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A Digital Free Trade Zone and Necessarily-Regulated Self-Governance for Electronic Commerce: The World Trade Organization, International Law, and Classical Liberalism in Cyberspace, 20 J. Marshall J. Computer & Info. L. 595 (2002)

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COMMENTS

A DIGITAL FREE TRADE ZONE AND NECESSARILY-REGULATED SELF-GOVERNANCE FOR ELECTRONIC COMMERCE: THE WORLD TRADE ORGANIZATION, INTERNATIONAL LAW, AND CLASSICAL LIBERALISM IN CYBERSPACE

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹

I. LAW IN THE HYPOTHETICAL “REAL WORLD”

In the absence of a world government, cross border trade is always subject to rules that must be politically negotiated among nations that are sovereign in their own realm but not outside their borders.²

The year is 2002, and a major multinational corporation has decided to go online with a flourish by offering the full line of its software products in entirely digital form. An entrepreneur in a developing country 13,000 miles away, yet reachable in three seconds on the Internet super-highway, wishes to purchase a trade development how-to kit from the corporation. She is amazed that the product, which can bring her fully into the realm of international trade, can be transferred to her computer in mere minutes in exchange for her credit card number. She will no longer wait weeks for a disc that may or may not ever arrive through the mail.

1. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. David A. Balaam & Michael Veseth, *Introduction to International Political Economy* 104 (Prentice Hall 1996) (citing Robert Kutner's book, *The End of Laissez Faire*).

The corporation and entrepreneur are delighted about the capabilities of the Internet, but the reality is not quite as carefree for the State members of the World Trade Organization ("WTO"). The completely digital trade guide is a miracle of modern computer code and technological infrastructure. It is also a great enigma, because it sheds its tangibility, its packaging, and its very texture as a good. Yet it is more than a service, because it is creative, the product of experience, and re-usable time and time again. The WTO knows only goods and services, not hybrids or even unknown classifications of products. The challenge is to classify digital products so that uniform rules can be applied on the stage of world trade.

Simultaneously, WTO member countries are now confronted with the specter of governing a borderless medium, typified by an architecture of fiber-optic firing lines that stretch across the map of the world. National sovereignty and traditional jurisdictional theories in international law never envisioned such an expansive polity of people and commerce. The programmers, Internet surfers, and e-businesses also share the concern of the governments, but for a different reason—they fear their very free existence. In an Internet community historically governed by codes of conduct, contracts, and old-fashioned politeness and respect between individuals, law is a foreign infiltrator that may pose great risks to civil liberties and a truly free market. The challenge is to balance government interests in security and order with individual autonomy and free expression in possibly the last remaining pure bastion of the classical liberal experiment, the Internet.

II. THESIS, SCOPE, AND SIGNIFICANCE

His power to reason is man's distinguishing characteristic, his mind is man's basic means of survival—and his ability to think, to learn, to discover new and better ways of dealing with reality, to expand the range of his efficacy, to grow intellectually, is an open door to a road that has no end.³

The construction of an international legal and policy framework to address trade via the Internet must strike the appropriate balance between institutional order and norms and the human and business realities of free trade and democracy. This balance can be achieved by creating an agreement within the structure of the WTO based on the concepts of necessarily-regulated self-governance and a digital free trade

3. *The Virtue of Selfishness: A New Concept of Egoism* 141 (Ayn Rand, Signet 1964) (quoting Nathaniel Branden, *The Divine Right of Stagnation*) (emphasis removed).

zone.⁴ Necessarily-regulated self-governance focuses on calculating the appropriate balance between individual and government, and a digital free trade zone ("D-FTZ") is the ultimate uniform rule for international trade over the Internet. These concepts are grounded in the classical liberal paradigm, yet recognize the need for minimal rules to make the vast expanses of the Internet predictably accessible.

This Comment addresses the development of an international trade and e-commerce paradigm in two main phases. First, important concepts relevant to the larger legal and policy issues surrounding trade on the Internet will be discussed. These include the nature and development of e-commerce, information about the WTO and its e-commerce endeavors, and a brief sketch of the concept of self-government on the Internet. In the second phase, law and policy will be presented, intertwined, and analyzed to define the parameters of an international agreement on trade in digital products. The topics to be addressed in this phase include the historical and intellectual background of classical liberalism, legal and policy discussion about a digital free trade zone and necessarily-regulated self-governance, and a proposal listing key points to be considered in fashioning an e-commerce trade framework.

III. INTRODUCTION TO RELEVANT CONCEPTS

The computer is no better than its program.⁵

A. DEFINING ELECTRONIC COMMERCE: HISTORY, COMPUTER LINGO, AND LAW

A year here and he still dreamed of cyberspace, hope fading nightly. All the speed he took, all the turns he'd taken and the corners he'd cut in Night City, and still he'd see the matrix in his sleep, bright lattices of logic unfolding across that colorless void.⁶

Even though we live in a society and a new millennium dominated by words from the technological world, we are not the first generation to face the challenge of adapting the ways in which we do business and our very lifestyles. For example, in the late-nineteenth century, the telegraph emerged on the world stage and revolutionized communications

4. These terms and their definitions are a mixture of basic scholarly ideas discussed throughout this Comment and the author's development, and will be defined and discussed in full throughout this Comment.

5. John Bartlett, *Familiar Quotations* 727 (Justin Kaplan ed., 16th ed., Little Brown & Co. 1992) (quoting Elting Elmore Morris, *Men, Machines, and Modern Times*).

6. William Gibson, *Neuromancer* 4-5 (Ace Books 1984). Gibson is commonly credited with inventing the term and concept of cyberspace, either in *Neuromancer* or his predecessor short story *Burning Chrome*. Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 Cornell J.L. & Pub. Policy 475, 551 n. 41 (1997).

and business transactions for a generation that knew nothing other than face-to-face communication; adaptation was a struggle, but from the lessons learned by one generation of inventors came further scientific innovation, including the telephone, and, eventually, the Internet.⁷ Today we face the same challenges, but due to the speed of fiber-optic cable, the effects of the Internet can be felt around the world, and wreak havoc with trade and law, in mere seconds.

Our living generations implicitly understand the power, speed, and usefulness of the Internet, but very few of us understand what the Internet is in computer science terms. The Internet is defined as "a cooperative message forwarding system linking computer networks all over the world."⁸ This system of worldwide digital connection enables many activities, including e-mail, use of the World Wide Web, and e-commerce transactions.⁹ E-commerce, short for electronic commerce, simply denotes the conduct of business on the Internet, including completing highly complex transactions, such as those involving human consumers purchasing products from an online retailer, or e-tailer.¹⁰

In a business sense, however, e-commerce is much more than simply buying a digital trade guide on the Internet. E-commerce also includes the computer synapses and peripheral transactions that make the arrival of a digital trade guide on the entrepreneur's computer a reality, including providing the customer support and other services vital to the efficient functioning of the electronic market.¹¹ The "components of elec-

7. Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's On-line Pioneers* 211-13 (Berkley Books 1999). In fact, the development of the telegraph serves to place the difficulties involved in addressing the world-altering ramifications of the Internet on international trade and law in perspective. *Id.* As Standage wrote,

[t]oday, we are repeatedly told that we are in the midst of a communications revolution. But the electric telegraph was, in many ways, far more disconcerting for the inhabitants of the time than today's advances are for us. If any generation has the right to claim that it bore the full bewildering, world-shrinking brunt of such a revolution, it is not us—it is our nineteenth-century forbears.

Id. at 213. In addition to providing perspective, the story of the telegraph serves as a warning trumpet blow for how necessary it is to approach the intersection of international law and e-commerce with care. *Id.* Standage emphasizes this point:

[b]ecause of its ability to link distant peoples, the telegraph was the first technology to be seized upon as a panacea. Given its potential to change the world, the telegraph was soon being hailed as a means of solving the world's problems. It failed to do so, of course—but we have been pinning the same hope on other new technologies ever since.

Id. at 210-11.

8. Douglas A. Downing, Michael A. Covington & Melody Mauldin Covington, *Dictionary of Computer and Internet Terms* 243 (7th ed., Barron's 2000).

9. *Id.* at 243-44.

10. *Id.* at 153.

11. David Kosiur, *Understanding Electronic Commerce* 4 (Microsoft Press 1997).

tronic commerce" are varied and include the institutions (including governmental/legal), processes, and networks that make the Internet go in the most basic sense; furthermore, the scope and composition of electronic commerce are always in flux as new technologies and uses explode into a traditionally hungry market.¹² The complex interplay of computer systems, delivery of goods and services, and institutional inputs exhibited by these definitions poses the challenge that international law must confront.

Furthermore, the application of law to newly developing technologies is not a challenge new to our millennium or to the Internet. The Internet's historical analogue, the telegraph, spawned an international organization, the International Telegraph Union ("ITU"), to govern its use for purposes of communication and business.¹³ This international institution originally set the rules for the use of code in telegraphic communication; in fact, despite the unenforceability of the rules for code and the demise of the telegraph, the ITU still operates today, now as the International Telecommunications Union, and addresses issues such as protocols for modems used to access the Internet.¹⁴ Furthermore, the ITU was not the last attempt to employ international governance to address global issues of concern related to technology and commercial trade, as will be seen by analyzing the WTO's struggle with e-commerce. This endeavor requires accepting that the complex legal and technical challenge of reconciling economic and government policy, the Internet, and trade law is the first step towards creating a harmonized legal framework for international trade and e-commerce.

B. THE GREAT HOPE OF THE WTO: GOODS V. SERVICES DISTINCTION

What's in a name? That which we call a rose
By any other name would smell as sweet[.]¹⁵

One of the most prominent topics for discussion and negotiation on recent WTO agendas has been the status of e-commerce in the international legal regime. However, beyond the establishment of a work program¹⁶ to consider and facilitate exploration of these issues, very little concrete progress has been achieved. To date, the main point of disagreement has been the classification of digital products delivered over

12. *Id.* at 6.

13. Standage, *supra* n. 7, at 111. The development of an international delegation of countries to govern the use of the telegraph was issued in response to consumer security and privacy concerns and led to the use of code to convey messages. *Id.* at 110.

14. *Id.* at 207-08.

15. William Shakespeare, *Romeo and Juliet*, in *Complete Works of William Shakespeare* 960, Act 2, Scene 2, Ll 43-44 (Harper Collins 1994).

16. World Trade Organization, *Work Programme on Electronic Commerce* <http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm> (Sept. 25, 1998).

the Internet as goods or as services for the purpose of WTO regimes and rules.¹⁷ Also at issue has been the longevity of the U.S.-initiated customs moratorium on electronic transmissions; the United States believes that the originally temporary moratorium remains in effect, but other countries, such as Pakistan, believe it expired when it was not renewed at the Seattle Ministerial Meeting.¹⁸ A larger question looms over all this controversy, due to the concern of many international scholars and leaders that unless future rounds of negotiations prove successful, the very livelihood and future efficacy of the WTO could be in jeopardy.¹⁹ These are the basic issues that face countries, businesses, and consumers interested in harmonizing international trade law and e-commerce transactions through the vehicle of the WTO. After considering all these challenging factors, the most pressing reason to support the creation of a harmonized e-commerce legal framework is what lies in the hearts, souls, and minds of scores of scholars, leaders, executives, and consumers worldwide—the belief that the dream of free trade, democracy, and development for all is still attainable in a new millennium devoted to international cooperation.

17. *WTO Members Fail to Agree on Rules for E-Commerce Deals; New Meeting Called*, 18 Intl. Trade Rep. 774 (May 17, 2001).

18. Daniel Pruzin, *Electronic Commerce: U.S. Holds E-commerce Talks with WTO Partners, Covering Nature of Digital Products*, Intl. Trade Daily (June 13, 2001). However, Pakistan's argument may be weakened by the fact that the Doha Ministerial Declaration provides that the moratorium should continue during the continued study of e-commerce by the work programme. WTO, *Doha WTO Ministerial 2001: Ministerial Declaration* ¶ 34 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> (Nov. 14, 2001). The next report and discussion on the e-commerce issue is scheduled for the Fifth Ministerial Meeting in Mexico in 2003. WTO, *The Doha Declaration Explained* <http://www.wto.org/wto/english/tratop_e/dda_e/dohaexplained_e.htm#electroniccommerce> (accessed Sept. 4, 2002).

19. WTO, *Trade Resources, Quotes* ¶ 26 <http://www.wto.org/trade_resources/quotes/new_round/new_round.htm> (July 30, 2001) (quoting WTO Director-General Mike Moore).

Failure to reach consensus on a forward work programme that would advance the objectives of the multilateral trading system, particularly in the light of the earlier failure at Seattle, would lead many to question the value of the WTO as a forum for negotiation. It would certainly condemn us to a long period of irrelevance, because it will not be any easier next year, or the year after.

Id. The sense of urgency was even further heightened by the terrorist incidents of September 11, 2001, as reflected by the comments of U.S. Federal Reserve Chairman Alan Greenspan during an October 2001 speech to the Institute for International Economics, in which he stated that fear of terrorism may lead to an unfortunate international economic disengagement, and encouraged President George Walker Bush to push to "launch a new round" of WTO negotiations at Doha. Jeannine Aversa, AP Online, *Greenspan: Terror Hurts Globalization* (Oct. 24, 2001) (available in 2001 WL 29336881). Additionally, protests took place during the Doha Ministerial, although they were mainly aimed at the WTO headquarters in Geneva. Clare Nullis, AP Online, *Protests Aimed at WTO* (Nov. 10, 2001) (available in 2001 WL 29792840).

The key issue to be resolved is arguably that of the classification of products researched, ordered, and ultimately, and importantly, delivered via the Internet. The resolution of this issue rests at the top of the urgency hierarchy because it is the source of the most dissension between countries and regions. For example, virtually without exception, WTO member countries recognize the importance of development initiatives and international coordination, but the issues of the status of the customs moratorium and even more so, the classification debate, are a bit more contentious. Some scholars might argue that the necessary process of harmonization should begin with areas of common agreement, but this author believes that unless the contentious issues are first resolved in a mutually acceptable way that fosters trust and bolsters present free trade, the process will continue to stall as it has since its inception. The very real borders to acceptance of borderless e-commerce, as an appropriate means of international trade, may never be broken down unless immediate action is taken on key issues related to customs. It is particularly disheartening that continued consideration of the classification debate and broader e-commerce issues was not included on the agenda for the vitally important Doha Ministerial in 2001.²⁰

The challenge to be confronted stems from products delivered through the Internet in digitized forms, such as the corporation's trade kit as translated into a computer-language compilation, which are known as e-products. E-products include books, music, videos, software, and other newly emerging media, which in a rapidly growing digital market²¹ may arguably be developed in strictly computerized forms simply to skirt customs duties and strict international legal standards on physical goods and services. A recent Organization of Economic Cooperation and Development ("OECD") report referred to physical goods delivered in digital form via e-commerce as "fuzzy products,"²² which is

20. WTO, *Doha WTO Ministerial 2001: Summary of 10 November 2001* <http://www.chil.wtoministerial.org/english/thewto_e/minist_e/min01_e/min01_10nove_e.htm> (Nov. 10, 2001). A list of six subjects to be addressed was released following the opening session of the Ministerial, and the list did not include e-commerce issues. However, the agenda was largely impacted by the unfortunate events of September 11, 2001, and consequently reflected the pressing issues of the moment. Reuters, *New York Times*, *U.S. Says New WTO Round Vital for Economic Growth* <<http://www.nytimes.com/reuters/politics/politics-trade-wto.usa.html>> (Nov. 10, 2001); see *supra* n. 18 for the only e-commerce related news to emerge from Doha.

21. Stewart A. Baker, Peter Lichtenbaum, Maury D. Shenk & Matthew S. Yeo, *E-Products and the WTO*, 35 *Int'l. Law.* 5, 6 (2001).

22. Julia Nielson & Rosemary Morris, *E-commerce and Trade: Resolving Dilemmas*, OECD Observer ¶ 11 (Jan. 1, 2001) (stating that a clear and concise example of a transaction in these products exists).

If a book is ordered online, but is delivered physically, there is general agreement that, for the purposes of international trade rules, it is a good. That makes it subject to the international rules for trade in goods, the GATT (General Agree-

certainly an apt name considering the legal confusion surrounding their development. The basic premise underlying the need to determine the nature of such products rests with the operation of the WTO to encourage, or more precisely not inhibit, free trade. As Nielson and Morris state:

There are currently few barriers to trade conducted via e-commerce over the Internet itself, partly for reasons of technological difficulty: it is harder to prevent a consumer from connecting to an online bookseller and downloading a book than it is to stop a physical book crossing a border. A primary aim of trade policy has thus been not so much to remove existing barriers but to prevent their emergence in the future.²³

Overall, despite the state of disagreement on the issue, two general points of agreement do exist in the classification debate: 1) the desirability of customs free treatment (although there is not agreement as to whether the moratorium remains binding) and 2) the application of existing WTO regimes and agreements to e-commerce.²⁴ These are some of the key considerations necessary in the process of harmonizing international trade law and e-commerce under the WTO.

To address these over-arching issues, the purpose of the WTO must be kept in mind as a guiding principle. The purpose is to provide a multilateral trading system to shape trade relations between countries in accordance with basic principles of free trade.²⁵ More directly, the WTO mandate is: "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."²⁶ The WTO system rests on the foundation of negotiated legally binding agreements and an ongoing negotiation process to update and improve these agreements.²⁷ Put simply, as my undergraduate International Political Economy teacher taught us, the mantra of the WTO is liberalization, non-discrimination, and reciprocity (in most circumstances).²⁸ These principles are considered the immuta-

ment on Tariffs and Trade). However, if the book is delivered electronically—downloaded onto the computer—there is no agreement whether this digital product should be treated as a good under the rules, or a service, which would make it subject to a GATS (General Agreement on Trade in Services) regime.

Id.

23. *Id.*

24. Baker, *supra* n. 21, at 6.

25. International Trade Center UNCTAD/WTO (ITC), *Business Guide to the World Trading System* 3 (2d ed. 1999).

26. WTO, *The Marrakesh Agreement Establishing the World Trade Organization*, art. II, ¶ 1, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Negotiations* 4 (Cambridge U. P. 1999).

27. International Trade Center, *supra* n. 25, at 4.

28. William F. Felice, Lecture, *International Political Economy* (Eckerd College, St. Petersburg, Fla. (Sept. 1998)). The parenthetical notation that qualifies this mantra recog-

ble objectives and principles of free trade in goods worldwide.

Keeping these principles in mind, on February 6, 1998, the United States came forth with a proposal that recognized the need to address e-commerce issues related to trade. The United States suggested that to encourage the free flow of trade until the classification debate was resolved, Member countries should continue the common practice of not imposing customs duties on imported electronic transmissions.²⁹ The U.S. proposal was generally warmly received by WTO Members and was instituted as policy. This does not mean, however, that the continued status of digital transmissions as duty free is not the subject of current controversy.³⁰

C. THE OTHER OPTION: INTERNET SELF-GOVERNANCE

I heartily accept the motto,—“That government is best which governs least;” and I should like to see it acted up to more rapidly and systematically.³¹

Within the framework of the WTO, two main options have been advanced for governing international trade in e-commerce under existing WTO regimes. At the same time, in the analysis of scholars and the discussion of world leaders, another option looms just beyond the horizon. That option is self-governance of the Internet based on existing quasi-legal norms within the cyber-community. Conduct in this world does not go entirely unregulated; it is instead regulated by the traders, gamers, and programmers who find a home away from home on the Internet, rather than by any national or supranational government. In a world in search of freer trade, an e-commerce trade regime governed by its very own actors could be the way to achieve this ultimate goal.

Edward Valauskas describes the Internet as the closest example of pure anarchy known to man; it has no centralized structure, participants

nizes that reciprocity is not required in all cases from developing countries engaged in the Generalized System of Preferences under the Enabling Clause, and that many countries escape punishment for preferential trade areas even though they do not have the necessary waiver from the WTO. Ralph H. Folsom, Michael Wallace Gordon & John A. Spanogle, Jr., *International Business Transactions: A Problem-Oriented Coursebook*, Problem 6.5 (4th ed. West 1999).

29. USTR, *Proposal by the United States* <<http://www.ustr.gov/sectors.ustrdocs.shtml>> (Feb. 6, 1998) (providing the text of the U.S. communication).

Currently, no Member of the WTO considers electronic transmissions as importations for customs duties purposes and, thus, not one imposes customs duties on them. The United States delegation would like to inscribe on the agenda of the General Council the proposal that WTO Members should agree to continue this current practice so that the absence of customs duties on electronic transmissions would remain.

Id.

30. See *supra* n. 18 and the accompanying text.

31. Henry David Thoreau, *Civil Disobedience and Other Essays* 1 (Dover Publ. 1993).

willingly enter its realm, and it operates as a "utopian society of individuals" unregulated by government.³² He points out, however, that anarchy does not mean chaos, but rather self-regulation and self-protection by individuals who take an interest in their environment and community.³³ There are rules within every sector of the Internet community; they are listed in compilations of Frequently Asked Questions ("FAQs"), e-mailed to subscribers who join a mailing list (possibly one on international trade law), or are related by moderators in chat rooms who explain language and topics that are to be kept off the discussion list.³⁴ Overall, as Valauskas so eloquently described it, the Internet as its own business world is governed by people who love its capabilities and take it upon themselves to create quasi-legal mechanisms for its protection:

The very nature of the Internet makes its participants incredibly loyal to it and defensive about it. The Internet is an engine for creativity, a catalyst for the imagination, and a potion to alter yourself completely. It is the best and most original American contribution to the world since jazz. Like really, really good jazz, the Internet is individualistic, inventive, thoughtful, rebellious, stunning and even humorous. Like jazz, it appeals to the anarchist in us all.³⁵

These values that are revered on the Internet seem very similar to the ones that comprise the free trade and democracy notions that any e-commerce and trade legal framework should aim to engender throughout the world.

One group of scholars has suggested that the best and most efficient way to regulate conduct on the Internet, including international transactions, is to allow the Internet through its users to regulate itself. To date, through the development of Internet norms of conduct and embedded code,³⁶ the Internet has been regulated in just such a manner. However, throughout its evolution, the Internet has engendered many problems that implicate legal rights, such as privacy, jurisdiction, and contract enforceability. Many times the solutions to these problems, to the extent they have been resolved, were found outside the Internet community in the material world in which law controls. But despite these developments, the Internet still stands alone, because it is not subject to

32. Edward J. Valauskas/First Monday, *Lex Networkia: Understanding the Internet Community* ¶ 7 <<http://www.firstmonday.dk/issues/issue4/valauskas/index.html>> (last accessed Nov. 8, 2002) (quoting Valauskas: "[b]y anarchy, I return to the often forgotten meaning of anarchy, that is a utopian society of individuals, individuals who enjoy complete and utter freedom of government").

33. *Id.* at ¶ 9.

34. *Id.* at ¶ 10.

35. *Id.* at ¶ 6.

36. See generally Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Basic Books 2000) (giving information on the use of code, or computer programming techniques, to control the structure and operation of the Internet).

a comprehensive and uniform body of specially tailored or applied law. And to the advocates of Internet self-governance and "cyber-libertarianism," this is exactly the way it should remain; the Internet should be allowed to regulate itself through its members, in much the same way as the free market of both products and ideas has historically operated, and should only be regulated by state actors when necessary, and to the most minimal degree, when important legal and socio-political issues enter the debate.³⁷ These are the legal roots of necessarily-regulated self-governance.

IV. ANALYSIS: CLASSICAL LIBERALISM AND E-COMMERCE LEGAL SOLUTIONS

[M]ore than law alone enables legal values, and law alone cannot guarantee them.³⁸

A. THE POLICY CHALLENGE

Maybe we can show government how to operate better as a result of better architecture.³⁹

The author has noticed in law school courses that the curriculum is noticeably devoid of serious public policy discussion. This is unfortunate because it is not at all representative of the world into which young lawyers will venture upon graduation. They can expect to be confronted with the politics of zoning, the Congressional intricacy of the U.S. Code, or the bureaucracy of government practice or administrative agency litigation. Law exists not just to promote order in society and provide careers for lawyers, but also to achieve the goals of society, including preserving liberty and individual rights and encouraging necessary innovation to address new legal issues.⁴⁰ This reality is obvious in the struc-

37. See *infra* nn.145-150 and the accompanying text.

38. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 549 (1999).

39. All-Wright Site, *On Govrenment and Other Institutions* <<http://www.geocities.com/SoHo/1469/flwquote.html>> (accessed Feb. 20, 2002).

40. Frederic Bastiat, *The Law* 1-2 (The Found. for Econ. Educ. 1998). As Frederic Bastiat wrote:

Life, faculties, production—in other words, individuality, liberty, property—this is man. And in spite of the cunning of artful political leaders, these three gifts from God precede all human legislation, and are superior to it. Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed that caused men to make laws in the first place." *Id.* Furthermore, "If this is true, then nothing can be more evident than this: The law is the organization of the natural right of lawful defense. It is the substitution of a common force for individual forces. And this common force is to do only what the individual forces have a natural and lawful right to do: protect persons, liberties, and properties; to maintain the right of each, and to cause *justice* to reign over all.

ture of the U.S. federal government, for Congress is charged with making all laws "necessary and proper" for the functioning of a republican democratic polity,⁴¹ and the executive branch must make the difficult policy decisions necessary for implementing and enforcing this legislation.⁴² Therefore, law does not operate in the absence of public policy goals; in fact, law reflects those very goals both in what it addresses and in what it leaves unspoken. Both municipal law and international law share these objectives, and it is clear from the writings in constitutions, declarations, and scholarly journals across the world, that the majority of people share like aspirations in the realm of policy.⁴³ Any international legal structure for e-commerce must reflect the drive to achieve two pairs of salient policy principles: free trade and capitalism and democracy and human rights.

Just because the majority of the world's people hold some basic principles and goals sacred, however, does not mean that the majority of governments agree about how to achieve these goals, especially in the context of international law as applied to the Internet. This tension was illuminated in the recent French case of *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*,⁴⁴ addressing the placement of Nazi paraphernalia on Yahoo!'s Internet auction site.⁴⁵ The case points out that although the Internet poses legal challenges to all states and the world as a whole, countries are likely to confront these challenges differently based on their political heritage, which makes the necessary international harmonization regarding the Internet and e-commerce that much more of a challenge and a necessity.⁴⁶ France likely addressed the challenge in *Yahoo!* based on a national history colored by the occupation of Vichy France and a generally statist approach to international rela-

Id. at 3.

41. U.S. Const. art. I, § 8, cl. 18.

42. U.S. Const. art. II, § 1, cl. 1; U.S. Const. art II, § 2, cl. 1.

43. UN, *Press Release GA/9533 / Marking Fiftieth Anniversary of Universal Declaration of Human Rights, Assembly Notes Need to Overcome Obstacles to Their Enjoyment* <<http://www.un.org/News/Press/docs/1998/19981210.ga9533.html>> (Dec. 10, 1998). This fact is evident in the text of the Universal Declaration of Human Rights (1948), which although aspirational as a legal document, represents the basic rights and policies that all countries in the world should seek for their citizens. *Id.* Article 21 of the declaration discusses democratic principles, Article 23 discusses economic rights in the context of work, and Article 25 embodies principles of economic development. *Id.* The need for the aspirational nature to be transformed into a legally binding nature to face the challenges of a new millennium was noted on the 50th Anniversary of the UDHR in 1998. *Id.*

44. Michael Traynor, *Conflict of Laws, Comparative Law, and The American Law Institute*, 49 Am. J. Comp. L. 391, 405 n. 7 (Summer 2001) (citing the case of *L'Union Des Etudiants Juifs De France v. Yahoo!, Inc.*, T.G.I. Paris, Nov. 20, 2000).

45. Mahasti Razavi and Thaima Samman, *Yahoo! and Limitations of the Global Village*, 19 Commun. Law. 27 (Spring 2001).

46. *Id.* at 29.

tions.⁴⁷ However, this ease of approach for individual nation-states will become all the more difficult in the era of the borderless Internet and the legal harmonization movement within the European Union.⁴⁸ The risk of clashing municipal legal approaches to the Internet and e-commerce worldwide is the destabilization of political relations.⁴⁹ The place to begin the process of balancing national and international goals related to the Internet may be with regional agreement where possible, and consensus on issues of common agreement, such as the importance of commercial transactions.⁵⁰ Therefore, it seems that e-commerce is a logical place to begin the international Internet harmonization process. But even in this realm, time and dedication will be required to achieve lasting consensus and develop a working legal framework in a world of strong national values and pressing Internet-based challenges.⁵¹ As Razavi and Samman stated: "[I]t is less a question of harmonizing the rules than a question of ensuring that nations have the means to enforce their own national values in the world of information. Balancing this effort with the necessity to protect freedom of expression, of course, is a difficult task."⁵²

In fact, the case for working policy into jurisprudential thinking is nowhere more evident than in the realm of international trade, because of the national tensions and cutting edge issues it implicates, specifically trade conducted over the virtually unregulated medium of the Internet. For this reason, it is important to guarantee that the current trends and nature of the Internet do not go unheeded.

47. See generally *Dictionary of Twentieth Century History* 720 (Minn. Lee ed., Larousse 1994) (defining and giving a brief background of the Vichy regime). For a discussion of the development of the statist approach to international relations under Charles DeGaulle, see generally Hubert Thierry, *France and Disarmament*, in *France and the United Nations (1945-1995)* 228 (Andre Lewin ed., Collection Panoramiques 1995).

48. See generally Razavi, *supra* n. 45.

49. *Id.*

50. *Id.* at 30. As the authors wrote:

For example, since ancient times, international trade has brought together economic actors from different countries. In these cases, it became necessary to regulate legal conflicts to solve disputes between merchants of different cities or countries. The markets of ancient Greece, the maritime trade of the Roman Mediterranean, the fairs of the Middle Ages, and international trade as it developed in the nineteenth century all spawned legal actions and led to the development of many new legal instruments.

Id.

51. *Id.* at 31.

52. *Id.* at 30.

B. A BRIEF DESCRIPTION OF CLASSICAL LIBERALISM

It is not what a lawyer tells me I may do; but what humanity, reason, and justice, tell me I ought to do.⁵³

The key to addressing e-commerce and product classification within the WTO regimes rests with both the present culture and the future opportunity of the Internet. To establish a viable legal framework, this Comment will consider and analyze how the theories of classical liberalism set the stage for both the development of law and the exercise of legal restraint on the Internet. This reality is evident in the two structural linchpins the author proposes, those of necessarily-regulated self-governance and a digital free trade zone, which will be considered in turn.

Classical liberalism, as an economic and political philosophy, is founded upon the idea that "broad areas of society are set up in such a way that competitors can all gain, through peaceful and cooperative actions."⁵⁴ Liberalism embraces individual liberty and is wary of excessive state involvement in the processes of the market and society.⁵⁵ Liberal theory firmly believes that the market most closely protects and elevates these views in combination with democratic government.⁵⁶

In the scheme of international relations and law, classical liberalism is one of a handful of prominent theories of ethics.⁵⁷ Liberalism hinges on a delicate balance between the role of the state and the liberty of individuals; however, this balance achieves new levels of fragility in an international realm colored by various state views of human rights and governance roles.⁵⁸ Overall, at the core of the balancing act rests the reality that "the authority of the liberal tradition taken as a whole derives from its faith in reason and in the application of rationally derived principles to human institutions."⁵⁹ Many scholars have addressed the concept of liberalism in the international realm, but some of the first to note the peculiarities of human decision-making in the realm of commerce and trade were the British liberals.⁶⁰ Of this group, Jeremy Ben-

53. *The Lawyer's Quotation Book: A Legal Companion* 24 (John Reay-Smith ed., Barnes & Noble Books 1991) (quoting Edmund Burke).

54. Balaam, *supra* n. 2, at 42.

55. *Id.* As the authors wrote: "[l]iberals view the fundamental tension between state and market as a conflict between coercion and freedom, authority and individual rights, autocratic dogma and rational logic." *Id.* at 43.

56. *Id.*

57. Terry Nardin & David R. Mapel, *Traditions of International Ethics* (Cambridge UP 1992). Others include realism, contractarianism, and utilitarianism. *Id.*

58. Michael Joseph Smith, *Liberalism and International Reform* 201-02 (Terry Nardin & David R. Mapel eds., Cambridge U. Press 1992).

59. *Id.* at 202.

60. *Id.* at 204.

tham stated the case for trade most articulately: "Mark well the contrast. All trade is in its essence advantageous—even to that party to whom it is least so. All war is in essence ruinous; and yet the great employments of government are to treasure up occasions of war and to put fetters on trade."⁶¹ In essence, Bentham was emphasizing the choices of individuals and the market over the constraints and realpolitik of governments in the balance of competing interests. Later, this concept led Richard Cobden to favor trade between nations, defined as peoples, over that between governments, the political infrastructures that represent nations.⁶² In essence, the Internet embraces Cobden's view in its libertarian and user-driven nature.

Overall, liberals believe that in the realm of policy and law, ideas have an emotive force all their own that cannot be reduced to the least common denominator of majority ideology, but instead shape policy by the sheer nature of their integrity as grounded in human liberty.⁶³ From these truisms, the concepts of free trade and democracy logically flow, even though classical liberals are not of one mind as to the proper role of international institutions such as the WTO.⁶⁴ But because the WTO and the scholars hold the same principles dear, the promise of a connection between classical liberalism, international trade law, and e-commerce is palpably real. In this Comment, the author hopes to more fully explore and construct this connection so as to establish the promise of necessarily-regulated self-governance and a digital free trade zone in addressing international trade and e-commerce. Although this paper will address the digital free trade zone concept in conjunction with free trade and capitalism, and the idea of necessarily-regulated self-governance in relation to democracy, these two proposed concepts and their intellectual underpinnings do overlap and interact based on their shared roots in classical liberalism and the current normative structure of the Internet.

C. FREE TRADE AND CAPITALISM

laissez-faire [n] 1: a doctrine opposing governmental interference in economic affairs 2: a policy of noninterference especially with individual freedom of choice and action⁶⁵

The roots of free trade, as envisioned in the concept of a D-FTZ, stem from the seventeenth century, when pro-commercial mercantilists real-

61. *Id.*

62. *Id.* at 206. As Cobden wrote: "[a]s little intercourse betwixt the *Government*, as much connection as possible between the *nations* of the world. *Id.*; see Charles W. Kegley & Eugene R. Wittkopf, *World Politics: Trend and Transformation* 535 (6th ed., St. Martin's Press 1997) (defining the word "nation").

63. Smith, *supra* n. 58, at 207.

64. *Id.* at 215.

65. *Merriam-Webster 365 New Words Calendar* (Workman Publ. 2002).

ized that trade operated much more smoothly when free.⁶⁶ Free trade as a government policy, however, did not achieve respectability until Adam Smith presented his laissez-faire free trade doctrine in *The Wealth of Nations* in 1776.⁶⁷ Smith's seminal work established "a systematic, coherent framework for thinking about the economics of free trade policy."⁶⁸ Since that time, free trade (in various incarnations) and the economic system that best represents similar laissez-faire principles, capitalism, have dominated the field of international trade and commerce. It is doubtful that any international legal framework addressing e-commerce should promote any other type of economic policy for the world and its component nation-states, especially considering the WTO's dedication to liberalization of trade. After all, "the compelling nature of Adam Smith's and David Ricardo's static demonstration of comparative advantage, as well as more recent dynamic models of international trade, cannot be doubted."⁶⁹

Free trade faces new challenges in its application to international e-commerce, however. Governments are increasingly placed into competition against each other in the rapid pace of the Internet market, and this competition is leading to increased market liberalization and improved standards of living across the world.⁷⁰ However, the tide of technology and trade may also tow in its wake the risk of collusion among states to suppress individual liberty.⁷¹ To insure that technology fuels competition and free trade on the Internet, it is important that free-market principles and minimal guaranteeing legal structures in the spirit of self-governance are established as soon as possible before the Internet takes on a life of its own through over-regulation by countries.⁷² This endeavor is important because empirical evidence demonstrates that the globalization of markets and increased foreign investment "have wrought breathtaking improvements in the lives of hundreds of millions," such as the citizens of South Korea who have escaped mass poverty and now interact with an economy on par with Europe, or China,

66. Douglas A. Irwin, *Against the Tide: An Intellectual History of Free Trade* 45 (Princeton U. Press 1996).

67. *Id.* at 45, 75.

68. *Id.* at 75.

69. Raj Bhala, *Assessing the Modern Era of International Trade (Book Review)*, in *International Business Transactions: A Problem Oriented Coursebook* 344 (Ralph H. Folsom, Michael Wallace Gordon & John A. Spanogle, Jr., 4th ed., West 1999); Raj Bhala, *Assessing the Modern Era of International Trade*, 21 *Fordham Intl. L.J.* 1647, 1661 (1998). For more on the economic theories of Smith and Ricardo, see *infra* nn. 74-75, 101 and the accompanying text.

70. Center for Trade Policy Studies, *Trade and Technology* ¶ 1 <<http://www.freetrade.org/issues/e-commerce.html>> (accessed July 30, 2001).

71. *Id.* at ¶ 2.

72. *Id.*

where 160 million people have escaped poverty in the last twenty years.⁷³

Political economy for liberals is based on laissez-faire principles such as Adam Smith's invisible hand that enhances the efficiency of the market,⁷⁴ and David Ricardo's comparative advantage that encourages nation-states to specialize and then trade efficiently in the market.⁷⁵ Overall, liberals believe that free trade encourages peace, cooperation, and mutual gain in the world because "free individual actions in the production, finance, and knowledge structures create such strong ties of mutual advantage among nations that the security tie [read national interest] is irrelevant, or nearly so."⁷⁶ The Internet is a community of unlimited and easily accessible knowledge, making the beneficial connection between e-commerce and free trade all the more plausible.⁷⁷

The principles of free trade and economics can be further exhibited and reaffirmed by the writings of F.A. Hayek.⁷⁸ In fact, Hayek's teachings can be even more closely tied to the phenomenon of the Internet and e-commerce than those of other representative scholars. Writing in the early 1940's in opposition to planned economies, Hayek discussed the impact of technological progress on the liberal way of life, mainly that technology holds the promise for a better life and advancement of human liberty, but that it also poses the risk of a denial of that very liberty if wrongly manipulated.⁷⁹ Furthermore, economic planning risks not only the upset of the productivity of national economies, but also the in-

73. Brink Lindsey, *Center for Trade Policy Studies, WTO Bashers Would Slam the Door on the World's Poor* <<http://www.freetrade.org/pubs/articles/bl-12-02-99.html>> (Dec. 2, 1999).

74. Balaam, *supra* n. 2, at 43.

75. Irwin, *supra* n. 66, at 91-92.

76. Balaam, *supra* n. 2, at 45.

77. Peter Cukor & Lee McKnight, *Knowledge Networks, the Internet, and Development*, 25 *Fletcher Forum of World Affairs* 43, 57 (2001) (explaining the knowledge resources and capabilities of the Internet).

The Internet contains most of the knowledge accumulated in the course of human history. Yet it is a dynamic repository of this knowledge, readily able to accommodate and integrate the new knowledge being created daily. Using Internet databases, it is further possible to revise the various ideas and theories that have been proven to be incorrect by recent research. Perhaps most importantly, besides sustaining and dynamically storing knowledge, the Internet allows the reconfiguration and dynamic organization of data, information, and knowledge.

Id.

78. F.A. Hayek, *The Road to Serfdom* (U. of Chi. Press 1994).

79. *Id.* at 59.

While it is true, of course, that inventions have given us tremendous power, it is absurd to suggest that we must use this power to destroy our most precious inheritance: liberty. It does mean, however, that if we want to preserve it, we must guard it more jealousy than ever and that we must be prepared to make sacrifices for it.

Id.

networkings of the world economy and international trade.⁸⁰ These two statements taken together show that e-commerce possesses tremendous capacity for advancing the liberal economic paradigm, but without an international harmonization process that avoids national policy balkanization, they could prove more fractious and perilous than beneficial. However, Hayek does not necessarily see the harmonization of international economic policy through a supranational organization, such as the WTO, as a positive or even necessary means to this end.⁸¹ This concern is mainly derived from the belief that although countries may agree on the rules of the game for an economic policy, such as on e-commerce, they may never agree on the precise means and priorities of an implementing and facilitating system.⁸² Hayek is right to point out these risks and challenges, but it is also notable that these comments were made before the creation of the "three-legged economic stool" at Bretton Woods and the successful history of the GATT-WTO experiment in the following fifty years.⁸³ Hayek suggests that a federal system of international government may prove the most productive means to the end of balancing sovereignty, globalization, technology, and free trade, because of its inherent give and take between nation-states and recognition and tolerance of workable differences within the free trade based market system.⁸⁴ Ironically, or maybe prophetically, this is the likely structure that an international legal framework addressing e-commerce will take, balancing the needs and suggestions of both developed and developing countries in the context of the WTO, NGOs, and industry.

Briefly, because this author repeatedly ties capitalism to free trade, the precise definition of a market economy should be established and explored. Black's defines capitalism as: "an economic system that depends on the private ownership of the means of production and on competitive

80. *Id.* at 240.

The part of the lesson of the recent past which is slowly and gradually being appreciated is that many kinds of economic planning, conducted independently on a national scale, are bound in their aggregate effect to be harmful even from a purely economic point of view and, in addition, to produce serious international friction. That there is little hope of international order or lasting peace so long as every country is free to employ whatever measures it thinks desirable in its own immediate interest, however damaging they may be to others, needs little emphasis now.

Id.

81. *Id.* at 242.

82. *Id.* at 252.

83. See generally Kegley, *supra* n. 62, at 204 (briefly sketching the development and history of the Bretton Woods system). As a testament to the success of the GATT and WTO, products of Bretton Woods, consider this statistic: "The past 50 years have seen an exceptional growth in world trade. Merchandise exports grew on average by 6% annually. Total trade in 1997 was 14-times the level of 1950." WTO, *WTO In Brief* <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm> (last accessed March 5, 2003).

84. Hayek, *supra* n. 78, at 259.

forces to determine what is produced.”⁸⁵ Combining this definition with the same concepts of competition and liberty at the core of the philosophies of Hayek, Smith, and Ricardo, Milton Friedman defined competitive capitalism as being based on the fact that “[e]xchange can therefore bring about co-ordination without coercion. A working model of a society organized through voluntary exchange is a free private enterprise exchange economy.”⁸⁶ This market provides economic freedom and reduces the need for government because the rules of the game are decided by the economic actors in their own forum and through their own transactions.⁸⁷ This is the precise role that the WTO plays in the international trade market, allowing countries to come together to set the necessary standards for the promotion of free trade, while corporations, consumers, and governments are free to experiment in the market. Ayn Rand explored the link between free market trade and capitalism, and her discussion brings free trade and capitalism full circle when combined with Hayek’s theories. Rand writes:

The free market represents the social application of an objective theory of values. Since values are to be discovered by man’s mind, men must be free to discover them—to think, to study, to translate their knowledge into physical form, to offer their products for trade, to judge them, and to choose, be it material goods or ideas, a loaf of bread or a philosophical treatise.⁸⁸

And maybe to that list, in the era of e-commerce, one might add a digital trade how-to kit delivered to an ambitious entrepreneur as the ultimate expression of what an international legal framework addressing trade over the knowledge-based and libertarian Internet must seek to foster and preserve.

In fact, several writers have addressed principles of free trade, capitalism, and economic efficiency in their studies of Internet behavior and commercial transactions. Jeremy Rifkin states that the modern wired economy shares both similarities and differences with the classical model. The geographically bounded marketplace involved autonomous sellers and discrete transactions, but commerce on the Internet is based

85. *Black’s Law Dictionary* 202 (Bryan A. Garner ed., 7th ed., West 1999).

86. Milton Friedman, *Capitalism and Freedom* 13 (U. of Chi. Press 1982) (emphasis removed).

87. *Id.* at 15. As Friedman explains:

The existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the ‘rules of the game’ and as an umpire to interpret and enforce the rules decided on. What the market does is to reduce greatly the range of issues that must be decided through political means, and thereby to minimize the extent to which government need participate directly in the game.

Id.

88. Ayn Rand, *Capitalism: The Unknown Ideal* 24 (Signet 1967).

on mutually beneficial relationships.⁸⁹ The Internet economy may be based on the same free trade and market principles advanced by Adam Smith, but Smith's economy was founded on the possession of property where e-commerce is based on networks of relationships.⁹⁰ E-commerce is also reasserting the prominence of the laissez faire approach, because government's role in controlling the computer frequencies is transferred to corporations.⁹¹ In general, the mainly libertarian culture of the Internet does revolutionize the scope and intensity of free trade and capitalism to a degree unknown in the classical material world.

Despite possible criticisms, it is also clear that the Internet economy does operate on some of the same basic efficiency assumptions of the free market. "[P]rices move inexorably towards the free,"⁹² and when items are copied either tangibly or intangibly, such as a digital trade kit transmitted over the World Wide Web, they "become cheaper [and presumably more readily available to a wider population cohort] as they improve."⁹³ In more concrete terms, an OECD study on e-commerce reflected the expectation that efficiency is likely to be improved through "reduced transaction and search costs, increased competition and more streamlined business [practices]."⁹⁴ In fact, studies indicate that the greatest opportunity for improved efficiency and the achievement of the classical liberal paradigm is in the realm of goods and services that can be entirely digitized, such as a digital trade how-to kit, due to the resulting economies of scale in delivery and production.⁹⁵ Based on this information, e-products, however classified and treated under the WTO regimes, are a natural study in the advancement of capitalism and free trade. However, in the process of erecting an international legal structure addressing e-commerce and trade, it is also important to remember the changed state of the marketplace (or "marketspace" as Kelly would say)⁹⁶ in the digital era and how this reality affects the application of traditional economic principles.

Building on the concepts of the WTO customs moratorium on digital products and those derived from the free market and capitalism theories of classical liberalism, one method of achieving international legal consensus on e-commerce involves labeling and enabling the Internet as a

89. Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life Is a Paid-for Experience* 19 (Jeremy P. Tarcher ed., Putnam 2000).

90. *Id.*

91. *Id.* at 227.

92. Kevin Kelly, *New Rules for the New Economy: 10 Radical Strategies for a Connected World* 53 (Viking 1998).

93. *Id.* at 54.

94. Jonathan Coppel, *OECD, E-Commerce: Impacts and Policy Challenges* 14, OECD Economics Department (2000).

95. *Id.* at 15.

96. Kelly, *supra* n. 92, at 96.

digital free trade zone ("D-FTZ"). Black's defines a free-trade zone as "[a] duty-free area within a country to promote Commerce, esp[ecially] transshipment and processing, without entering into the country's market."⁹⁷ As Ralph Folsom and his co-authors write "importers may therefore bring goods of foreign origin into such an area without paying customs duties and taxes."⁹⁸

The concept of a free trade zone also has deep historical roots. As early as the mid-seventeenth century, economists noted the theoretical benefits of free ports that would allow for duty-free transshipment of popular products.⁹⁹ Then in 1744, economist Matthew Decker suggested that all of Britain should become a free port to stimulate trade, a proposal that was echoed by many of his contemporaries.¹⁰⁰ The proposal for a free port was given further legitimacy when it was included in the vision of free trade created by Adam Smith; however, although Smith supported the British free port idea, he believed that the concept of free trade could be extended beyond just this and other isolated notions of past scholars.¹⁰¹ The principles of the WTO embrace Smith's devotion to free trade, and although free trade has yet to be achieved in its purest and most absolute classical liberal form, the existence of FTZs and the possibility of a D-FTZ are steps in the right direction along the hallowed path to free trade. Therefore, since international e-commerce transactions involving wholly digitally ordered and delivered products currently occur in the absence of tariffs and are protected within the fiber-optic cables that transmit digital trade how-to kits across the Internet, e-commerce in such a fashion already operates within a free-trade zone of sorts (without being so labeled). In fact, this option has been vaguely discussed by trade policy scholars and has the potential to provide the basic architecture for an international Internet trade regime.

Logically, the customs moratorium should not be the subject of any controversy. As Aaron Lukas points out, the entire purpose of the WTO is to lower barriers to international trade in all sectors, which should include e-commerce; therefore, Members are in the unique position with e-commerce to never even establish a tariff that would later need to be

97. *Black's Law Dictionary* at 676.

98. Ralph H. Folsom, Michael Wallace Gordon & John A. Spanogle, Jr., 1999 *Documents Supplement to International Business Transactions: A Problem-Oriented Coursebook* 9 (4th ed. West 1999).

99. Irwin, *supra* n. 66, at 33.

100. *Id.* at 61-62. Decker defined free port as "[where] all sorts of merchandise be imported and exported at all times without paying any customs or fees." *Id.* This concept is virtually identical to, and in fact synonymous, with that of a free trade zone in modern trade parlance.

101. *Id.* at 75.

lowered and eliminated.¹⁰² Lukas furthers his proposal by stating that continuing the no-duty policy would result in little negative economic impact because governments are not collecting and allocating money to programs from digital transactions as they do from other customs activities that actually result in the payment of tariffs.¹⁰³ From this base of virtually unrestricted trade, "it only makes sense that [countries] work to lock in the current beneficial state of affairs"¹⁰⁴ for trade in electronic goods and services. Most importantly, as Lukas' colleagues at CTPS point out, a digital free-trade zone would make the classification of e-products, in all of its contentious splendor, unnecessary because all fully digital trade in products or services would not be subjected to tariffs under GATT, GATS, or any other regime.¹⁰⁵ CTPS only provided a brief suggested plan and benefits sketch of the Internet as a digital free-trade zone, but by adding some legal meat and policy muscle to these bones, a solution that balances law, liberty, and architecture to effectively govern the Internet might be foreseeable.

In conclusion, although the challenge of confronting a newly structured market and advancing sacred principles in a time of uncertain governance of the Internet is before us, we must create a legal framework to address these issues and bring the principles of Smith, Hayek and the law and economics school to all through fiber optic cables. As Adam Smith wrote:

The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations.¹⁰⁶

D. THE PROMOTION OF DEMOCRACY AND HUMAN RIGHTS ON THE INTERNET

I disapprove of what you say, but I will defend to the death your right to say it.¹⁰⁷

Democracy, most simply defined, is "government by the people."¹⁰⁸

102. Aaron Lukas, Center for Trade Policy Studies, *Seattle Shouldn't Delete Free E-Trade* ¶ 4 <<http://www.freetrade.org/pubs/articles/al-12-20-99.html>> (Dec. 20, 1999).

103. *Id.*

104. *Id.*

105. Brink Lindsey, Daniel T. Griswold, Mark A. Groombridge & Aaron Lukas, *Seattle and Beyond: A WTO Agenda for the New Millennium* 26-27 (Ctr. for Trade Policy Stud. 1999).

106. Robert L. Heilbroner, *The Essential Adam Smith* 324 (W. W. Norton & Co. 1987).

107. Voltaire, in John Bartlett, *Familiar Quotations* 307 (Justin Kaplan ed., 16th ed., Little Brown & Co. 1992).

108. *Black's Law Dictionary* at 444.

Democracy and human rights together are the second desired policy component of the international legal framework addressing trade and e-commerce. Democracy is also the second element of the classical liberal theory key to this framework. Democracy is further strongly linked to the Internet because it can serve as a forum for both representation and organization.¹⁰⁹ As Anne Bingaman states about furthering the policy goals necessary for the international e-commerce endeavor:

These connections will empower us and enhance freedom and democracy. Citizens will be able to communicate—both send and receive information—on a previously unimaginable scale. . . . When you think about this, recall scenes from Nazi-occupied Europe of women and men crouched around the wireless, desperate to learn and tell the truth. Or think of citizens behind the iron curtain, searching the short-wave bands for Radio Free Europe or the BBC. And imagine how much more difficult an oppressor's job is when people yearning for freedom have access to digital computer networks.¹¹⁰

This is the reason why access to computer networks and the ability to freely navigate for communication and e-commerce is an emerging area of human rights scholarship. At the core, it is for these reasons of human dignity and liberty, along with free trade, that an international e-commerce policy needs to be implemented.

Briefly, the nature and definition of democracy should be developed. As Solidarity leader Adam Michnik stated: "Democracy is something more than freedom. Democracy is freedom institutionalized."¹¹¹ Furthermore, it is one of the many rights guaranteed by the Universal Declaration of Human Rights in Article 21.¹¹² From these definitions and realities, it is evident that the importance of democracy is closely tied to the principles of free trade and human rights that any international e-commerce legal framework must seek to promote. In fact, democracy is also closely tied to the structure of the Internet, which allows individuals

109. Don Tapscott, *The Digital Economy: Promise and Peril in the Era of Networked Intelligence* 304 (McGraw-Hill 1996); see generally Yves R. Simon, *Philosophy of Democratic Government* Chap. 5 (U. of Chi. Press 1964) (discussing the intertwined role of technology and democracy throughout history).

110. Tapscott, *supra* n. 109, at 65. Anne Bingaman was an Assistant Attorney General for the U.S. Dept. of Justice at the time of publication of Tapscott's book. Tapscott does not provide the citation for the original quotation.

111. Diane Ravitch & Abigail Thernstrom, eds., *The Democracy Reader: Classic and Modern Speeches, Essays, Poems, Declarations and Documents on Freedom and Human Rights Worldwide* ix (HarperCollins 1992).

112. UN, *Universal Declaration of Human Rights* Art. 21 <<http://www.un.org/Overview/rights.html>> (accessed Feb. 10, 2003) [hereinafter *UN Declaration*]. Article 21 both provides that all citizens have the right to participate in government and that this government will be founded on the will of the people. *Id.* Also guaranteed are other civil liberties, such as freedom of religion in Article 18 and freedom of expression in Article 19, which are often considered coterminous with democracy. *Id.* at Arts. 18, 19.

the freedom to go places (at least in their minds and on their monitors) that they never could have gone before; it is the institutional structure guaranteeing this unfettered freedom to sell a digital trade kit and express political beliefs that must be further bolstered in the process of creating a legal framework for e-commerce.

Next, it is important to define the concept of human rights. Human rights are largely based on the classical liberal "protection of the individual."¹¹³ As William F. Felice summarized, "[h]uman rights are thus claims and demands essential to protect human life and enhance human dignity, and should therefore enjoy full social and political approval."¹¹⁴ A link can be established between free trade and democracy by paralleling these concepts with Universal Declaration of Human Rights provisions.¹¹⁵ Further, since international trade and communication advance these goals on the Internet, and they are also essential to human rights, it is a small logical leap that human rights on the Internet and in accessing the Internet are a key part of the international electronic globalization puzzle. In fact, Felice makes links between human rights and classical liberal principles in his book, but not in relation to trade via e-commerce, when he concludes by discussing the possibility for a global community founded on humane governance: "A rival normative world order based on values that promote a peaceful, equitable, sustainable, just, and participatory humane governance is needed for the new millennium."¹¹⁶ In this spirit, the concept linking human rights and Internet access is often debated, but is unlikely to be considered a pillar of customary international law because of the vast disagreement between states on how to regulate the Internet, if at all.¹¹⁷ This author believes that, if properly constructed and respected, an international legal framework addressing e-commerce may be a step in the direction of establishing a human right to access because some degree of consensus and

113. William F. Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights* 17 (St. U. of N.Y. Press 1996).

114. *Id.*

115. See generally UN Declaration, *supra* n. 112.

116. Felice, *supra* n. 113, at 184.

117. Mark W. Janis, *An Introduction to International Law* 42-43 (3d ed. Aspen L. & Bus. 1999) (discussing customary international law in the following manner: "[t]he fundamental idea behind the notion of custom as a source of international law is that states in and by their international practice may implicitly consent to the creation and application of international legal rules"). Janis further compares customary international law to usage of trade in contract law; this analogy indicates why determining a common standard of municipal Internet regulation is both challenging and necessary in developing an international customary right to Internet access. *Id.* at 6; see e.g. Steven M. Hanley, Student Author, *International Internet Regulation: A Multinational Approach*, 16 John Marshall J. Computer & Info. L. 997 (1998) (discussing the disparate ways in which States regulate Internet access).

reciprocally conditioned behavior will be a necessary result of an e-commerce trade framework that stresses classical liberalism, a D-FTZ, and necessarily-regulated self-governance.

The connection between democracy, human rights, trade, and the Internet has been explored in legal scholarship. Joel Reidenberg advanced the theory that trade paradigms manage the balance between the "free flows of information and [necessary] human rights,"¹¹⁸ whether this process is heavily based on state oversight as in Europe with data privacy protection laws, or on libertarian principles of governance as in the United States.¹¹⁹ In some countries the state-managed concept is taken to an extreme in which the government serves as the gateway to Internet access and content.¹²⁰ Reporters Sans Frontieres, in a study of global press freedom, established that forty-five countries restrict Internet access, and twenty do so to such an individually detrimental extent that they are labeled "enemies of the Internet."¹²¹ These countries either limit Internet access to government controlled and censored servers, or entirely prohibit Internet access, and include China, Cuba, Tunisia, and Iran.¹²² The Tunisian government closely regulates the Internet and citizen access and has gone so far as to block access to the *Hotmail*, *Amnesty International*, and *Le Monde* Web sites (among others).¹²³ Furthermore, the two government-contracted Internet service providers must provide lists of subscribers to the government, which then visits the homes of users to question them about access to objectionable Web sites.¹²⁴ Clearly, these examples do little to live up to the standards of Holmes' marketplace of ideas or the American culture of entrepreneurship and liberty;¹²⁵ the denial of access to the Internet and the censorship of content must be addressed within the international human rights rubric in order to avoid such egregious violations of human rights in such a promising medium.¹²⁶ But at least there is some hope on the horizon, as exemplified by this recent example from China reported in *The Economist*:

[Chinese] state constraints [on the Internet] are powerful, but not comprehensive. The government felt angry but foolish when, in April last year [1999], 10,000 or more followers of the Falun Gong suddenly sur-

118. Joel R. Reidenberg, *Rules of the Road for Global Electronic Highways: Merging the Trade and Technical Paradigm*, 6 Harv. J. Law & Tech. 287, 301-02 (1993).

119. *Id.* at 302.

120. Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 Comm. L. & Policy. 445, 475 (2001).

121. *Id.* at 476.

122. *Id.*

123. *Id.*

124. *Id.* at 476-77.

125. *Id.* at 483; see *supra* n. 1 for Holmes' precise quote.

126. Eko, *supra* n. 120, at 484.

rounded the compound in Beijing where the top leaders live. The gathering had been organized in large part by e-mail that the government could not detect.¹²⁷

Many of the NGO efforts regarding human rights on the Internet focus on freedom of expression and related freedoms on the Internet, possibly because of the power of the press and Article 19 of the Universal Declaration of Human Rights. The Global Internet Liberty Campaign is one endeavor that insists that governments not restrict free expression online, that access to the Internet be extended to developing countries, and that viewpoint discrimination not be practiced on the Internet.¹²⁸ The campaign argues that the broad expression guarantees in international and regional human rights doctrines apply equally to the Internet, and that government attempts to control free expression on the medium, such as in Tunisia and China, run afoul of international law.¹²⁹ The Internet is a vital medium for advancing democracy and human rights that must be protected because it has already enhanced facilitation of participation in government, expanded access to government information, strengthened the bonds between citizens, and broadened access to media of all viewpoints.¹³⁰ Government programs employing blocking, labeling, and filtering technology must also be overcome, in addition to more traditional controls, to guarantee unfettered Internet access for all.¹³¹ The battle against government restriction of Internet access is founded on the human right of free expression "regardless of frontiers" as the relevant legal instruments recite,¹³² a phrase that is certainly applicable to the borderless and expansive Internet.¹³³ Overall, the campaign recognizes that:

[C]itizens from the most repressive regimes are able to find information about matters concerning their government or their human rights

127. Nancy Bearg Dyke, *Alleviating Global Poverty: Technology for Economic and Social Uplift* 51 (The Aspen Inst. 2001); *The Flies Swarm In*, *The Economist* (July 20, 2000); See generally CNN, *Falun Gong: China's Dilemma* <<http://www.cnn.com/SPECIALS/2001/falungong/>> (accessed Nov. 7, 2001) (giving background information on the clash between the Chinese government and the "cult" known as Falun Gong).

128. Center for Democracy and Technology, *Global Internet Liberty Campaign, Regardless of Frontiers: Protecting the Human Right to Freedom of Expression on the Global Internet* ¶ 1 <<http://www.cdt.org/gilc/report.html>> (accessed Oct. 29, 2001); see *supra* n. 112 and *infra* n. 132.

129. Center for Democracy and Technology, *supra* n. 128, at III A.

130. *Id.*

131. *Id.*

132. UN Declaration, *supra* n. 112, at art. 19. The language of Article 19 of the Universal Declaration of Human Rights states: "[e]veryone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through *any media and regardless of frontiers*." *Id.* (emphasis added).

133. See generally Center for Democracy and Technology, *supra* n. 128.

records that no local newspaper may dare print, while denouncing the conditions under which they live for the world to hear. The Internet allows us an intimate look at other countries, other people and other cultures which few before were ever able to attain. This power to give and receive information, so central to the conception of any democracy, can be truly achieved on the Internet, as nowhere before.¹³⁴

The concept of human rights and democracy related to the Internet can be taken one step further by combining access and freedom of expression to create a human right to Internet access. Jeremy Rifkin suggests that a burgeoning academic movement seeking to redefine the concept of property rights as access rights in the digital age represents the vanguard of an impetus to re-order social relationships based on networks, cyberspace, and "cultural capitalism."¹³⁵ Rifkin echoes the thoughts of other scholars when ruminating on the fact that the Internet will serve as the new medium for trade, development, and democracy when he cites MacPherson, stating that "[Property] needs to become a right to participate in a system of power relations which will enable individuals to live a fully human life."¹³⁶ This language seems to reflect the very human dignity inherent in human rights paradigms, again suggesting Internet access as a human right. Key in the application of this concept is the role of governance, or what governments must do to ensure access to the means of economic advancement and a life of dignity and freedom:

Inclusion and access, rather than autonomy and ownership, become the more important tests of one's personal freedom. Freedom is a measure of one's opportunities to enter into relationships, forge alliances, and engage in networks of shared interest. Being connected makes one free. Autonomy, once regarded as tautological with personal freedom, becomes its opposite. To be autonomous in a network world is to be isolated and disconnected. The right not to be excluded, the right of access, on the other hand, becomes the baseline for measuring personal freedom. Government's role in the new scheme of things is to secure every individual's right of access to the many networks—both in geographic space and cyberspace—through which human beings communicate, interact, conduct business, and constitute culture.¹³⁷

The challenge within this seemingly collective approach to human rights is balancing the libertarian ideals of the Internet with the need for governance, guaranteed access, and legal harmony regarding e-commerce.¹³⁸

134. *Id.* at III A.

135. Rifkin, *supra* n. 89, at 236-37.

136. *Id.* at 239. The author is unable to determine the citation information for the original quoted source.

137. *Id.* at 240.

138. Felice, *supra* n. 113, at 3 (defining collective human rights as: "based upon the 'groups' in which the human species naturally congregates as a result of its social nature,

One scholarly article attempted to take the leap from access and expression to a human right to Internet access. Henry H. Perritt and Christopher J. Lhulier proposed a legal framework for the Internet that grants everyone a right of access to government documents and a right to disseminate like information.¹³⁹ Under some domestic and regional legal regimes, such as in the United States and Sweden, such a concept of rights is already ensured, but to expand this basic coverage to the rest of the world will require the mechanism of international human rights awareness and law.¹⁴⁰ The "right to receive information" is already codified in the majority of international human rights instruments, such as Article 19 of the Universal Declaration of Human Rights.¹⁴¹ The analysis of Perritt and Lhulier combines the importance of access more fully formulated by Rifkin with the idea of a human right to free expression and information dissemination on the Internet discussed by the GILC. Overall, these sources indicate that a key consideration in negotiating an international legal framework for e-commerce is the ability to access the medium and gain the resulting opportunities for free trade and democratic freedom.

Democracy is a keystone concept in forging structures for free trade and development on the Internet. Developing democracy both in the material world and the cyber world requires access to the power of the World Wide Web and its opportunities for trade and expression. Therefore, a human right to Internet access may be a vital component of any international legal framework intended to address e-commerce and encourage the three desired policy goals. This is a challenging proposition because this strand of scholarship is yet in its nascent stages, as Thomas Cottier more fully develops:

Theories on global justice and equity, coping with the challenges of the twenty-first century, are still in their beginnings. This, however, does not exclude putting into effect in a process of "constitution building," step by step, those elements of democratic constitutionalism which proved in long human experience to be the main pillars of the long-term legitimacy of rules: individual rights, open government, checks and balances, wide open participation and robust debate in rule-making; and combining this with successful traditions of diplomatic consultation, negotiation, and consensus. New communication technologies bear the potential to assist these processes and create a wider public which is

which include not only ethnicity/race, but also gender, class, and sexuality"). The classification of information haves and have-nots can be extrapolated from the class grouping, and reflects some of the same issues discussed in Felice's Chapter Four on development. See generally *id.*

139. Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 Buffalo L. Rev. 899, 901 (1997).

140. *Id.* at 901-02.

141. *Id.* at 902. For the text of Article 19, see *supra* n. 132.

necessary to achieving legitimate global rules. Thus, new technologies create new and complex regulatory needs. But they also offer new horizons and avenues in order to meet these needs in adequate substance-structure pairings of an emerging global trade constitution.¹⁴²

Most assuredly, the process of addressing e-commerce law and policy is not simple, but then again, the Internet may provide the very forum and means to address these complex issues and develop appropriate legal structures. Ultimately, this Comment is really about creating a quasi-constitution for trade via e-commerce, in the sense that a framework must address not only the necessary structure and substance of e-commerce law, but also the rights and policies of interest to the traders who use the Internet to participate in free trade or advance the cause of human rights and democracy using the Internet as a forum.¹⁴³

This author could think of no better conclusion to this discussion of the policy goals of democracy and human rights than the words of Article 29 of the Universal Declaration of Human Rights:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society.¹⁴⁴

The second element of this right suggests precisely the concept intended by the term necessarily-regulated self-governance. The remaining question is whether self-governance is likely to hold up to empirical scrutiny in practice in international trade via the Internet. One of the foremost legal scholars to advocate the self-governance of the Internet, and, impliedly, commercial transactions over the World Wide Web, is Llewellyn Joseph Gibbons.¹⁴⁵ Gibbons views the Internet community as a balance between its members' belief in the "dominant value" of the First Amendment and the pressures of "civilization, population, and, above all, commerce" in a rapidly globalizing Internet reality.¹⁴⁶ The challenge is how to address this balance in a legal and policy sense. Ultimately, a careful consideration of the factors implicit in this mixture

142. Thomas Cottier, *The Impact of New Technologies on Multilateral Trade Regulation and Governance* 72 Chi.-Kent L. Rev. 415, 435-36 (1996).

143. See Zechariah Chaffee, Jr., *How Human Rights Got Into the Constitution* (Boston U. Press 1952) (noting that the United States Constitution, a convenient model for the framework Cottier suggests, is intended to guarantee basic human, or individual rights in several provisions of the original document and the entirety of the Bill of Rights).

144. UN Declaration, *supra* n. 112, at art. 29.

145. Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation* 6 Cornell J.L. & Pub. Policy 475 (1997).

146. *Id.* at 477-78.

leads to the conclusion that Internet governance will largely be the province of cyber-citizens, mixed with government control when cost-benefit analysis makes it appear necessary.¹⁴⁷ Contracts are the preferred method of self-governance because they are quasi-legal, because if properly executed they are legally enforceable, and because they are native to the social contract theory that forms the core of the libertarian tradition of cyberspace.¹⁴⁸ Gibbons further recognizes that in addressing this reality, an important principle is the use of existing legal paradigms already ingrained in the culture of the Internet to design an international governance structure. The two most useful theories to avoid an unnecessarily *sui generis* approach to Internet governance are limited government and the law and economics approach;¹⁴⁹ in this author's formula, these theories form the basis for necessarily-regulated self-governance and a D-FTZ. And not only does Gibbons believe that political and economic theory is the way to construct a legal structure for governing the Internet and e-commerce transactions, he also believes that such must be an international endeavor.¹⁵⁰

147. *Id.* at 483-84.

148. *Id.* As Gibbons writes:

A self-regulation model based on contract law is appropriate because the contract law model, when it represents the true meeting of the minds, best fits the libertarian frontier tradition of cyberspace. A contract-based law of cyberspace facilitates the governing of cyberspace. Contract is, in essence, private law-making. Contract can provide for choice of law, forums, jurisdiction, and dispute resolution, thus avoiding the difficult questions of which jurisdiction's laws will govern the dispute. Unlike government, contracts made in the marketplace rapidly react to changing economic, technological, or social circumstances. Yet, as in all governments (private or public), there must be effective checks on the primacy of the new social contract or Cyberians may unwittingly contract away their liberties.

Id.

149. *Id.* at 499-500. Gibbons defends the law and economics interdisciplinary approach to governance, by stating:

The law and economics approach has the advantage of respecting individual differences, thus resolving values and moral issues in the marketplace of cyberspace. Each ideology, value, code of conduct, or custom may compete freely for acceptance in the marketplace. Some values will fall by the wayside, others will be assimilated, and still others will remain in active competition to become the dominant paradigm.

Id. at 500.

150. *Id.*

Trying to regulate cyberspace on a country-by-country basis is doomed to fail because it is inefficient and does not account for the inherent nature of the technology. 'The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location.' 'The unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes.' Similarly, the unique nature of the cyberspace requires a uniform global system of regulation [that] should bar nation-states from enacting inconsistent national legislation.

Self-regulation has been used successfully and efficiently in many other contexts, such as regulation of electrical appliances by the Underwriters Laboratories, certification of kosher food, and the Motion Picture Association of America rating system.¹⁵¹ The logic that allows this type of self-regulation to function should hold true for the creation of an international legal structure for the Internet, because “self-regulation is less costly than traditional command and control regulations.”¹⁵² This is the case because rules and regulations are likely to place drag on the economy and processes of free trade, especially in a fluid and advancing technological world where authorities have a lesser (and thus, less costly) role in enforcement, and consumer demand serves to determine the appropriate standards of conduct for the efficient functioning of the market place.¹⁵³

Furthermore, the flow of international e-commerce can be greatly improved by the removal of existing tariffs, quotas, and barriers that damage traditional forms of commerce (since none now exist in the realm of wholly digital trade),¹⁵⁴ thus removing the unnecessary and redundant portions of government regulation that serve to muddy the self-regulation waters with outmoded concepts of protectionism. This view is reflected in the Internet sector’s campaign against intrusive “government regulation of electronic commerce,” which considers national regulation of e-commerce to be a non-tariff barrier to trade that violates the spirit of the WTO agreements.¹⁵⁵ The industry group recognized the necessity of avoiding unnecessary government regulation, the necessity of constructing an applicable legal environment for international e-commerce, and the necessity of private sector involvement in the creation of a legal framework and its operation.¹⁵⁶ Furthermore, the group recognized that “it is the WTO—as the premier global trade organization with

Id. at 502. Gibbons cites the proceedings of *American Libraries Association v. Pataki*, 969 F.Supp 160 (S.D.N.Y. 1997) and an article located at <<http://chronicle.com/che-data/focus.dir/data.dir/0623.97/ala.htm>> to support these assertions. *Id.*

151. Solveig Singleton, *CATO Today's Commentary, Self-Regulation: Regulatory Fad or Market Forces?* ¶ 2 <<http://www.cato.org/dailys/08-07-99.html>> (Aug. 7, 1999).

152. *Id.* at ¶ 4.

153. *Id.* Singleton cautions against “self-regulation with substantial government involvement” as being equally damaging to the Internet and free trade as full-government regulation. *Id.* at ¶ 14. However, as reflected in this Comment, the author believes that there is some role for limited government in approaching the creation of an international legal structure to address e-commerce trade.

154. Aaron Lukas, *Center for Trade Policy Studies, Little Need for Government in E-Commerce* ¶¶ 7-14 <<http://www.freetrade.org/pubs/articles/al-11-23-98.html>> (Nov. 23, 1998).

155. Stuart S. Malawer, *National Governments Should Defer to the Private Sector and Avoid Undue Restrictions on Electronic Commerce*, Leg. Times (Feb. 8, 1999) (focusing on the campaign of 17 global Internet industry corporations launched in early 1999).

156. *Id.*

a binding dispute resolution system—that has the greatest responsibility to develop new rules of law concerning Internet trade.”¹⁵⁷ It seems that legal scholars, economic and political analysts, and the industry agree that the way to manage international e-commerce is through a harmonized structure under the auspices of the WTO which seeks to balance self-regulation by consumers and business groups with necessary and limited government regulation for protection of rights and legal order. The above policy discussion and examples of self-governance provide hope for a regime of necessarily-regulated self-governance.¹⁵⁸

In addition to the two main WTO proposed ways of addressing international e-commerce in a legal sense, the option of necessarily-regulated self-governance should be added, defined as a structure of rules for managing the Internet trade environment with minimal government interference. Governments should seek to shape the rules of the game, and only interfere in the operation of the marketplace managed by these rules when necessary to protect against serious threats to public welfare or national security, leaving individuals their classical liberal freedoms for unrestrained interaction on the Internet. Most of the scholarship in this area has addressed governance of the Internet generally, but by implication and the application of socio-political and economic theory and empirical evidence, the concept can be extended to governance of international e-commerce. Yet, even this option is not without its strong critics.¹⁵⁹ The bottom line is, however, that a solution, and preferably due to increasing trade friction and the complexity of relevant legal issues, the best and most efficient solution, must be developed to avoid the destruction of the free-spirited nature of the cyber-community and its attendant promise for increased free trade and democracy. Overall, self-governance can help to alleviate the pressure on the WTO negotiating bodies in choosing a precise Internet governance regime while yet protecting the nature and freedom inherent in the Internet and e-commerce. As America Online CEO Steve Case remarked in 1998: “Without such a new international framework, e-commerce will prove to be destabilizing and conflict inducing, rather than emerging as the new glue that binds nations, and the new fuel that expands world and regional economies.”¹⁶⁰

The principles of democracy, economics, and necessary regulation inherent in the self-governance approach serve the policy goals of promoting free trade and capitalism and promoting the spread of democracy and

157. *Id.*

158. See generally Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 Ind. J. Global Leg. Stud. 211 (1997) (stating an additional example of self-governance can be derived from the history of the Lex Mercatoria).

159. See e.g. Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 Cal. L. Rev. 395 (2000).

160. Malawer, *supra* n. 155, at § Leg. Times.

human rights, while successfully combining normative structure and existing international trade law with liberty in governing the Internet. This realization and conclusion, in combination with the principles implicit in the concept of a digital free trade zone, will prove instrumental in solidifying the core of an innovative international legal framework addressing e-commerce and trade.

E. THE BIG PICTURE IN BRIEF: THE INTERSECTION OF TRADE LAW AND PUBLIC POLICY ON THE INTERNET

Believe what you will
That is your right
But I choose to win
So I choose to fight¹⁶¹

Originally, this author intended to lay out in a very structured manner, resembling a blueprint, the proposed international legal framework. Upon further review, however, this does not seem to be the way to approach the process of creating a useful and acceptable paradigm. The entire objective of the analysis of this Comment is to preserve to the degree possible the autonomous nature of the Internet, while at the same time providing the certainty necessary for the conduct of international digital product transactions involving corporations, entrepreneurs, and governments. The broader goal is for the WTO and its constituent members to recognize the promise of an approach to setting the rules for e-commerce grounded in both legal and policy concepts, and then to encourage the adoption and implementation of the policy in the name of a new millennium of international harmonization and cooperation that puts the livelihood of people first. To accomplish these ambitious, and hopefully laudable goals, a flexible list of suggested approaches might prove most worthwhile.

The composition of this list should be founded on one main precept: the international legal trade and e-commerce structure is inherently a balancing act. The paradigm must balance all viable legal arguments with all credible policy suggestions, the need for order and certainty in international trade with the free-spirited and innovative nature of the Internet, and the realities of a world shaped by terrorism, national passions, and development issues, with the basic human needs of classical liberalism and its principles of choice, voice, and opportunity. In confronting this complicated formula, the WTO and its individual Member States should be free to pick and choose among all the competing ideas discussed and analyzed in this Comment, and in so doing, should keep squarely in mind the ones which are most supportive of a D-FTZ and necessarily-regulated self-governance. To this author, these two core

161. Creed, *Weathered* (Wind-up Ent. 2001) (CD-ROM).

concepts represent on one hand the human realities of e-commerce, in the concept of necessarily-regulated self-governance, and on the other, the business realities of trade in digital products, as exemplified in the discussion of the D-FTZ. Although these concepts are certainly not the only available approaches to the problem of certainty and constraint in e-commerce, they are the ones most likely to encourage a lasting consensus on how best to promote and advance both the needs of governments and the rights of individuals in all problematic realms of a cooperative and promising world. Governments should be free to choose and implement these options, but not be coerced into undermining their sovereign desires simply to rigidly adopt any proposal. In the end, the ultimate balance does not have to be between individual liberty and government security; rather, the balance could be between the responsibilities of people and the responsibilities of world leaders in a mutually agreeable global endeavor to promote free trade and democracy on the Internet, and as trust builds, in wider global society. One hopes that governments will see and understand the hope and beauty in these words, because after all, governments are comprised of people, too.

Finally, the other element of a possible framework that repeatedly struck a chord with this author is whether institutionalization of the relevant legal and policy principles is the most practicable route for ensuring a balance between liberty and security on the Internet. Theoretically, a grass roots movement in one country could encourage the implementation of a domestic Internet trade policy similar to this one, which could then be mirrored by other countries. This is a bottom-up approach that replicates the pitfalls of dissensus and multifarious national pronouncements which are already evident in Internet law and the e-products classification debate. It is true that the WTO has not been able to facilitate widespread agreement on the classification debate and other Internet issues itself, but the precedent for the promise of an institutional approach to the challenge is present in history. On earth, there are innumerable international and regional inter-governmental organizations, treaties, and declarations (whether always observed or not). In many cases these instruments were developed by a slow process of gradual consensus, eventually implemented successfully, and later resulted in the spawning of other international cooperative endeavors because the groundwork of trust was in place (painlessly for the most part). The WTO was the result of such evolutionary processes to determine the best route for coordinating and governing international trade.¹⁶² The challenge of the telegraph was confronted by an international organiza-

162. See generally Ralph H. Folsom, Michael Wallac Gordon & John A. Spanogle, *International Trade and Investment in a Nutshell*, Ch. 2 (2d ed., West 2000) (giving the historical development of the WTO).

tion that is still in existence and addresses Internet-related issues. And Michnik claimed that institutions are what make democracy permanent and unshakable. It therefore seems that the WTO, with the assistance of other governmental and non-governmental organizations, is in the perfect position to define the e-commerce paradigm, necessarily-regulated self-governance, and the D-FTZ. The WTO can look to its own successes in the realm of goods under GATT, the example of the telegraph, and the importance of guaranteeing freedom to choose and earn in the classical liberal domain of the Internet (and beyond) in confronting this challenge. Hopefully, this Comment provides some guidance in that regard, so that courageous entrepreneurs purchasing digital trade how-to kits can escape both the fear of never receiving physical goods through the mail and the fear of no longer being able to attain them freely in digital form on the Internet.

The WTO, its member countries, and interested individuals worldwide should keep in mind the balancing act, institutional prominence, and classical liberal concepts presented in this Comment when discussing how to best create an e-commerce trade framework that suits the needs of diverse countries and free people. In the end, this author is confident they will come to appreciate the practicality and power of necessarily-regulated self-governance and a digital free trade zone in fashioning the rules for a cyber-marketplace grounded in classical liberal notions including free trade and the freedom to speak the truth.

V. CONCLUSION

For what is a man profited, if he shall gain the whole world, and lose his own soul?¹⁶³

In the end, although this paper is a law review Comment, it is important to remember that law does not occur in a vacuum. In this case study, technology greatly impacts the path of the law, and even access to basic legal documents by the general public. Public policy related to economics, liberty, and standards of living is also implicated in any legal structure and should not be undermined by the constraints of that structure. Some of what is contained in this Comment may be theoretical or even a bit idealistic, but what is needed in this "real" world is a synthesis of all past ideas and suggestions into a new legal and policy package to be applied to new realms of human innovation, such as the Internet and trade via e-commerce. This synthesis forgets at its peril the concepts individuals hold dear, including economic freedom and democratic choice, because law governs individuals and provides them both the guidance and space to experiment with their dreams and ideas, much like the entrepreneur in the hypothetical who purchases a digital trade how-

163. *Matthew* 16:26.

to kit. In conclusion, "the doctrine of free trade, however widely rejected in the world of politics, holds its own in the sphere of the intellect,"¹⁶⁴ and can serve to promote the most basic concepts of human existence for all countries and peoples through an international legal framework addressing e-commerce and trade.

When we build, let us think that we build for ever.¹⁶⁵

Kristi L. Bergemann[†]

164. Irwin, *supra* n. 66, at 3 (citing Frank Taussig). This statement was made in 1905, before the technological innovation of the twentieth century, the establishment of a powerfully successful international trade regime beginning in 1947, and the birth of the miracle known as the Internet. *Id.* Irwin indicates that the quotation is from a publication of the American Economic Association entitled *The Present Position of the Doctrine of Free Trade* that this author was unable to obtain for review. *Id.*

165. John Ruskin, *The Seven Lamps of Architecture* (Dover 1989).

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