



# Getting beyond the Zero-Sum Game of National Law and Jurisdictions

Consensus-Based Solutions for Cross-Border Problems

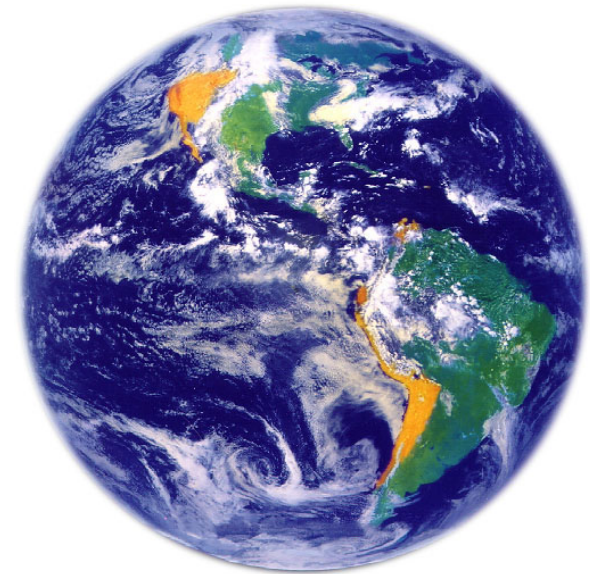
*Presented by*

Scott Cooper  
Vice President, Government Relations  
March 29, 2010

# The International Language of Commerce Is Standards

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- Standards impact 80% of global commodity trade – more than \$13.5 trillion in 2008 alone
  - U.S. Department of Commerce



# Level Setting: Key Terms

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## Standards

**Market-driven** product and service specifications  
(e.g., technical requirements, management systems, etc.)

## Regulations

**Mandatory** technical specifications, which may include  
particular standards or conformity assessment procedures

## Conformity Assessment

**Processes and systems** used to verify the compliance of a product,  
person, process or system to either a standard or a regulation (e.g.,  
testing, certification)

# What Is ANSI?

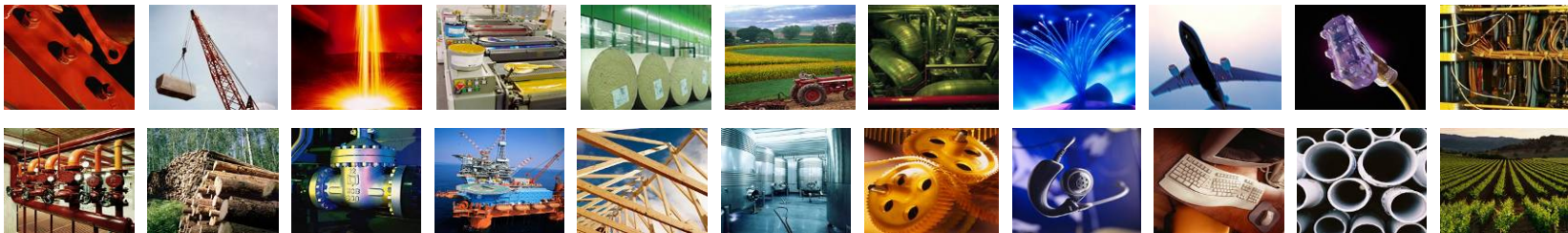
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- The American National Standards Institute leads U.S. standards, conformity assessment, and related activities
- Founded in 1918, ANSI is a private, non-profit organization
- ANSI is not a government agency or a standards developer

***Mission:** to enhance the global competitiveness of U.S. business and the American quality of life by promoting and facilitating voluntary consensus standards and conformity assessment systems and ensuring their integrity*

# What Does ANSI Do?

- Represents U.S. globally
- Ensures integrity of the standards and conformity assessment system
- Offers neutral forum for the development of consensus-based solutions
- Accredits standards developers and conformity assessment organizations



# Guiding Principles of the U.S. Standards System

- Standards should meet societal and market needs and should not be developed to act as barriers to trade
  
- The U.S. endorses the globally accepted standardization principles of the World Trade Organization Technical Barriers to Trade Agreement
  - Transparency
  - Openness
  - Impartiality
  - Effectiveness and relevance
  - Consensus
  - Performance-based
  - Coherence
  - Due process
  - Technical Assistance
  - Flexible
  - Timely
  - Balanced



# Global E-Commerce Is More than Just the Fastest-Growing Component of World Trade

It can be . . .

- Empowering for consumers
- Lucrative for trusted businesses
- A metaphor –  
technology overcomes barriers
- Discomfiting for those who highly  
value national sovereignty and jurisdiction



# A Forcing Mechanism / Template

- E-commerce is a **forcing mechanism**
  - Stakeholders had to reach consensus on the management and regulation of the global marketplace
  
- E-commerce is a **template**
  - Solving challenges with consensus-based solutions
  - Broad, interdependent stakeholders: consumers, industry, world governments
  - Today's world is smaller and flatter than ever before





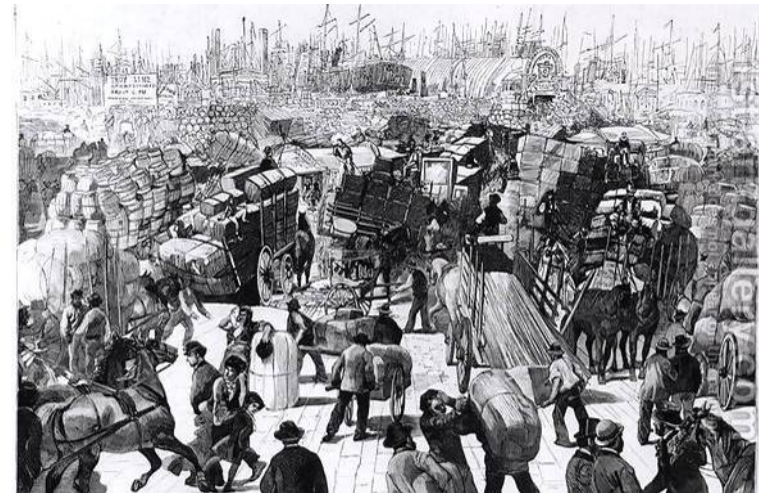
# What About Trust and Dispute Resolution?

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- These issues are not new to the e-commerce environment
- Both must be addressed for trade to flourish
- Effectiveness varies depending upon:
  - Economic vitality and security
  - Faith in the governance structure regulating trade

# Historical Economic Models for Trade

- Empires
  - Rome, Middle Kingdom China
- Mercantilism
  - 17-18<sup>th</sup> C. Western Europe
- Hegemony
  - 19<sup>th</sup> C. Great Britain



*Mercantile Activity in New York Harbor, c.1880*

# Lex Mercatoria = An Apt Comparison?

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- Well-developed universal merchant customs
  - Evolved over time and based on best practices
- Lack of trust in local courts and protection of princes
- Willingness of merchants to regulate and protect each other
- Weak local rule of law

## 3 Concepts of Medieval Merchant Law

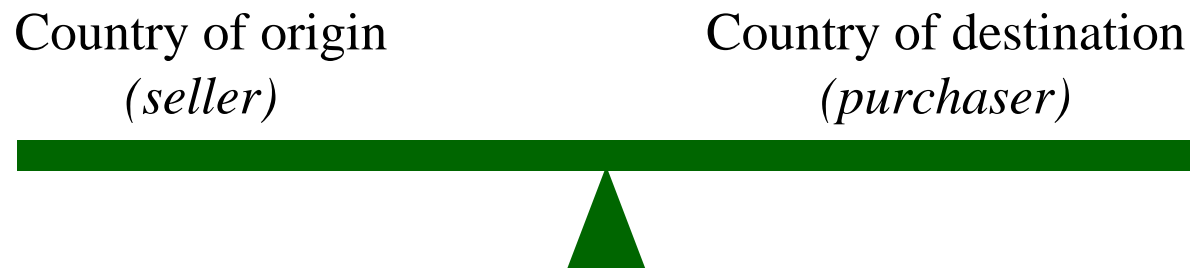
1. Evolved out of traditional commercial practices
2. Codification of such rules – not local law – governed adjudication
3. Merchants handled their own disputes regardless of jurisdiction



*Lex mercatoria in action*

# Why Is Lex Mercatoria Relevant to Today's Global Marketplace?

- One word: **jurisdiction**
- Goods, services, businesses, and consumers travel the world to negotiate and transact.
  - Do they carry their country's laws with them?
  - Do they confront the laws of the countries where they may do business?



# Dealing with Jurisdiction Requires a New Approach

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- If the authority to adjudicate does not stem from sovereign nation-states, then it must develop from the consensus of the adjudicated – *the sellers and purchasers themselves*
- The Global Business Dialogue on e-Society  
(formerly the Global Business Dialogue on Electronic Commerce)
  - Worked on consensus approach in 2003, including input from:
    - CEOs from 70 large multinationals
    - Consumers International (representing 250 consumer organizations in 115 countries)

# What Was the Consensus?

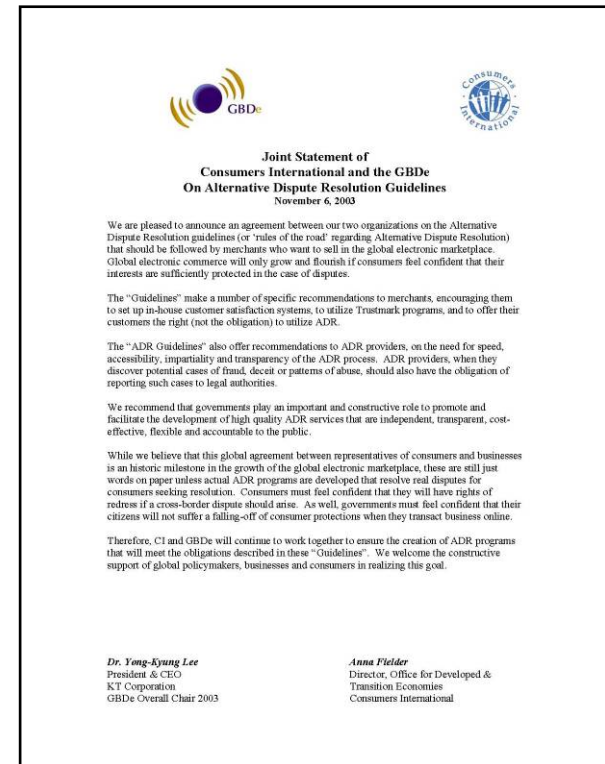
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- Consumers must be offered a compelling alternative to the existing approach of resolving cross-border disputes through local court systems
- Consumers must find the system friendly and fair
- Business must find the system cost-effective and fair
- Governments must find the system consistent with their local consumer protection mandates and fair

*Process took three years, multiple drafts, and face-to-face negotiations*

# Alternative Dispute Resolution (ADR) Guidelines

1. ADR must always be voluntary for consumers, not contractual
2. Consumers should try to resolve disputes directly with a merchant
3. ADR should only be offered after a dispute has arisen, and a consumer should choose whether to pursue judicial remedies



*Final Joint Statement on ADR Guidelines*



# Alternative Dispute Resolution (ADR) Guidelines (continued)

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4. Governments should develop rules (in collaboration with consumers, businesses, and others) to assess the adequacy and effectiveness of ADR providers
5. Governments should take enforcement actions when ADR providers do not comply with policies/procedures
6. When ADR providers discover fraud, deceit, or abuse, they are obligated to alert relevant legal authorities

# Current Challenges in the Global Marketplace

- National authority ends at the border
- Nations protective of their own sovereignty will not accept in-country enforcement activities by other nations



# Current Challenges in the Global Marketplace (continued)

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- Growth of multinational supply chains has moved manufacturing based into newly industrialized regions
- Destination countries cannot use their enforcement agencies to follow the supply trail back to countries of origin
- Very few imports are inspected

# How Can a Consensus-Based Process Help?

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- Current void at global level of governance
- Solution cannot be developed in a vacuum
- Consensus process would include input from:
  - Governments
  - Multinationals (industry)
  - Civil society (consumer groups, labor organizations, NGOs, academia, foundations, etc.)

*When all interested and affected parties are engaged in the process, the strongest solutions result*

# Case Study

## Problem: Lead in Toys

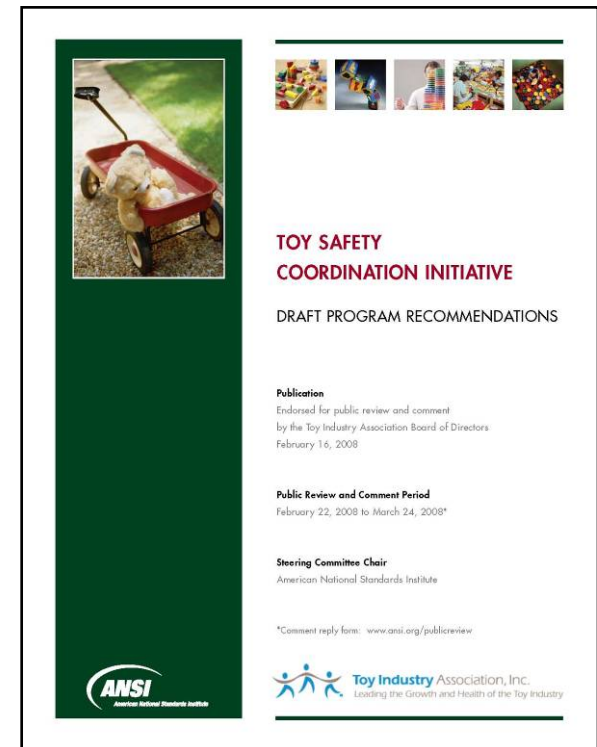
- 2007 – lead in toys makes global headlines
  - U.S. regulator (Consumer Product Safety Commission) signed MoU with Chinese counterparts
  - U.S. manufacturers and retailers ramped up testing and inspection
  - Toxic products continued to show up on retail shelves

*The safety standards were in place, but a consistent way to assess conformity to those standards was missing*

# Case Study

## Consensus-Based Solution

- Manufacturers, retailers, government representatives, consumer groups, and standards organizations met and agreed to a conformance regime
  - Partnership between the American National Standards Institute (ANSI) and the Toy Industry Association (TIA)
- Resulting consensus-based document became today's **Toy Safety Certification Program**



# Case Study

## Toy Safety Certification Program

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- Administered by the Toy Industry Association (TIA)
- Provides increased confidence that toys manufactured or assembled in any nation conform to U.S. safety standards
- Upon successful completion of applicable requirements, the product or packaging may bear a toy safety mark controlled by product certification bodies that are overseen by a single accreditation body (ANSI)

# Case Study

## Result

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- Manufacturers agree to require third-party testing of all products
- Subcontracts must comply or lose contract
- Chinese government agrees to TSCP precepts
- TSCP meets and exceeds requirements in U.S. regulation, *Consumer Product Safety Improvement Act of 2008*
- **Result:** lead contamination of toys manufactured in China drops significantly and continues to drop

EN



**Slide 24**

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**EN1**

Is this really true? I know that TIA made a number of presentations in China, but have they really agreed to anything at the government level?

Elizabeth Neiman, 3/18/2010

# Conclusions

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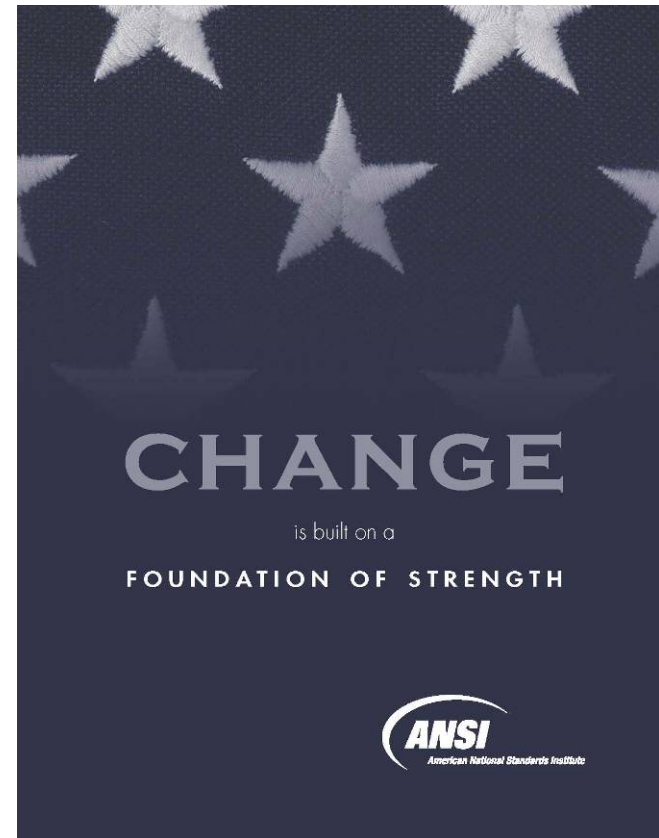
*Merchants should “follow good conscience”*  
- Council of Venice, 1287

- In a modern world of sovereign nations, bottom-line oriented multinationals, and autonomous consumers, “good conscience” is the work of many
- Only in a **consensus-based system** are all points of view given deference and weight
- Partnership between the public and private sectors is crucial

## Further Reading

- Public-private partnerships are powerful problem solvers
- Participants collaborate to solve shared challenges through consensus
- Examples from the U.S. system outlined in brochure, *Change Is Built on a Foundation of Strength*

[www.ansi.org/change](http://www.ansi.org/change)



# For more information



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