E-Commerce: The Challenges it Poses to the Concept Permanent Establishment[1]

I. Introduction

It is without question that the advent of the Internet and electronic commerce ("e-commerce") poses a challenge to the manner in which countries around the world tax business profits generated from e-commerce transactions. The primary reason why e-commerce, the sales of goods and services on-line, poses a challenge to the already established concepts of the taxation of foreign income is twofold. First, the established sourcing rules do not always provide a clear-cut answer as to where goods sold and services provided on-line are to be sourced. Secondly, since the sale and purchase of goods and the rendering of services on-line make it virtually impossible to establish a "fixed place of business," it is difficult to determine the residence of an e-commerce business, and as such, it is difficult to establish whether that business has a permanent establishment. As a result of the international community's fears that e-commerce will erode their tax bases, the Organization for Economic Cooperation and Development (OECD), as well as OECD countries and non-OECD countries have begun to explore the manner in which a jurisdiction can establish that it has the right to subject the business profits of an e-commerce business to taxation in its jurisdiction. Although there is still much debate surrounding the issue of how e-commerce will be taxed, there appears to be a general consensus among most countries, including the OECD, that the existing principles of taxation, particularly the concept of "permanent establishment," are adaptable to the new e-commerce business model.

The scope of this paper is limited to determining whether the concept of "permanent establishment" can be modified to apply to e-commerce or whether a new concept needs to be developed in determining when and how business profits derived from e-commerce transactions are taxed. Part II of this article will examine the infrastructure of the Internet, and in turn, reveal what technological capabilities made "e-commerce" part of the global economy. Furthermore, since this paper seeks to demonstrate that the organizations regulating and monitoring the Internet may prove to be part of the solution, in determining which jurisdiction has the right to tax e-commerce business profits, Part II will also provide an overview of those organizations and the regulations which have been established. Part III will describe the current tax rules in the United States and the treaty concept of "permanent establishment." Part IV will demonstrate that the current tax rules in the United States and the concept of "permanent establishment" are no longer meaningful in attempting to tax the business profits generated from e-commerce transactions. Part V will discuss and provide a critical analysis of the most recent proposed recommendations and solutions offered by the United States and the OECD as to how they believe e-commerce business profits should be taxed. Part VI will recommend that since the proposed recommendations and solutions discussed in Part V are not viable, due to the infrastructure of the Internet, the application of the "place of effective management" as a tie-breaker warrants further consideration for the purposes of determining how the taxation of e-commerce should be resolved.

II. Infrastructure of the Internet and E-commerce & the Internet's Regulatory Organizations

Although it may be true that the Internet is not owned by any particular entity or person, this does not mean that the Internet is not regulated and monitored to ensure that the procedures and mechanism developed for its proper use are abided by.[1] This section will describe the infrastructure of the Internet which makes e-commerce a reality, as well as examine the various organizations and agencies currently regulating and monitoring the Internet. Whereas a general[2] understanding of the Internet's infrastructure[3] may be helpful in assisting the OECD and countries around the world determine how the Internet may constitute a "permanent establishment," it is equally important to fully understand how the Internet is organized and regulated when making this determination. When analyzing the regulations and standards which these organizations have developed, this paper will specifically focus on the manner in which an entity or individual registers for a domain name, as well as the regulations and procedures regulating domain names. The main goal of this paper is to demonstrate that already established procedures, standards, and mechanism currently used to monitor and regulate the Internet may assist the OECD and other countries in finding a viable solution as to how to deal with the challenges that the Internet and e-commerce pose to the concept of "permanent establishment," especially if it is concluded that the concept of "permanent establishment" is not conducive within the context of e-commerce.

A. Infrastructure of the Internet

The word “Internet” refers to a hierarchy of networks that are interconnected throughout the world;[4] therefore, the word “Internet” encompasses the connection between a particular computer, such as one in a person’s home or office, with numerous phone cables and various networks or computers located throughout the world.[5] The two most common ways in which a personal computer is able to establish a connection to the Internet by way of an “Internet Service Provider” (ISP) are as follows:[6]

One way is through the use of a modem which serves to connect a user’s personal computer to a telephone cable, thus establishing a connection with the user’s ISP.[7] It is also possible to connect through a high speed digital phone line, known as a “Local Area Network” (LAN), in which case a modem is not necessary.[8] Once the user is connected to his ISP, but before he has access to the Internet, there are several intermediate steps or connections which must be established.[9] First, ISP’s have “Points of Presence” (POP) in each region where their service is provided.[10] In other words, when a user dials into his ISP, he is accessing a POP which is a merely a rack of modems that the user’s modem dials into by way of high speed telephone lines.[11] Once the user has established a connection with the his ISP’s POP, yet another connection needs to be established to a “Network Access Point” (NAP).[12] NAP’s are located both in the United States, as well as all over the world to enable Internet Service Providers, and other commercial, international and federal POP’s to connect with each other.[13] Peering agreements provide the mechanism which allow a particular ISP to exchange their user’s demands and information with other ISP’s, thus enabling all of the ISPs’ users throughout the world to intercommunicate with each other.[14]

The specialized computers which allow users to connect from a POP to a NAP and finally to the Internet, all in a matter of seconds, are called “routers.”[15] In essence, routers serve to pass information from one computer to another and ensure that the information or messages from users reach their proper destination.[16]

When finally connected to the Internet, the user will want to either send an e-mail or navigate through the World Wide Web (WWW).[17] The WWW is a “navigation tool for locating and accessing information presented in graphic form available on the hard drives and other storage facilities of computers know as “Web Servers” on the Internet.” [18] The WWW works by allowing users to navigate through the Internet by clicking on links such as words or pictures, but in order to use the WWW, the user must have the appropriate web browser software installed in his computer.[19] Alternatively, the user may have a specific website’s address which he is interested in visiting. So, how does a user get to a specific website? Each computer has an assigned unique “Internet Protocol Address” (IP Address) which is nothing more than a string of numbers;[20] the Internet Protocol is the language which computers use to communicate with each other over the Internet.[21] To enable users to remember the IP Address of web sites, “domain names” were created.[22]

For example, www.yahoo.com is a domain name, but the IP Address for www.yahoo.com is really a string of numbers; needless to say, since each IP Address or domain name is assigned to a particular website, it is crucial that they be unique.[23] When a user types in a domain name into the web browser, a “Domain Name Server” (DNS) will translate the domain name into its IP Address, and providing that it is a valid domain name, the user’s DNS will connect through multiple DNSs until it establishes a connection to the DNS's IP Address the user has requested.[24] In essence, a DNS maps the human readable names of a website to the IP address.[25] In sum, the web browser, once instructed that the user wants to access www.yahoo.com, will form a connection with yahoo's web server and the page will appear on the user's screen.[26]

B. Organizations Regulating the Internet

The Internet, originally consisting of only four host computers, was developed in 1969 to allow the U.S. Defense Department's network, ARPANET,[27] to connect to radios and satellites.[28] Initially, the objective was to create a system of communication and research that could operate and remain unaffected during a military attack.[29] In the 1980s, the National Science Foundation (NSF) developed the National Science

Foundation Network (NSFNET) to facilitate the research capabilities of educational institutions such as universities.[30] By 1983, due to the growth of the Internet, the management of the numerical IP Addresses became unmanageable and the Domain Name System (DNS) was created by Mr. Jon Postel and Joyce Reynolds to allow word addresses to be used, thus making the Internet more user-friendly.[31] All of these functions were overseen by an organization which eventually came to be known as the Internet Assigned Numbers Authority (IANA).[32] It was not long before the Internet's users were located around the world, and as a result, it was necessary for IANA create regional directories (ARIN in North America, RIPE in Europe, and APNIC in the Asia/Pacific region) to which blocks of numerical IP addresses were assigned;[33] this further enabled ISPs throughout the world to apply to these regional directories for IP address which would then be reassigned to end users. The management of the Internet took a sharp turn when the United States government stopped funding ARPANET and NSFNET and various commercial entities took over the Internet.[34]

After the control of the Internet shifted from the government to the private and commercial sectors, organizations were established to ensure the Internet was operated in an organized manner. The Internet Society, a nonprofit group, was established in 1992 to oversee the formation of the policies and protocols that the define the way the public uses the Internet.[35] Due to the advent of the commercial expansion of the Internet, and as more IP Addresses were assigned to the growing number of computers, in 1993, the NSF and Network Solutions, Incorporated (NSI) entered into an agreement making NSI the authoritative database of Internet registrations.[36] NSI was responsible for maintaining a central database with all the registered domain names to make sure they were not duplicated.[37] The NSI's central database was then copied to the Top Level Domain[38] (TLD) servers around the world to create primary routing tables used by every computer connecting to the Internet.[39] In addition, InterNIC, the registration services of NSI, provided registration services for entities and individuals seeking to acquire a domain name, as well as maintained the WHOIS database.[40] The WHOIS database is "an electronic white pages of information about Internet users, hosts, domains, and networks [and] [i]t can be used . . . to find the administrative contact for a given domain."[41]

Until 1998, NSI was the only company providing registration services for domain names.[42] However, the United States government, recognizing that the "Internet [wa]s rapidly becoming an international medium for commerce, education and communication," decided that "the traditional means of organizing its technical functions need[ed] to evolve as well."[43] More importantly, as of 1995, NSI was permitted to charge a $50 registration fee, and as the registration of domain names became a lucrative business, the

United States government was concerned that NSI was becoming a monopoly.[44] In July 1997, President Clinton directed the Secretary of Commerce to privatize the DNS to increase and facilitate international participation.[45] In 1998, the Department of Commerce chose the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation, as the organization which would replace the NSI since ICANN "has a stated purpose to perform the described coordinating functions[46] for Internet names and addresses and is the organization that best demonstrated that it can accommodate the board and diverse interest groups that make up the Internet community."[47]

In anticipation of the lawsuits and dispute resolutions that would arise as a result of trademark infringement[48] and the fact that trademark owners would not know which jurisdiction[49] would be able to enforce a judgment protecting their trademark rights, the Department of Commerce recognized the need to provide "trademark holders and domain name registrants . . . access to searchable databases of registered domain names that provide the information necessary to contact a domain name registrant when a conflict arises between a trademark holder and a domain name holder.[50] Therefore, for the purpose of being able to contact the domain holders, in the event that there was a trademark dispute with respect to the domain name, the Department of Commerce determined it would be necessary for ICANN to maintain a database which would allow trademark owners to obtain information to enable them to contact the domain name holder,[51] as well as a mailing address where service of process could be sent.[52] To fulfill this objective, ICANN is required to provide all internet users access of every domain name holder's contact information[53] and require domain holders to keep their information up-to-date.[54] In addition, the Department of Commerce made it a requirement for ICANN to maintain a "searchable database" which by "utilizing a simple, easy-to-use, standardized search interface" Internet users would have access to up-to-date contact information, a mail address for service of process, and state a "convenient dispute resolution process . . . [which] registries/registrars will abide by the decisions resulting from an agreed upon dispute resolution process or by the decision of a court of competent jurisdiction."[55]

Today, the primary purpose of ICANN is to accredit registrars;[56] only accredited registrars are permitted to provide registration services for TLDs.[57] Prior to registering a domain name, an accredited register is required to obtain certain contact and technical information from the individual or entity attempting to register, and [t]he registrar will keep records of this information, as well as submit it to the central directory known as the "registry."[58] Furthermore, during the domain registration process it is disclosed that "[i]nformation about who is responsible for domain names is publicly available to allow rapid resolution of technical problems and to permit enforcement of consumer protection, trademark, and other laws," and such information is made available on the WHOIS database.[59] Although ICANN is a United States based non-for-profit corporation, there are accredited registrars throughout the world providing TLD registration to users throughout the globe.[60] This notwithstanding, ICANN does not accredit registrars providing Country Code Top Level Domains (ccTCDs)[61] (i.e., .uk for United Kingdom, .us for United States, .tv for Tuvalu), although there are some ICANN accredited registrars which are also accredited to provide registration for ccTCDs.

With respect to the registration of ccTLDs, the rules and registration process may differ significantly since each country establishes their own rules and procedures.[62] Some countries reserve their country's ccTLD for their citizens.[63] In fact, many countries require that an entity or individual "[is] a legally constituted company within the country in question, . . . provide proof of [their] business registration, a form of tax identification number, date of incorporation, or company identification number, . . . [and] have a local administrative contact in the country in question to serve as the point of contact for [the] domain."[64] Other countries, like the United States, organize their country code based on geographical divisions; for example, a .us address' structure is as follows: organization's name.city.state.us.[65] Yet other countries stand to profit from their ccTLD's by "licensing their national rights to administer their country code domain name to other marketing-oriented companies."[66] For example, Tuvalu, whose country code is .tv, was recently paid $50 million dollars by a Los Angeles company, "dotTV," to administer the .tv country code.[67]

C. What is E-Commerce?

E-commerce has been defined by the United States Department of Treasury as "the ability to perform transactions involving the exchange of goods or services between two or more parties using electronic tools and techniques."[68] The terms "electronic tools and techniques" refers to the all of the components of the Internet which is commonly referred to as the infrastructure of the Internet (i.e., modems, servers, and ISPs). In addition, the WWW is the tool largely responsible for making e-commerce a possibility since it allows user to click on hyperlinks to access web pages and web sites where companies and individuals advertise and sell their products and services.[69] It can be argued that e-commerce is not a revolutionary new way of doing business; e-commerce can be likened to the concept of the mail order catalog business with the only difference being that rather than the catalogs being disseminated through the postal service, the web pages and web sites are disseminated through the Internet and the WWW via telephone cables and computers.[70] Furthermore, e-commerce can be said to be similar to traditional commerce since a web page, where the seller displays his goods and services, serves the purpose of a traditional store or office, as well as the forum in which the buyer places his order and his payment is accepted.[71] Notwithstanding the fact that e-commerce is similar in many ways to traditional business models, with respect to the manner in which buyers and sellers interact at arm's length for the exchange of goods and services, e-commerce poses a challenge the manner in which jurisdictions assert their power to tax the business profits of such transactions.[72] Part IV of this article will provide an analysis of the manner in which e-commerce challenges the current U.S. tax system, but prior to that discussion, it is important to understand the manner in which the current tax rules in the United States operate when taxing foreign companies doing business in the United States.

III. Overview of the Current U.S. Taxing System

Currently, a foreign entity conducting business in the United States may be subjected to the tax laws of the United States in one of three ways, depending on whether the corporation's business activities are "effectively connected" to a "U.S. trade or business," whether there is a treaty between the United States and the country in which the foreign entity resides, or whether the foreign entity earns fixed or determinable annual or periodic gross income. From the outset, it must be noted that it is easier for a foreign entity to be subjected to the taxing jurisdiction of the United States in the absence of a treaty since the threshold of whether a corporation is "engaged in U.S. trade or business" and whether such business profits are "effectively connected income" is essentially one of a "taxable presence;" this threshold is easier to met than that of "permanent establishment." Likewise, it is more difficult for a foreign entity to meet the threshold of a "permanent establishment," under a treaty, since that test requires a greater presence, or a "fixed presence," in the United States before its business profits can be subjected to the United State's taxing system. It is imperative to understand the different situations in which a foreign entity may be subjected to the U.S. tax system in order to properly advise clients with respect to how they should structure their business operations. Moreover, for this very same reason it is essential to determine and define when the threshold of e-commerce business activities will amount to a level deemed sufficient enough such that a taxing jurisdiction may impose its tax laws on a foreign entity.

A. U.S. Trade or Business

In the absence of a treaty, a foreign entity's business profits must meet two elements before its business profits are taxed. If it determined that the foreign entity is "engaged in a U.S. trade or business within the United States " and that its profits are "effectively connected" with its trade or business, the foreign entity's business profits will be taxed at the corporate tax rate under § 11 of the Internal Revenue Code. The Internal Revenue Code provides that a foreign entity's gross income is taxable when it is "effectively connected with the conduct of a trade or business in the United States."[73] The Internal Revenue Code goes on to explain that a foreign entity's gross income "includes only gross income which is effectively connected with the conduct of a trade or business in the United States."[74] Therefore, in order to determine whether the "effectively connected" income will be taxable, it must first be determined whether such income is "connected to a trade or business in the United States" under § 864(b).[75] A close reading of § 864(b), however, indicates that the Internal Revenue Code does not provide an extensive list indicating what is to be defined as a "U.S. trade or business."[76] Instead, § 864(b) merely states that personal services[77] and trading in securities or commodities[78] will not be deemed to be a U.S. trade or business. Due to the Internal Revenue Code's lack of guidance in defining a U.S. trade or business, case law has developed and revenue rulings have been issued to provide assistance, and as a result, whether there is a "U.S. trade or business" depends largely on the facts and circumstances[79] of each case.[80]

According to case law, in order for a taxpayer to be deemed as having a "U.S. trade or business," his activities must be "considerable, continuous, and regular."[81] Typically, the performance of personal services conducted by a salesperson[82] or the sales of goods in the United States[83] will be deemed to be activities meeting the definition of "considerable, continuous, and regular." The court also held in *Lewenhaupt v. Commissioner,*[84] that a foreign person owning property in the United States, whether acting alone or through an agent, would be deemed to be engaged in a U.S. trade or business if his activities were "beyond the scope of mere ownership of real property, or the receipt of income from real property."[85] A foreign corporation or taxpayer cannot avoid meeting the threshold of "considerable, continuous, and regular" by contracting with a third party to conduct his business activities; if a court finds that a foreign taxpayer has an agent conducting business on his behalf, the U.S. trade or business activities will be imputed to the foreign taxpayer such that his gross income will be subject to U.S. tax liability.[86]

Courts have also identified certain activities which will not amount to "considerable, continuous, or regular" conduct such that certain activities will not be subject to U.S. tax liability. If the business activities are investments in securities,[87] mere ownership of property[88] or can be categorized as "isolated and sporadic"[89] business activities, they will not be deemed to constitute a U.S. trade or business.

In addition, to a finding that the business activities be "considerable, continuous, or regular," the activities must also be "effectively connected" to the United States.[90] The court in *Piedras Negras Broadcasting Co. v. Commissioner*,[91] focused specifically on the language "within the United States."[92]

The case involved a Mexican radio station, and although the radio station was incorporated in Mexico, approximately 95% of its advertisement contracts were with advertisers located within the United States.[93] In reaching a determination as to whether the gross income could be deemed to be a U.S. trade or business, the court found it irrelevant that most of the contracts were entered into with advertisers located in the United States.[94] Instead, the court focused on the where the contracts were executed, where the radio equipment was located, the location from which the broadcasting took place, and the location of the physical labor and services that made the broadcasting possible, all of which were in Mexico.[95] As a result, the court held that the gross income was derived from sources outside the United States and therefore not subject to U.S. tax.[96]

B. Permanent Establishment

In the event that there is a treaty[97] between the country in which the foreign corporation is incorporated, whether the gross income of a foreign corporation or taxpayer is "effectively connected" to a "U.S. trade or business" is immaterial since the foreign corporation will only be subject to U.S. taxation if it is deemed to have a "permanent establishment." Under the treaty, the determinative factor of whether a foreign corporation or taxpayer's "business profits" will be taxed depend on whether a foreign corporation or taxpayer has a "permanent establishment" to which the profits are attributable;[98] at the crux of the analysis is determining whether a "permanent establishment" is present in the United States. Since tax treaties provide more guidance than the Internal Revenue Code, by defining the concept of permanent establishment, as well as by providing examples of what business activities constitute a permanent establishment, it is usually easier to determine whether business activities meet the threshold of the "permanent establishment" test, as opposed to that of an "effectively connected U.S. trade or business." Providing that a foreign corporation or taxpayer is deemed to have a "permanent establishment," its "business profits" will be taxed at the corporate tax rate under § 11 of the Internal Revenue Code.[99]

According to the U.S. Model Treaty,[100] a finding of a "permanent establishment" requires that the foreign corporation have a "fixed place of business through which the business of an enterprise is wholly or partially carried on."[101] The U.S. Model Treaty states that "a place of management, a branch, an office, a factory, a workshop, and a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources" are deemed to be "fixed" such that they would constitute a "permanent establishment."[102] It should be noted that it is irrelevant whether the "fixed place of business" is owned or leased by the foreign entity or taxpayer.[103] In addition, if the foreign entity or taxpayer uses the "fixed place of business" of another person, a "permanent establishment" may still be found to exist.[104] Even in the absence of any of a "fixed place of business", under Article 5(5) an agent who has the authority to enter into binding contracts, on behalf of a foreign entity or person, will be deemed to be a "permanent establishment."[105] Article 5 also explicitly states several activities that will not constitute a permanent establishment. Article 5(4) provides a list of activities that will not constitute a "permanent establishment" and are as follows: facilities used to store, display or deliver goods or merchandise, the maintenance of stock or goods for the purpose of storage, display, delivery or for the processing of another enterprise, a fixed place of business solely to purchase goods or merchandise, to collect information, or for carrying on preparatory or auxiliary activities for the enterprise.[106] In addition, a "permanent establishment" will not be found to exist if a foreign entity or person utilizes a broker or an independent agent as long as the they are acting independently and in the ordinary course of their business.[107]

C. Fixed or Determinable Annual or Periodic Gross Income

Finally, if a foreign corporation or nonresident alien is neither engaged in a “U.S. trade or business” which income is deemed to be “effectively connected” and it does not have a “permanent establishment,” its income may still be taxed at a flat withholding rate of 30%[108] or a lower treaty rate if there is a treaty between the foreign corporation’s country of incorporation and the United States. Fixed or determinable annual or periodic (FDAP) income is defined as interest, dividends, compensation for personal services, rents, royalties, income from the disposition of U.S. real property, and the sale or exchange of inventory property.[109] Because e-commerce does not challenge the manner in which FDAP income is taxed an in-depth analysis exceeds the scope of this article.

IV. Current Taxing Law & the Infrastructure of the Internet: The Conflict with the Concept of Permanent Establishment

Although e-commerce is said to be similar to traditional forms of commerce, with respect to the buyer and seller relationship, e-commerce is, at the same time, regarded as a different business model which is posing challenges to the established tax laws and concepts.[110] This section will highlight the issues and sub-issues which have arisen due to the intersection of the infrastructure of the Internet and e-commerce and the current established tax laws.

Because Internet companies incorporated in the United States are subject to the United States’ tax laws based on the established notion that U.S. citizens and corporations are taxed on their world wide income, companies incorporated in the United States technically do not pose a problem with respect to how their gross income derived from e-commerce transactions will be taxed; e-commerce businesses incorporated in the U.S. are taxed on their entire gross income regardless of where or how such income is derived, and as such the taxation of U.S. e-commerce businesses is a non-issue.[111]

With respect to foreign based e-commerce businesses, the issue is whether a foreign e-commerce business has established a “sufficient nexus with the United States” which would allow the United States to subject the foreign business’ “effectively connected” business profits to taxation in the United States.[112] The United States Treasury Department acknowledges that the “U.S. trade or business” concept was “developed in the context of conventional types of commerce, which [is] generally conducted through identifiable physical locations [and that] electronic commerce does not seem to occur in any physical location but instead takes place in the nebulous world of cyberspace.”[113] In addition, the Joint Committee on Taxation also recognizes that the “[p]resent law generally does not provide special income tax rules for Internet-based transactions and activities and, as a result, issues may arise as to the proper application of general U.S. tax concepts to these activities in the cross-boarder context.”[114] In particular, the Committee recognized the need to address the issues of when a foreign e-commerce business’ activities constitute a taxable presence in the United States such that those activities can be deemed to be part of a “U.S. trade or business.”[115] Not withstanding these acknowledgments, the United States and the OECD insist that the established concept of “permanent establishment” can be applied with the context of e-commerce.

The main reason why a foreign based e-commerce business will not meet the threshold of a “U.S. trade or business” is due to the infrastructure of the Internet which permits a foreign e-commerce business to be physically located outside of the United States while at the same time engaging in an extensive amount of business within the United States.[116] Furthermore, an analysis of the operation of e-commerce clearly indicates that the United States cannot attempt to subject foreign e-commerce businesses to taxation in the United States. For example, it has been held that in order for sales generated in the United States to be deemed to be of a "U.S. trade or business," such sales must either be carried out through a salesperson in the United States or an agent.[117] Therefore, mere solicitation or advertising for goods purchased in the United States, through a web page, which does not require the presence of a salesperson or agent in the United States, will clearly not constitute a "U.S. trade or business." The argument that a web server or an ISP acts as the agent of the foreign e-commerce business also fails since an agent must be actively involved in the performance of the sales, as well as be dependent on the foreign entity; with respect to e-commerce, a web server's or ISP's "agency" functions can at best be categorized as passive and independent.[118]

In light of the fact that web pages cannot be deemed to establish a "U.S. trade or business," some commentators have suggested that the web servers or the ISPs maintaining the web servers that located in the United States, in which a foreign e-commerce business stores its web pages, be used to establish that the business profits of a foreign e-business are "effectively connected to a U.S. trade business within the United States."[119] Although at first glance this appears to be a viable solution, it in fact is not for the simple reason that web servers or ISPs can be located anywhere in the world. Once a foreign e-commerce business, with a web server located in the United States, realizes that the United States is subjecting it to U.S. tax on the basis of location or agency, all it has to do is simply re-locate its web page to a server which is located outside the United States.[120] Moreover, as was stated earlier, a United States court, in *Piedras Negras Broadcasting Co. v. Commissioner*, held that if equipment responsible for broadcasting advertisements into the United States was located outside of the United States, any gross income derived from such advertisement would not be subject to U.S. tax.[121] Given the current state of the law in the United States and the infrastructure of the Internet, it is clear that the e-commerce transactions and activities of foreign business will not be within the reach of the United States' established concept of "U.S. trade or business."

The lack of a foreign entity's U.S. trade or business makes "the absence of a permanent establishment irrelevant since the United States will not tax that person's business income."[122] In other words, the only way that Article 5 in a treaty can be invoked by a foreign entity is if they come within the grasp of a "U.S. trade or business;" since it has been demonstrated that this is not a possibility, the foreign entity would not have a need to resort to the treaty to ameliorate its tax liability as there would be none. Assuming, however, that the concept of "permanent establishment" would be relevant, it is a concept which is proving to be inadequate in light of e-commerce. This notwithstanding, several arguments have been made suggesting that location of web servers can establish the presence of a "permanent establishment." Some of those arguments, as well as the reasons as why "the location of [a] server [should] not be relevant for business purposes and thus, may not be a logical taxing point"[123] are discussed below.

As stated in Part III, one way to establish that there is a "permanent establishment," would be by establishing that there is a "fixed place of business through which the business of an enterprise is wholly or partially carried on."[124] However, due to the mobility of web servers, it is improbable that web servers will be deemed to fit within the traditional definition of "a place of management, a branch, an office, a factory, a workshop, and a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources."[125] Additionally, since web pages can be maintained on a web server owned and operated either by the business enterprise itself or by an ISP provider, which can be located anywhere in the world, suggesting that a web server could constitute a permanent establishment is not a logical proposal.[126]

Another argument which has been proposed is based on the premise that a "permanent establishment" can be found to exist even in the absence of a "fixed place" providing that an agent, when acting on behalf of the foreign entity, has the authority to enter into contracts which bind that foreign entity.[127] As such, some claim that a web server containing a web page which is capable of "executing all aspects of an enterprise's daily business transactions such as: contracting with customers, receiving payments, and performing other desired services" is acting as an agent of the foreign e-commerce business making it subject to taxation.[128] This argument is questionable, however, for the reasons as follows: First, it is doubtful that a court would hold that a web server is a dependent agent since it is not a human being and cannot knowingly enter into a binding contract.[129] For even if a web server could serve the purpose of executing a contract between an e-commerce customer and the e-commerce business entity, the e-commerce business could always argue that the presence of the human labor, which ultimately programed the web page such that it would be able to execute a binding contracts, is located in a foreign jurisdiction.[130] Another argument which may be advanced to negate the fact that a web server is an agent is that it is merely stores the web page which, like a store, displays goods and merchandise. Finally, it can be argued that a web page merely collects a customer's information and performs preparatory or auxiliary activities the foreign e-commerce business which is located outside of the taxing jurisdiction. As was explained in Part III, all of these functions and activities would not be deemed to constitute a "permanent establishment."

In sum, in light of this analysis, it is doubtful that the location of web servers, web pages, ISPs, or any of other equipment making the Internet and e-commerce a reality, such as cables and computer terminals could be deemed to constitute a "fixed place of business" or a dependent agent when attempting to establish that an e-commerce business has a "permanent establishment."

V. Analysis of the Recommendations and Suggestions by the United States and the Organization for Economic Cooperation and Development: Application of the Permanent Establishment Concept in E-Commerce A. United States

The United States was one of the first countries to take the initiative to address the manner in which e-commerce challenges existing tax laws[131] by exploring tax issues related to e-commerce, establishing an advisory commission, and enacting e-commerce related legislation.[132] As early as November 1996, the Department of the Treasury published the "Selected Tax Policy Implications of Global Electronic Commerce" ("Treasury Report") which was intended to be an exploratory paper on the challenges and issues raised by e-commerce on existing tax rules and concepts, and it was also intended to encourage an open debate on these pressing issues.[133] The Treasury Report also alludes to the fact that since finding answers to the issues arising from e-commerce are of an international nature, the involvement of the OECD, as well the members of the international community is vital.[134]

The Treasury Report indicates that one of the leading difficulties in resolving e-commerce tax issues is finding a balanced e-commerce tax policy such that it does not hinder the technological and economical developments of the e-commerce, as a result of double taxation, while at the same time not losing sight that, due to the principles of neutrality and fairness, e-commerce business profits should be taxed as are the business profits of other business models.[135] In addition, the Treasury Report identified that one of the main substantive issues related to e-commerce is determining which countries will have the jurisdiction to tax e-commerce transactions, and in reaching this determination the paper suggests that, due to the infrastructure of the Internet, there will have to be a greater focus on the concept of residency and less importance should be placed on source-based taxation.[136] Furthermore, the Treasury Report states that current tax rules and concepts can withstand the challenges posed by e-commerce and that although the Internet and "[r]ecent technological innovations may appear to be radical . . . careful examination will reveal that few, if any, of these emerging issues will be so intractable that their resolution will not be found using existing principles, appropriately adjusted."[137]

In spite of the fact that the Treasury Report expresses a desire to adhere to existing tax principles, the Report does not indicate any means by which there could be any sort of adherence to the established treaty "permanent establishment" concept. Since there must be a "fixed place of business" in order for there to be a finding of a "permanent establishment," the Report recommends that a determination needs to be made as to whether a web server operated in the United States by a foreign entity could be held to constitute a fixed place of business.[138] At the same time, however, the Report acknowledges that excluded from the treaty definition of a "permanent establishment" are locales which are simply used to store, display or assist in the delivery of goods, and that due to a web server's operational nature and functions, a web server is more likely to resemble a warehouse than a "permanent establishment."[139] Since "persons engaged in electronic commerce may not have a U.S. permanent establishment because they do not have a fixed place of business in the United States, unless a permanent establishment is created by imputation," a "permanent establishment" will not be deemed to exist; the Report attempts to make an argument that a "permanent establishment" can still be found to exist as a result of a foreign entity's "agency" relationship with its ISP.[140] The Report suggests that due to the foreign entity's use of a U.S. based ISP provider, or alternatively, the fact that a U.S. based customer will access information of a foreign e-business from a U.S. based ISP provider, that this, in and of itself, may establish that the ISP provider is an agent of the foreign entity;[141] however, while making this argument, the Report also concedes that such an agency relationship can at best be deemed to be that of an independent nature which would not suffice in terms of meeting the dependent agency standard required by the treaty.[142]

In addition to the Treasury Department's discussion paper, the Internet Tax Freedom Act ("ITFA")[143] established the Advisory Commission on Electronic Commerce to study the issues presented by e-commerce on a domestic and international level, and the Advisory Commission submitted a report to Congress in April of 2000.[144] The main accomplishment of the ITFA was to impose a three year moratorium on e-commerce transactions to provide an ample time period for an adequate resolution of the tax issues raised by electronic commerce. Nevertheless, the Advisory Commission did not make any significant contributions with respect to the manner in which the issue of "permanent establishment" should be resolved, except to suggest that the OECD "is the appropriate forum to sponsor the required international dialogue, which will require input from the business community and non-OECD countries."[145]

Although the United States government is to be commended for attempting to find answers to questions posed by e-commerce, an analysis of its studies and enacted regulations indicate that it has made more strides with respect to finding solutions to outstanding domestic e-commerce tax policy concerns rather than those on an international level. The only contribution made by the United States, with respect to the issue of the modification of the concept of "permanent establishment," was the recognition that the concept of residency, as opposed to source, should become more relevant within the context of the e-commerce and technological developments; however, the studies fail to provide any viable solutions or recommendations as to how this can be achieved. Furthermore, and in light of a critical analysis of the OECD's recent developments, which are discussed below, it is clear that the observations provided by the Treasury Report suggesting the adherence to the current concept of "permanent establishment," albeit with some modification, do not seem very probable.

B. Organization for Economic Cooperation and Development

The OECD has held various conferences and undertaken several studies with respect to numerous issues raised by e-commerce,[146] but due to the limited scope of this paper, this section will solely focus on the conclusions reached by the OECD dealing with the circumstances under which a "permanent establishment" can or cannot be found to exist given the infrastructure of the Internet, and thus permitting a jurisdiction to subject an e-commerce business to its tax laws.[147]

The OECD's Committee on Fiscal Affairs ("Committee") established Working Parties to work on various subjects and issues raised by e-commerce, and a working party may be assisted by Technical Advisory Group ("TAG") which are composed of private sector and government tax experts from OECD and non-OECD countries.[148] Working Party No. 1, which is the working party responsible for resolving tax treaties issues, such as the concept of "permanent establishment," submitted draft proposals on October 1999 and March of 2000 in attempt to resolve the issue of how the current definition of permanent establishment should be modified to fit within the concept of e-commerce.[149] By December 2000, Working Party No. 1 and the Committee reached its conclusions and submitted its final proposals as to what should and should not be deemed to constitute a permanent establishment in the context of e-commerce in a document entitled Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to Commentary on the Model Treaty Convention of Article 5.[150] These conclusions, that have since been adopted by the Committee, may serve to officially modify Article 5 in the OECD Model Tax Convention as evinced by their incorporation into the Draft Contents of the 2002 Update to the Model Tax Convention ("Draft").[151] Notwithstanding the incorporation of the proposals in the Draft, the Committee stated that they "look forward to receiving the views of the TAG on the more important issue of whether any changes should be made to that definition or whether the permanent establishment concept should be abandoned."[152] Evidently, it can be deduced that although the Working Party's proposals were implemented in the Draft, the OECD is only its preliminary stages with respect to reaching a resolution on this matter.

Nonetheless, the Committee acknowledged and reached a determination as to the three broad points which are as follows: (1) "a website cannot, in itself, constitute a permanent establishment," (2) "a website hosting agreement typically does not result in a permanent establishment for the enterprise that carries on business through that web site," and (3) "an ISP will not, except in very unusual circumstances, constitute a dependent agent so as to constitute a permanent establishment of that enterprise."[153] In addition, the Committee added that the reasoning behind the adoption of the notion that a website cannot constitute a permanent establishment is due to the fact that it is important for e-commerce businesses to be able to determine, prior to establishing their operations, whether they will be deemed to have a taxable presence in a country by the mere utilization of a website in a specific jurisdiction.[154] This reasoning seems rather logical considering that an e-commerce business' website can be viewed and used to make purchases all around the world; if a website would be deemed to constitute a permanent establishment, an e-commerce enterprise could be subject to tax in multiple jurisdictions leading to double, if not multiple, taxation.

Although the conclusions do not explicitly state whether computer equipment, such as a web server, will be deemed to constitute a permanent establishment, the Committee did allude to the fact that it would be unlikely. The Committee stated that in the event that an e-commerce taxpayer is subject to taxation based on the fact that he has computer equipment present within the taxing jurisdiction, "the ability to relocate the equipment should reduce the risks . . . [of] hav[ing] a permanent establishment where they did not intend to."[155] Likewise, the Committee stated that if it were determined that computer equipment constitutes a permanent establishment and an e-commerce business wishes to be taxed in that jurisdiction, all the e-commerce taxpayer would have to do is locate its equipment within the boarders of that taxing jurisdiction.[156] Clearly, such statements indicate that the Committee recognized the reason why it would not be prudent to suggest tax policy in which computer equipment and servers would be deemed to constitute a permanent establishment - the ability to relocate such equipment and evade tax rules could be accomplished effortlessly.

In a further attempt to suggest that computer equipment, in and of itself, should not lead to the finding of a permanent establishment, the Committee went on to state that "whether computer equipment at a given location constitutes a permanent establishment will depend on whether the functions performed through that equipment exceed the preparatory or auxiliary threshold, something that can only be decided on a case-by-case analysis."[157] Since the OECD only implied that it may not be wise to consider computer equipment and web servers as constituting a permanent establishment, but did suggest that it may, in cases where computer equipment exceeds preparatory or auxiliary threshold, several countries were quick to adopt the position that such a policy may lead to uncertainty.[158] For example, the United Kingdom took the position that web servers or web sites cannot constitute a permanent establishment under any circumstances.[159] On the other hand, Spain and Portugal opined that there are certain circumstances in which a web server could constitute a permanent establishment since they do not believe that a "physical presence," in the context of e-commerce, is a prerequisite for a finding of a permanent establishment;[160] however, Spain and Portugal did not express under which "circumstances" computer equipment would constitute a permanent establishment.

In addition, since some commentators, albeit a minority, were of the opinion that a certain amount of human intervention was necessary for there to be a finding of a permanent establishment, the Committee addressed this issue and concluded that human intervention was indeed not a requirement in order for there to be a finding of a permanent establishment.[161] The commentators argue that paragraphs 2 and 10 of Article 5 imply that human intervention is a requirement for there to be a finding of a permanent establishment.[162] The Committee, however, disagreed with this interpretation since that would further imply that the absence of human intervention would negate the finding of a permanent establishment; this is not the case since there can in fact be a permanent establishment even if an enterprise's own personnel is not present at the site.[163] As to paragraph 10 of Article 5, the OECD expressed the same concern; if the minority's interpretation were to stand, that would mean that a permanent establishment would cease to exist in the event that there were no personnel working at the fixed place of business. Clearly, this would not be a desired outcome since it would provide a loophole for enterprises wishing to avoid meeting the requirements of permanent establishment in a given jurisdiction.[164]

On October 2, 2001, the OECD issued the Draft Contents of the 2002 Update to the Model Tax

Convention, and its purpose is to update the Model Tax Convention.[165] The Draft contents contain the previously approved change which are discussed above and which were made to on December 22, 2000 by the Committee of Fiscal Affairs for the purpose of clarifying the definition of permanent establishment in the context of e-commerce.[166] Although much of what is stated in the document entitled Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to Commentary on the Model Treaty Convention of Article 5 is reiterated in the Draft, the Draft provides greater insight as to the OECD's conclusions since explanations and examples assisting in the interpretation of its conclusions are provided.[167]

With respect to and consistent with the Committee's opinion that a website cannot constitute a permanent establishment,[168] the Draft explains that the reason why a web site cannot be classified as a permanent establishment is due to the fact that a web site "is a combination of software and electronic data [which] does not constitute tangible property, [and] it[,] therefore[,] does not have a location that can constitute a 'place of business' as there is no 'facility such as premises or, in certain instances, machinery or equipment.'"[169]

As to the question of whether computer equipment, a website hosting agreement, or an ISP constitute a permanent establishment, as was stated above, the OECD did not take a solid stand in the Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to Commentary on the Model Treaty Convention of Article 5 document;[170] however, in the Draft, the OECD's takes the position that under certain conditions, computer equipment, particularly web servers, may be deemed to be a permanent establishment and constitute a "fixed place of business."[171] In determining the circumstances under which a server may constitute a fixed place of business, the OECD distinguishes between an e-tailer[172] which operates its own web server and those who enter into hosting agreements with ISPs to maintain a web page on one of its own web servers. In essence, the issue is whether the e-tailer operates and owns or leases its own web server or whether the web server, storing and displaying the e-tailer's web site, is owned and operated by an ISP;[173] this question clearly goes to the sub-issue of whether the e-tailer ultimately has control to determine the location of where the web server containing its web site is to be located or "fixed." This deduction is reached because the OECD acknowledges that when an e-tailer contracts with an ISP, it often times has no control in determining where the ISP's web server is to be located, and even if the e-tailer could request the ISP to locate the web server in a particular location, the web server would still not be within the disposal of the e-tailer.[174] In such cases, involving an ISP, the OECD concludes that it is not possible that the e-tailer could be deemed to have a permanent establishment.[175]

On the other hand, the OECD takes the position that in the case where an e-tailer owns or leases a web server, on which it stores its web site, the location of the web server constitutes a permanent establishment "*if* [emphasis added] the other requirements of the Article are met."[176] The fact that the OECD states that "the other requirements of Article [5 must be] met" can lead one to conclude that it is not the web server, itself, which is a determinative factor in the finding of a permanent establishment. Even if there is a web server, owned and operated by the e-tailer and the other requirements of Article 5 are not met, then according to the OECD's language, a permanent establishment would still not be deemed to exist. In sum, a web server alone, would not be deemed to be sufficient to constitute a permanent establishment, and precisely because of this fact, it is safe to conclude that a web server does not affect the analysis of the Model Tax Convention as it currently stands. Also, if this is the case, all an e-tailer has to do to avoid being classified as having a permanent establishment is to contract with an ISP to store its web site on one of its servers. If the argument is made that an e-tailer may not want to do that so as to have more control over the web server that stores and displays its web site, the e-tailer would then see to it that his own web server is located in another jurisdiction.

The OECD goes on to explain that a web server can only constitute a permanent establishment "if it meets the requirement of being fixed."[177] This statement, however, is analogous to an oxymoron since it is a well-established fact that web servers can be moved with relative ease. The OECD ignores this fact by stating that "what is relevant is not the possibility of the server being moved, but whether it is in fact moved."[178] In addition to this, the web server must also be located at that certain location "for a sufficient amount of time so as to become fixed within the meaning of paragraph 1."[179] Although the Draft does not indicated the length of time necessary for such a finding to be made, this "requirement" may provide a loophole since the web server can be easily moved shortly before the time requirement is met. In short, as this analysis points out, even in the cases in which the OECD claims that a web server "may" constitute a permanent establishment, the OECD's own language clearly demonstrates that a web server does not and cannot logically play a determinative role in determining whether an e-tailer has established a permanent establishment. Furthermore, the OECD's requirements of control and time which must be met in order for an e-tailer to constitute a permanent establishment can be easily evaded.

Other issues which are further clarified in the Draft in relation to whether computer equipment may constitute a permanent establishment are whet her an e-tailer wholly or partially carries its business through such equipment, whether the computer equipment's functions exceed that of an auxiliary or preparatory nature, and whether the e-tailer has employed personnel at the location of the web server.[180] To the question of whether an e-tailer's business activities are wholly or partially carried out from the location where the web sever is located, as well as whether the web server's functions exceed a preparatory or an auxiliary nature, the Draft states that such issues must be determined on a case-by-case basis.[181] The Draft does not provide an explanation or examples illustrating what would constitute activities that would be deemed as "wholly or partially carried on at a location where the enterprise had equipment," other than to allude to the fact that as a prerequisite to a finding that there are such activities, "the enterprise has [to have] facilities at its disposal where business functions of the enterprise are performed."[182] This is similar to the reference which was made above that a permanent establishment can only be deemed to exist "if the other requirements of the Article are met."[183] As to the latter point, the Draft indicates that activities which would constitute auxiliary or preparatory are as follows: (1) providing a communications link, (2) advertisement of goods or services, (3) relaying information through mirror servers, (4) gathering market data, and (5) supplying information.[184] In addition, the Draft defines activities that exceed the auxiliary and preparatory stages as being functions that are "an essential and significant part of the business activity . . . or activities that go beyond activities covered by paragraph 4 [of the Model Tax Convention]."[185] Another indication which may be useful in making the determination as to whether an e-tailer's activities exceed that of an auxiliary or preparatory nature is to determine what constitutes the "core functions for a particular enterprise."[186] On the issue of personnel, the Draft maintains the same position it stated in the Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to Commentary on the Model Treaty Convention of Article 5.[187]

Lastly, the Draft discusses the issue of whether an ISP provider may be deemed to be the agent of an e-tailer under paragraph 5 of the OCED Model Tax Convention, an issue which was not discussed in the Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to

Commentary on the Model Treaty Convention of Article 5.[188] The Draft concludes that it is unlikely that an ISP can be deemed to be an agent of an e-tailer since an ISP does not have the capacity to enter into contracts on behalf of the e-tailer, and at most will "constitute independent agents acting in the ordinary course of their business, as evidenced by the fact that they host the web sites of many different enterprises."[189] The Draft also adds that in order for there to be a finding that agent has bound his principal, it is a requirement under Article 3 of paragraph 5 that the agent be a "person," and since an ISP is not deemed to be a person, it could not meet the requirements of an agent.[190]

VI. Recommendation: Application of the "Place of Effective Management" as a Tie-Breaker in E-Commerce as a Viable Solution

The principal goal of tax treaties is to eliminate double taxation which usually arises when there is a jurisdiction claiming that it has a right to tax an entity based on source-jurisdiction, while another jurisdiction claims it has the right to tax the entity by virtue of the entity's residency in that jurisdiction. Alternatively, there are circumstances in which an entity is subjected to tax in two or more jurisdictions, based on the notion of residency, since an entity may in fact be a resident of two or more countries; according to the manner in which the OECD has attempted to resolve the issue of permanent establishment, in the context of e-commerce, this could be a likely outcome since a company may have multiple servers in various jurisdictions while at the same time being incorporated in yet another jurisdiction.[191] For example, if an e-tailer is incorporated in Country A, but maintains web servers in various countries, it is not difficult to conceive a situation in which Country A subjects the e-tailer to tax based on the fact that the e-tailer would be deemed to be a resident of Country A, since it is incorporated there, while the other countries would assert that since the e-tailer maintains web servers within their jurisdictions, the e-tailer is also subject to tax in these countries by virtue of the e-tailer's web server.[192] With this said, not only can it be concluded that the OECD's conclusions as to how to solve the problem of the application of the concept of permanent establishment is erroneous, but more importantly, it can be concluded that the OECD must look elsewhere to prevent the possibility that e-tailers may be subjected to tax in multiple jurisdictions.

Just as the OECD reached and adopted conclusions with respect to how the concept of permanent establishment is to be modified to fit within the context of e-commerce, the OECD is also currently analyzing whether the concept of "place of effective management" tie breaker rule may serve as a solution in determining how countries can claim jurisdiction to tax a company, in light of the current technological developments.[193] Although the publication, "The Impact of the Communications Revolution on the Application of 'Place of Effective Management' as a Tie Breaker Rule," is an attempt to modify the concept of "place of effective management" to fit in today's current technological environment, whereby it is difficult to determine a company's actual "place of effective management," this part will recommend that the "place of effective management" should also be modified to provide a solution when determining which jurisdiction has a right to subject an e-tailer to tax within its jurisdiction - particularly since the concept of permanent establishment cannot be modified to work within the framework of e-commerce. This part will first analyze the manner in which"place of effective management" has been applied and defined in a traditional commercial environment, as well as the limitations the OECD has identified with respect to the application of the concept of "place of effective management" in the current and developing technological commercial environment. This part will then recommend that the OECD look at the regulations which have been developed by ICANN for guidance, in particular, the regulations which require individuals or entities registering a domain name to provide detailed contact information, such that the concept of "place of effective management" can be modified to apply to e-tailers which may be subjected to taxation in multiple jurisdictions.

A. The Traditional Concept of "Place of Effective Management"

Traditionally, the tie-breaker rules of Article 4 of the OECD Model Tax Convention has addressed the problem of an entity which is being subjected to tax in multiple jurisdictions due to a residence-residence conflict through the use and application of the "place of effective management" concept.[194] Article 4, entitled "Resident,"[195] has been applied to individuals and to other entities, such as companies, when attempting to determine the residence of such individual or company for the purposes of avoiding double taxation.[196] Due to the nature of the residency test of Article 4, establishing that an individual is a resident of a country can be accomplished with relative ease since one may look to the "domicile" or "residence of an individual,"[197] as well as to "various indicia of personal attachment to a State;"[198] on the other hand, with respect to a company, the determination may be more difficult since Article 4 does not define "place of effective management," the criteria used to determine the country in which a company has its principal residency.[199] The determination of where a company has its "place of effective management" is a factual one[200] requiring one to look to "the place where key management and commercial decisions that are necessary for the conduct of the enterprise's business are in substance made."[201] It should be noted that the "place of effective management" determination will not be influenced solely on the place where a company is incorporated if the principal business decisions are made elsewhere.[202] Furthermore, the Commentary on Article 4 states that although a company may have "more than one place of management, it can only have one place of *effective* management at any one time."[203]

Since the OECD Model Tax Convention fails to provide in-depth guidance in defining "place of effective management," commentators have developed two tests in an effort to determine where a company's "place of effective management" is located.[204] The first test, "Central Management & Control" ("CM & C"),[205] looks to see where a company is incorporated, "centrally managed and controlled,"[206] and where the voting shareholders reside.[207] The second test which has evolved is called the "Place of Management"[208] test which differentiates between a "place of effective management and merely administrative management or decision making by executive bodies."[209] Under this test, the "place of effective management" is defined to mean the locale where "important policies are made,"[210] whereas the place where administrative management or decisions are made refers to decisions that are "limited to control of the company and basic decisions."[211] If a decision cannot be reached based on this distinction, then the "place of effective management" is deemed to be where the principal director resides.[212] Furthermore, it should be noted that in most cases, "place of effective management will ordinarily lie with the directors . . . since paragraph 24 of the Commentary on Article 4, makes it clear that the relevant consideration is where the high level decision making occurs."[213]

The underlying problem facing the concept of "place of effective management" is very similar to the problem facing the concept of "permanent establishment"- that problem is "the communications and technological revolution [which] is fundamentally changing the way people run their business."[214] As was noted above, the goal of the publication, "The Impact of the Communications Revolution on the Application of 'Place of Effective Management' as a Tie Breaker Rule," is to modify the concept of "place of effective management" to fit in today's current technological environment, and this is beyond the scope of this article;[215] however, it is interesting to note that if the concept of "place of effective management" is modified to accommodate e-commerce also, then a resolution as to the concept of "permanent establishment" within the context of e-commerce will be irrelevant. Rather than utilizing the concept of "permanent establishment" to determine which jurisdiction has the authority to tax an e-tailer, the e-tailer will instead be subjected to taxation in the place in which it is deemed as having its "place of effective management." In accomplishing this objective, the four options which have been developed to deal with the limitations confronting the concept of "effective place of management" should also be taken into consideration to determine where an e-tailer should be subjected to tax.[216]

B. Finding a Solution: Application of the Concept of Place of Effective Management in E-Commerce

This subpart will analyze three of the four options[217] which have been proposed by the OECD in an attempt to determine where a company's "effective place of management" is located, as well as demonstrate whether and how these three options can be further modified to accommodate the companies of the twenty-first century - e-tailers.

The first option[218] which has been proposed suggests that the concept of effective place of management should be a three-part test which looks to see 1) where a company is incorporated, or in the alternative, the jurisdiction's corporate tax laws which are applicable to the company, 2) where the directors and shareholders reside, *and* 3) the jurisdiction in which the company has the strongest economic nexus.[219] The OECD states that although the place of incorporation can be easily determined, it may not provide an answer when determining the residency of a company for the reasons as follows: 1) The OECD recognizes that because of the process of incorporating can be achieved with relative ease, a company may be incorporated in one jurisdiction while at the same time actually conduct its operations from another jurisdiction, or possibly multiple jurisdictions, other than the jurisdiction of incorporation,[220] 2) The OECD acknowledges that although a company, at its inception, may conduct its operations within the jurisdiction of incorporation, through the course of time, that company may transfer its operations to another jurisdiction in which it is not incorporated, or in the alternative, the company may simply change its place of incorporation altogether,[221] and 3) The OECD recognizes that there is the possibility, that where allowed, a company may be incorporated in multiple jurisdictions.[222] With respect to the second prong, the OECD states that solely looking at the place where the directors or shareholders reside will not provide a "clear result" as to the "place of effective management."[223] Finally, in evaluating the last prong, the OECD suggests that since it is very probable that the location where the economic nexus would be strongest would be a developed country, this prong is inherently discriminatory against less developed countries where multinational companies generate profits;[224] nonetheless, from the three prongs, this is the prong which the OECD appears to find the least problematic.[225] Although the OECD articulated that this test is fundamentally flawed, it is clear that the reason why the OECD reached this conclusion is due to the fact that rather than analyzing the test as a whole, as it should be since it is a conjunctive test, the OECD analyzed each prong as if it stood on its own. If the test is examined as was intended, that is as a balancing test, this test could be utilized as an effective tie-breaker for the purpose of determining which jurisdiction has the right to subject an e-tailer to taxation.

The registration information ICANN requires from a registrant can assist in determining where an e-tailer's place of effective management is located. As was discussed above, the first prong of the first option proposed by the OECD entails establishing where a company is incorporated, or in the alternative, determine the jurisdiction's corporate laws which apply to the e-tailer. Currently, ICANN requires registrants to provide a mailing address where the e-tailer can be served with process, and it could just as easily require e-tailers to state where their company is incorporated. Furthermore, although ICANN does not require a registrant to state which corporate laws it wishes to be subjected to, ICANN, in anticipation of lawsuits involving trademark infringement of domain names, requires registrants to state the jurisdiction which it agrees to subject itself to with respect to trademark infringement laws; in the event that the e-tailer has not clearly stated which jurisdiction's corporate law it agrees to be subjected to, it could be inferred that the e-tailer also agrees to have that jurisdiction's corporate laws apply to its company. This information is easy to access on the WHOIS database which serves as a white pages of all the domain holders currently displaying websites on the Internet. By using the WHOIS database, not only could it be determined where an e-tailer is incorporated, but one could also determine the jurisdiction the e-tailer has agreed to be legally subjected to. If the OECD feels that it is important that corporate law, rather than trademark infringement law, should be the determinative factor, the OECD may consider persuading ICANN to require domain registrants to also state which jurisdiction's corporate laws the e-tailer agrees to abide by.

Although ICANN currently does not require registrants to provide the location where the directors and shareholders reside, the OECD, through discussions, may also persuade ICANN to require registrants to provide this information. As for the final prong, which requires a determination of where the e-tailer's strongest economic nexus lies, this information can be revealed by looking at the e-tailer's financial statements, and ICANN can assist in this respect by requiring registrant's to provide an address where such documents are located.

The second option which is proposed by the OECD is to "refine the existing place of effective management test" by considering "the basis of predominant factor(s)," or in the alternative, "giving a weighting to various factors."[226] Under this test, the first factors which would be considered include the locale where the substantial "management and commercial" decisions are made, the location where the top management resides, and the location where the business plans are determined.[227] In the event that the "predominant factors" do not provide sufficient guidance, then this test would further consider where the headquarters are located, the location which is identified in the corporate documents to be the principal place of business, the actual place of incorporation, the "relative importance of the functions performed" in the various jurisdictions in which the company conducts its operations, and the location in which most of the directors reside.[228] Additionally, this test acknowledges the possibility that the management of a company may be mobile, and as such takes this fact into consideration in determining where the place of effective management would be deemed to established.[229] In cases in which management meets in different locales when conducting business operations, the OECD suggests that the "place of effective management" should be the location in which the company has its "closest links."[230] There may also be situations in which management is deemed to be "mobile" when its place of effective management is deemed to be on a ship or boat, and in these cases, "place of effective management" will be considered "to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident."[231]

The second option proposed by the OECD requires the finding of several "predominant factors" which include where the substantial management and commercial decisions are made, where top management resides, and the location where the business plans are determined. Although the registration information which ICANN currently requires a registrant to submit would not be helpful in determining whether such factors are met, the OECD could make an attempt to persuade ICANN to require registrants to submit this information. In the alternative, since the OECD states that in the event that the second option's "predominant factors" do not provide sufficient guidance, this test would look to see where the headquarters are located, as well as where the corporate documents indicate the principal place of business is located or the place of incorporation, ICANN could also require registrants to submit this information. If the information listed in the WHOIS database is utilized to determine where the e-tailer's principal place of business or place of incorporation is located, the fact that the company may meet in various locales in reaching its business decisions or that its place of effective management may be mobile would no longer be relevant since the e-tailer would have explicitly stated the location of its principal place of business.

The third option which is suggested by the OECD is to adopt a "hierarchal approach" for companies which is similar to that which is used to determine the residency of individuals.[232]

Under this test, the factors which would be considered are as follows: 1) the place of effective management, 2) place of incorporation, 3) economic nexus, and 4) mutual agreement.[233] The only concern that the OECD has with respect to this test is the possibility that it may prove to be too "rigid;" however, the OECD does not provide any other comments or obstacles it foresees with respect to this test.[234]

If the OECD adopted the third proposed option, the information which ICANN requires registrants to submit during the registration process would also prove to be helpful. This option requires that the place of effective management, place of incorporation, economic nexus, and mutual agreement be analyzed when determining the "place of effective management" of a company. As was stated above, the WHOIS database would be useful in identifying the place of incorporation of an e-tailer. With respect to concluding where the company has its strongest economic nexus, one would have to look to the financial statements of the company, and ICANN, as recommended earlier, could require e-tailers to provide an address where such documents are located. As to a finding of the place of effective management, which would be the location where management makes its substantial business decisions, the OECD may convince ICANN to request that registrants indicate the location in which the primary business decisions are made. Finally, because the OECD does not define what it means by the term "mutual agreement," it unclear at this point what information ICANN could require, if there is anything at all, of a registrant to enable a finding of a "mutual agreement."

From the three options proposed by the OECD, option one should be the option chosen by the OECD for the purposes of determining the place of effective management of an e-tailer. From the three options, option one provides the most clearly defined test, and more importantly, the information could be readily ascertained by accessing an e-tailer's information on the WHOIS database. Because the three prongs are based on factual information, it would preclude a company from fabricating information which would subject it to taxation in a more favorable taxing jurisdiction. For example, the location as to where the company is incorporated, where the directors or shareholders reside, as well as where the economic nexus of the company are all factors which can be substantiated. On the other hand, the second option's "predominant factors," although not necessarily vague, can be easily manipulated by a company. For instance, a company may state that the locale where the substantial management decisions are made or where the business plans are determined is a place other than that in which these decisions are actually made; unless a company implements a system by which it documents what takes place at these meetings, as well as where the meetings are conducted, this information can be easily manipulated to enable the company to deemed as having its place of effective management in a more favorable taxing jurisdiction. Finally, the third option's forth prong of "mutual agreement" is not only vague, since the OECD fails to define what is meant by this term, but it may also provide a loophole for companies who mutually agree to subjected to taxation in a tax haven.

VII. Conclusion

The fact that the OECD has currently adopted the position that the concept of permanent establishment need not be abandoned since it can work within the framework of e-commerce is largely due to the OECD's belief that "special rules d[o] not need to be drawn up because the traditional tax principles appl[y] equally well to electronic commerce."[235] As was demonstrated in Part V, due to the infrastructure of the Internet, the OECD's conclusions not only do not adequately provide a solution for determining which jurisdiction will be able to tax the business profits of e-tailers, but they also create loopholes by which e-tailers can evade being subjected to tax in any jurisdiction. This coupled with the fact that commentators have suggested that, due to the nature and infrastructure of the Internet, the determination of how e-tailers are subjected to taxation should be based on the notion of residency, rather than source-jurisdiction,[236] the OECD should consider replacing the concept of "permanent establishment" with that of "place of effective management"as the means by which countries determine which jurisdiction has the authority to subject an e-tailer to taxation.

As discussed in Part II, prior to an individual or an entity being able to set up a web page, it is a requirement that such individual or entity register to obtain a domain name.[237] During the process of registration, the entity or individual is required to follow several procedures, established by ICANN, which include the furnishing of the individual's or entity's contact information.[238] In developing the manner in which "place of effective management" can be modified and prove to be a viable solution in determining which jurisdiction has the authority to tax the business profits of an e-tailer, these registration procedures, as well as the information which is complied by ICANN, can be utilized by the international community to determine the appropriate "place of effective management" of an e-tailer, thus solving the dilemma of which jurisdiction has the right to subject an e-tailer to tax in its jurisdiction. Thus far, the OECD has encouraged a dialogue among OECD countries, non-OECD countries, and tax experts for the purpose of finding an a means by which e-commerce transactions can be subjected to taxation.[239] The OECD, however, should not ignore that it is equally important for the organizations regulating and monitoring the Internet to be part of these discussions since they may prove to be vital part of the solution, especially in an administrative sense since they can require registrants to submit certain information which would further assist the international community in determining the residency of a particular e-tailer. If the OECD worked closely with these organizations, there may be a way in which additional regulations and procedures could be implemented to facilitate the international community in trying to collect tax revenues from e-commerce businesses.