electronic  
commerce*, available at [http://www.wto.org/english/newse/pres98\\_e/pr96\\_e.htm](http://www.wto.org/english/newse/pres98_e/pr96_e.htm) (March 13, 1998).

<sup>7</sup> See *Dotty about dot.commerce?* The Economist (February 26, 2000).

<sup>8</sup> See *Anniversary Lessons from eBay*, The Economist (June 11, 2005).





## 2 WTO and E-commerce

E-Commerce has developed after the creation of the WTO in 1994. Consequently, the WTO does not contain specific articles for e-commerce. Nevertheless, there are several WTO agreements related to e-commerce. These WTO agreements include the General Agreement on Trade in Services (GATS) and the Information Technology Agreement (ITA).

100

The GATS is of particular significance to e-commerce for several reasons. First, the communication services which provide access to e-commerce fall under the GATS.<sup>9</sup> Second, the execution of an electronic transaction necessitates infrastructure services (distribution, payment, etc.) whose liberalization equally falls under the GATS. In view of the acknowledged importance of telecommunication services, the access to public telecommunication networks was incorporated in a separate telecommunication annex.<sup>10</sup> In addition, WTO members agreed to so-called Reference Paper. The Reference paper provides for rules that shall prevent anti-competitive behavior in the telecommunications sector.<sup>11</sup> The Reference Paper includes competition policy principles to ensure access to public telecommunication networks

105

110

The ITA is of a particular significance to e-commerce. WTO members agreed to a common position with regard to trade in information technology (IT) goods. WTO members committed themselves to reduce their tariffs on IT-goods in four steps of twenty-five percent to reach a tariff-free policy by the year 2000.<sup>12</sup> This obligation pertains to a common list of IT-products covering wide range of some 180 information technology products in five major categories: computers and peripheral devices, semiconductors, printed circuit boards, telecommunications equipment (except satellites), and software. The IT covers ninety-five percent of the existing world trade in IT-goods. Thus, the ITA brings advantages to a wide range of production activities.

115

120

125

Largely at the insistence of the U.S. at the WTO Ministerial Conference in 1998, WTO members decided to develop a work program covering

---

<sup>9</sup> See Taunya L. McLarty 'Liberalized Telecommunications Trade in the WTO: Implications for Universal Service Policy' (1998) *Federal Communications Law Journal* Vol 51, pp 1-7.

<sup>10</sup> The Telecommunication Annex states that any service supplier of any other WTO member must be accorded access to and use of public telecommunication networks and services on reasonable and non-discriminatory terms and according to conditions for the supply of a service included in the country schedule (Annex 5 a).

<sup>11</sup> The non-discriminatory, transparent access and interconnection with the public network or dominant supplier is obligatory. Even though each country has the right to maintain domestic regulations concerning universal service obligations, this right shall be used in a fair and non-discriminatory manner. The allocation of licenses but also the award of other scarce resources (numbers, frequencies, etc.) shall also be fair and non-discriminatory. The Reference Paper demands the establishment of an independent regulatory agency which must supervise the observance of the above principles and the telecom markets in general.

<sup>12</sup> See Charles Owen Verrill, Jr., Peter S. Jordan, Timothy C. Brightbill 'International Trade' (1998) *International Lawyer* Vol 32, pp 319-324, 1998.





e-Commerce.<sup>13</sup> According to the WTO Work Program on Electronic Commerce, e-commerce is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The WTO divides e-commerce transactions into three distinctive stages: the advertising and searching stage, the ordering and payment stage, and the delivery stage. Any or all of these stages may be carried out electronically and may therefore be covered by the concept of e-commerce. In other words, a buyer may purchase a book via the Internet and to be delivered physically later on or he can purchase and download the book via the Internet. In either case, the purchase of the book could be said that it is conducted through e-commerce means.

Despite the fact that the WTO Work Program on Electronic Commerce has been set up in 1998, very little progress has been achieved. The most important issue blocking progress on e-commerce in the WTO agenda is the question of categorization. WTO members differ whether products which were usually sold as goods due to their link to a physical carrier and which can now be delivered online over the net (e.g. music or movies) shall be treated as goods under the General Agreement on Tariffs and Trade (GATT) or as services under the GATS.<sup>14</sup> For example, if a book is ordered online, but is delivered physically, for the purposes of WTO trade rules, it is a good. That makes it subject to the GATT. However, if the book is delivered electronically – downloaded onto the computer – it is unclear whether this digital product should be treated as a good or a service. If goods delivered online were considered goods, they would be subject to few trade restrictions under the GATT such as tariffs.<sup>15</sup> On the other hand, if goods delivered online were considered services, they would be subject to more trade restrictions under the GATS such as market access barriers and discriminatory domestic regulations.<sup>16</sup> For example, if the delivery of films and broadcasts on the Internet is considered services, countries apply their restrictive rules on the distribution and broadcast of audiovisual works to films and television programs transmitted

---

<sup>13</sup> Four WTO subsidiary bodies had been charged with examining e-commerce issues: the Goods Council, the Services Council, the TRIPS Council and the committee on Trade and Development. See WTO Secretariat, *Development Implications of Electronic Commerce*, WT/COMTD/w/51 (November 23, 1998).

<sup>14</sup> See Kristi L. Bergemann 'A Digital Free Trade Zone and Necessarily-Regulated Self-Governance for Electronic Commerce: The World Trade Organization, International Law, and Classical Liberalism in Cyberspace' (2002) *Marshall Journal of Computer and Information Law* Vol 20, pp 595–601.

<sup>15</sup> The U.S. has been the primary advocate of the position that products delivered online should be classified as goods. The European Union counters that all products delivered electronically should be considered services. See Stewart A. Baker et al. 'E-Products and the WTO' (2001) 35 *International Lawyer* Vol 35, pp 5–7.

<sup>16</sup> When an electronic transaction falls under the GATS one must also decide under what GATS mode the service is to be registered. The GATS describes several modes for service delivery. In the case of electronic transaction, it is a point at issue if it shall be under mode 1 (cross-border trade) where a service is exported from one member of the WTO to another member or mode 2 (consumption abroad) where the service is consumed in the country of origin of the service supplier but is consumed by a customer of a different nationality.





over the Internet. Until the classification debate is resolved, WTO members decided not to impose tariffs on imported electronic transmissions. 160

There were numerous WTO meetings and seminars producing views and proposals which are reflected in the country statements or the final reports.<sup>17</sup> These meetings would include informal exchange of viewpoints than the achievement of agreements. Therefore, the classification debate issue continues to be unresolved.<sup>18</sup> There have been no new e-commerce relevant actions at the WTO until now. 165

## 2.1 *WTO Case-Law and E-commerce*

The first time the WTO addressed Internet trade was its ruling on U.S. restrictions on cross-border Internet gambling services. Antigua and Barbuda initiated a dispute case against the U.S. claiming that U.S. Internet gambling restrictions, restrictions by U.S. credit card companies on payments to offshore gambling outlets, at both the federal and state levels violated the U.S. commitments under the GATS. Antigua claimed to have lost some \$90 million over the period 2000–2004 as a result of the restrictions in the U.S., its principal market, and reducing the number of Internet gambling enterprises in Antigua from 119 to 30 in the same period. 170 175

A WTO panel ruled that online gambling restrictions imposed by the U.S. at the federal and state levels violated its market access commitments under sub-sector 10.D (other recreational services) of its GATS schedule.<sup>19</sup> In specific, the WTO panel agreed with Antigua that U.S. market access commitments under Section 10.D of its GATS schedule covering “other recreational services” do include gambling services. The panel rejected the U.S. claim that it never intended to allow the cross-border supply of such services. The panel also maintained that the U.S. commitment to allow unrestricted market access on recreational services applies to all means of delivery, including the Internet. While the WTO panel agreed with the U.S. that the U.S. ban on cross-border gambling services may be justified under WTO rules to protect “public morals,” it found that the ban was applied in a discriminatory manner since the U.S. permits remote gambling wagers through off-track betting under the 1978 Interstate Horseracing Act. 180 185 190

A WTO arbitrator has given the U.S. until April 3, 2006, to comply with a WTO ruling concerning U.S. restrictions on cross-border Internet gambling services.<sup>20</sup> Antigua has the right to seek compensation or WTO

---

<sup>17</sup> See Committee on Trade and Development, *Seminar on Electronic Commerce and Development*, WT/COMTD/18 (March 23, 1999).

<sup>18</sup> See Daniel Pruzin, *U.S. Holds E-commerce Talks with WTO Partners, Covering Nature of Digital Products*, *International Trade Daily* (Bureau of National Affairs) (June 13, 2001).

<sup>19</sup> See Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005).

<sup>20</sup> See Arbitrator Award, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/13 (August 18, 2005).





authorized trade retaliations should the U.S. fail to comply with the ruling by 195  
the deadline. Although it remains unclear what form any eventual sanc-  
tions might take, they can be in the form of additional duties on U.S.  
imports or relaxing protection for U.S. intellectual property products.

Prior to the WTO panel's findings in the dispute, neither WTO panel  
nor the Appellate Body has ever decided an Internet trade case. The 200  
WTO's ruling would have important implications, notably in the relation-  
ship between the WTO and e-commerce. Now, under the WTO jurispru-  
dence e-commerce is covered albeit under the GATS. This despite the  
fact that there is no specific e-commerce articles in WTO agreements.

205

### 3 The U.S.-Jordan Free Trade Agreement

The US-JO FTA was the first FTA with an Arab country. In addition, the  
US-JO FTA was the second FTA between the U.S. and a middle-income 210  
country, after the U.S. and Canada expanded their FTA to include Mexico  
in North American Free Trade Agreement (NAFTA). There are several  
reasons that lead the U.S. to negotiate a free trade agreement with Jordan.  
Jordan was the right candidate for an FTA economically and politically.  
Economically, Jordanian imports into the U.S. would not threaten U.S. 215  
industries.<sup>21</sup> The FTA could also spur Jordan's economic growth, allow-  
ing for the possibility that it would become less dependant on foreign aid.  
Politically, the FTA reflects the U.S.'s appreciation for Jordan's role in  
the Middle East peace process and cooperation with international coun-  
ter-terrorism activities.

On June 6, 2000, King Abdullah II and then President Clinton declared 220  
that the U.S. and Jordan would negotiate for a free trade agreement.<sup>22</sup> The  
US-JO FTA was signed in a record time on October 24, 2000. The National  
Assembly of Jordan ratified the US-JO FTA by acclamation in May 2001.<sup>23</sup>  
The U.S. Congress approved the FTA implementing legislation in Septem- 225  
ber 2001.<sup>24</sup> President Bush signed the FTA into a law on September 28,  
2001.<sup>25</sup> The US-JO FTA entered into force on December 17, 2001.

---

<sup>21</sup> A study conducted by the Office of Economics and the Office of Industries of the U.S. International Trade Commission, found that Jordan's exports to the U.S. would not have a measurable impact on U.S. industries, employment, and production. For one sector, textiles and apparels, a likely rise in U.S. imports of apparel is expected to have an effect, but this effect is a negligible. See U.S. International Trade Commission, *Economic Impact on the United States of a U.S.-Jordan Free Trade Agreement*, 5-1 Pub. No. 3340 (September 2000).

<sup>22</sup> See Gary G. Yerkey, *U.S., Jordan Make "Substantial" Progress in Talks on Free Trade Agreement*, *USTR Says*, 17 *International Trade Reporter* (Bureau of National Affairs) 1224 (August 3, 2000).

<sup>23</sup> See Royal Decree, Official Gazette No. 4486, p 1664 (April 1, 2001).

<sup>24</sup> See The United States-Jordan Free Trade Agreement Free Trade Area Implementation Act, H.2603, 107th Congress (2001).

<sup>25</sup> See United States-Jordan Free Trade Agreement Implementation Act, Public Law 107-43, 115 Statute 243, (2001).





The US-JO FTA is comprised of a preamble, nineteen articles, three annexes, joint statements, memorandums of understanding, and side letters.<sup>26</sup> The US-JO FTA covers trade in goods and services, rules of origin, and dispute settlement mechanism. Moreover, for the first time in the history of trade agreement, it covers explicitly e-commerce. The U.S. intended to use the e-commerce provisions of the US-JO FTA as model for future bilateral trade agreements.

### 3.1 *The US-JO FTA Provisions on E-commerce*

The US-JO FTA is the first bilateral or multilateral free trade agreement to include explicitly provisions concerning e-commerce.<sup>27</sup> The US-Israel Free Trade Agreement (US-Israel FTA) does contain parallel provisions regarding e-commerce. Although article 1302 of North American Free Trade Agreement (NAFTA) could be considered an article related to e-commerce, but NAFTA does not incorporate specific and direct provisions on e-commerce.<sup>28</sup> This is understandable as the US-Israel FTA and NAFTA are fifteen and six years older respectively, than the US-JO FTA. In the time since the drafting of the US-Israel FTA and NAFTA, e-commerce has become more developed with the advent of the internet.<sup>29</sup>

Article 7 of the US-JO FTA is concerned with e-commerce. The e-commerce provisions of the US-JO FTA apply to goods and services traded over the medium of the Internet. The FTA ensures that physical software and downloaded software are both treated the same.

The US-JO FTA covers e-commerce but does not define the term. There is no standard definition of e-commerce. A standard definition could have helped the parties to the FTA to define the term “e-commerce.” The FTA also uses the term “digitized products” without providing a definition. The FTA could have listed illustrative examples of digitized products, such as electronically traded software, books, and music, or the FTA could have defined digitized product broadly as any product that can be transformed into a digital format that can be traded electronically. Moreover, the FTA uses the term “electronic transmission” without defining it. Electronic transmissions could be defined as the trade by “electronic means” of digitized products.

<sup>26</sup> See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, October 24, 2000, 41 International Legal Materials 63.

<sup>27</sup> Thomas Cottier ‘The Impact of New Technologies on Multilateral Trade Regulation and Governance’ (1996) 72 *Chicago-Kent Law Review* Vol 72, pp 415–435.

<sup>28</sup> Article 1302 of NAFTA contemplates in its subparagraphs access to and use of public telecommunication networks for information services, privacy, security, and confidentiality.

<sup>29</sup> The Internet has changed the way international trade is conducted. National boundaries become secondary to network borders. For example, a simple transaction may involve data captured in one country, a transaction authorization system at a remote computer site located in a second country, and settlement of the transaction in a third country on another computer system. See Joel R. Reidenberg ‘Electronic Communications and Legal Challenge: Rules of the Road for Global Electronic Highways: Merging the Trade and Technical Paradigms’ (1993) *Harvard Journal of Law and Technology* Vol 6, p 304.



The entire purpose of the FTA is to lower barriers to trade in all sectors, include e-commerce; therefore, the U.S. and Jordan were in the position with e-commerce to never even establish a tariff that would later need to be lowered and eliminated. The FTA creates duty-free cyberspace. The FTA requires that the parties do not deviate from their “existing practice” of not imposing customs duties on electronic transmissions.<sup>30</sup> This language is based on the U.S. Internet Tax Freedom Act of 1998.<sup>31</sup> At the time the U.S. and Jordan concluded their FTA in 2000 there were no customs duties imposed on such electronic transmissions. The customs duties standstill covers tariffs, excise taxes, and a ban on multiple, discriminatory, and bit duty based on the size of the file being transferred. The customs duties standstill in the US-JO FTA is not indefinite or permanent. The parties to the FTA are merely obliged to continue the customs duties standstill until further notice.

The continuing of the no-duty policy under the FTA may result in negative economic impact because Jordan would not collect from digital transactions as it does from other transactions that actually result in the payment of tariffs. The other economic implication for no-duty policy under the FTA is that it could lead to trade-diversion because of the preferential treatment of a particular mode of delivery over other modes. The FTA language is limited to tariffs but not domestic taxes whether direct or indirect. Therefore, the U.S. or Jordan could impose taxes on seller’s income based on his economic activity. Jordan can impose value added taxes on some transactions, especially for “tangible” goods above a certain value. However, any domestic taxation of e-commerce could be limited and done in a way which ensures neutral treatment between supply modes. Jordan could consider ways to monitor transactions and collect taxes while the same time promoting simplicity and clarity in its tax regime. At any rate, Jordan should have studied the fiscal implications of a tariff-free e-commerce regime with the U.S.<sup>32</sup>

<sup>30</sup> See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 26, article 7.1.a.

<sup>31</sup> The act, which has the purpose of promoting universal access and less burdensome Internet tax policy, imposes a moratorium on all taxation of Internet access and on “multiple” or “discriminatory” taxes on e-commerce. The act also includes a declaration that the Internet should be free of tariffs, trade barriers, and other restrictions. Moreover, the act asks the U.S. President to pursue “international agreements” to ban such tariffs and other trade barriers. See Internet Tax Freedom Act of 1998, 47 United States Code §151 (2000). The moratorium begins on Oct. 1, 1998 and ends on Nov. 1, 2003. On Nov. 19, 2004, the Congress passed legislation S.150 that reinstated a four year moratorium on Internet access taxes and multiple and discriminatory taxes on e-commerce. The new legislation applies retroactively to Nov. 2003. Thus, the new legislation will expire in 2007.

<sup>32</sup> Jordan should have studied whether a new tax regime to deal with e-commerce is warranted, electronically-delivered services should be considered as a single and homogenous category for tax purposes, new rules to govern the classification of income, transfer pricing as a tax consequence of e-commerce, and the double taxation treaty between the U.S. and Jordan as it affect e-commerce.



The FTA also requires that the parties do not establish “unnecessary” barriers on electronic transmissions.<sup>33</sup> The term “unnecessary” is not clearly understandable. In addition, the standard “unnecessary barriers” is subjective since each party will determine what a necessary or unnecessary barrier is. An example of unnecessary barrier could be applying trade restrictive technology mandates and not using open and market-driven standards. Applying trade restrictive technology mandates could inhibit the growth of e-commerce.

The US-JO FTA is concerned with the delivery of services electronically.<sup>34</sup> As such, the FTA not only covers trade in goods electronically but also trade in services. For instance, a supplier in the U.S. could deliver financial services, engineering plans, or legal services, to a client in Jordan through the Internet. However, in this instance it is unclear how the mode of the delivery could be classified, whether it is virtual cross border supply or consumption abroad.

The FTA contains transparency language. It requires the U.S. and Jordan to make publicly available all laws, regulations, and requirements affecting e-commerce.<sup>35</sup> The publicity of laws and regulations affecting e-commerce will help e-traders when transacting between the U.S. and Jordan.

Until recently, Jordan did not have laws and regulations conducive to e-commerce. Jordan made some legislative reforms in order to conform to the environment of e-commerce.<sup>36</sup> For example, Jordan enacted a new law on electronic transaction and modified its existing evidence law.<sup>37</sup> By contrast, the U.S. has a myriad of statutes that regulate e-commerce. For example, the Communications Decency Act, Identity Theft and Assumption Deterrence Act, Anticybersquatting Consumer Protection Act, E-Sign Act, and the Digital Millennium Copyright Act.<sup>38</sup> Jordan should not over-regulate the Internet by enacting many laws that at some point in the future might become trade barriers to e-commerce.

The US-JO FTA does not require harmonization of e-commerce laws and regulations of the U.S. and Jordan. The absence of such harmonization could pose problems for trading in products electronically when countries have different levels of laws and regulations. However, since the nature of

---

<sup>33</sup> See United States (U.S.)-Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, *supra* note 26, article 7.1.b.

<sup>34</sup> *Id.* article 7.1.c.

<sup>35</sup> *Id.* article 7.2 & 3.

<sup>36</sup> Jordan adopted two approaches to enact laws that are conducive for the e-commerce environment. Many laws that are written for the physical world fit for the virtual world, though some modifications are needed. For example, Jordan modified its existing evidence law to recognize the digital environment. On the other hand, Jordan enacted laws specifically designed to e-commerce such as Jordan’s electronic transaction law.

<sup>37</sup> See Provisional Law on Electronic Transactions No. 85 of 2001, Official Gazette No. 4524 (2001). Article 7 of the provisional law on evidence holds that faxes, telexes, and emails constitute writing sufficient to satisfy evidence law. See Provisional Law on Evidence No. 37 of 2001, Official Gazette No. 4501 (2001).

<sup>38</sup> For more information on these laws and other bills see Marcia S. Smith et. al., *Internet: An Overview of Key Technology Policy Issues Affecting its Use and Growth*, appendix A 39 (Novinka Books: New York 2002).





the Internet and e-commerce is global then an international approach is needed for regulating e-commerce. Jordan enacted its electronic transactions law of 2001 based on the model law of electronic transactions enacted by the United Nations Commission on International Trade Law (UNCITRAL).<sup>39</sup> In the U.S., the E-Sign Act embodies the general rules of UNCITRAL Model Law of 1996.<sup>40</sup> Thus, potential conflicts between U.S. and Jordan laws are minimized since both laws are based on UNCITRAL Model Law. However, tension could arise from the pace of enacting and implementing legislations between the U.S. and Jordan.

### 3.2 *E-commerce and Technical Assistance*

The e-commerce provision of the US-JO FTA does not tie the parties' commitments to e-commerce with technical assistance. The FTA Joint Statement endorses a shared vision on policy principles that would foster the growth of e-commerce between the U.S. and Jordan.<sup>41</sup> However, the principles of the US-JO Joint Statement on e-commerce do not carry with it any legal value. There is no legal obligation to share information and experience on laws and regulations related to e-commerce. Technically, the Joint Statement is just a soft law or in a state of legal limbo. As the current language of the article 7 stands, it does not ensure that the benefits from e-commerce will be equally distributed between the parties to the FTA which are at different stages of development. Therefore, the U.S. ought to provide technical assistance for Jordan through the provision of exchange of experience and information.

### 3.3 *E-Commerce Sparks Economic Growth and Opportunity*

The introductory clause of article 7 of the US-JO FTA recognizes that e-commerce provides economic growth and opportunity. The FTA parties reflected their mutual desire not to retard the growth and opportunity offered by e-commerce. The economic growth and trade opportunity created by e-commerce depend in the first place on access to the Internet.

---

<sup>39</sup> UNCITRAL adopted the Model Law on Electronic Commerce in 1996. The Model Law has rules to validate contracts formed through electronic means, set requirements for contracts formation and electronic contract performance, defines the characteristics of valid electronic writing and an original document, provides for the acceptability of e-signatures for legal and commercial purposes, and supports the admission of computer evidence in courts. This model law provides a set of rules that guide states in removing uncertainties arising from e-commerce. See Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session, U.N. GAOR, 51st Session, Supplement No. 17, at 70 Annex 1 (1996), U.N. Doc. A/51/17, reprinted in 36 International Legal Materials 197 (1997).

<sup>40</sup> The legislation grants e-signature the same legal force as the traditional paper signature, endorses technology neutral standard for electronic authentication, states that federal rules will not preempt state law covering electronic agreements and provide certain legal protection for consumers. See Electronic Signatures in Global and National Commerce Act, 15 United States Code Service § 7001 (2000).

<sup>41</sup> The joint statement includes general principles such as: the private sector should lead in the development of e-commerce, governments should avoid unnecessary restrictions on e-commerce, industry self-regulation should be encouraged through codes of conduct and guidelines, effective means for the protection of privacy, protections of consumers online, and the right of individual to control access to the Internet.



The U.S. has the largest number of Internet users, estimated at 200 million. About seventy percent of all Internet websites are based in the U.S.<sup>42</sup> Even more, eighty-five percent of the world's Internet revenue in 1996–97 was generated in the U.S.<sup>43</sup> In 2003, online retail sales in the U.S. were \$55 billion.<sup>44</sup> The average cost of a subscription to a dial-up Internet connection in the U.S. is about \$10–15 dollars per month. Thus, Internet and e-commerce are behind the “new economy” of the U.S.

In contrast, in Jordan, online commerce is negligible.<sup>45</sup> There are seven effective Internet Service Providers (ISPs) in Jordan. Jordan had only 120,000 internet users.<sup>46</sup> The cost of connecting to the Internet, the basic key for e-commerce, in Jordan is high. To great extent, Jordan follows per hour/minute charges for Internet use. This system creates disincentive for individuals to take the time to surf the Internet to discover what information or goods or services companies on the Internet have to offer.<sup>47</sup> Only the privileged in Jordan will have an unlimited access to the Internet while the public at large will be deprived from the opportunity that e-commerce offer.<sup>48</sup>

Most commercial websites in Jordan are aimed at cataloging and advertising products rather than selling online.<sup>49</sup> In other words, these websites are cataloguers or “window shops.” Additionally, many of these commercial websites are ineffective or they are rudimentary or less sophisticated.<sup>50</sup> Business activities conducted in Jordan over the Internet

<sup>42</sup> See *E-Commerce Takes Off*, *Economist* 3, 20 (May 15, 2004).

<sup>43</sup> See Catherine L. Mann et al., *Global Electronic Commerce: A Policy Primer* 16 (Institute of International Economics, Washington, D.C 2000).

<sup>44</sup> According the U.S. Department of commerce, the figures exclude online travel services. For example, the owner of Seattle-based expedia.com and hotels.com sold \$10 billion worth of travel in 2003 (some 20 percent of travel in the U.S. is bought online. It also excludes pornography which made \$ 2 billion in the U.S. in 2003. The figure excludes also sales of financial services, ticket-sales agencies, online dating, tracing ancestors, and gambling. The gambling business is worth \$ 6 billion. About \$ 24 billion worth of trade was done in 2003 on the California-based ebay, the biggest online auctioneer. Used-car sales are now one the biggest online growth areas. See *The Economist*, *supra* note 42, at 3

<sup>45</sup> See U.N. Economic and Social Commission for Western Asia, *Trade Facilitation and E-commerce in the ESCWA Region*, at 5, U.N. Doc. E/ESCWA/ED/2001/2 (2001).

<sup>46</sup> *Id.* at 36.

<sup>47</sup> As long as per minute fees continue, users must pay to browse through the goods and services and prices that are available online. These charges create disincentive for e-commerce. Internet subscribers count roughly 2% of the population, with each subscription serving an average of six people. Costs are comparatively high: combined server and phone charges per month are the third highest in the Middle East, while Jordan's per head income is one of the lowest in the region. See *Economist Intelligence Unit, Country Report Jordan* p 18 (2003/2004).

<sup>48</sup> Nevertheless, one must say that an abundance of Internet cafes and the establishment of government-sponsored Internet centers offering free access are helping to extend access to a wider market. The government also embarked an initiative to connect schools to the Internet.

<sup>49</sup> See U.N. Economic and Social Commission for Western Asia, *supra* note 45, at 36.

<sup>50</sup> The concept of e-government in Jordan is still evolving despite the fact that important steps have been taken such as posting online some passive government information (policy statements, press releases, and contact information), e-bids, exam results, and training courses. See Gregory G. Curtin et al., *The World of E-Government* 132–133 (Haworth: New York 2003).



tilt toward importation rather than exportation. In summary, the Internet in Jordan is mainly used for research and the use of e-mail. There are no data available that would indicate how much e-commerce contributes to Jordan's economy.<sup>51</sup> Thus, it is hard to measure precisely what is the contribution of e-commerce to Jordan's economy at the macroeconomic scale. 380

Online commerce requires use of modern financial and credit transactions and payments via consumer credit cards. One of the obstacles for the development of e-commerce in Jordan is the fact that the number of credit card holders is small.<sup>52</sup> Jordan can be describes Jordan as a cash-transaction society.<sup>53</sup> In contrast, the U.S. is cashless society. Therefore, in order for e-commerce to thrive in Jordan there must be an increase in penetration of credit card use. 385

A related challenge that Jordan could encounter is the language issue. The English language dominates the contents and addresses of the Internet.<sup>54</sup> English can be a barrier to Jordanian businesses when they trade with its U.S. counterparts. Therefore, Jordanian businesses must accommodate the English language to transact. Alternatively, Jordanian businesses could use the Arabic language to target the regional Arab market only. 390 395

In Jordan, the telecommunications sector has gone through a massive deregulation and privatization process. Services that had formerly been provided by monopolists were handed over, step-by-step, to private suppliers. In its accession to the WTO, Jordan made market access concessions in the different basic telecom activities.<sup>55</sup> Jordan improved market access for Internet service providers by making explicit and specific concessions on Internet service providers or Internet backbone operators.<sup>56</sup> These concessions are particularly important considering that the telecommunications infrastructures upon which the Internet rests must be accessible and competitive. 400 405

---

<sup>51</sup> Statistics of the Department of Statistics and the Ministry of Industry and Trade in Jordan do not record the contribution of e-commerce to the economy. Therefore, it is hard to reflect accurately the state of play of e-commerce in Jordan.

<sup>52</sup> See U.N. Economic and Social Commission for Western Asia, *supra* note 45, at 36.

<sup>53</sup> Buying using credit card is not the norm. Cash is the norm. Generally, credit cards are accepted at major hotels, restaurants, and other major establishments.

<sup>54</sup> See Chris Nuttall, *Why Internet Needs to Break Down the Language Barriers*, Financial Times, March 25, 2004, at 7.

<sup>55</sup> Jordan agreed to phase put all restrictions on market access by the end of 2004. Jordan commitments cover basic services which include mobile and wireline voice and data services, local and long distance domestic telephony, mobile radio (cellular, paging and personal communications services), international telecommunications, satellite services, private leasing services, and network carrier and network access business. See Working Party Report, *Report of the Working Party on the Accession of Jordan*, WT/ACC/JOR/33/Add.2, page 13–16 (December 3, 1999).

<sup>56</sup> Jordan agreed to liberalize value-added services defined as email, voice mail, online information database storage and retrieval, online data processing, internet access service, internet content service, and videoconferencing services. *Id.*





The availability of technical infrastructure is crucial for the development of e-commerce in Jordan. Jordan, which does not produce or export IT-goods, would profit from the ITA because it will enjoy duty-free imports of IT-products. Therefore, Jordan's accession to the ITA will reduce the rate of tariffs on computers, which will make more computers available and thus help expand the market for e-commerce.<sup>57</sup> Jordan's accession to the ITA should help build up its IT sector. 410

### 3.4 General Observations

The US-JO FTA contains several principles that deal with technological neutrality—i.e., ensuring that basic trade concepts of non-discrimination, national treatment, and most-favored-nation status apply to e-commerce, and regulatory forbearance – i.e., avoiding government action that would restrict trade. However, the US-JO FTA has yet to determine if digital products should be treated as goods, services, or something new altogether. Determining whether an e-product is a good or service is a crucial assessment. If an e-product is a good, then it will be subject to the national treatment rules of the FTA. In contrast, if an e-product is a service, then each party may impose restrictions on market access and national treatment. Moreover, the e-commerce provisions of the FTA apply to digitized products traded only between the U.S. and Jordan. However, considering the global nature of e-commerce, it might be difficult to determine whether the product is of a U.S. or Jordanian origin for purposes of the FTA. 420 425

At first glance, the US-JO FTA implies that it will cover all matters concerned with e-commerce. However, the e-commerce provision of the US-JO FTA does not extend to all e-commerce matters. For example, the FTA does not address domain name, Internet security, and intellectual property.<sup>58</sup> The FTA covers border trade measures only such as, tariffs, 430

<sup>57</sup> See Working Party Report, *Report of the Working Party on the Accession of Jordan*, WT/ACC/JOR/33, (December 3, 1999).

<sup>58</sup> Legal questions brought about by e-commerce but not discussed here include domain names in cyberspace and trade marks. See Suzanna Sherry 'Haste Makes Waste: Congress and the Common Law in Cyberspace', *Vanderbilt Law Review* Vol 55, p 309, 2002. See also Serge G. Avakian 'Global Unfair Competition in the Online Commerce Era' (1999) 46 *UCLA Law Review* Vol 46, p 905. For the effects of new methods, such as price comparison, cookies, exclusive provision by Internet Service Provider (ISP), and business alliances, used by e-retailers to sell their products online that may raise issues of anticompetitive practices see Alan E. Wiseman *The Internet Economy: Access, Taxes, and Market Structure*, chapter four (Brookings Institution Press: Washington, D.C 2000). For discussion of privacy issues such as cookies on user's personal computers and unsolicited commercial communications without the consent of the addressee (opt-in system) in the age of e-commerce and the U.S. reliance on market oriented industry self-regulation approach of handling personal data see Joel R. Reidenberg 'Restoring Americans' Privacy in Electronic Commerce' (1999) *Berkeley Technology Law Journal* Vol 14, p 771. For discussion on consumers concern regarding identity, privacy, data collectors, and security of financial information see Nicole Ladouceur 'Calibrating the Electronic Scale: Tipping the Balance in Favor of Vigorous and Competitive Electronic Market for Consumers' (1999) *Canada-U.S. Law Review* Vol 25, p 295. For discussion of cyber-security issues and how not only legal but architectural responses are needed see Neal Kumar Katyal 'Digital Architecture as Crime Control' (2003) *Yale Law Journal* Vol 112 , p261.





unnecessary trade barriers, and services that facilitate e-commerce. Therefore, the title of article 7 of the US-JO FTA is misnomer and should have been “Trade-Related Aspects of Electronic Commerce” since it only covers trade related aspects of e-commerce. 435

The vagueness of the e-commerce provision of the US-JO FTA suggests that negotiators faced a dilemma while drafting it. On the one hand, the FTA parties had to recognize the importance of e-commerce to world trade. On the other, there is no universal regulatory system for e-commerce within the WTO that would have guided the FTA negotiators. The U.S. and Jordan adopted an approach whereby the current rules of trade that apply in the physical world would also apply in the virtual world. For example, the e-commerce provision of the US-JO FTA holds to the existing rules regarding market access, services, and transparency. Thus, the drafters of the US-JO FTA did not create entirely new rules for e-commerce. 440 445

It is not clear what impact the e-commerce provisions of the FTA will have on the trade flows between the U.S. and Jordan. Only time will tell how the e-commerce provisions of the US-JO FTA will operate, and if a more detailed framework within the WTO surfaces how it will be incorporated into the FTA. The differences between the U.S. and Jordan with respect to internet accessibility, efficient telecommunication infrastructure, and volume of e-commerce should have been an indication for the FTA negotiators that more balanced provisions would be needed to accommodate the e-commerce environments in each country. Refusing e-commerce on the part of Jordan is like objecting to electricity, roads, or railways. However, with Jordan is still figuring out how to reduce electricity outages, the U.S. could have agreed to share its experience regarding the development of e-commerce. 455 460

## 4 Concluding Remarks

The focus of this article has been on how existing trade agreement influence e-commerce. The article examined WTO rules and the US-JO FTA provisions on e-commerce. The US-JO FTA does not serve as a model on e-commerce. There are loopholes in the FTA that must be filled. 465

The Internet offers substantial opportunities to companies. The world has witnessed an explosion in e-commerce in the past few years, with online shopping now doubling annually. Although the WTO did not contain explicit articles covering e-commerce, it was seen that the WTO is well-fitted to advance e-commerce because of the WTO principles of non-discrimination, transparency, and market openness. However, the WTO program on e-commerce is stalled because WTO members could not agree on the so-called horizontal issues such as whether products delivered in digital form should be classified as goods or services under WTO rules. 470 475





The US-JO FTA was thought as a breakthrough to the WTO deadlock in the sense that the FTA included explicit provisions concerning e-commerce. However, a close examination of the FTA provisions on e-commerce revealed that the U.S. and Jordan did not invent specific and additional rules needed for e-commerce. The approach of the U.S. and Jordan was based on the simple premise that e-commerce is commerce, that it is only the form by which the commercial transaction is performed which may be new, and not its substance; thus the U.S. and Jordan considered that exiting WTO rules and obligations are directly applicable to commerce performed electronically or otherwise. For the present, the U.S. and Jordan maintained the status quo of uncertainty regarding how to deal with e-commerce in trade agreements. The e-commerce provisions in the US-JO FTA showed the need to push the debate over e-commerce and trade agreements forward. Future bilateral trade agreements should expand existing trade rules or draw up new rules to specifically cover electronic commerce. There is a host of e-commerce issues that need to be addressed in future bilateral trade agreements. Among them are the classification of the content of certain electronic transmissions, the definition of "e-commerce," concepts of technological neutrality, and the issue of "likeness" of e-goods; development-related issues, including access to infrastructure and technology; fiscal and revenue implications of e-commerce; and the relationship and possible substitution effects between e-commerce and traditional forms of commerce. Jordan is expected to address certain issues if it desires to broaden its benefit from the e-commerce provisions of the US-JO FTA. In network access and reliability, Jordan does not have universal, affordable access to the telecommunications infrastructure as well as sufficient bandwidth available to meet the increase demand of expanding e-commerce. In standards, the U.S. and Jordan must try harmonize some of their services to ensure seamless interoperability. In marketplace rules, an effort must be made to clarify the classification of some products as goods, services or some other category when they are delivered electronically, and to determine the financial implications of foregoing tariffs on all intangible products transmitted digitally. The U.S. and Jordan should discuss how commitments on basic telecommunications at the WTO will be implemented. In intellectual property protection, the Jordanian legislator must make necessary changes to current laws to provide protection for electronically transmitted intellectual property, and cooperative efforts will be required to make information on the rights of creators of intellectual property and the treatment of their copyrighted materials over open communications networks widely available and easily accessible.

In the area of taxation and electronic payments, Jordan must address the challenge of using electronic technologies to improve the efficiency of tax administrations while at the same time dealing with the problems of applying existing sales or value-added taxes to electronic commerce;





and Jordan will have to decide who will be permitted to issue electronic money, whether it would be appropriate to regulate digital technology and how to deal with potential abuses such as money laundering, tax evasion, illegal gambling, fraud, and counterfeiting. Rules developed in Jordan on strong encryption technology for national security reasons, but should not be so restrictive as to create unnecessary barriers to electronic trade. In marketplace confidence, Jordan must ensure the right to redress for consumers in cases of dishonest or fraudulent claims by either buyers or sellers in e-commerce transactions.

E-commerce does not only depend on the availability of hardware, trust-related measures, and consumer protection. In addition, human capital (E-literacy) is important. Therefore, the U.S. should aid Jordan in this respect by promoting trade in high-technology goods and encouraging investment in the high-technology sector so that Jordan can take maximum advantage of the vast opportunities that the technological revolution offers.

