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Sungjoon Cho

IIT Chicago-Kent College of Law, scho1@kentlaw.iit.edu

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RECONSTRUCTING WORLD POLITICS: NORMS, DISCOURSE, AND COMMUNITY

*Sungjoon Cho**

ABSTRACT

This Article argues that the conventional (rationalist) approach to world politics characterized by political bargain cannot fully capture the new social reality under the contemporary global ambience where ideational factors such as ideas, values, culture, and norms have become more salient and influential not only in explaining but also in prescribing state behaviors. After bringing rationalism's paradigmatic limitations into relief, the Article offers a sociological framework that highlights a reflective, intersubjective communication among states and consequent norm-building process. Under this new paradigm, one can understand an international organization as a "community" (*Gemeinschaft*), not as a mere contractual instrument of its contracting parties (*Gesellschaft*). The Article applies the new paradigm to the World Trade Organization (WTO) as it describes the WTO's institutional evolution from a power-oriented, tariff-reducing contract to a norm-oriented world trade community.

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* Visiting Professor of Law, Northwestern University School of Law; Professor of Law and Norman and Edna Freehling Scholar, IIT Chicago-Kent College of Law. This article has greatly benefited from the comments of Professor Joseph Weiler. I also thank David Gerber, Jide Nzelibe, Gregory Shaffer, Karen Alter, Emilia Powell, Sida Liu, Steve Nelson, Terry Halliday, Robert Knowles, Joseph Conti, Tom Ginsberg, Jeffery Atik, and participants of the 2011 Colloquium on Globalization of Law, International Organizations, and International Law at University of Chicago Law School, and the 2010 Faculty Workshop at Loyola LA Law School. Jonathan Walton, Tanya Solis, Lauren Emery, Cecilia Suh, and Kevin McClure provided excellent research assistance. All errors are those of the author.

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INTRODUCTION

Two months after the 9/11 terrorist attacks in 2001, members of the World Trade Organization (WTO) gathered in the Qatari capital, Doha. Glued by the exigency of the time, they launched an audacious trade negotiation round for the main purpose of reducing or eliminating chronic agricultural protection in developed countries.¹ WTO members were desperate to send the post-9/11 world a clear message that would reverberate even to the marginalized lands: “development.” To the embarrassment of the WTO itself and its members, a decade of tedious, and torturous, talks hardly delivered anything, leaving the Doha Round in tatters.² While the Doha crisis must be one of the darkest hours of the WTO's history, it offers, in irony, a rare opportunity to testify about the gestalt of an international organization. Its conventional postmortems invariably assign the debacle to the lack of convergence in trade *interests* of key negotiating members, such as the U.S., the EU, China, and India.³ This

¹ In the Doha Ministerial Declaration of 2001, WTO members highlighted that “the majority of WTO members are developing countries” and agreed to “place [developing countries’] needs and interests at the heart of the Work Programme adopted in this Declaration.” World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 2, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

² See generally, Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT’L L.J. 573 (2010) (analyzing the history of the Doha Round’s decade-long negotiation stalemate).

³ See e.g., Alan Beattie, *Hopes Fade for Accord at Doha Talks*, FIN. TIMES, Jun. 22, 2011 (highlighting fissures among the U.S., the EU, Brazil, and China on various issues, such as cotton subsidies); Int’l Ctr. for Trade & Sustainable Dev., *Contemplating Doha Failure, WTO Members Look to Paris Meeting for Way Forward*, 15 BRIDGES WKLY. TRADE NEWS DIGEST, May 25, 2011, at 1,

perspective betrays a firm premise that the WTO is an instrument that coordinates and channels its (major) members' positions, which are ultimately informed by their domestic politics. That is, WTO members' national interests determine what the WTO *does*, and perhaps more importantly what it *is*. This perspective, which presupposes individualized, profit-maximizing states, is subject to a positivist methodology⁴: it explains why and how states behave in a particular situation. This thread of thought, loosely coined "rationalism,"⁵ is a dominant paradigm among contemporary international relations (IR) scholars.⁶ Under a rationalist lens, the Doha Round is no more than a deal fallen apart.

Rationalism certainly holds great explanatory power over state behaviors. It would be disingenuous to say that states do not pursue material (economic) interests. Still, however, rationalism does not, and cannot, elucidate how those WTO members form the titular "interests" in the first place, and equally importantly, how the WTO, qua organization, shapes such formation. While states communicate with one another as *social* actors, rationalism simply brackets such ideational factors as ideas, values, norms,⁷ discourse,⁸ and learning, which *do* influence, and even

<http://ictsd.org/downloads/bridgesweekly/bridgesweekly15-19.pdf> (observing gaps in negotiating parties' positions as "unbridgeable"); Int'l Ctr. for Trade & Sustainable Dev., *Deeply Divided, WTO Members to Search for Common Ground on Doha*, 14 BRIDGES WKLY. TRADE NEWS DIGEST, May 26, 2010, at 1, <http://ictsd.org/downloads/bridgesweekly/bridgesweekly14-19.pdf> (pointing out that WTO members failed to agree on "common terms of engagement").

⁴ See Steven Smith, *The Discipline of International Relations: Still an American Social Science?*, 2 BRIT. J. POL. & INT'L REL. 374, 375 (2000) (contending that positivism is so dominant as a methodology, in particular in the United States, that it tends to marginalize other epistemological approaches).

⁵ Two strands of IR theories stand out under the banner of rationalism depending on main parameters: realism (neo-realism) characterizes an IO as a mechanism reflecting interest of powerful states, while liberalism (neo-liberalism and neo-liberal institutionalism) focuses on the utilities that an IO offers to its members, such as the reduction of transaction costs. See *infra* Part I.A–B.

⁶ See Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 324 (1998) (observing that the neorealist-neoliberal debate has been central within IR for the past decade).

⁷ Although scholars in a wide range of disciplines have used social norms as an analytical device, social norms can be defined as a set of criteria for "appropriate behavior for actors with a given identity" in understanding social construction. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 891 (1998); see also Matthew J. Hoffmann, *Norms and Social Constructivism in International Relations*, in 8 INT'L STUD. ENCYCLOPEDIA (Robert A. Denemark ed., 2010). Cf. AMARTYA SEN, ON ETHICS AND ECONOMICS xiii (1987) (arguing that "norms and behaviour should become more closely integrated in economic theory").

⁸ In this article, the term "discourse" is used in a generic sense referring to an

determine, state behaviors.⁹ After all, the WTO membership cannot be reduced simply to a bargaining privilege; it also represents a common set of beliefs shared collectively by WTO members, with or without cost-benefit calculations.¹⁰ From this perspective, one might render a different explanation for the Doha failure. The true failure of the WTO members might be the failure to establish a shared normative ground among themselves over the cause of development that the Doha Round was supposed to espouse (“Doha Development Agenda”).¹¹ Major WTO members never factored development into their interest matrices through adequate discursive interactions. Development never morphed into the WTO’s social structure based on which WTO members self-evaluate their particular behaviors as appropriate or not.¹² Under this framework, the Doha Round is a failed *community*-building project.

These two distinct frameworks—rationalist and sociological—can apply in general to other international organizations (IOs). Under a rationalist framework, an IO is merely a tool that states create to maximize their material interests. With the *ex ante* institutional choice and design, states pre-program an IO to facilitate interstate cooperation to reduce transaction costs and stabilize expectations. However, rationalism does not exhaust perspectives on IOs. In an alternative view, an IO may be defined as a community that emerges, rather than being created by its members, based on the aforementioned socio-cognitive properties.¹³ This Article aims to animate the latter—“sociological”—framework that remains hitherto under-explored in international studies.¹⁴ Importantly, the starkly

“interactive process by which ideas are conveyed” without any “post-modern baggage.” Vivien A. Schmidt, *Discursive Institutionalism: The Explanatory Power of Ideas and Discourse*, 11 ANN. REV. POL. SCI. 303, 305 (2008).

⁹ Regarding this line of thought (“constructivism”), see *infra* Part II.B.

¹⁰ José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT’L L. 324, 338 (2006) (observing that “the ideas, shared understandings, and norms (soft and hard) that emerge from participation in IOs [International Organizations] ‘constrain and enable choices’ for states”).

¹¹ Cho, *supra* note 2, at Part III.

¹² Regarding the “logic of appropriateness,” see *infra* note 185.

¹³ See *Two Approaches*, *infra* note 14, at 389 (observing that “institutions are often not created consciously by human beings but rather emerge slowly through a less deliberative process”).

¹⁴ One of the earlier ventures to apply sociology to international law can be found in Max Huber’s work. While emphasizing collective interests among states, Huber still recognized a special status of powerful states (“Machtrecht”), especially in his early work. See Jost Delbrück, *Max Huber’s Sociological Approach to International Law Revisited*, 18 EUR. J. INT’L L. 97, 97–98, 109–11 (2007). Subsequently, Harold Lasswell and Myres McDougal also pursued “the global common interest in approximating a world public order of human dignity.” Richard H. Steinberg & Jonathan M. Zasloff, *Power and International*

different prescriptions that these two frameworks generate over a failure of interstate cooperation justify the urgent need for the alternative approach. Those who advocate rationalism would propose to refurbish the machinery of bargaining, while those who adopt the sociological framework might be more interested in community-building agendas.

The baseline of this Article is that we are accustomed to perceiving an IO *through* its creators, i.e., sovereign states. The conventional paradigm of an IO may be best depicted as a global “Gesellschaft,”¹⁵ a contractual relationship that sovereign states establish to achieve a certain functional (regulatory) goal, be it the promotion of free trade or the prevention of climate change.¹⁶ Here, particular political outcomes may be attributed eventually to calculative individual actions and interactions, rather than to endogenous norms provided by an IO itself.¹⁷ To this extent, an IO may be viewed as an “empty shell” that states manipulate to attain their desired goals.¹⁸ Methodologically, rationalism’s characteristic

Law, 100 AM. J. INT’L L. 64, 76–77 (2006). Yet this sociological approach has often been criticized as lacking interest in the “effectiveness” of international law. *Id.* More recently, international scholars, in particular those who take international organizations seriously, have begun to pay more attention to a sociological framework in understanding state behaviors. For example, José Alvarez viewed compliance pull as a sociological phenomenon. Alvarez, *supra* note 10. In a similar vein, Jutta Brunnée submitted that IOs “socialize[]” states and lead them to internalize norms generated within IOs even without material (cost-benefit) considerations. *Id.* (referring to the reliance on the concept of socialization based on IO membership by Jutta Brunnée and other scholars). Robert Keohane called a sociological approach a “reflexive” approach in contrast with a rationalist approach, yet he criticized that a sociological approach generally lacks a coherent “theory.” Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379, 381, 393 (1988) [hereinafter *Two Approaches*].

¹⁵ See FERDINAND TÖNNIES, COMMUNITY AND SOCIETY 223–31 (GEMEINSCHAFT UND GESELLSCHAFT) (Charles P. Loomis trans. & ed., 1957), reprinted in MARCELLO TRUZZI, SOCIOLOGY: THE CLASSIC STATEMENTS 145–54 (1971) [hereinafter *The Classic Statements*]. Tönnies wrote about the dichotomy between *Gesellschaft* (“society”) and *Gemeinschaft* (“community”) found in human interactions and group dynamics. Tönnies defined *Gesellschaft* as an artificial human connection built by people who possessed an intent to work together, whereas *Gemeinschaft* was a natural human connection arising out of birth or family. *Id.*

¹⁶ Cf. FRANCIS YSIDRO EDGEWORTH, MATHEMATICAL PHYSICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES 52 (1881) (viewing that “economical calculus” in opposition to ethical deliberation was particularly relevant to “war and contract”).

¹⁷ James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 736–39 (1984) (observing that utilitarianism as an ideology interprets actions as based on calculated decisions).

¹⁸ See Kenneth A. Shepsle, *Studying Institutions: Some Lessons From the Rational Choice Approach*, 1 J. THEORETICAL POL. 131, 133 (1989).

Epicurean propensity for parsimony (“the propensity to account for all appearances from as few principles as possible”)¹⁹ does not address “accounts based on post hoc observation of values or ideology.”²⁰ In other words, it “limit[s] the number of variables that a theory considers,” which “can increase both its explanatory content and its capacity to concentrate the scholarly mind.”²¹ Therefore, a “technical analysis of a very high order”²² may produce many useful research projects, which not only offer convincing narratives on an IO’s present operation but also hold a prognostic force on its evolution.

Useful as it may be, rationalism is nonetheless prone to paradigmatic blind spots, presenting a largely curtailed picture of contemporary IOs and their relationships with states. Most of all, rationalism’s very assumption does not envision cognitive-normative properties of state action.²³ Yet, states’ strategic (rational) choices, which are informed by their (rationally structured) national interests, cannot be made in a vacuum. States are not just “calculating automatons”²⁴; they also may be “interpretive.”²⁵ Their alleged rational choices are not to be merely deducted from the “tightly defined, pre-packed sets of motives.”²⁶ There must be an explicit explanation as to *how* these interests (preferences) are formed,²⁷ such as through “frames of reference, moral templates and normative orientations.”²⁸ States, as well as their actions, are in fact deeply “embedded” in their socio-cultural settings, which are beyond their control, such that a purely utilitarian (profit-maximizing) paradigm becomes nonsensical.²⁹

The ever-intensifying interdependency fueled by both the *yin* and

¹⁹ SEN, *supra* note 7, at 24.

²⁰ *Two Approaches*, *supra* note 14, at 392.

²¹ *Id.*

²² SEN, *supra* note 7, at 8.

²³ *Id.* at 15.

²⁴ Colin Hay & Daniel Wincott, *Structure, Agency and Historical Institutionalism*, 46 POL. STUD. 951, 952 (1998).

²⁵ Stephen Bell, *Institutionalism: Old and New*, in GOVERNMENT, POLITICS, POLICY AND POWER IN AUSTRALIA 1, 8 (Dennis Woodward, Andrew Parkin & John Summers eds., 2002).

²⁶ *Id.*

²⁷ Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, in STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 1, 8 (Kathleen Thelen & Sven Steinmo eds., 1992).

²⁸ Bell, *supra* note 25; *see also* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991).

²⁹ This theoretical position is called “historical institutionalism.” *See* Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 COMP. POL. 231, 237 (1995) (book review).

yang of globalization also warrants a sociological framework in that it offers a compelling analytical framework under which one can systematically reconstruct our conventional way of understanding of an IO. The end of the Cold War and the subsequent “postnational constellation”³⁰ instilled a strong sense of collectivity (“*mentalités collectives*”)³¹ in the Hobbesian international sphere.³² Here, the sociological approach defines states as *social* actors, rather than atomistic individuals.³³ The internal dynamics among social actors both condition and constitute their own perception of challenges and responses, which conventional IR theorists tend to discount.³⁴ Therefore, the sociological paradigm is capable of probing those issues that rationalism removes from the research agenda under its own assumptions.³⁵ In particular, this Article employs an IR version of a sociological framework, i.e., “constructivism.”³⁶ While

³⁰ JÜRGEN HABERMAS, *THE DIVIDED WEST* 176 (Ciaran Cronin trans., 2006) [hereinafter *DIVIDED WEST*] (“In spatial, social, and material respects, nation-states encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level.”).

³¹ John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 *INT’L ORG.* 139, 157 (1993) [hereinafter *Territoriality*].

³² See Thelen & Steinmo, *supra* note 27.

³³ Alexander E. Wendt, *The Agent-Structure Problem in International Relations*, 41 *INT’L ORG.* 335, 366 (1987) (arguing for a theory that posits the state as a particular kind of social actor that is “an inherently *social* entity, rather than as a Hobbesian primitive individual”).

³⁴ *Id.*

³⁵ Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism*, 50 *INT’L ORG.* 325, 337 (1996) (book review) (observing that realism and neoliberalism treat certain questions as assumptions and remove them from the research agenda whereas institutionalism’s framework allows questions about issues such as the origin and nature of states).

³⁶ The pedigree of constructivism dates back to the 1950s when Karl Deutsch “highlighted the importance of identity formation measured by social transactions and communications.” Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 *COL. J. TRANSNAT’L L.* 19, 26 (2000) (quoting Peter J. Katzenstein et al., *International Organization and the Study of World Politics*, 52 *INT’L ORG.* 645, 654 (1998)). See generally KARL W. DEUTSCH ET AL., *POLITICAL COMMUNITY IN THE NORTH ATLANTIC AREA: INTERNATIONAL ORGANIZATION IN THE LIGHT OF HISTORICAL EXPERIENCE* (1957). Yet the term (“constructivism”) was coined by Nicholas Onuf in 1989. See Brunnée & Toope, *supra* note 36 (citing NICHOLAS GREENWOOD ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY* ch. 1 (1989)). There are many different forms of constructivism. In this article, I draw mainly on a modest (thin) form of constructivism that Alexander Wendt developed along the line of “structurationist and symbolic interactionist sociology.” ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL*

admitting that power and interest still matter in terms of their causal (determinative) effect on state behaviors, constructivism nonetheless emphasizes the constitutive role of ideas and norms on such materialistic factors as power and interest.³⁷ In other words, “power and interest explanations *presuppose* ideas.”³⁸ Therefore, constructivists focus on certain “discursive conditions,” which may justify a rationalist explanation.³⁹

Constructivism enables us to conceptualize an “imagined community” that exists in a cognitive dimension comprised of norms and legal discourses.⁴⁰ Under this constructivist *Weltanschauung*, an IO’s norms function as a *language* by which members of the IO communicate among one another, thereby understanding and predicting each others’ behaviors, instead of simply attempting to outmaneuver their fellow members. Through norms *qua medium* (language), participants’ communicative competence transforms into administrative power that can effectively coordinate their behaviors.⁴¹ In this community (*Gemeinschaft*) conceptualized within an IO, one can envision the “enlarged mentalities” under which we can “compare[] our judgment with the possible rather than the actual judgments of others” and “put[] ourselves in the place of any other man.”⁴²

Suppose that an IO member claims that its measure is consistent with IO norms. The eventual reception of this member’s validity claim by others—the legal interpretation—hinges on the “context-dependent acceptability of reasons.”⁴³ That is to say, the member’s claim originates from its own perspective, which may be sustained unless challenged by another member. Another member may attempt to invalidate the measure at issue by exposing it to “better reasons and context-altering learning

POLITICS 1 (1999). *See also* Stefano Guzzini, *A Reconstruction of Constructivism in International Relations*, 6 EUR. J. INT’L REL. 147, 148 (observing that constructivism is inherently eclectic).

³⁷ WENDT, *supra* note 36, at 135 (arguing that power and interest are still important but constituted more by ideas and emphasizing the constitutive, not causal, nature of ideas).

³⁸ *Id.* (emphasis original).

³⁹ *Id.*

⁴⁰ Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT’L REL. 319, 327 (1997); *see also* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2d ed., 1991).

⁴¹ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 150 (William Rehg trans., 1992) [hereinafter *BETWEEN FACTS AND NORMS*].

⁴² *Id.* at 148 (quoting IMMANUEL KANT, *CRITIQUE OF JUDGMENT* § 40 (John Henry Bernard trans., 1951)).

⁴³ *Id.* at 36.

processes.”⁴⁴ Thus, norms channel social actors’ behaviors via the “reasoning process,” which is operated by discursive merits and generalizable rules.⁴⁵

Nonetheless, this Article neither denounces rationalism nor oversubscribes to constructivism.⁴⁶ The presence of global norms does not automatically translate into an immediate revision of a state’s strategic balance sheet. Political gravitational force is always at large. The “political survival calculus” in the minds of domestic politicians bound by short-term election cycles may interfere with or delay certain socio-cognitive transformations within an IO.⁴⁷ Ideas and discourse do not always guarantee institutional changes within an IO. These cognitive factors might prove futile in the face of “crystallized ideas about rationalist interests.”⁴⁸

What this Article *does* argue is that the old politics driven by the old paradigm cannot prevent the new social reality around IOs from emerging. Many international regulatory challenges that the world faces today, ranging from global poverty to climate change, may require structural, systemic, and long-term solutions, which a conventional bargain model based on a routine power politics or strategic cost-benefit analysis alone cannot fully embrace on account of its inevitable paradigmatic limitations. Those challenges call for a soul-searching discourse and deliberation among members of an IO and their nationals on such issues as values, goals, and their collective identities that the IO represents. Although constructivism should not simply bracket those “things out there,” such as military and economic power,⁴⁹ it can certainly lay bare that even these material elements “take on significance as states develop shared expectations

⁴⁴ *Id.*

⁴⁵ FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICES AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 43 (1991) (arguing that rules and norm guide choices via deliberation and discourse on the merits and “cast in terms of universalizable rules”).

⁴⁶ Of course, constructivism could, and should, not claim a disciplinary monopoly in understanding the WTO. “[N]o approach can sustain claims to monopoly in truth—even on useful insights.” John Gerard Ruggie, *What Makes the World Hang Together?: Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 882 (1998) [hereinafter *Neo-Utilitarianism*].

⁴⁷ See AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID (1995).

⁴⁸ Vivien A. Schmidt, *Taking Ideas and Discourses Seriously: Explaining Change through Discursive Institutionalism as the Fourth “New Institutionalism,”* 2 EUR. POL. SCI. REV. 1, 16 (2009).

⁴⁹ See ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 134 (1999).

through interaction.”⁵⁰ Insofar as the old paradigm is unbecoming for these kinds of ideational factors in addressing new realities in the international field, a new perspectival endeavor, such as one proposed in this Article, should complement the conventional approach.⁵¹ On balance, an IO’s true reality may best manifest as a *double helix* structure⁵² of the two paradigms, under which any single paradigm may not claim its disciplinary monopoly.⁵³ As a construct, an IO’s community (Gemeinschaft) is not only a constraining environment to its members: it is also an “enabling” structure that generates and even facilitates their purposeful behaviors.⁵⁴

⁵⁰ *Id.* at 128.

⁵¹ See Peter J. Katzenstein et al., *International Organization and the Study of World Politics*, 52 INT’L ORG. 645 (1998); James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in HANDBOOK OF INTERNATIONAL RELATIONS 53 (Walter Carlsnaes et al. eds., 2002) (arguing that a “cross-paradigmatic” discourse between rationalism and constructivism can lead to a better understanding of world politics).

⁵² I owe this insight to Professor Joseph Weiler. See also Katzenstein et al., *supra* note 51, at 682 (emphasizing the complementarity between rationalism and constructivism).

⁵³ The “structuration” theory may help elucidate this mutually complementary nature of rationalism and constructivism. See generally ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS 69 (1979). The structuration theory objects to structural determinism and emphasizes an ontological role of human agency. It “join[s] agents and structures in a ‘dialectical synthesis’ that overcomes the subordination of one to the other, which is characteristic of both individualism and structuralism.” Wendt, *supra* note 33, at 356. It also accommodates insights from historical institutionalism by arguing that “social structures are inseparable from spatial and temporal structures, and that time and space must therefore be incorporated directly and explicitly into theoretical and concrete social research.” *Id.* Under the structuration theory, an IO as a social structure maintains the “duality” of structure. IO members (actors) and the IO (structure) are “mutually constitutive yet ontologically distinct” entities by “giving agents and structures equal ontological status.” *Id.* at 338–39, 360. They are “co-determined”: an IO is the result of its members’ intended actions and interactions, while these actions and interactions are at the same time mediated by the unique context of the IO’s community that is not necessarily reducible to its members. *Id.* at 360. For example, within the context of the European Union (EU), while members determine its original constitutional architecture (inter-governmentalism), the EU’s supranational governance takes over once it is created by members and subsequently shapes members’ culture and identities. See notably JOSEPH H. H. WEILER, THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION 30 (1999) (observing that the original decision-making process had “strong supranational elements” and that the European Commission had “virtually exclusive proposal-making competence”).

⁵⁴ The neorealist bias according to which norms are imposed as constraints on social actors fails to recognize norms’ “enabling” function. While actors are subject to norms, actors’ practices alter the normative structures by which they “share meanings, communicate intentions, criticize claims and justify choices.” Kratochwil, *supra* note 45, at 61. On the other hand, many constructivist explanations might be also consistent with the conventional IR paradigms in terms of “chang[ing] the material incentive structure of

Against this background, this Article first spotlights the increasing unfitness of the conventional paradigm (Gesellschaft) in fully apprehending what is happening with IOs and then offers an alternative paradigm (Gemeinschaft) to gain a more complete understanding of them. This paradigm shift from a bargaining model to a community model also connotes a deontological project that attempts to institute more duty-sensitive pathways in an IO's operational mechanism that used to be dominated largely by material incentives such as power and interests. In a methodological sense, the Article's empirical undertaking of the WTO tends to enrich constructivist legal scholarship by "specify[ing] when, under what conditions, and to what extent, state behavior is shaped by social structure."⁵⁵

The Article unfolds in the following sequence. Part I first delineates major properties of rationalism. This Part observes that the conventional image of an IO is a contractual (treaty-borne) tool—a global Gesellschaft—for sovereign states to achieve certain functional (regulatory) goals. It then highlights how the conventional paradigm has increasingly become inapt in the face of the postnational constellation in which the Cold War focus of narrow national interests is rapidly losing ground, if not disappearing entirely. Part II then turns to constructivism as a sociological attempt to reconstruct an IO from a functional tool (Gesellschaft) to a community of law (Gemeinschaft) where ideational factors, such as norms and culture, can bond members in a sociological sense.

Part III offers a case study on the WTO and the new (constructivist) paradigm presented in this Article. This Part first addresses the old paradigm's analytical deficiency. It underlines the altering environment around the WTO, such as the global supply chains, which has made the global Gesellschaft model increasingly incapable of accurately reflecting the WTO's actual, not hypothetical, operation. This Part also accuses the old paradigm of normative paucity (protectionism) that continues to undermine the global trading system. Concomitantly, Part III critically observes that an increasing number of diverging domestic regulations, albeit legitimate (non-protectionist) ones, cannot simply be bargained away under the old paradigm. It then proposes that the WTO's community (Gemeinschaft) is a conscious undertaking to overcome the aforementioned descriptive and normative challenges.

their targets by raising the costs of existing practices." Brian C. Rathbun, *Uncertain about Uncertainty: Understanding the Multiple Meanings of a Crucial Concept in International Relations Theory*, 51 INT'L STUD. Q. 533, 551 (2007) [hereinafter *Uncertainty*].

⁵⁵ Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1753 (2003).

Finally, some cautionary notes are in order. First of all, this Article does *not* claim that constructivism should evenly apply to *all* IOs.⁵⁶ Constructivism, in and of itself, is oriented to a “conditional, context-specific” approach to investigating an IO.⁵⁷ Thus, the Article duly acknowledges that the new paradigm may not explain what is happening in every single existing IO with the same level of contentment. In this sense, the Article’s case study (WTO) might be vulnerable to the criticism of a selection bias.⁵⁸ Nor should the new paradigm be unduly construed as a World Government or its equivalent along the lines of John Austin’s command theory. Any international theory should always heed the fatal risk of a false constitutional (domestic) analogy.⁵⁹ Critically, an IO’s community is not a logical evolution from a domestic constitution, but rather a noble systematization of international relations themselves.⁶⁰

I. THE CONVENTIONAL PARADIGM: A CONTRACT, TREATY AND GESELLSCHAFT

A. *Realism (Neorealism)*

The end of the Second World War heralded an era of international organizations (IOs). The unprecedented tragedy brought to nations a rare Kantian moment of collective enlightenment.⁶¹ Most of about two hundred international organizations now operating were established post-bellum.⁶²

⁵⁶ See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 20 (2008) (arguing that constructivism cannot serve as a “single framework” for the study of international law due to the lack of a “model”).

⁵⁷ *Two Approaches*, *supra* note 14, at 379–80.

⁵⁸ See George Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379 (1996) (arguing against inferences based on compliance rates of enacted treaties due to problems of selection bias).

⁵⁹ Hedley Bull defined the “domestic analogy” as follows: “the conditions of an orderly social life ... are the same among states as they are within them: they require that the institutions of domestic society be reproduced on a universal scale.” HEDLEY BULL, *HEDLEY BULL ON INTERNATIONAL SOCIETY* 79 (Kai Alderson & Andrew Hurrell eds., 2000).

⁶⁰ DIVIDED WEST, *supra* note 30, at 132 (arguing that international law and a domestic state constitution cannot be understood in the same terms because international law “presents an inverted image of the state and the constitution”).

⁶¹ WENDT, *supra* note 36, at 297–308 (describing the Kantian culture based on collective identity and “friendship”).

⁶² For a comprehensive history of international organizations, see BOB REINALDA, *ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS: FROM 1815 TO THE PRESENT DAY* (2009).

Most conspicuously, the United Nations (UN) was created “to save succeeding generations from the scourge of war” and “to unite our strength to maintain international peace and security.”⁶³ Many other IOs derived from the UN, such as the World Health Organization (WHO), whose goal is the “attainment by all peoples of the highest possible level of health.”⁶⁴ On the economic side, the so-called Bretton Woods institutions—the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), and the General Agreement on Tariffs and Trade (GATT)—were launched to rehabilitate the war-torn international financial, economic, and trade systems.⁶⁵

From a technical standpoint, those IOs are a product of “treaties,” such as the UN Charter, the WHO Constitution, and the IMF Articles of Agreement. These treaties are multi-party contracts in which sovereign states (*contracting parties*) stipulate their rights and obligations in a collective attempt to achieve the putative various regulatory goals. Those sovereign states negotiate terms of such contracts, draft, sign, and execute them. In any private contract, contracting parties engage in various types of “bargains” among themselves over eventual *terms* of those treaties during the negotiation process. Naturally, they vie to secure better terms than their fellow states.

This contractual characterization of treaties and IOs, which is conventional under public international law,⁶⁶ is susceptible to “realism”⁶⁷

⁶³ U.N. Charter pmb1.

⁶⁴ WHO Constitution, art.1.

⁶⁵ See Reinalda, *supra* note 62.

⁶⁶ Vienna Convention on the Law of Treaties; Draft Articles of State Responsibility on the Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001).

⁶⁷ Richard Steinberg and Jonathan Zasloff categorized realism into three groups roughly in accordance with its pedigree and theoretical development. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 73–76 (2006). First, the “traditional realism” represented by Hans Morgenthau in the 1940s viewed that international law was a “reflection of *both* the interests of powerful states and norms held in common across states.” *Id.* at 73. Many scholars considered Morgenthau’s emphasis on “power” as a positive (scientific) step in understanding international law since it duly recognized the Westphalian reality largely lost in the American legal discourse in the first half of the 20th century. *Id.* at 73–74. Yet some warned that such an approach might be “morally wrong” in that it would rationalize the hegemonic (domestic) interest in the name of international law. *Id.* at 74; *see, e.g.*, Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001). The traditional realism evolved on in the latter half of the 20th century and reached its climax in the 1970s and 1980s during the heyday of the Cold War. Here, the “power” element became so dominant that the normative element still visible in Morgenthau’s classical realist theory evaporated.

in IR theories. Realists basically regard an IO, despite its copious variations, as an instrument that serves states' functional needs, such as the promotion of interstate cooperation and reductions in transaction costs in interstate relations.⁶⁸ Under the realist logic, an IO is nothing but a global "Gesellschaft," an artificial ("sterilized") association that states establish for the purpose of facilitating certain pre-programmed regulatory goals.⁶⁹ An

Steinberg & Zasloff, at 74. Steinberg and Zasloff labeled this rather radical form of realism, strongly influenced by political science literature, as "structural realism," which is synonymous with "neo-realism." Structural realists employed a Hobbesian view of anarchic state system, a submissive role of international law which they argued was a mere "epiphenomenon of underlying power" or a "coincidence of state interests or coercion by powerful states." See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 105 (1979); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1 (Stephen D. Krasner ed., 1983); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 36–37, 118, 225 (2005). Interestingly, Steinberg and Zasloff observed that despite the "common misunderstanding," few realists make such claims other than structural realists. Steinberg & Zasloff, at 75. Finally, Steinberg and Zasloff viewed that some realists acknowledge certain "consequential" effects of international law on state behaviors, such as a facilitative role of international law in interstate cooperation ("realist-institutionalist hybrid"). *Id.* Nonetheless, even this eclectic position is not free from basic realist beliefs, such as the belief that international law facilitates interstate cooperation to the extent that such cooperation is useful to or favored by powerful states. See Richard H. Steinberg, *In the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004). Therefore, it might be fair to say that most contemporary realists, both legal scholars and political scientists, are "structural realists" or "neo-realists" in essence because even their nuanced acknowledgement of institutional influence of international law (and international organizations) still refuses to endorse a genuine "endogenous" impact of international law to state behaviors. See Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 112 (2009) (equating "structural realism" to "neo-realism" as a "recent incarnation" of the classical realism). One way or another, international law is *still* reduced to hegemonic interests of powerful states.

⁶⁸ See Gayl D. Ness & Steven R. Brechin, *Bridging the Gap: International Organizations as Organizations*, 42 INT'L ORG. 245, 246 (1988); Harold K. Jacobson et al., *National Entanglements in International Government Organizations*, 80 AM. POL. SCI. REV. 134, 141–59 (1986). The most radical version of realism leads to a wholly dismissive claim that "international law does not pull states toward compliance contrary to their interests." GOLDSMITH & POSNER, *supra* note 67, at 13. According to this position, states comply with international law only when such compliance is in sync with their interests. Harlan Grant Cohen, *Can International Law Work?: A Constructivist Expansion*, 27 BERKELEY J. INT'L L. 636, 637 (2009) (observing that rational choice (game theory) scholars view states as rational actors who condition their compliance with international law on their interests).

⁶⁹ See *The Classic Statements*, *supra* note 15, at 223–31 (viewing that where contracts become the basis of a system, it is then formed by its interests).

IO as a global *Gesellschaft* basically represents an “economistic” model where states attempt to maximize their interests by using a rational instrument to attain certain goals.⁷⁰

While realism represents a rationalist understanding of an IO,⁷¹ the IO’s innate contractual origin, and in particular, reciprocal bargain, inevitably exposes the global *Gesellschaft* to *power* disparity among its members. Powerful states tend to design IO norms (contracts) in a way that best serve their own preferences and interests. Therefore, *Gesellschaftian* norms are exogenously imposed constraints under which states’ alleged rational behaviors are strategized.⁷² The realist paradigm dates back to the Cold War period when “high politics,” such as security issues, dominated both public policymaking and academic debates.⁷³ The realist methodology had nearly become a “tacit ontology,”⁷⁴ as it had long been left unchallenged.

This rather inorganic view of IOs is a logical corollary to the root thesis of realism, such as “theories about states”⁷⁵ or “statist ontology.”⁷⁶ Under this paradigm, an IO could not claim its own “ontological independence”⁷⁷ separate from states. Even an IO’s “causal status,” under

⁷⁰ Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699, 702 (1999); Powell & DiMaggio, *supra* note 28; Anna Grandori, *Notes on the Use of Power and Efficiency Constructs in the Economics and Sociology of International Organizations*, in INTERDISCIPLINARY PERSPECTIVES ON ORGANIZATIONAL STUDIES, 61–78 (Siegwart Lindenberg & Hein Schreuder eds., 1993).

⁷¹ Realism is rationalistic in that it is based on Herbert Simon’s “substantive” notion of rationality, which always generates an optimal behavior through objective calculations. See *Two Approaches*, *supra* note 14 (citing Herbert A. Simon, *Human Nature in Politics: The Dialogue of Psychology with Political Science*, 79 AM. POL. SCI. REV. 293, 294 (1985)). Yet as Robert Keohane aptly observed, this substantive rationality is situation-specific, depending on an initial analytical setting. Thus, the realist mantra of “national interests,” which found its heyday in the Cold War era, tends to presuppose an ever-present Hobbesian zero-sum conflict.

⁷² Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 410–11 (1999) (observing that ideologies of rationality determine strategic responses to law).

⁷³ Katzenstein et al., *supra* note 51, at 652; cf. JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 59 (2006) [hereinafter *Sovereignty*] (characterizing the sovereignty-based old assumptions of public international law as “mantras”).

⁷⁴ John Gerard Ruggie & Friedrich V. Kratochwil, *Epistemology, Ontology, and the Study of International Regimes*, in CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION (1998); see also WENDT, *supra* note 36, at 35.

⁷⁵ Barnett & Finnemore, *supra* note 70, at 706.

⁷⁶ *Id.* at 700.

⁷⁷ *Id.* at 704.

which it may condition or structure state behaviors by controlling the information-decision flow among states, might not grant the IO autonomy.⁷⁸ According to the old paradigm, IOs “have no independent effect on state behavior”⁷⁹ since every single output generated by an IO is made, after all, *through* and *by* states. Therefore, the old paradigm basically views an IO as a passive instrument created by sovereign states for a specific function, such as the reduction of transaction costs.⁸⁰ At the same time, the old paradigm betrays “reductionism” in that its focus on “intricacies of the interactions among the individual actors” tends to make any organizational autonomy at the collective level “certainly superfluous and probably deleterious.”⁸¹

Realism, based on “overly simplistic behavioural assumptions,”⁸² tends to bracket complex social interactions that lead to the formation of preferences.⁸³ Since realists tend to address only “one dimension of a multidimensional reality,” it tends to “reify contemporary political arrangements.”⁸⁴ However, states, as well as their actions, are in fact deeply “embedded” in their socio-cultural setting beyond their control such that a purely utilitarian (profit-maximizing) paradigm becomes nonsensical.⁸⁵ Historical developments reflected in an IO’s institutional (normative) design shape states’ behaviors, which are “culturally and structurally thick, not just strategically lean.”⁸⁶

Interestingly, this historicity has deprived the old paradigm of its *Zeitgeist* status. Recent changes in both economic and cultural dynamics on a global scale have provided strong propellants for a “gestalt shift” in how we perceive and comprehend IOs.⁸⁷ Although the Cold War era had provided sovereigntists (realists) with a uniquely fertile ground to thrive, the global market integration in tandem with the demise of political ideologies have gravitated toward communitarian *inter*-dependence over sovereign *in*-dependence. For example, it was no coincidence that in its youth, the WTO

⁷⁸ *Id.*

⁷⁹ John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 7 (1995).

⁸⁰ See *Two Approaches*, *supra* note 14, at 390.

⁸¹ March & Olsen, *supra* note 17, at 735–36.

⁸² STEPHEN R. BELL, *AUSTRALIA’S MONEY MANDARINS: THE RESERVE BANK AND THE POLITICS OF MONEY* (2004).

⁸³ See Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996).

⁸⁴ *Two Approaches*, *supra* note 14, at 390–91.

⁸⁵ See *supra* note 29.

⁸⁶ See Ira Katznelson, *The Doleful Dance of Politics and Policy: Can Historical Institutionalism Make a Difference?*, 92 AM. POL. SCI. REV. 191 (1998).

⁸⁷ DIVIDED WEST, *supra* note 30, at 161 (viewing that a gestalt shift depends on the world society’s cultural and economic dynamics).

was in its ascendancy when the old realist paradigm emphasizing the theme of power and security declined at the end of the Cold War.⁸⁸ Thus, with the advent of the new millennium, the prominence of the old (obstructionist) absolute sovereignty,⁸⁹ and its descriptive power, has begun to decline, if not disappear entirely.⁹⁰ This “postnational constellation,”⁹¹ which is comprised of, *inter alia*, the end of the Cold War and the consequent vanishing of the old realist security threat, pushed forward a new pattern of thought, one that is “more ideational and holistic”⁹² than sovereignty-driven confrontationalism. Under this new reality, while states still remain major authoritarian entities whose collective actions distribute public goods and manage global affairs, new transnational trends, such as global supply chains, tend to deprive states of their “structural primacy and autonomy as [] unitary actor[s] in the international system.”⁹³

As *collective* stakes in the global public sphere—ranging from international commerce to the war on terrorism—have grown, states’ perceptions toward IOs have begun to shift gradually from a functional tool (contract) under which states compete with each other to something in which they actually collaborate, partner, and *participate* (community). This “*mentalités collectives*”⁹⁴ tends to reconfigure the traditional Hobbesian existential premise of states, i.e., anarchy, into a civilized status of “membership” in an international community.⁹⁵ In this situation, overemphasizing state interests tends to generate an “incomplete” understanding of IOs, which should be complemented by an alternative that recognizes the “power of ideas.”⁹⁶ In this context, Professor Joseph Weiler

⁸⁸ Daniel Abebe, *Future of the WTO (Daniel Abebe)*, THE UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG (Feb. 23, 2009), <http://uchicagolaw.typepad.com/faculty/2009/02/future-of-wto.html>.

⁸⁹ Cf. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 14 (1996) (observing that there have been significant changes in the international financial and political economies and noting that there has been a “diffusion of authority away from national governments”).

⁹⁰ See WENDT, *supra* note 36, at 4.

⁹¹ DIVIDED WEST, *supra* note 30.

⁹² WENDT, *supra* note 36, at 4.

⁹³ Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT’L ORG. 595, 625 (1995).

⁹⁴ *Territoriality*, *supra* note 31.

⁹⁵ CHAYES & CHAYES, *supra* note 89, at 27 (viewing that sovereignty has changed and no longer means states have the freedom to act independently in their self-interest, but act in membership in an international community).

⁹⁶ Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT’L ECON. L. 347, 378 (1998). (Neo)liberalists have recently turned to “ideas” as “additional intervening

insightfully observes that:

[T]he static nature of 20th Century hermeneutics has camouflaged the development and differentiation of the international legal system itself from an almost exclusively *state-centric* system concerned primarily with mediating conflicting *national interests* and ensuring mutual co-existence to a more complex system which displays now *communitarian* features and is concerned with *common systemic values* which at times may transcend or be different from the negotiated aggregate of national interests.⁹⁷

Another descriptive weakness of the old paradigm is its incapability of identifying an institutional *change* within an IO—how it develops and evolves internally over an extensive period of time. Under realism, change is either simply “assumed away”⁹⁸ or imposed externally upon an IO by states as a logical outcome of their altered interests and preferences.⁹⁹ Here, change is no more than an exogenous re-creation by a state, not an endogenous institutional development. In addition, “few have noted that organizations differ over time, or that they perform differently from one another, or that they achieve their ends with varying effectiveness or efficiency.”¹⁰⁰ Therefore, the old paradigm encounters few needs to investigate a unique nature and property of any given IO.

Notably, certain normative deficiencies of the realist-Gesellschaftian paradigm accompany the aforementioned descriptive ones. First of all, in the Gesellschaftian structure, as is often the case in a domestic contract situation, power determines the eventual *terms* of the contract.¹⁰¹ Naturally,

variable[s] between power/interest and outcomes.” WENDT, *supra* note 36, at 19. Nonetheless, they still remain materialists in the sense that they do not accept the premise that those material variables (power/interest) are in fact “effects” of or constituted by ideas. *Id.* at 114, 378.

⁹⁷ WEILER, *supra* note 53 (emphasis added); see also Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. INT’L ECON. L. 135, 150 (2008) (observing that the realist obsession with the status quo is unsuitable to the WTO’s integrationist aspirations).

⁹⁸ Ira Katznelson & Barry R. Weingast, *Intersections between Historical and Rational Choice Institutionalism*, in PREFERENCES AND SITUATIONS: POINTS OF INTERSECTION BETWEEN HISTORICAL AND RATIONAL CHOICE INSTITUTIONALISM 1, 7 (Ira Katznelson & Barry R. Weingast eds., 2005).

⁹⁹ Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 661 (2006). Here, realists show strong resistance to change, at least until the tipping point of what Krasner called “punctuated equilibrium.” Krasner, *supra* note 67; see also Bell, *supra* note 25, at 12.

¹⁰⁰ Ness & Brechin, *supra* note 68, at 247.

¹⁰¹ See Ji Li, *From “See You in Court!” to “See You in Geneva!”: An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT’L L. 485, 488 (2007) (observing that “realists predict that the WTO is nothing more than a

the innate power disparity in the Gesellschaftian anarchy may entail exploitation or other unjust outcomes. For example, even if a small WTO member prevails over a big, powerful country (such as the U.S.) in a WTO litigation, the former's victory may be in vain. If the powerful country refuses to comply with the WTO tribunal's decision, the ultimate retaliation by the small country, i.e., the suspension of a tariff concession, might not work simply due to the insurmountable gap in the economic size between the two countries.¹⁰² This frustrating prospect tends to deter small countries from filing complaints against powerful countries in the first place.¹⁰³ In sum, paradoxically, the contractual nature of an IO is vulnerable to the very Hobbesian struggle that it is supposed to prevent.

This power disparity among IO parties is also prone to an "externalization" of domestic politics, in particular those of powerful nations, onto the global Gesellschaft.¹⁰⁴ In this process, the desperate voices of powerless developing countries tend to be silenced.¹⁰⁵ This marginalization of developing countries within IOs raises various developmental concerns. Two interrelated, and disheartening, contemporary global trends—the widening global income gap¹⁰⁶ and ever-increasing abject poverty in the least-developed countries (LDCs)¹⁰⁷—have

forum for *power politics*") (emphasis added).

¹⁰² "Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the (Dispute Settlement Understanding) for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality." Decision by the Arbitrators under Article 22.6 of the DSU, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB/ECU (Mar. 24, 2000), at ¶ 177 (emphasis added).

¹⁰³ See Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 WORLD BANK ECON. REV. 287–310 (2005). See also Andrew Guzman & Beth Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, 34 J. LEGAL STUD. 557 (2005) (highlighting the importance of capacity constraints in preventing poor countries from suing rich countries in the WTO).

¹⁰⁴ See Wendt, *supra* note 33, at 361; DAVID H. LUMSDAINE, *MORAL VISION IN INTERNATIONAL POLITICS* (1993); JUSTIN ROSENBERG, *THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS* (1994).

¹⁰⁵ See Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483, 492 (2004).

¹⁰⁶ See WORLD BANK, *WORLD DEVELOPMENT REPORT: EQUITY AND DEVELOPMENT 7* (2005); *INCOME: Global Gap Rising, World Bank Study Shows*, UN WIRE (Jan. 18, 2002).

¹⁰⁷ See UN MILLENNIUM PROJECT, *INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS*, ch. 2 (2005); Charlotte Denny, *US Blocks Brown-led Drive for Increase in Aid*, GUARDIAN UNLIMITED, Jan. 23, 2002, available at <http://www.guardian.co.uk/business/story/0,3604,637808,00.html> (last visited

currently eclipsed a triumphant halo of globalization. As the World Economic Forum (WEF) glorifies the mainstream consensus on market opening and deregulation,¹⁰⁸ the World Social Forum (WSF) accuses the North of enacting hypocritical economic policies and explores the possibility of “another world.”¹⁰⁹ As discussed above, the realist-Gesellschaftian paradigm is largely incapable of accommodating a genuine pro-development discourse within an IO, as its theoretical concerns remain preoccupied with an egocentric state pursuing myopic national interests. This development deficit that is destined to materialize under the global Gesellschaft even invites those criticisms along the lines of neo-imperialism. Some development scholars condemn the global Gesellschaft as an “emerging Global State”¹¹⁰ or a new version of “Empire” operated by a “global market and global circuits of production”¹¹¹ without due consideration of the interests of those marginalized.

Conceivably, those in the old paradigm camp might point to the eventuality of “hegemonic unilateralism”¹¹² or even certain merits of a “well-meaning hegemon,”¹¹³ a role allegedly shouldered by the U.S. during the Cold War era. For example, Kenneth Chan’s empirical analysis illustrates the importance of “egalitarian” considerations in the outcome of the GATT Tokyo Round trade negotiation.¹¹⁴ Chan argues that during the Tokyo Round negotiation, which took place during the 1970s, the Swiss proposal highlighting equity and fairness in tariff reductions prevailed over the U.S.’ “efficiency” approach.¹¹⁵ Ethan Kapstein translated such prevalence of egalitarianism in the Tokyo Round as a small “price” paid by the U.S. for having an open global economy.¹¹⁶ Considering the U.S.’

on Feb. 20, 2012) (reporting that 2.8 billion people on earth live on less than \$2 a day).

¹⁰⁸ See WORLD ECONOMIC FORUM, <http://www.weforum.org> (last visited Feb. 20, 2012).

¹⁰⁹ See WORLD SOCIAL FORUM, <http://www.nadir.org/nadir/initiativ/agn/free/wsf> (last visited Feb. 20, 2012). The WSF is “opposed to neo-liberalism and to domination of the world by capital and any form of imperialism.” WORLD SOCIAL FORUM INDIA, *Charter of Principles*, <http://www.wsfindia.org/?q=node/3> (last visited Feb. 20, 2012).

¹¹⁰ B.S. Chimni, *A Just World under Law: A View from the South*, 22 AM. U. INT’L L. REV. 199, 201 (2007).

¹¹¹ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* xi (2000).

¹¹² DIVIDED WEST, *supra* note 30, at 183.

¹¹³ *Id.* at 116.

¹¹⁴ See Kenneth S. Chan, *The International Negotiation Game: Some Evidence from the Tokyo Round*, 67 REV. ECON. & STAT. 456 (1985).

¹¹⁵ *Id.*

¹¹⁶ Ethan B. Kapstein, *Power, Fairness, and the Global Economy*, in POWER IN GLOBAL GOVERNANCE 80, 95 (Michael Barnett & Raymond Duvall eds., 2005). Regarding a similar observation that powerful nations bargain some constraints for the long-term stability of the international society, see Joseph A. Conti, *Learning to Dispute:*

hegemonic status in the middle of the Cold War, this observation sounds quite plausible. Yet after the Cold War ended and the post-hegemonic era began, such strategic (hegemonic) egalitarianism declined in what Jagdish Bhagwati termed the “diminished giant syndrome.”¹¹⁷ Unilateralist and parochial trade politics have increasingly become a hallmark of U.S. trade policy since the end of the Cold War.¹¹⁸

In sum, the old—realist-Gesellschaftian—paradigm tends to generate certain descriptive discontents because its outmoded narratives cannot fully analyze how the altered environment around an IO impacts its structure in a manner driven by endogenous sociological dynamics within the IO via cognitive factors such as ideas, culture, and norms. In addition, the old paradigm, and its Gesellschaftian logic, are prone to the normatively problematic consequences destined to entail from the inherent power disparity among parties in an IO’s operation.

B. Regime Theory and Neoliberal Institutionalism

Many a scholar has attempted to overcome the aforementioned limits in the realist-Gesellschaftian paradigm by exploring an alternative one. Some realists departed from their traditional assumptions and took an institutionalist turn. In the 1970s, an intellectual thirst for a systematic explanation of global governance amid some uncharacteristic developments, such as the relative encroachment of the U.S. hegemony and the rise of the Organization of Petroleum Exporting Countries (OPEC), gravitated many scholars toward the “regime theory.”¹¹⁹ Regime theorists define regimes as “governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue areas.”¹²⁰ Therefore, a regime may constrain and condition states’ behavior. In this regard, one can identify a “trade” regime represented by the GATT/WTO and a “monetary” regime represented by the IMF.

Yet the lingering deficiency in the regime theory is its failure to

Repeat Participation, Expertise, and Reputation at the World Trade Organization, 35 L. & SOC. INQ. 625, 633 (2010); Joel P. Trachtman, *Embedding Mutual Recognition at the WTO*, 14 J. EUR. PUB. POL’Y 780 (2007); Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOLUTION 3 (1998).

¹¹⁷ Jagdish Bhagwati, *The Diminished Giant Syndrome: How Declinism Dives Trade Policy*, 72 FOR. AFF. 22 (1993).

¹¹⁸ *Id.*

¹¹⁹ Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT’L ORG. 753, 759 (1986).

¹²⁰ *Id.*

close the discrepancy between its epistemology and ontology.¹²¹ By definition, regimes are based on certain epistemological traits, such as the convergence of expectations or intersubjectivity among their participants. Yet the realist-positivist pedigree in the regime theory tends to focus only on objective forces influencing state behaviors and therefore trivializes the subjective, and intersubjective, elements that produce *meanings* of their behaviors and eventually constitute their identities (ontology).¹²² Therefore, the role of norms is rather passive in the regime theory since the theory regards norms as mere external variables with which to “hypothesize” a certain incidence, such as a state behavior.¹²³ Under this basically “causal” setting, one of the classical logics, *modus tollens*, tends to prevail. In other words, “even a single counterfactual occurrence” may lead to the refutation of norms or their efficacy.¹²⁴ For example, the IMF helps prevent its members from manipulating their foreign exchange rates for the purpose of obtaining undue trade advantage. Here, a regime theorist may be tempted to equate an anecdote of currency manipulation with the normative bankruptcy of the IMF.

Importantly, however, rather than directly “causing” a certain state behavior, norms may “guide,” “inspire,” or “justify” the behavior.¹²⁵ While regime theorists are interested in whether an IO can effectively control its members’ behavior, they seldom pay attention to the importance of the “communicative dynamic” under which states justify their own behaviors as well as interpret and respond to others’ behaviors *through* norms.¹²⁶ In the IMF example, regime theories would not focus on how other exporting countries potentially affected by such an alleged currency manipulation might demand reasons behind the measure from the devaluing country as well as how the devaluing country might respond to such a reason-giving request. Regime theorists might not fully embrace the possibility of the devaluing country being persuaded and modifying its original measure as a

¹²¹ *Id.* at 764–66.

¹²² Sociologists criticize the titular objective tenets of rationality, such as market efficiency or causality, as a “myth” in that they are not axiomatically correct but rather widely “shared” and “accepted” in a community. See Edelman et al., *supra* note 72, at 410–11; RICHARD W. SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS (2d ed., 1987).

¹²³ Kratochwil & Ruggie, *supra* note 119, at 766–68. One solution to this deficiency, proposed by Kratochwil and Ruggie, might be to shift this positive epistemology embedded in the regime theory to more “interpretive strains” accentuating discourses and communication among state actors, as seen in Ernst Haas’ “evolutionary epistemology” and Jürgen Habermas’ “universal pragmatics.” *Id.*

¹²⁴ *Id.* at 767.

¹²⁵ *Id.*

¹²⁶ *Id.*

result of this communication in a manner consistent with IMF norms.

Moreover, the regime theory, like realism, remains rationalistic in that the role of norms is still instrumental: norms exist in a regime to serve certain goals, such as reducing transaction costs.¹²⁷ Yet such separation of means and ends appears to be at odds with the nature of law itself. “In law when available means limit and in part define the goals, the means and the goal thus defined are to that extent inseparable.”¹²⁸ On account of the aforementioned deficiencies, even in its heyday (1980s) regime theory literature failed to outshine that of general international relations.¹²⁹ Therefore, scholars sought another alternative framework to understand IOs against a broad backdrop of international relations. Liberalism (neoliberalism)¹³⁰ might present itself as such an alternative framework.

Liberalism (neoliberalism) considers private individuals or their groups as primary actors in international relations.¹³¹ It views states as mere “surrogates” for individual or group preferences.¹³² These domestic constituencies express their values and interests through various domestic channels, such as legislation, political actions, court decisions, or self-organizations.¹³³ As rational actors, neoliberalism argues, those individuals “promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence.”¹³⁴

¹²⁷ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2624–25 (1997) (observing that regime theory explains cooperation in rationalistic terms where compliance with international law resulted almost entirely from its functional benefits).

¹²⁸ Kratochwil & Ruggie, *supra* note 119, at 770 (quoting R.S. Summers, *Naïve Instrumentalism and the Law*, in *LAW, MORALITY AND SOCIETY* (P.S. Hacker & J. Raz eds., 1977)).

¹²⁹ *Id.* at 761.

¹³⁰ The prefix “neo” denotes a contemporary version of realism and liberalism distinguished from their classical prototypes. *Neo*-realism and *neo*-liberalism employ the “analytical tools of microeconomics to lend greater precision.” Finnemore & Sikkink, *supra* note 7, at 890. In a similar manner, rational choice (game theory) theorists also emphasize the scientific superiority of a rationalist methodology in studying international law. See GUZMAN, *supra* note 56, at 17, 21 (praising a rational choice model as the most promising model due to its parsimony and falsifiability). However, their subtle differences are not material for the purpose of this article. Therefore, these two terminologies are used interchangeably in this article.

¹³¹ While (neo) realists understand international relations as “simple behavioral responses to the forces of physics that act on material objects from outside,” neoliberalism recognizes certain cognitive factors, such as individuals’, albeit not states’, ideas and beliefs, as a determinant for state behaviors. Adler, *supra* note 40, at 321.

¹³² Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT’L L. 673, 681–83 (2001).

¹³³ *Id.*

¹³⁴ Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of*

Therefore, neoliberalism takes an integrated view of the relationship between the international and domestic spheres.¹³⁵ For example, neoliberal scholars believe that an understanding of the workings of international tribunals requires knowledge of the internal operations of the state actors that establish such tribunals and decide which disputes to submit or not to submit.¹³⁶

The challenge that liberal theorists face in international relations is how to coordinate these different liberal preferences among states with minimum transaction costs.¹³⁷ Liberal theorists view that a regime or an international organization provides such a coordination mechanism among states by creating norms, reducing transaction costs, and supplying information. Accordingly, the stability of a regime indicates that conflicting domestic liberal preferences have been somehow coordinated.¹³⁸ For example, drawing largely on economics, such as game theory (the prisoner's dilemma), Robert Keohane demonstrates that "institutions" matter since they can facilitate interstate cooperation by providing information, reducing transaction costs, and monitoring compliance.¹³⁹ In a similar vein, Robert Axelrod observes that the prisoner's dilemma could be avoided if games were repeated indefinitely, the monitoring costs were sufficiently low, and the actors' discount rates (for the future) not too high.¹⁴⁰

Therefore, the neoliberal paradigm portrays an IO as a Lockean architecture that denotes a cooperative rivalry among members to attain

International Politics, 51 INT'L ORG. 513, 516 (1997).

¹³⁵ See Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. 240, 241 (2000).

¹³⁶ See Laurence Helfer & Karen Alter, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT'L L. & POL. 871 (2009) (arguing that European courts are more willing to engage with the European Court of Justice because they are empowered by the relationship, whereas Andean judges were passive).

¹³⁷ Although neoliberalism offers richer narratives than neorealism, the variety, and the complexity, of actors and their preferences tend to undermine its explanatory power of causal relationship between those actors' interests and state behavior. See Katzenstein et al., *supra* note 51, at 658–59.

¹³⁸ Andrew Moravcsik, *supra* note 134, at 537 (arguing that an international regime is stable when groups adjust so as to make domestic policy socially embedded and its reversal costly).

¹³⁹ See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (viewing that international institutions facilitate decentralized cooperation among state actors).

¹⁴⁰ See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 182 (1984) (noting the importance of monitoring actual behavior so that players are able to observe and respond to each other's choices).

certain common regulatory goals.¹⁴¹ Neoliberalism is similar to the regime theory in that it highlights a regularized institutional mechanism with which to monitor and coordinate states' behaviors.¹⁴² According to neoliberalism, such a coordinative mechanism is, as discussed above, largely a reflection of member states' domestic preferences. In other words, an IO's members project their domestic norms and values to the IO system.

Nonetheless, neoliberalism is also vulnerable to criticism, in particular as to its key assumptions. One might argue that neoliberalism is a rather *special* theory that applies only to a special situation, i.e., such a time and space as meets "liberal" conditions. When and where such conditions are met, neoliberalism may well describe why and how states cooperate and change their behaviors. However, when and where such conditions are not met, which in fact appears to be a norm in the contemporary international environment, its theoretical persuasiveness and validity tend to be questioned.

José Alvarez challenged a fundamental liberal assumption that liberal nations are more likely to cooperate among themselves than non-liberal ones. Not only did Alvarez question the artificial distinction between "liberal" and "non-liberal" states but also he pointed out the poor record of the U. S., a liberal state, in international cooperation and compliance.¹⁴³ After all, according to one survey, 57 percent of WTO memberships by population belong to the titular "non-liberal" group.¹⁴⁴ Under this situation, over-projecting liberal political values embedded in some Western democracies onto the WTO domain may result in both descriptive and prescriptive conundrums.

C. The Rationalist Dilemma

The aforementioned conventional IR theories, be it neorealism or neoliberalism, feature common properties as a form of rationalism. Even

¹⁴¹ See WENDT, *supra* note 36, 279–96 (explaining the Lockean anarchy in the international relations based on cooperative rivalry).

¹⁴² Joseph Nye classified liberalism into three groups: (1) commercial Liberalism, which focuses on the conciliatory role of international trade; (2) democratic Liberalism, which spotlights the peace-making effects of republican government; and (3) regulatory Liberalism, which captures the vitality of norms and institutions in regulating relations between countries. See Joseph S. Nye, Jr., *Neorealism and Neoliberalism*, 40 *WORLD POL.* 235, 246 (1988) (quoting Robert O. Keohane, *Economic Limits of Modern Politics: International Liberalism Re-Considered*, unpublished manuscript, 1986).

¹⁴³ See José E. Alvarez, *Behave Better: A Critique of Slaughter's Liberal Theory*, 12 *EUR. J. INT'L L.* 183, 202 (2001). He also emphasized that transjudicial communication might not be exclusively reserved among liberal courts. *Id.* at 233.

¹⁴⁴ *Id.* at 210.

neoliberalism considers norms as a “superstructure built on a material base.”¹⁴⁵ Neoliberal scholars view that IO norms simply constrain or “regulate” state behaviors in certain issue areas, rather than “constituting” states’ interests and identities. They contend that those interests and identities are exogenously defined by liberal domestic politics rather than emerging endogenously within an IO.

Here, neoliberalism parallels neorealism in that material factors exogenously determine state behaviors and provide us with useful knowledge in understanding how international institutions work.¹⁴⁶ According to David Baldwin,¹⁴⁷ the theoretical distinction between neorealists and neoliberals is far from being salient: any differences between them are of a matter of degree, not of substance. For example, both neorealists and neoliberals recognize that anarchy constrains state behavior, while institutions (regimes) can mitigate such constraints. (No wonder that the regime theory derives from neorealism, while neoliberal institutionalism derives from neoliberalism.) What distinguishes neorealists from neoliberals is that the former are more cognizant of anarchy’s constraining power than the latter, while the latter are more optimistic on institutions’ cooperation-inducing power than the former. Markedly, both theories view that states desire to maximize their material interests, while paying little attention to *moral* considerations. In this vein, Robert Keohane grouped neorealism and neoliberalism together and labeled them as “rationalism” in that their common thesis is substantive rationality consisting of certain material utilities, such as power, interest, and efficiency. The rationalist interpretation of an IO is as follows: Member states create and maintain an IO because it serves the interest of powerful members (neorealism) or to generate certain collective utilities, such as the reduction of transaction costs, among like-minded (liberal) members (neoliberalism).

Naturally, rationalism connotes a strong microeconomic bias¹⁴⁸ as it presupposes that international institutions are mediums that “rational, self-interested actors” establish to “enhance *efficiency* in obtaining the actors’

¹⁴⁵ Checkel, *supra* note 6, at 327.

¹⁴⁶ See *Two Approaches*, *supra* note 14 (comparing the two approaches and their respective strengths in analyzing how international institutions work and change).

¹⁴⁷ See David Baldwin, *Neoliberalism, Neorealism, and World Politics*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 5–8 (David Baldwin ed., 1993).

¹⁴⁸ See Brunnée & Toope, *supra* note 36, at 32 (observing that proponents of neorealism and neoliberalism “adopted the analytic tools of microeconomics to lend greater precision”).

preferences.”¹⁴⁹ Thus, mainstream international relations (IR) theories reveal their “enthusiasm for measurement”; in fact, both realism and liberalism widely adopt microeconomic methodologies that are highly susceptible to modeling and mathematical equations.¹⁵⁰ In a similar vein, John Ruggie highlights the “utilitarian” framework adopted by rationalism. Ruggie critically observes that even rationalists consider ideational factors, but in terms of utilities in achieving agents’ material interests.¹⁵¹ For example, some scholars submit that rational actors may comply with international law out of a fear of “reputation” costs.¹⁵² At first glance, one might assume that a reputation seeker might easily internalize international norms for fear of loss to its reputation from non-compliance. Yet it is still a derivative form of rationalism in that reputation itself is an exogenous factor shaping an actor’s rational pay-off matrices. If the fear of such loss is somehow attenuated, as is often the case with superpowers like the U.S., it is only rational to expect relatively little compliance from the actor, if not always.¹⁵³ More importantly, states may often comply with international law without any rational (cost-benefit) basis.¹⁵⁴

Although rationalism may be useful in understanding and predicting IO members’ behaviors within a given matrix of preferences, it nonetheless offers very few collective possibilities to “change” the existing system of fixed preferences.¹⁵⁵ Consequently, rationalism largely “reproduce[s] the

¹⁴⁹ Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT’L ECON. L. 461, 474 (1998) (emphasis added); see also JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 22 (1989) (“Actions are valued and chosen not for themselves, but as more or less efficient means to a further end.”).

¹⁵⁰ See Finnemore & Sikkink, *supra* note 7, at 889–890. Cf. Robert W. Staiger, Non-Tariff Measures and the WTO, WTO Staff Working Paper ERSD-2012-01, Jan. 2012, available at http://www.wto.org/english/res_e/reser_e/ersd201201_e.pdf. (adopting a quantitative (mathematical) methodology in understanding non-tariff barriers under the WTO system).

¹⁵¹ See *Neo-Utilitarianism*, *supra* note 46, at 865–66 (observing that neorealists have often imported unacknowledged ideational factors and that neoliberal institutionalism “assigns a limited causal role to ideational factors”).

¹⁵² See GUZMAN, *supra* note 56, at 33 (arguing that reputation, along with reciprocity and retaliation, are the three costs of non-compliance with international obligations).

¹⁵³ In this context, the reputation model is vulnerable from its own rationalist camp. See GOLDSMITH & POSNER, *supra* note 67, at 102 (observing that the reputation discourse tends to exaggerate the theoretical determinacy of reputation over state behaviors).

¹⁵⁴ See Cohen, *supra* note 68, at 660–61 (arguing that states comply with the prohibition of “torture” regardless of a cost-benefit analysis). Cf. Richard Warner, *Does Incommensurability Matter?: Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287 (1998).

¹⁵⁵ See WENDT, *supra* note 36, at 377. Cf. Thelen and Steinmo, *supra* note 27, at 16

status quo.”¹⁵⁶ For this reason, the rationalist interpretation of an IO often lacks historical and cultural insights with which one may identify the transformation of the IO system *on its own terms*. As a type of functionalism, rationalism tends to offer a “solution that is achieved relatively rapidly and is independent of the details of historical events leading to it.”¹⁵⁷ It largely brackets the unique historical path of an organization and its often rich institutional legacies, such as norms and practices, thereby omitting the sociological reality of the organization. Thus, it cannot explain how an IO has developed its own unique institutional values and identity. Nor can it fathom how its norms, which the system itself generates internally rather than accepting those imposed externally, engineer the institutional evolution. For example, the rationalist diagnosis of the current stalemate of the Doha Development Round is either the lack of political input from powerful countries (neorealism) or the failure to coordinate members’ domestic preferences (neoliberalism). Rationalism simply would not take into account the ideational cause (development) historically entrenched in the Doha Round.

Finally, as rationalism basically presupposes states as asocial, atomistic, and “self-centered” entities,¹⁵⁸ such an exclusivist dimension of sovereignty tends to foreclose many necessary inquiries.¹⁵⁹ As long as sovereignty means “the ability to afford not to learn,”¹⁶⁰ its mere invocation may shrink future institutional possibilities, including various institutional changes.¹⁶¹ Likewise, insofar as rationalism or Gesellschaftian theses regard an international institution only as the “object of strategic choice,” they fail to embrace the possibility that an IO may be a genuine—

(arguing that “a critical inadequacy of institutionalist analysis has been a tendency towards mechanical, static accounts that largely bracket the issue of change and sometimes lapse inadvertently into institutional determinism”).

¹⁵⁶ WENDT, *supra* note 36, at 377.

¹⁵⁷ March & Olsen, *supra* note 17, at 737–38.

¹⁵⁸ Nichols, *supra* note 149, at 472 (quoting Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 336, 336 (1977) (“[t]he economic man is a social moron.”)); *id.* (also citing Mark Granovetter, *Economic Action and Social Structure: A Theory of Embeddedness*, 91 AM. J. SOC. 481, 502–05 (1985) (critically observing that economic relations are in fact molded by socio-cultural interests)).

¹⁵⁹ See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 801 (2003) (observing that there are many criticisms of sovereignty and that the IR system has to “reconsider certain sovereignty concepts”).

¹⁶⁰ KARL W. DEUTSCH, *THE NERVES OF GOVERNMENT: MODELS OF POLITICAL COMMUNICATION AND CONTROL* 111 (1966).

¹⁶¹ WENDT, *supra* note 36, at 17 (criticizing realism’s incapability to explain “structural change” under the logic of “plus ça change”).

normative—constraint on actors’ behavior.¹⁶²

II. A NEW PARADIGM: AN INTERNATIONAL ORGANIZATION AS A “COMMUNITY”

A. A Sociological Turn

The cardinal contribution of rationalism originates from its characteristic parsimony enabled by its “thin” model of rationality defined by “fixed preferences” and “neutral institutional incentive structures.”¹⁶³ Based on such parsimony, rationalists can formulate mathematical game models with hypothetical (rational) actors. Under rationalism, actors may be rational yet “in an unthinking manner.”¹⁶⁴ Nonetheless, these rational actors are not necessarily *real* actors: they do not feature more complicated (*social*) dimensions of their behaviors driven by non-material, i.e., cognitive and ideational, factors such as ideas and beliefs.¹⁶⁵ The rationalist framework does not embrace the notion of “sentient agents” that can change their institutions via “deliberation, contestation, as well as consensus-building around ideas.”¹⁶⁶

At this juncture, it is vital to appreciate that these paradigmatic shortcomings of rationalism derive not from its inherent flaws in the theoretical design but from a largely inevitable epistemological distinction.¹⁶⁷ Rationalism basically denotes a “structural theory” in that its main concern is to explain certain causal relations between the conditions of action and action itself.¹⁶⁸ Therefore, rationalism views that a state behavior can be understood by, and attributable to, power (realism) or domestic preferences (liberalism). In other words, according to a structural theory given, exogenous conditions (structure) constitute “various modes of

¹⁶² Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT’L ORG. 729, 729 (1998) (arguing that institutions matter as constraints that shape actors’ behavior in world politics).

¹⁶³ Schmidt, *supra* note 48, at 5.

¹⁶⁴ Schmidt, *supra* note 48, at 13.

¹⁶⁵ See Schmidt, *supra* note 48, at 5; BO ROTHSTEIN, *SOCIAL TRAPS AND THE PROBLEM OF TRUST* ch. 1 (2005); FRITZ W. SCHARPF, *GAMES REAL ACTORS PLAY: ACTOR-CENTERED INSTITUTIONALISM IN POLICY RESEARCH* (1997).

¹⁶⁶ Schmidt, *supra* note 48, at 9.

¹⁶⁷ See David Dessler, *What’s at Stake in the Agent-Structure Debate?*, 43 INT’L ORG. 441, 448 (1989) (observing that an epistemological distinction between systemic and reductionist theories corresponds with the ontological distinction between the arrangement or structure of units in the international system and their interaction).

¹⁶⁸ *Id.* at 444, 461.

enablement and constraint” to state actions.¹⁶⁹ Another epistemological characteristic of structural theory is “reductionism.”¹⁷⁰ Here, Kenneth Waltz offered a classical definition of a structure. According to Waltz, a structure refers to a “spontaneously generated, and unintended” arrangement that is generated by individual units differentiated by their properties or elements of domestic origin.¹⁷¹ In this structure, domestic politics eventually externalize international outcomes.¹⁷²

Such paradigmatic limitedness compels us to search for a novel paradigm that departs from the aforementioned etymological assumptions and instead embraces a “systems-level theory” that is capable of explaining how the *organization* of units, rather than individual units themselves, shapes their behaviors.¹⁷³ The new paradigm should overcome the overdeterminacy of rationalism (structuralism) driven from an individuated agency (state) structure defined by material factors, such as power, interests, and utilities. Although these conventional IR theories hold analytical prowess due to parsimony, they are nonetheless oblivious to certain sociological phenomena, such as “intentional rule structures”¹⁷⁴ that social dynamics among agencies (states) create. Critically, it is not a mere aggregate, or interrelationship, of states, but rather their corporate existence or collectivity (community) that endogenously constructs those states’ perception of values, norms, and even their collective identities.¹⁷⁵

While IR scholars have more recently begun to pay belated attention to various *social* aspects of political life, their investigations have largely failed to overcome the chronic “disciplinary isolation.”¹⁷⁶ As IR scholars face ever-mounting theoretical needs to reflect social constructions into their own research programs, sociology offers a uniquely powerful set of narratives on the role of culture and norms in international life that could not be found in conventional IR theories such as realism and liberalism.¹⁷⁷

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 448.

¹⁷¹ WALTZ, *supra* note 67, at 18, 39–40, 60, 91.

¹⁷² *Id.* at 39, 60; see Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 219, 247 (2000) (observing that a trade policy depends on the domestic power balance between pro-trade and anti-trade groups).

¹⁷³ Dessler, *supra* note 167, at 448.

¹⁷⁴ *Id.* at 462.

¹⁷⁵ Guy E. Swanson, *An Organizational Analysis of Collectivities*, 36 AM. SOC. REV. 607 (1971) (arguing that collectivities can be classified according to their organization’s fundamentals for making decisions and taking action).

¹⁷⁶ Finnemore, *supra* note 35, at 325.

¹⁷⁷ *Id.* Notably, “sophisticated” versions of liberalism appear to converge with constructivism. See Nye, *supra* note 142, at 238. Joseph Nye coined this strand of

In particular, while conventional IR scholars (realists and liberals) tend to abstract from historical changes universal principles that can apply irrespective of time and space, a sociological paradigm “endogenizes” these changes.¹⁷⁸ In other words, it seeks to explore the very dynamics of these *changes* themselves. In this regard, Martha Finnemore’s apt observation merits a full reference:

Sociology’s institutionalism is thus radically different from realism or liberalism in IR in that it falls on the structural or holist side of the agent-structure debate. Analytically, *social structure is ontologically prior to and generative of agents*. It creates actors; it is not created by them. In contrast, most arguments in IR and political science begin with agents. They take as given some set of actors having a similarly pre-specified set of interests-states pursuing wealth or security, members of Congress pursuing reelection, firms pursuing profits, national leaders pursuing a place in history. Macro-level social structure is explained as the consequence of their interaction. Even in approaches that IR calls “structural,” like Kenneth Waltz’s structural realism, the international structure is an epiphenomenon of the power capabilities of and interaction among individual actors; it has no independent ontological status. *It constrains only; it is not generative.*¹⁷⁹

Against this background, political scientists have recently presented various strands of institutionalism (“new institutionalism”) based on different *logics* from rationalism. While rationalism (or rationalist institutionalism) represents a “logic of calculation,”¹⁸⁰ “historical

liberalism as “sociological Liberalism,” which highlights the “transformative effect of transnational contacts and coalitions on national attitudes and definitions of interests.” *Id.* at 246. The realist paradigm, which tends to reduce all “unexplained variance” to the unit (state) level, cannot adequately theorize “nonstructural determinants” of state action, such as the communicative ability, technological advancement, and international norms, which go beyond the distribution of power among states. *Id.* at 250. In other words, neorealism cannot fully explain the fact that the information technology and other logistical revolutions may profit non-state actors and incentivize states to further open their markets with no major changes in the international power distribution. *Id.* In contrast, liberalism—at least some of its strands, such as sociological liberalism discussed above—pays more attention to “non-power incentives and variations in the capacity to communicate and cooperate.” *Id.*

¹⁷⁸ Finnemore, *supra* note 35, at 327–28.

¹⁷⁹ *Id.* at 333 (emphasis added).

¹⁸⁰ Vivien Schmidt observes that in exceptional cases some rationalist scholars, such as Judith Goldstein, do turn to the notion of ideas when they fail to explain institutional change through interests only. For example, those scholars seem to view that ideas can

institutionalism” and “sociological institutionalism” connote the “logic of path-dependence” and the “logic of appropriateness,” respectively.¹⁸¹ First of all, historical institutionalism focuses on a historical path-dependency of an organization in its creation and evolution of an integrated system.¹⁸² While still recognizing a strategic (calculative) dimension of individual actors’ dynamics in an organization, historical institutionalism also highlights the “cultural” properties that an organization provides, such as “moral or cognitive templates for interpretation and action.”¹⁸³ It provides “background information” as to how social actors as “sentient agents” instill past practices (and norms) with contextualized meanings, generate knowledge, and respond to external challenges.¹⁸⁴

In a similar fashion, sociological institutionalism highlights how broadly defined institutions, such as norms, shape behaviors of states by providing them with the “cognitive scripts, categories and models” that are vital for those behaviors.¹⁸⁵ According to sociological institutionalism, an organization’s creation and evolution depends on social legitimacy, which it generates in a certain cultural setting, rather than on a narrow utilitarian premise.¹⁸⁶ Thus, sociological institutionalism highlights the logic of “appropriateness” based on the culture and values (“how reality is structured”)¹⁸⁷ in contrast with the logic of calculation or preferences

determine interests by clarifying goals in advance. Yet, they still fail to demonstrate why some ideas are chosen over others. See Schmidt, *supra* note 48, at 4; see also JUDITH GOLDSTEIN, IDEAS, INTERESTS, AND AMERICAN TRADE POLICY (1993).

¹⁸¹ Schmidt, *supra* note 48, at 1 (arguing that that historical institutionalism concentrates on political institutions and their development through “regularized patterns and routinized practices” subject to a “logic of path-dependence” and that sociological institutionalism focuses on social agents who act based on a “logic of appropriateness”).

¹⁸² Nichols, *supra* note 149, at 475–82 (submitting that historical institutionalism’s definitive characteristic is its attenuated path dependency, which places an emphasis on the historical path taken by an institution in its creation and development).

¹⁸³ See Hall & Taylor, *supra* note 83, at 939.

¹⁸⁴ Schmidt, *supra* note 48, at 9 (viewing that the background information offered by a historical institutionalist examination can illustrate how sentient actors instill rules with contextualized meanings, construct understandings, or create ideas that “lead to the ‘layering’ of one institution over another, the ‘reinterpretation’ of an institution, or the ‘conversion’ of agents to another institution”).

¹⁸⁵ See Hall & Taylor, *supra* note 83, at 948. “Sociological institutionalism (SI) focuses on the forms and procedures of organizational life stemming from culturally specific practices, with institutions cast as the norms, cognitive frames, scripts, and meaning systems that guide human action according to a ‘logic of appropriateness.’” Schmidt, *supra* note 48, at 10; see also W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (1995); Powell & DiMaggio, *supra* note 28; JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATION BASIS OF POLITICS (1989).

¹⁸⁶ See Nichols, *supra* note 149, at 485; Hall & Taylor, *supra* note 83, at 949.

¹⁸⁷ WENDT, *supra* note 36, at 143.

adopted by the law and economics approach.¹⁸⁸ Yet some scholars who pursue non-rationalist *logics* focus particularly on the “discursive” dimension, such as ideas and discourse, and are often collectively dubbed the “discursive institutionalism.”¹⁸⁹ Among these scholars, some spotlight the “ideas” side (e.g., “ideational turn,”¹⁹⁰ “ideational institutionalism,”¹⁹¹ and “constructivist institutionalism”¹⁹²); others emphasize the “discourse” side (e.g., “discourse analysis”¹⁹³ and “*référentiel*” (frame of reference”¹⁹⁴).

B. Constructivism

Premised on the aforementioned cognitive-sociological pedigree, “constructivism”¹⁹⁵ in the IR theory circle provides us with an insightful paradigm. Constructivism emerged in the late 1980s as an “ideational turn,”¹⁹⁶ which aimed to counter materialistic theories such as neorealism and neoliberalism.¹⁹⁷ This new “style of reasoning”¹⁹⁸ is a “move from the

¹⁸⁸ See Nichols, *supra* note 149, at 498. “[E]ven though an individual may be acting rationally or out of self interest, perceptions of rationality or self interest are framed through—and thus shaped by—institutions.” *Id.* at 485; see also Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 8 (1986).

¹⁸⁹ Schmidt, *supra* note 48, at 1–2; see also John L. Campbell & Ove Pedersen, *Introduction*, in THE RISE OF NEO-LIBERALISM AND INSTITUTIONAL ANALYSIS 1, 9–13 (John L. Campbell & Ove Pedersen eds., 2001) (discussing discursive institutionalism).

¹⁹⁰ See MARK BLYTH, *GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY* (2002) (discussing ideational developments and transformations in institutional change).

¹⁹¹ See Colin Hay, *The “Crisis” of Keynesianism and the Rise of Neo-Liberalism in Britain: An Ideational Institutional Approach*, in THE RISE OF NEO-LIBERALISM AND INSTITUTIONAL ANALYSIS 193, 193–218 (John L. Campbell & Ove Pedersen eds., 2001).

¹⁹² See generally Colin Hay, *Constructivist Institutionalism*, in OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 56, 64–65 (R.A.W. Rhodes et al. eds., 2006) (discussing constructive institutionalism).

¹⁹³ See Martin Hajer, *A Frame in the Fields: Policymaking and the Reinvention of Politics*, in DELIBERATIVE POLICY ANALYSIS: UNDERSTANDING GOVERNANCE IN THE NETWORK SOCIETY 88–112 (Maarten A. Hajer & Hendrik Wagenaar eds., 2003).

¹⁹⁴ Bruno Jobert, *The Normative Frameworks of Public Policy*, 37 POL. STUD. 376, 376–86 (1989).

¹⁹⁵ See *supra* Part II.B.

¹⁹⁶ Finnemore & Sikkink, *supra* note 7, at 888.

¹⁹⁷ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982) [hereinafter *International Regimes*] (observing that the prevailing interpretation of international authority, which focuses on power and a market rationality in international economic regimes, ignores phenomenological dimensions such as social purpose).

¹⁹⁸ IAN HACKING, *HISTORICAL ONTOLOGY* 160 (2004).

model of reality to the reality of the model.”¹⁹⁹ In other words, the new *Zeitgeist* calls for an “ontology” (“what kind of things there are and how they are structured”) of an IO different from the old IR theories.²⁰⁰ In this regard, a mere equilibrium of competing *political* vectors cannot fully explain the existential foundation of an IO and its norms.²⁰¹ While long-term benefits to states are “heavily discounted” under the short-term election cycle in an average democratic system, the “value of obeying the law” still counteracts such myopic calculation.²⁰² Kenneth Abbott observes that:

Economic and political structures are not corporeal things; they owe their existence to *constitutive ideas*, constitutive in the sense of defining or creating a social institution ... that would otherwise not exist ... [This] is true of ... *social constructs* like ... international regimes As the underlying ideas change, the norms, rules and institutions that embody them, at all levels of political activity, evolve along with them.²⁰³

Crucially, this new paradigm can explicate the nascent phenomenon of *community* within an IO.²⁰⁴ While still regarding “states” as the main units of analysis in explaining international relations, constructivism differentiates itself from the traditional IR theories in that it focuses on certain socio-cultural (“intersubjective”) dynamics among states in understanding states’ behaviors. This is a “moment of perfect subjectivity” in the social process that the rationalist model has largely bracketed, as it naturalized its calculative methodology as ontology.²⁰⁵ Therefore,

¹⁹⁹ Vincent Pouliot, “*Subjectivism*”: *Toward a Constructivist Methodology*, 51 INT’L STUD. Q. 359, 363 (2007) (quoting PIERRE BOURDIEU, CHOSSES DITES [THINGS SAID] 62 (1987)).

²⁰⁰ WENDT, *supra* note 36, at 22, 370–71; *see also* MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATION IN GLOBAL POLITICS* 6–7 (2004) (observing that an international organization can create its own “social reality” based on norms).

²⁰¹ *See* Kenneth W. Abbott, *The Trading Nation’s Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT’L L. J. 501, 520 (1985).

²⁰² *Id.* at 522.

²⁰³ Kenneth W. Abbott, “*Economic*” *Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 974 (1996) (emphasis added).

²⁰⁴ This paper focuses on a “legal” or “normative” community. An international community, however, is not necessarily constituted by law alone. *See* Bruno Simma & Andreas L. Paulus, *The “International Community”*: *Facing the Challenge of Globalization*, 9 EUR. J. INT’L L. 266, 267 (1998) (warning against any wholesale adoption of “international legal community,” which views a community of states exclusively as a community of international law).

²⁰⁵ WENDT, *supra* note 36, at 367–68 (observing that rationalism “isolates an important

“endogenous” factors, such as ideas, values, and norms,²⁰⁶ are central parameters to constructivism vis-à-vis “exogenous” factors such as power, interest, or domestic politics.²⁰⁷

These endogenous factors concern “not merely the instrumental rationality of the means actors select but also the normative self-understanding of the ends held by the social groups in question.”²⁰⁸ Therefore, constructivism can offer a richer, deeper, and perhaps better explanation than realism as to why states “hang together,” as Gerard Ruggie puts it, in particular through decades-long institutional *changes*, which are beyond the disciplinary assumptions of the old paradigm.²⁰⁹ The norm-based intersubjectivity tends to overcome the realist failure to envision “critical self-reflection” which “gives us perspective on our social environment and helps us to overcome any false sense of determinism.”²¹⁰ This “collective reflexivity” offers an ideational foundation for a community within an IO as a “public sphere” which is an “emerging space where states appeal to public reason to hold each other accountable and manage their joint affairs.”²¹¹

Constructivist understanding of an IO features the following basic characteristics: the emergence of cognitive rationality, the formation of social identities, and the redefinition of national interests.

First, the emergence of “cognitive rationality,”²¹² which is enabled by a shared cultural-normative background within an IO, has naturally transformed the tone of organizational discourse from being *power*-oriented to being *rule*-oriented, and thus has paved the normative ground for an emerging community within an IO.²¹³ This is a “norm-governed”

moment in the social process, a moment of perfect subjectivity when actors choose actions on the basis of identities and interests which are for an instant given”).

²⁰⁶ See Nichols, *supra* note 149, at 504; Gardner Patterson & Eliza Patterson, *The Road from GATT to MTO*, 3 MINN. J. GLOBAL TRADE 35, 41–42 (1994) (documenting how Professor John Jackson’s study led to the creation of the WTO).

²⁰⁷ See *supra* Part I.A.

²⁰⁸ *Neo-Utilitarianism*, *supra* note 46, at 860. See generally Max Weber, *The Meaning of “Ethical Neutrality” in Sociology and Economics*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 1 (Edward A. Shils & Henry A. Finch eds., 1949).

²⁰⁹ A rationalist behavioral change is “exogenous” in that a state responds only to “changing prices in the environment.” WENDT, *supra* note 36, at 316.

²¹⁰ *Id.* at 375.

²¹¹ *Id.* at 375–76.

²¹² Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 369 (1997) [hereinafter *Supranational Adjudication*].

²¹³ See *Sovereignty*, *supra* note 73. In his celebrated “communicative action” theory, Jürgen Habermas argued that a communicative action necessitates a shared ground of both norms and facts among social actors. See generally JÜRGEN HABERMAS, JUSTIFICATION

change.²¹⁴ In this sense, the biggest contribution of some IOs' dispute resolution systems and its derivative jurisprudence may be that it promotes "fidelity to law," rather than power, and unites state members around this ideal.²¹⁵ It is under such fidelity to law that states may learn to lose under the dispute resolution mechanism based on their trust in the "law-impregnated international community."²¹⁶ They cultivate an institutional confidence that they can prevail in the future, even though they lose today, as long as the community of law sustains. In the absence of the fidelity to law, myopic parameters, such as political contingencies, would fill in any legal vacuum.²¹⁷ Therefore, an essential element of community of law is the "self-awareness" by participants of the community of the "apolitical context" of their operation.²¹⁸

Second, in this new normatively conscious terrain, a collective

AND APPLICATION: REMARKS ON DISCOURSE ETHICS (Ciaran P. Cronin trans., 1993); BETWEEN FACTS AND NORMS, *supra* note 41; *see also* Emanuela Ceva & Andrea Fracasso, *Seeking Mutual Understanding: A Discourse-Theoretical Analysis of the WTO Dispute Settlement System*, 9 WORLD TRADE REV. 457, 468 (2010) (arguing for a Habermasian discourse-theoretical interpretation of the WTO Dispute Settlement System).

²¹⁴ *International Regimes*, *supra* note 197, at 404–05.

²¹⁵ Cf. Jeremy Waldron, *Why Law – Efficiency, Freedom, or Fidelity?*, 13 LAW & PHIL. 259, 275–81 (1994). "[T]he law of international trade requires that all of their matters be dealt with in terms of principles, rather than naked animosity and power. Thus international trade law encourages the continued communication essential for cooperation among trading nation governments." Abbott, *supra* note 201, at 532; *see also* WTO Panel Report on United States-Sections 301–310 of the Trade Act of 1974, WT/DS152/R (Jan. 27, 2000), ¶ 7.76 ("The security and predictability in question are of "the multilateral trading system." The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of *individual economic operators*. The lack of *security and predictability* affects mostly these individual operators...") (emphasis added).

²¹⁶ Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 59 (Volker Rittberger ed., 1995).

²¹⁷ *See generally* Sungjoon Cho, *A New Agenda for Peace: International Trade Law as a Practical Discourse*, in TRADE AS GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES 63, 67–68 (Padideh Ala'i et al. eds., 2006) [hereinafter *A New Agenda*] (warning that a lack of discourse based on legal principles creates a "fatal legal vacuum," which tends to give rise to naked politics and peace-breaking economic balkanization).

²¹⁸ *Supranational Adjudication*, *supra* note 212, at 369; *see also* Vagts, *supra* note 67, at 845 (observing that even a hegemon "has to operate in the highly legalized universe of the World Trade Organization"). Regarding views that a legalized dispute settlement system tends to reduce the role of bargains based on power, *see* Robert Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000). *But see* MAJA ZEHFUSS, CONSTRUCTIVISM IN INTERNATIONAL RELATIONS: THE POLITICS OF REALITY 150 (2002) (emphasizing a political nature of intersubjectivity that reflects underlying power dynamics among states).

identity of states may be formulated against a *social* backdrop, rather than in an egocentric, atomistic, and rational player image.²¹⁹ Here, a social identity may be defined as “sets of meanings that an actor attributes to itself while taking the perspective of others.”²²⁰ Importantly, this intersubjectivity intermediated by ideas and norms is not reduced to an individual, psychological level²²¹: it is “collective intentionality” based on social interactions.²²² Based on social actors’ “ontological security,”²²³ this social identity shapes their behaviors under given situations and thus defines their collective interests.²²⁴ Therefore, under constructivism, how the material world is shaped depends on “dynamic normative and epistemic interpretations of the material world.”²²⁵ In other words, this social identity is an essential element of members’ “lifeworld,” which might be defined as the “storehouse of unquestioned cultural givens from which those participating in communication draw agreed-upon patterns of interpretation for use in their interpretive efforts.”²²⁶

A logical corollary of these social, collective identities is a strong “empathy” among actors (states). A leading constructivist theorist, Alexander Wendt, refers to this ethos as “positive identification with the welfare of another, such that the other is seen as a cognitive extension of the self, rather than independent.”²²⁷ That is to say actors build up not particularized but “diffuse” reciprocity, which tends to discourage uncooperative behaviors such as free-riding as well as assume costs even

²¹⁹ “The resolutely positivist (...) approach of international law (...) has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 270-271 (July 8) (Declaration of President Bedjaoui, at ¶ 13).

²²⁰ *Id.*

²²¹ See Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 3* (Judith Goldstein & Robert Keohane eds., 1993) (observing that ideas, as well as material interests, shape behavior and noting the impact of beliefs shared by large numbers of people, such as world views).

²²² *Neo-Utilitarianism*, *supra* note 46, at 869.

²²³ See Jennifer Mitzen, *Ontological Security in World Politics: State Identity and the Security Dilemma*, 12 EUR. J. INT’L REL. 341 (2006).

²²⁴ See Alexander Wendt, *Collective Identity Formation and the International State*; 88 AM. POL. SCI. REV. 384, 385 (1994).

²²⁵ Adler, *supra* note 40, at 322.

²²⁶ Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT’L ORG. 555, 564 (1997) (quoting JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 136 (1991)).

²²⁷ Wendt, *supra* note 224.

without “selective incentives.”²²⁸ Such observation is not merely utopian but empirically proven.²²⁹ Admittedly, the intersubjective qualities of social identities are not necessarily cooperative; they can be “conflictual,” as was seen in the Cold War.²³⁰ Nonetheless, this “intersubjective framework of meaning”²³¹ structures the “internationalization of political authority,” whose elements include not only power but also legitimate “social purposes.”²³² Importantly, it is norms that bring to terms these sociological behavioral patterns among actors.²³³ IO norms, such as institutional practices and jurisprudence,²³⁴ share similar operational patterns with a *language* in the sense that the structure of norms is basically self-referential. A state member’s behavior “can be corrected by an appeal to its own rules.”²³⁵ Moreover, these norms are “deeply embedded” and “taken for

²²⁸ *Id.* at 386.

²²⁹ See Linnda R. Caporael et al., *Selfishness Examined: Cooperation in the Absence of Egoistic Incentives*, 12 BEHAV. BRAIN SCI. 683 (1989); Robyn M. Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCI. 1669 (1989).

²³⁰ Wendt, *supra* note 224, at 386. In this sense, constructivist thinking has been around ever since Karl Deutsch envisioned “security communities” in which social interactions among members led to unique *identity* formation. See Brunnee & Toope, *supra* note 36, at 26; Deutsch et al., *supra* note 36.

²³¹ *International Regimes*, *supra* note 197, at 380.

²³² *Id.* at 382. Ruggie’s use of the term “social purpose” seems ambivalent. On the one hand, it seems to signify a *domestic* social purpose (such as smooth adjustment), which inevitably compromises the goal of the multilateral trading system, i.e., free trade. On the other hand, however, it also appears to indicate the GATT’s institutional purpose itself, which tends to construct its institutional identity and states’ interest.

²³³ According to Jutta Brunnée and Stephen J. Toope, a strong sociological tradition, in particular Anthony Giddens’ “structuration theory,” shaped the development of constructivism. Structurationists view that agents’ self-understandings of their behaviors are inseparably linked to social structures and that agents and social structures constitute each other via interaction. Brunnée & Toope, *supra* note 36, at 27; see also ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 281–84 (1984). Yet constructivists express a nuanced position in the causal relationship between these ideational factors and state behaviors. They do not argue that shared understandings (norms) nurtured by social structures are a *direct* cause of state actions: rather, they observe that these social structures “constrain *and* enable” state actors in their behavioral choices. *Neo-Utilitarianism*, *supra* note 46, at 869. “[S]tates follow specific rules, even when inconvenient, because they have a *longer-term* interest in the maintenance of law-impregnated international community.” Hurrell, *supra* note 216 (emphasis added). This position parallels with Anthony Giddens’ thesis of the “duality of structure.” GIDDENS, at 25–29.

²³⁴ See generally JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005) (arguing that the age of IOs has given rise to international norms, which alter the mechanisms behind the making, implementation, and enforcement of international law).

²³⁵ *Two Approaches*, *supra* note 14, at 384.

granted by participants as social facts that are not to be challenged.”²³⁶ In other words, state members “proceed on the performative assumption that speakers and hearers understand a grammatical expression in identical ways.”²³⁷ In this sense, norms can be viewed more as a “rhetorical and symbolic resource,” rather than as an “articulate mandate.”²³⁸ Therefore, the sociological role of norms does not necessarily translate into a Humean utility or a Hobbesian command. Rather, as Émile Durkheim observed, norms prescribe a “claim to validity which is mediated by language and which can be validated discursively.”²³⁹

Finally, the aforementioned cognitive-collective traits in constructivism spotlight how national interests are molded in a broader community of social actors (states) vis-à-vis the conventional IR theories that simply treat national interests as something cast from outside and fixed.²⁴⁰ These new possibilities connote the re-definition of the traditional national interests in much longer and broader terms than the old paradigm via a diffused notion of reciprocity. In this regard, national interests might even signify systematic interests such as maintaining a stabilized, rule-based system.²⁴¹ According to this new paradigm, the yardstick for an IO’s success should be not only efficiency but also “appropriateness” reflecting certain socio-cultural considerations.²⁴² As Martha Finnemore observed, organizations exist not solely because they are efficient but because as social goods they are perceived to be legitimate.²⁴³ Thus, the new theory also allows us to grapple with the “historical and cultural particularity” of an IO *qua* independent entity.²⁴⁴

²³⁶ *Id.*

²³⁷ BETWEEN FACTS AND NORMS, *supra* note 41, at 11.

²³⁸ Edelman et al., *supra* note 72, at 406–407 (arguing that “the content and meaning of law is determined within the social field that it is designed to regulate”); *see also* Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change*, 99 AM. J. SOCIOLOGY 847 (1994).

²³⁹ KRATOCHWIL, *supra* note 45, at 97.

²⁴⁰ *International Regimes*, *supra* note 197 at 384. In fact, this socio-idealist approach is not new; it dates back to postwar thinkers, such as Karl Deutch, Ernst Haas, and Hedley Bull, as well as to much earlier ones, such as Hugo Grotius and Immanuel Kant. *See* WENDT, *supra* note 36, at 3.

²⁴¹ *See Sovereignty*, *supra* note 73, at 35–36 (criticizing a narrow version of self-interest in international law based on rational choice theories).

²⁴² *See International Regimes*, *supra* note 197, at 338; *see also* MARCH & OLSEN, *supra* note 185 (arguing that a logic of appropriateness is fundamental to political action and that legitimacy often depends on appropriateness).

²⁴³ Finnemore, *supra* note 35, at 329. She also argues that this is the “entry point for culture” and that “the social values that support and legitimate some organizational forms and not others, some social activities and not others, are cultural values.”

²⁴⁴ Reus-Smit, *supra* note 226, at 585.

In sum, constructivism, as a new “generic orientation” or a new “research project,”²⁴⁵ is capable of offering a complementary narrative to pre-existing IR theories such as realism and liberalism. Constructivism *can* demonstrate, via various empirical confirmations, its analytical capability over modern developments of IOs.²⁴⁶ In the next chapter, this Article applies constructivism in analyzing an institutional evolution of the GATT/WTO.

III. APPLYING THE NEW PARADIGM: THE WORLD TRADE ORGANIZATION AS A WORLD TRADE COMMUNITY

A. *The Origin and the Nature of the WTO's Gesellschaft*

The archetype of the modern global trading system, i.e., the General Agreement on Tariffs and Trade (GATT), was created against the backdrop of a Hobbesian battle among trading nations in the interwar period. In a desperate attempt to escape the quagmires of the Great Depression at the expense of its trading partners, the U.S. under the Hoover administration commissioned one of the most egregious incarnations of protectionism in history, the Smoot-Hawley Act of 1930.²⁴⁷ This ill-conceived prescription evoked spontaneous retaliations from its trading partners. This dismal phenomenon was quite a realist manifestation in that every country attempted to safeguard its own (myopic) national interest at the sacrifice of others. At the same time, it demonstrated a Gesellschaftian symptom in that those trading nations had totally failed to take into account their collective interests, let alone those of others. The consequent economic balkanization soon wreaked havoc on the global trading system, reducing the world trade volume by seventy percent and eventually contributing to the outbreak of the Second World War.²⁴⁸

²⁴⁵ Susan K. Sell & Aseem Prakash, *Using Ideas Strategically: the Contest between Business and NGO Networks in Intellectual Property Rights*, 48 INT'L STUD. Q. 143, 145 (2004) (quoting Mayer N. Zald, *Culture, Ideology, and Cultural Framing*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 262 (1996) (defining a “frame” as “specific metaphors, symbolic representations and cognitive clues used to render or cast behavior and events in an evaluative mode and to suggest alternative modes of actions”)).

²⁴⁶ Katzenstein et al., *supra* note 51 at 647–48 (viewing that research was generally more empirically oriented when analyzing social forces and political institutions).

²⁴⁷ See Judith Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 INT'L ORG. 179, 187 (1988) (observing that the failure of the Smoot-Hawley Act to deal with economic decline led to the delegitimization of protectionism and created a policymaking crisis).

²⁴⁸ See Edward C. Luck, *American Exceptionalism and International Organization:*

This bitter experience brought to trading nations a rare Kantian moment of collective enlightenment.²⁴⁹ Bonding trading nations with a dense web of trade relations would be an effective way to prevent another tragic war.²⁵⁰ The GATT's framers realized that they should promote open trade to achieve the Kantian aspiration of peace via collective prosperity,²⁵¹ i.e., "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand."²⁵²

This Kantian aspiration notwithstanding, the GATT framers had no option but to create a contract (Gesellschaftian), not a community (Gemeinschaftian), in its inception: there had been neither a strong ethos of community among trading nations nor an adequate legal infrastructure to buttress the original lofty cause. Neither vibrant trade nor collective trust had existed among them. Under these circumstances, the most important mission was to promptly resuscitate anemic international trade and staunch any further protectionism, i.e., the "substantial reduction of tariffs and other barriers to trade" and the "elimination of discriminatory treatment in international commerce."²⁵³

Against this background, the GATT had started as a conventional contractual entity that sovereign contracting parties established for the purpose of administering trade liberalization, in particular tariff reduction, and monitoring any cheating (protectionism) among contracting parties. The gist of this contract was to conduct reciprocal tariff reduction bargains and preserve their outcomes (tariff concessions) via legally binding obligations. The GATT contract condemned and remedied any cheating that would counterbalance the delicate balance of concessions attained by previous tariff-cutting negotiations. As a contract, the GATT, and now the WTO that inherited the GATT's contractual legacy, naturally preserves the

Lessons from the 1990s, in U.S. HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND MULTILATERAL INSTITUTIONS 25, 39 (Rosemary Foot et al. eds., 2003) (quoting remarks by the former U.S. Trade Representative Charlene Barshefsky on the U.S. trade policy and the WTO on Mar. 2, 2000).

²⁴⁹ See *supra* note 61.

²⁵⁰ See *A New Agenda*, *supra* note 217, at 66 (observing that the cost of disputes increases when trading nations become tightly interlocked with one another).

²⁵¹ IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHIC ESSAY 33 (Benjamin F. Trueblood trans., 1795) ("it is necessary that *all together*, expressing the *collective unity* of their united will, should determine to bring about this condition... The society of citizens must act as a whole. Above the diversity of the particular wills of all a uniting cause must intervene.").

²⁵² General Agreement on Tariffs and Trade pmb., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

²⁵³ *Id.*

sanctity of “bargains” based on the *quid pro quo* principle.²⁵⁴

Thus, the GATT’s original function was to cut tariffs, as was seen in its very appellation, the General Agreement on Tariffs and Trade. Beware that the word “Tariffs” comes before “Trade.” Cutting tariffs was the quintessential material goal of a grand contract titled GATT: material, tangible term “Tariffs” were prioritized over cognitive, intangible term “Trade.” Tariff reduction is mainly a “bilateral” negotiation process,²⁵⁵ which is run by a reciprocal bargain and culminates in a balance of mutual concessions, although benefits of these bilateral bargains are eventually multilateralized. Under this *quid pro quo* structure, power and interest are the main currencies and languages of discourse; there is little room for cognitive factors such as norms and values. Note that trade rules, such as the National Treatment principle, were originally designed to play only a *secondary* role of preserving the original balance of reciprocal concessions in trade negotiations, not for the sake of rule of law in trade relations itself.²⁵⁶

An earlier pattern of GATT jurisprudence attests to this contractual aspect. For example, the remedial prototype of the GATT was “nullification or impairment,”²⁵⁷ which is equivalent to injuries or damages in the domestic law of contract. Once a contracting party inflicted any commercial loss (nullification or impairment) on another contracting party, the former was deemed to have undermined the subtle material balance of concessions made in the previous negotiation and thus liable to the latter,²⁵⁸ regardless of whether the measure at issue conflicted with GATT provisions.²⁵⁹ Therefore, early GATT panels often explored whether and

²⁵⁴ See Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 766–67 (2004) (observing that GATT was mainly a reciprocal tariff reduction mechanism among contracting parties that was meant to preserve the “delicate balance of tariff concessions” or interests that “parties had labored to establish”).

²⁵⁵ See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535, 549 (2001) (arguing that most WTO treaty provisions can be reduced to bilateral state-to-state relationships); *but see* Chios Carmody, *A Theory of WTO Law*, 11 J. INT’L ECON. L. 527 (2008) (contending that the WTO is based on a framework of collective obligations and individual rights, which promotes interdependence over time); Sungjoon Cho, *WTO’s Identity Crisis*, 5 WORLD TRADE REV. 298 (2006) (book review) (observing that Pauwelyn “sacrifice[s] the autonomy of the WTO system,” which has its own norms).

²⁵⁶ See Sungjoon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles’ Heel of the Dispute Settlement Process?*, 39 HARV. INT’L L.J. 311 (1998).

²⁵⁷ GATT, *supra* note 253, at art. XXIII.

²⁵⁸ See generally Cho, *supra* note 257 (discussing the multilateral trading system (GATT/WTO)’s institutional evolution from a negotiated contract to a legalized regime).

²⁵⁹ Since the contractual nature of GATT 1947 prioritized attached contracting parties’ original expectations on the balance of concessions struck in the tariff negotiation over any

how much a defendant's measure caused actual adverse commercial effects, such as the loss of exports, to the complainant.²⁶⁰

B. The WTO's Gesellschaftian Legacy and Its Descriptive Discontent

Like any other social construct, the old paradigm (realism-global Gesellschaft), discussed above reflects a particular social context of its time. Such context may be both ideological and material (economic). Importantly, as its original underlying social context changes, the old paradigm tends to lose its original traction as an analytical tool. In addition to these external contextual changes, the unprecedented institutional-sociological evolution within the GATT/WTO over the last six decades has transformed its internal dynamics, which is characterized by its unique norms and culture in a manner unfathomable under the old paradigm.

First, from an ideological standpoint, the old GATT had operated under the dominant milieu of the East-West conflict. The GATT largely excluded the former Soviet bloc as well as Communist China during the Cold War era. This exclusion might have disqualified the GATT as a genuine "global" trading system. Yet the sudden dissolution of the Soviet bloc and the rise of China as a major trading power during the last two decades have eloquently demonstrated the ever-intensifying trend of globalization-cum-interdependence. This sea change tends to invite more open, integrationist thoughts than ever, free from rigid statist, sovereignty-driven patterns of thought.

From an economic perspective, the Lockean architecture—cooperative rivalry—embedded in the GATT prototype was based largely on the nineteenth-century mercantilist reciprocity. The classic production paradigm, under which any product would be harvested or manufactured

legal breach of GATT norms, GATT framers provided atypical remedies for those situations in which such expectations were unduly denied, i.e., when their potential benefits were nullified or impaired, even in the absence of any specific violation. GATT Article XXIII:1 (b) provides this special cause of action, labeled "non-violation" claims, which the WTO DSU also endorses. *See generally* Cho, *supra* note 257 (discussing and critiquing non-violation provisions of GATT/WTO dispute settlement system).

²⁶⁰ *See e.g.*, Italian Discrimination against Imported Agricultural Machinery, Oct. 23, 1958, GATT B.I.S.D. (7th Supp.) at 60, ¶ 17, 20 (1959) [WTO Doc. Symbol BISD/75/60]. In this early GATT case, the panel, after observing that the Italian measures violated GATT Article III (National Treatment), engaged in quite a thorough analysis as to "whether the operation of Law No. 949 had caused injury to United Kingdom commercial interests, and whether such an injury represented an impairment of the benefits accruing to the United Kingdom under the General Agreement." *Id.* ¶ 17 (emphasis added). The panel eventually recommended that Italy should remove the "adverse effects" which Law No. 949 had caused to the UK. *Id.* ¶ 20.

entirely in one country (“mono-location”),²⁶¹ led naturally to a “producer-oriented” trade policy.²⁶² In turn, this producer-oriented trade policy nurtured a mercantilist myth that export would be a virtue and import a vice. A historically etched image of a sovereign country’s power and its national interest envisioned a mercantilist country amassing national wealth (foreign currencies) by promoting exports and discouraging imports. Imports, as concessions, were deemed mostly as *prices* paid for better market access. In this situation, domestic producers are well positioned to lobby and capture their governments since their commercial interests are concentrated in this single-sourcing structure. Thus, competition between domestic and foreign producers easily translated into competition between states that endeavor to maximize their net exports (exports minus imports). This mercantilist structure explains a conventional trade negotiation model, i.e., reciprocity, under which each trading nation acquires market access (export) from its trading partner only by offering corresponding concessions (import) to the latter. According to this paradigm, the GATT/WTO, as a global *Gesellschaft*, exists to coordinate such reciprocal bargains whose ultimate purpose is to augment these material (commercial) values, which are equated with the titular “national interests.”

More recently, however, technological innovations, in particular in the areas of transportation and telecommunication, have allowed businesses to pursue “trans”-national wealth and prosperity, challenging the sacrosanct notion of territoriality.²⁶³ A revolution in manufacturing patterns, such as “global supply chains,” has seriously diminished the territorial closure in international trade, which was once a hallmark of sovereignty (“multi-location”).²⁶⁴ Under this sophisticated web of global sourcing networks, once parochially defined domestic trade interests have now expanded to every niche throughout the world.²⁶⁵ “The distinction between what is and what is not American or Finnish or Chinese has been blurred by foreign direct investment, cross-ownership, equity tie-ins, and transnational supply chains.”²⁶⁶

In other words, made-in-China does not necessarily mean that every step of production would be conducted in China, as a recent study on the

²⁶¹ See *Made in the World*, WTO, http://www.wto.org/english/res_e/statis_e/miwi_e/miwi_e.htm (last visited Feb. 20, 2012).

²⁶² See *Sovereignty*, *supra* note 73, at 237–38.

²⁶³ See *Territoriality*, *supra* note 31.

²⁶⁴ See *supra* note 262.

²⁶⁵ Daniel Ikenson, *Made on Earth: How Global Economic Integration Renders Trade Policy Obsolete*, 42 CATO INSTITUTE TRADE POLICY ANALYSIS 1, 5 (2009).

²⁶⁶ *Id.*

iPod manufacturing powerfully demonstrates.²⁶⁷ Thanks to logistical innovations, a footloose manufacturer can now outsource multiple intermediate production stages to multiple countries. Moreover, those factories manufacturing made-in-China products may even be owned by non-Chinese (foreign) investors.²⁶⁸ The old obsession with a “national origin” has increasingly become trifling in this new era of global sourcing.²⁶⁹ After all, these expanded trade opportunities tend to make the old mercantilist *Gesellschaftian* model anachronistic and force us to pierce the veil of a state so as to better observe what is really happening underneath. Ranging from a T-shirt to an iPod, these “made in the world”²⁷⁰ products involve multiple economic players—both manufacturers and service providers—from multiple countries. Here, more states *and* individual economic players can benefit from global commerce than the traditional mono-location model. This multi-origin manufacturing structure tends to dilute the aforementioned obsession with mercantilist national interests. Instead, these diversified and diffused configurations of trading nations (and traders) tend to care more about stability at the systematic level that secures their footloose transnational business activities than pre-determined commercial rents. Thus, the prevailing concept of trade has shifted from a “zero-sum” (mercantilist) or us *versus* them image to that of “positive-sum” or us *and* them. Here, trading nations have become partners rather than rivals.²⁷¹ The old paradigm cannot fully capture this new trade reality.

Equally importantly, while the old paradigm’s realist-*Gesellschaftian* legacy is undeniably at large, the institutional development of GATT/WTO for the last six decades has nonetheless revealed the burgeoning non-material (ideational and cognitive) elements in constructing the GATT/WTO.²⁷² It is within this altered context in which constructivism can offer an appropriate tool to expound a *norm*-oriented evolution in the

²⁶⁷ Hal R. Varian, *An iPod Has Global Value. Ask the (Many) Countries That Make It*, N.Y. TIMES, Jun. 28, 2007.

²⁶⁸ Even as economic growth in China has reportedly slowed, 2011 was a record-breaking year with \$103.8 billion in foreign direct investments in China. See Aileen Wang & Koh Gui Qing, *Foreign Investment in China Down First Time in 28 Months*, REUTERS, Dec. 15, 2011.

²⁶⁹ *Sovereignty*, *supra* note 73, at 11.

²⁷⁰ See Pascal Lamy, WTO Director-General, Speech to French Senate (Oct. 15, 2010), available at http://www.wto.org/english/news_e/sppl_e/sppl174_e.htm.

²⁷¹ See James Rice & Matthew Waller, *How to Make “Made in China” Less Alarming*, FIN. TIMES, Dec. 12, 2008, at 9.

²⁷² See Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT’L ECON. L. 81, 85 (2006).

operational governance of the world trading system.²⁷³ This new pattern of perceiving the WTO holds vital potential for its reconstruction because a new ontology of the world trading system—a *community* (*Gemeinschaft*) of law—based on the new way of thinking tends to generate new social realities around the WTO.

From the “political bargain” perspective, the validity, which may be gauged by efficiency, of certain provisions would not matter much if they were bargained for other provisions in different issue areas.²⁷⁴ What is vital in a global *Gesellschaft* is that it maintains an overall balance of *quid pro quo* across issue areas. The negotiation style, i.e., single-undertaking, reflects this cross-bargaining. Subsequently, however, discourses on those rules develop in various discursive forums, such as the committee meetings or WTO dispute settlement proceedings. These discourses transpire not necessarily within the context of an original political bargaining but more likely transpire against the teleological backdrop of the WTO *legal system*. In fact, this critical mismatch between *Gesellschaftian* positions from certain (powerful) members and *Gemeinschaftian* interpretations of the WTO often generates tensions.²⁷⁵

Decades of institutional evolution under the GATT had begun to form a new legal dynamic.²⁷⁶ As the former Director of the WTO Appellate Body Secretariat Debra Steger observed, the GATT slowly evolved into “something greater than a contract that could be withdrawn from by any contracting party whenever it found the obligations too onerous.”²⁷⁷ Naturally, the material element of “nullification or impairment” was fossilized as it was simply presumed whenever a panel detected a “violation,” which as a cognitive-normative element became more

²⁷³ See *supra* note 36.

²⁷⁴ Robert Howse, *Do the World Trade Organization Disciplines on Domestic Subsidies Make Sense?: The Case for Legalizing Some Subsidies*, in *LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE* 85 (Kyle W. Bagwell et al. eds., 2010) (submitting that a political bargain perspective of the WTO views legal constraints on subsidies as a desirable cost of a bargain that curbs CVDS [countervailing duties] used against subsidies).

²⁷⁵ See Sungjoon Cho, *Global Constitutional Lawmaking*, 31 *U. PA. J. INT’L L.* 621 (2010) (contrasting the US’ sovereignty-maximizing interpretation of its zeroing practice with the majority of WTO members’ institution-preserving construction of the same practice).

²⁷⁶ John Gerard Ruggie describes this as “communicative dynamics.” *Neo-Utilitarianism*, *supra* note 46, at 868; see also PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 134 (1987) (defining discourse as a historical “unit of meaning”).

²⁷⁷ Debra P. Steger, *Afterword: The “Trade and ...” Conundrum—A Commentary*, 96 *AM. J. INT’L L.* 135, 137 (2002).

important to the community of law than its material consequences, i.e., nullification or impairment, such as the decrease of export.²⁷⁸ In fact, any violation would *ipso facto* constitute a nullification or impairment.²⁷⁹ Overall, a successful institutionalization, in particular the juridicalization, of GATT, as represented by its well-operating dispute settlement mechanism, attests to the emerging presence of certain endogenous factors, such as shared norms, which would construct member states' behaviors and identities.

In sum, both *external* changes in the global trade environment and institutional transformations of the *internal* dynamics among trading nations as social actors tend to weaken the diagnostic force of the old realist-Gesellschaftian paradigm within the WTO system.

C. The WTO's Gesellschaftian Legacy and Its Normative Discontent

In addition to the incomplete description of the new trade environment as well as internal institutional evolution, the old paradigm, when it functions as a *modus operandi* for state behavior, is also vulnerable to "normative" dilemmas. For example, a narrow functionalist agenda, such as trade liberalization, enshrined in the original GATT contract could not fully address an enhanced goal of the newly created WTO, i.e., an "integrated, more viable and durable multilateral trading system." Only shared ideas and perceptions among WTO members can embrace such integration that often requires the reconciliation between trade and non-trade values.²⁸⁰ Integration is a serious normative project that requires socio-cultural dynamics beyond contractual inputs.

First of all, the contractual (Gesellschaftian) nature of the GATT/WTO is naturally prone to positive narratives of "power" and "economics,"²⁸¹ as is often the case in a private contract.²⁸² For example,

²⁷⁸ Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980) [WTO Doc. Symbol L/4907].

²⁷⁹ See United States-Taxes on Petroleum and Certain Imported Substances, Jan. 17, 1987, GATT B.I.S.D. (34th Supp.) at 136, §§ 5.1.3–5.1.12 (1988) [WTO Doc. Symbol L/6175].

²⁸⁰ See Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 94 AM. SOC'Y INT'L L. PROC. 220, 221 (2000) (observing that trade liberalization "inherently starts to require, rely upon and develop positive integration, i.e., it depends on common and shared standards and perceptions").

²⁸¹ While classical realists, such as Hans Morgenthau, did pay attention to normative factors, such as international law, which could restrain the exercise of power, the "turn" away from norms resulted from the wide adoption of an economic approach among political scientists in the late 1970s and 1980s. Obsessed with the propensity for

Richard Steinberg observes that powerful WTO members, such as the U.S. and the EU, can wield a unilateral veto power in the selection of the WTO Appellate Body members and even refuse to comply with its decisions that are unpleasant for domestic political reasons.²⁸³ From an economic standpoint, Alan Sykes applies a private contract model to the WTO remedies and advocates an “efficient breach” thesis. Sykes contends that paying damages via compensation or suspension of concessions should be “an option for WTO Members” and that it is “both understandable and desirable” “as a matter of economic logic.”²⁸⁴ According to his economic logic, powerful (and wealthy) WTO members might be tempted to buy out their violations with impunity.²⁸⁵ Powerful members will maintain a global *Gesellschaft* so long as the benefits from reciprocal bargains (such as trade negotiations) exceed the costs of administration (such as the monitoring and enforcement of cheating (protectionism)). Importantly, the power disparity within the global *Gesellschaft* inevitably accords powerful members a variety of advantages, such as more “bargaining space.”²⁸⁶

The realist-*Gesellschaftian* paradigm’s other normative deficiency is that it is inherently vulnerable to capture: domestic politics, engineered by interest groups, shape²⁸⁷ or constrain²⁸⁸ trade policies. Naturally, the old

“measurement,” both realist and liberal scholars wanted to demonstrate, in an aura of scientific alacrity, that states pursue the maximization of “utilities” and that a coordinated “game” toward cooperation is possible even among these egocentric state actors. See Finnemore & Sikkink, *supra* note 7, at 889–90.

²⁸² See e.g., Ian R. Macneil, *Power, Contract, and the Economic Model*, 14 J. ECON. ISSUES 909 (1980) (observing that there are two categories of power in contract and economics).

²⁸³ See Steinberg, *Judicial Lawmaking*, *supra* note 67, at 249 (contending that political constraints are difficult when powerful WTO members each have unilateral veto powers over Appellate Body member selections and can defy domestically unpopular political decisions by refusing to comply).

²⁸⁴ Alan O. Sykes, *The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance?*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOR OF JOHN H. JACKSON* 347, 347 (Marco Bronckers & Reinhard Quick eds., 2000).

²⁸⁵ *Id.*; see also Cho, *supra* note 257.

²⁸⁶ See *Two Approaches*, *supra* note 14, at 387.

²⁸⁷ Anu Bradford, *When the WTO Works, and How it Fails*, 51 VA. J. INT’L L. 1, 19–21 (2010) (arguing that strong lobbies from developed countries’ domestic interest groups, such as big pharmaceutical companies, pushed forth the launch of the TRIPS Agreement in the Uruguay Round).

²⁸⁸ See Timothy J. McKeown, *Firms and Tariff Regime Change: Explaining the Demand for Protection*, 36 WORLD POL. 215, 216 (1984) (observing that the civil society’s demands put constraints on the government’s tariff policies since ignoring such demands incur high political costs in the competitive political system).

paradigm preserves protectionism and mercantilism,²⁸⁹ which is symptomatic of the normative encroachment of the GATT/WTO system. This dyad of protectionism and mercantilism has in fact become a trade ontology itself. Based on the realist structure,²⁹⁰ modern trade policies are based on a parochial assumption that exports are good and imports are bad.²⁹¹ In the global *Gesellschaft*, the parochial domestic politics of powerful trading nations directly control trade negotiations. Captured domestic governments, which are largely unresponsive to the general public (both domestic *and* global) welfare gains from open markets, repeat the same old protectionism seen in the interwar era.²⁹² For example, powerful domestic lobby groups, such as the American Farm Bureau and the National Association of Manufacturers, tailgated the U.S. negotiators all the way to Geneva not only to monitor the negotiation but also to give instructions to negotiators.²⁹³ It is this die-hard mercantilist bargaining driven by a myopic obsession with exports as utilities and imports as disutilities which has deadlocked the Doha Round negotiation for the past decade.

Consider why the Doha Round failed. Interestingly, the old and the new paradigms tend to present two starkly different diagnoses and prescriptions over the aforementioned recent Doha debacle. Under the old (rationalist) paradigm, as some WTO members argue, the debacle is yet another failed *deal* due to the failure of negotiators to discover a *balanced*

²⁸⁹ ROBERT GILPIN, *U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* (1975) (arguing that the U.S. needs a trade-dominated mercantilist strategy and should impose selective controls and taxation).

²⁹⁰ The Realists basically adopt the Hobbesian assumption that the international system represents a perpetual struggle between the “Self” and the “Other.” See McKeown, *supra* note 289, at 216.

²⁹¹ See Ikenson, *supra* note 266 (observing that trade statistics are misleading or even meaningless due to the proliferation of transnational supply chains and that exports are no longer an appropriate indicator of competitiveness).

²⁹² *Id.* at 10 (“Mercantilist negotiating strategies or trade barriers may temporarily benefit some producers, but they invariably hurt consumers, wholesalers, retailers, importers, truck drivers, warehouse operators, designers, engineers, accountants, marketers, financiers, and globally integrated producers who rely on imports and who have great stakes in an open world economy”).

²⁹³ Of course, the South itself may not be free from the accusation of mercantilism. Developing countries are also eager to protect their own champion industries by means of tariffs and other trade barriers. Although some protection, such as certain agricultural protection for the food security or rural livelihood concern, may be justified, others, such as high industrial tariffs, may not. See generally Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219 (2004); Jagdish Bhagwati, *Wanted: Jubilee 2010 (Dismantling Protection)*, June 26, 2002, <http://www.oecdobserver.org/news/fullstory.php/aid/713/Wanted: Jubilee 2010.html>.

bargain.²⁹⁴ Yet, the old paradigm is oblivious to the fact that the Doha Round was meant to be a “development” round. While powerful members’ externalization of domestic interests may appear natural from a Gesellschaftian standpoint, it hardly addresses the solemn consequence that the Doha failure takes an enormous toll on the world’s poor.²⁹⁵ Ominously, the recent financial crisis only highlights this normative deficiency of the old paradigm, as the Gesellschaftian struggle might precipitate an entropic vision of the world.²⁹⁶

More generally, protectionism is nothing but a “constitutional failure” in that special interests (factions) prevail over the general public welfare.²⁹⁷ These “normatively unfiltered interest positions” simply exploit law in according themselves the semblance of legitimacy.²⁹⁸ For example, the current U.S. Farm Bill continues to shower a lavish sum of federal subsidies mostly to rich corporate agro-businesses.²⁹⁹ At this juncture, one might recall that James Madison passionately warned against such special interests (“factions”) in the Federalist Papers.³⁰⁰

Moreover, the old paradigm is largely ill-equipped to address new types of trade restrictions such as “non-tariff barriers” (NTBs). After rounds of trade talks, conventional trade barriers, such as tariffs and quotas, were dismantled dramatically. In contrast, domestic regulations have begun to emerge as new trade barriers (NTBs) that rapidly replace tariffs and quotas.³⁰¹ Concomitantly, as the era of the welfare state dawned, modern governments began to multiply domestic regulations in response to novel regulatory demands in such areas as the environment and human health. Left largely uncoordinated, these diverging domestic regulations themselves function as trade barriers even without protectionist intent.³⁰² Of course, these domestic regulations, shrouded in legitimate social policies, often

²⁹⁴ Cho, *supra* note 2.

²⁹⁵ *Id.*

²⁹⁶ See Gideon Rachman, *Welcome to a Zero-Sum World*, *ECONOMIST*, Nov. 22, 2010.

²⁹⁷ Robert E. Hudec, *The Role of Judicial Review in Preserving Liberal Foreign Trade Policies*, in *NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* 503, 503–8 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (discussing Jan Tumlir’s critique of protectionism as “constitutional failure”).

²⁹⁸ See *BETWEEN FACTS AND NORMS*, *supra* note 41, at 40.

²⁹⁹ See Thomas Gift, *Big Government of the Most Imprudent Kind*, *RICHMOND TIMES DISPATCH* (Virginia), Sept. 2, 2007.

³⁰⁰ See *THE FEDERALIST NO. 10* (James Madison).

³⁰¹ See Daniel Y. Kono, *Optimal Obfuscation: Democracy and Trade Policy Transparency*, 100 *AM. POL. SCI. REV.* 369, 371 (2006) (viewing that democracy reduces incentives to employ tariffs while increasing incentives to employ less transparent NTBs).

³⁰² See generally SUNGJOON CHO, *FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM* (2003).

cater to protectionist needs.³⁰³ Hard to measure, these administrative barriers cannot be simply bargained away. Instead, they should be *talked* away.

This is a serious challenge to the WTO qua institution. Whether, or how far, should a trade organization tolerate non-protectionist, yet still trade-restrictive, measures? How can the global trading system reconcile trade and non-trade (societal) values? This is a systemic structural problem whose solution requires more than a conventional bargain based on routine strategic cost-benefit analysis under each member's trade balance sheet.³⁰⁴ Rather, it necessitates much collective thinking and soul-searching dialogue among trading nations, and their nationals (traders), on such cognitive issues as values, goals, and the collective identity of the global trading system.

For example, the old paradigm might ascribe the failure to reach an international antitrust agreement in the WTO to the "great power divide" between the U.S. and the EU.³⁰⁵ As seen in high-profile cases such as *GE/Honeywell* and *Microsoft*, these two jurisdictions cannot form a firm consensus on how much the government should intervene to rectify the market dominance of powerful firms.³⁰⁶ Under the realist logic, powerful members such as the U.S. and the EU could not reconcile between themselves.³⁰⁷ Yet the old paradigm still fails to present how in the future such a clash could be avoided and a consensus formed. More importantly, realism fails to highlight the lack of genuine regulatory dialogue between these two jurisdictions on this subject: two parties are simply *not talking*. The old paradigm's status quo bias makes it difficult to envision new possibilities of regulatory cooperation in this sensitive area. Behavioral changes necessary to global antitrust cooperation may ensue only after much collective thinking and discourse among regulators on critical issues such as the nature of market(s), the definition of (fair) competition, and the ultimate role (goal) of the government in a free market economy.³⁰⁸

Finally, the status quo bias in the realist-Gesellschaftian paradigm tends to naturalize the marginalization of less powerful trading nations.

³⁰³ See notably Kono, *supra* note 302 (contending that core NTBs are clearly protectionist by restricting import supply).

³⁰⁴ See generally Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625 (2005) (approaching the linkage ("trade and ...") issues from a constitutional perspective).

³⁰⁵ Bradford, *supra* note 288, at 17.

³⁰⁶ *Id.*

³⁰⁷ See DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS AND GLOBALIZATION* (2010).

³⁰⁸ *Id.*

Such marginalization, prone to create frustration and resentment from developing countries,³⁰⁹ innately militates against its normative agenda, in particular its integrationist *telos*.³¹⁰ For example, under the realist-Gesellschaftian view, developed countries' power-based threats forced developing countries to accept the protection of intellectual property rights (TRIPS) in the Uruguay Round. By linking the intellectual property rights (IPR) to development assistance programs such as Generalized System of Preferences (GSP), rich countries pressured developing countries into accepting the IPR protection regime.³¹¹ In addition, rich countries' "aggressive unilateralism," represented by Section 301, might potentially prosecute developing countries' lack of IPR protection as a kind of unfair trade.³¹² While this realpolitik discourse may explain how and why the TRIPS regime came to light in the WTO, it nonetheless tends to overlook critical socio-legal debates as to whether the TRIPS' existence within the WTO is *normatively* justified³¹³ and how WTO members perceive, and eventually reform, this new regime, as revealed in certain contentious issues, such as AIDS drugs and human health.³¹⁴

As the Hobbesian "competition bias"³¹⁵ still characterizes WTO trade negotiations under the old paradigm, it has also contributed to an ever-deepening chasm between the North and the South. The current global

³⁰⁹ See B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004) (arguing that a "transnational capitalist class" (TCC) has recently shaped international economic norms and institutions to its advantage and that these imperial developments deepened the North-South divide); B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799, 806 (2005) (observing that an emerging notion of global administrative law is an essential character of imperial international laws and institutions).

³¹⁰ Emmerson, *supra* note 97, at 146, 150 (arguing that the "Realist view presupposes a given order" reflecting powerful state interests and that this concern with maintaining the status quo is irreconcilable with the WTO's economic integration objective).

³¹¹ Bradford, *supra* note 288, at 15.

³¹² *Id.*

³¹³ *Id.* at 3.

³¹⁴ The patent protections afforded to AIDS drugs under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights is a contentious issue with several African WTO members. See e.g., Ben Sihanya, *Patents, Parallel Importation and Compulsory Licensing of HIV/AIDS Drugs: The Experience of Kenya*, in MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES (2005). Regarding the relationship between WTO Agreements and various contentious health policies such as tobacco, drugs, and intellectual property rights, see WTO AGREEMENTS & PUBLIC HEALTH: A JOINT STUDY BY THE WHO AND THE WTO SECRETARIAT (2002), available at: http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf.

³¹⁵ See *Uncertainty*, *supra* note 54, at 538 (quoting Charles L. Glaser, *Realists as Optimists: Cooperation as Self-Help*, 19 INT'L SECURITY 50, 58 (1994-1995)).

financial crisis has aggravated development concerns due to the comatose Doha “Development” Round. The world’s poor are hit hardest by these double troubles—the financial crisis and the comatose Doha Round—in our time.³¹⁶ As experts predict a long period of jobless recovery from the financial crisis, the nascent political zeal for protectionism is likely to gather speed in the future.³¹⁷ The real peril of protectionism nowadays is that it is rapidly “marginalizing” poor people from the mainstream global trading community.³¹⁸ Shocking anecdotes abound. The U.S. currently collects more tariffs from Bangladesh than from France!³¹⁹ While the EU’s subsidy on every cow is \$2 a day,³²⁰ more than half of the world’s human population lives with the same amount or less per day.³²¹ Most problematically, rich countries’ protectionism falls on poor countries’ only lifeline products, such as African cotton,³²² Moldovan fruits,³²³ and Cambodian garments.³²⁴

Yet enhancing market access for poor countries’ main exports is not asking a “special favor,” but merely “playing by the [trade] rules.”³²⁵ Many government subsidies in rich countries violate both the spirit and the letter of trade rules. Nonetheless, rich countries, under the frustrating logic of mercantilist *quid pro quo* (reciprocity), repeatedly find fault with the lack of concessions from the poor countries even in the current “development” round.³²⁶

³¹⁶ See Cho, *supra* note 2.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Dustin Smith, *The Truth About Industrial Country Tariffs*, 39 FIN. & DEV. (2002), available at <http://www.imf.org/external/pubs/ft/fandd/2002/09/smith.htm> (last visited Feb. 20, 2012).

³²⁰ James Lamont, *Doha Deal “Close to Conclusion”*, FIN. TIMES, Sep. 3, 2009, at 4 (quoting Dhruv Sawhney, a past president of the Confederation of Indian Industry).

³²¹ POPULATION REFERENCE BUREAU, <http://www.prb.org/Journalists/PressReleases/2005/MoreThanHalftheWorldLivesonLessThan2aDayAugust2005.aspx> (last visited Feb. 20, 2012).

³²² See *Stitched Up: African Irritation at Rich Countries’ Cotton Subsidies*, 368 ECONOMIST, Jul. 26, 2003, at 71.

³²³ See *Moldova’s Poverty: Outsiders Aren’t Helping*, 366 ECONOMIST, Feb. 15, 2003, at 48.

³²⁴ See David Woods, *Two Queries – and Same Answer – for U.S. Textile Lobbyists*, FIN. TIMES, Dec. 22, 2005, at 12.

³²⁵ Sixth WTO Ministerial Conference, Summary of December 13, 2005, Day 1: Conference Opens Formally and Ministers Consult on Industrial Goods, http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_13dec_e.htm.

³²⁶ See Oxfam Press Release, *Responsibility on EU and US to Deliver Fair Trade Rules for 2006*, Dec. 20, 2005, available at http://www.oxfam.org/en/news/pressreleases2005/pr051220_hongkong.

In sum, although the Kantian enlightenment pursuing collective prosperity via free trade had inspired the launch of the GATT prototype, power politics still fuels, and is fueled by, the aforementioned mercantilist trend. This depressing pattern is confirmed by the recent protectionist trends in the aftermath of the global financial crisis³²⁷ as well as the deadlock of the Doha Round talks.³²⁸ Therefore, WTO members' primary goal in their trade policies remains the maximization of the alleged national economic interests, even at the expense of their trading partners' welfare. As long as WTO members perceive and construct international trade basically as a mercantilist enterprise, this shrinks the civilizing power of legal discourse in international trade relations.³²⁹ To that extent, the global trading system is never immune to the old Hobbesian economic balkanization.³³⁰

This structural dilemma confronted by the WTO tends to call for a new paradigm in understanding the global trading system, which will be discussed in the next section.

D. Toward the WTO's Community (Gemeinschaft)

1. The WTO as a Community of Law

The aforementioned analytical and normative dilemmas of the old paradigm call for a new paradigm that focuses on certain cognitive properties of social interaction—such as ideas, norms and culture—among social actors (states). The WTO is not a mere *aspect* of its members'

³²⁷ See Simon Evenett, *Managed Exports and the Recovery of World Trade: The 7th GTA Report*, CTR. FOR ECONOMIC POLICY RESEARCH (Sep. 16, 2010), <http://www.globaltradealert.org/sites/default/files/GTA7.pdf>; Christian Henn & Brad McDonald, *Crisis Protectionism: The Observed Trade Impact*, VOX (Dec. 22, 2010), <http://www.voxeu.org/index.php?q=node/5960> (emphasizing that new protectionist measures, such as bailouts and buy national policies, are not suitable for conventional modeling frameworks (partial or general equilibrium models) and therefore might not render a full picture of crisis protectionism).

³²⁸ See generally Cho, *supra* note 2.

³²⁹ See *A New Agenda*, *supra* note 217, at 66 (noting that “a legal vacuum resulting from a lack of discourse tends to push international commercial relations and dynamics beyond the realm of law”).

³³⁰ See e.g., Ernesto Zedillo, *The Multilateral Trading System: A Response to Its Challengers*, in *THE COLLAPSE OF GLOBAL TRADE, MURKY PROTECTIONISM, AND THE CRISIS: RECOMMENDATIONS FOR THE G20 15* (Richard Baldwin & Simon J. Evenett eds., 2009) (observing the economic balkanization of the post-crisis protectionism now appears to be more a “possible scenario” than a mere “historical reminiscence”).

actions and interactions like a contract (*Gesellschaft*), but rather a systemic social construct (*Gemeinschaft*) that ascribes cognitive values (meanings) to members' behaviors.³³¹ In this regard, the WTO "cannot be reduced to the activities carried out in its name" such as ministerial conferences and trade negotiations: "[i]t consists also of relatively enduring rules and norms that these actions draw upon, reproduce, and transform."³³²

As discussed above, the new WTO system has already demonstrated, albeit still in an inchoate stage, these constructivist attributes in the GATT/WTO's record of institutional development. This nascent constructivist turn within the WTO must further develop into a fully operating paradigm. Only then can the new paradigm, which departs from the global *Gesellschaft* and builds the WTO's *Gemeinschaft*, engage in a more precise analysis of trading nations' behaviors as well as propose more normatively sound solutions to various normative challenges confronted by the global trading system. Constructing a new paradigm (the WTO's *Gemeinschaft*) from burgeoning institutional-sociological transformations within the WTO system should begin with its very object and purpose (*telos*).³³³

With the launch of the WTO, this normative-cognitive parameter has become increasingly prominent both in the legal text and the jurisprudence. For example, the WTO Agreement employed a more mature *telos*, i.e., "an integrated, more viable and durable multilateral trading system"³³⁴ than the narrow and sterilized one under the old GATT embodying a pro-trade bias, i.e., "the substantial reduction of tariffs and other barriers to trade."³³⁵ Likewise, WTO tribunals often adopt "teleological" interpretations to make sense of particular decisions against a broad theme of WTO's object and purpose.³³⁶ After all, as long as the WTO remains a *legal* institution, it cannot fully separate its regulation of participants' behaviors from collective goals.³³⁷

³³¹ See Dessler, *supra* note 167, at 462.

³³² *Id.*

³³³ Historical institutionalism lends insights to the WTO's transformation from a *Gesellschaft* to a *Gemeinschaft*. Institutions like the WTO, with its historically embedded norms and practices, can be seen as "frozen decisions" or "history encoded into rules" where rules are the "summaries of past decisions." March & Olsen, *supra* note 17, at 741; John Rawls, *Two Concepts of Rules*, 64 *PHILOSOPHICAL REV.* 3 (1955).

³³⁴ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, pmb1.

³³⁵ GATT pmb1. (1948).

³³⁶ Report of the Panel, *United States-Standards for Reformulated and Conventional Gasoline*, adopted on May 20, 1996 WT/DS2/9; *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on Nov. 6, 1998 WT/DS58.

³³⁷ BETWEEN FACTS AND NORMS, *supra* note 41, at 151 (observing that moral rules

Markedly, the WTO's integrationist *telos* closely corresponds with its *rule*-oriented transformation explicit in its new treaty setting.³³⁸ For example, the new WTO Dispute Settlement Understanding (DSU) eliminated the *veto* power in order to secure a normative efficacy within the system. Under the old GATT dispute resolution mechanism, a WTO panel's decision was legally binding only when *all* GATT contracting parties, including a losing one, agreed to adopt the decision. This was yet another symptom of *power*-driven *Gesellschaft* since, unsurprisingly, powerful parties such as the U.S. often vetoed the adoption of GATT panel decisions when they were the losing party. To remedy this lack of normative deficiency, the new WTO DSU eliminated this veto system and made the adoption process automatic.

Ironically, the recent global financial crisis has only amplified the fateful necessity of a collective bond within the global trading system. While the crisis has negatively affected developing countries and their people, the post-crisis situation ("new normal")³³⁹ has ironically put developing countries and their economic players in a position of a "solution" on account of their enormous growth potential that is superior to crisis-stricken developed countries.³⁴⁰ Developing countries must fully realize their development potential by actively connecting with the WTO's community, i.e., by mainstreaming international trade, which will in turn engender global growth. In this regard, although the new paradigm alone could not eliminate the development deficit in the immediate future, it could nonetheless stimulate a number of new ideas and projects that will shape a more desirable institutional path for the WTO by changing the way in which we understand the world trading system.

This normative-teleological turn of the WTO warrants a constructivist interpretation. Under constructivism, how WTO members understand their national interests would depend on the WTO's norms and social structure.³⁴¹ "Social structures have an inherently discursive

"express a universal will pure and simple," laws also express "the particular wills of members of a particular legal community," and that a legal community's political will expresses "an intersubjectively shared form of life, existing interest positions, and pragmatically chosen ends").

³³⁸ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109–11 (1997).

³³⁹ See Ian Davis, *The New Normal*, MCKINSEY Q., Mar. 2009, http://www.mckinseyquarterly.com/The_new_normal_2326.

³⁴⁰ Robert Zoellick, *Pittsburgh Should Be a Turning Point for the Poor*, FIN. TIMES, Sep. 24, 2009.

³⁴¹ Checkel, *supra* note 6, at 325–26 (noting the constructivist emphasis on the role of social structures and norms).

dimension in the sense that they are inseparable from the reasons and self-understandings that agents bring to their actions.”³⁴² In other words, the WTO's norms and social structure “constitute” WTO members’ interests and preferences. Being a WTO member is not a mere sum of rights and privileges under the WTO agreements. A WTO membership also connotes certain *social* benefits like belongingness, assurance, and even prestige derived from a certain social status in the world trading system. This explains why so many countries—in particular, developing countries such as China, Vietnam, and Russia—have been so eager to become WTO members.³⁴³

The constructivist interpretation of GATT/WTO centering on social—cognitive and intersubjective—parameters generates communitarian (Gemeinschaftian) images of GATT/WTO, such as “dense and demanding social ties” and “common beliefs in an idea system.”³⁴⁴ First of all, the enhanced visibility of shared goals (free trade and market integration) manifest both in the WTO text and its jurisprudence helps WTO members converge their normative expectations, which is a prerequisite for building a collective identity of community.³⁴⁵ Perhaps the very fact that the WTO is

³⁴² See Wendt, *supra* note 33, at 359.

³⁴³ China became a WTO member in 2001. See *Member Information: China and the WTO*, http://wto.org/english/thewto_e/countries_e/china_e.htm. Vietnam has been a member of the WTO since 2007. See *Member Information: Viet Nam and the WTO*, http://wto.org/english/thewto_e/countries_e/vietnam_e.htm. The Russian Federation was recently accepted as a WTO member in December 2011. See *Accessions: Russian Federation*, http://wto.org/english/thewto_e/acc_e/a1_russie_e.htm.

³⁴⁴ See Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOC. THEORY 1, 3–4 (2001). Employing Emile Durkheim's “disaggregating” theorem, Steven Brint modernized the notion of Gemeinschaft. The disaggregating theorem defines a community (Gemeinschaft) as a set of certain salient attributes in human relations, rather than an actual physical locus, such as a rural town. *Id.* at 1–2. Brint's new approach is an attempt to overcome the narrow binarism from which Fernando Tönnis' dyad (Gesellschaft and Gemeinschaft) suffers, while still capturing in the Gemeinschaftian concept a basic aspiration for mutual support originating directly from our own humanness. *Id.* at 1. *But cf.* Elisabeth Zoller, *Institutional Aspects of International Governance*, 3 IND. J. GLOBAL LEGAL STUD. 121, 123 (1995) (rejecting the possibility of an “international community” and instead positing the notion of “international society” on the ground that the international society lacks the “commonness” which can only be found in “national communities”). In other words, Brint's approach offers a theoretical lens through which we can construct a Gemeinschaft with the WTO, which is often classified, and criticized at the same time, as a global Gesellschaft. Two critical community properties, *inter alia*, tend to provide such lens. Naturally, these properties correspond with constructivists' intersubjectivity thesis.

³⁴⁵ See Carmody, *supra* note 256, at 535 (characterizing the WTO as a “constitutional” instrument which “seeks to protect the distribution of expectations concerning the trade-related behavior of governments”).

the most successful international organization in the postwar era,³⁴⁶ as measured by its continuing operational effectiveness as well as ever-expanding agendas and membership, speaks to the potential communitarian nature of the WTO.

Importantly, this communitarian solidarity reifies, and at the same time is reified by, a well-developed and sophisticated set of norms as a communicative device whose “generative grammar” and “underlying principles of order and meaning” shape the contour of GATT/WTO’s institutional development.³⁴⁷ WTO norms as a communication device denote the “logic of appropriateness” in a sociological sense, which derives from certain “patterns of practice” as well as “shared understandings or behavioral expectations.”³⁴⁸ In sum, WTO members see themselves as a “we” bound by common norms as a “symbolic mode of communication.”³⁴⁹ Therefore, in this WTO’s *Gemeinschaft*, trading partners should be perceived more as “customers, suppliers, and potential collaborators instead of competitive threats.”³⁵⁰ Once trading partners share the same communicative foundation, their relationships could be more cooperative than competitive because such foundation provides the “structure of meanings that defines action” in our common realm.³⁵¹

Since the WTO discourse assumes a legal vehicle (such as rhetoric, arguments, and narratives) to channel individual ideas to collective action,³⁵² the WTO’s “logic of communication”³⁵³ or its members’ “communicative action”³⁵⁴ cannot be but *through* law. Here, an analogy of *language* is useful for the constructivist understanding of the WTO’s community as a community of *law*.³⁵⁵ Certain “semantic regularities,”³⁵⁶ such as case law and precedents, administer the WTO’s community in that

³⁴⁶ Rachman, *supra* note 297.

³⁴⁷ *International Regimes*, *supra* note 197, at 390.

³⁴⁸ See Brunnée & Toope, *supra* note 36, at 67; March & Olsen, *supra* note 17; Finnemore, *supra* note 35; Karol Soltan, *A Social Science That Does Not Exist*, in REDISCOVERING FULLER 393 (William J. Witteveen & Wibren van der Burg eds., 1999).

³⁴⁹ Brunnée & Toope, *supra* note 36, at 60, n.176.

³⁵⁰ Ikenson, *supra* note 266, at 14.

³⁵¹ Dessler, *supra* note 167, at 455–56 (observing that when one follows constitutive rules, one “make[s] oneself understood according to the structure of meanings that defines action in that realm”).

³⁵² See Schmidt, *supra* note 48, at 12.

³⁵³ See Schmidt, *supra* note 8, at 303–26.

³⁵⁴ See *supra* note 213.

³⁵⁵ Cf. *Supranational Adjudication*, *supra* note 212, at 367 (observing that effective supranational adjudication tends to nurture a “community of law” in the human rights area among private parties and courts of the European Union).

³⁵⁶ See Goodrich, *supra* note 277, at 139.

this WTO jurisprudence features “lexico-grammatical” aspects³⁵⁷ of WTO and thus shape meanings of the WTO text within the WTO’s own socio-cultural context. The WTO norms as “linguistic phenomena” are “embedded”³⁵⁸ in the WTO’s history, institutional evolution, and internal dynamics.³⁵⁹ Thus WTO members “work [] together creatively to refashion the linguistically structured symbols of social cohesion which serve as the resources for intersubjective experience, with the aim of motivating action.”³⁶⁰ As far as the WTO is concerned, a *community*-building process is a *norm*-building process. Here, the WTO norms hold the “duality of praxis” in that they are used to transmit intentional claims and arguments of members, and at the same time, they reproduce themselves and become taken for granted.³⁶¹

The growing prominence of international trade law, both in academia and in practice, helps this *lingua franca* of international trade law circulate farther.³⁶² For example, Professor John Jackson, the leading international trade law scholar whose critical influence played a critical role in building the current form of the WTO system, launched the *Journal of International Economic Law* (JIEL) in 1998 to lead and develop academic discourses on international trade law issues.³⁶³ A few years later, none but the WTO Secretariat itself embarked on the publication of the *World Trade Review* (WTR) for a similar purpose.³⁶⁴ Importantly, these academic initiatives have helped spread international trade law discourses not only to scholars but also to policymakers, business circles, and the general public.

These WTO Secretariat staff, WTO tribunal members, trade lawyers, trade law scholars may be labeled “discursive agents”³⁶⁵ in that

³⁵⁷ See Goodrich, *supra* note 277, at 177.

³⁵⁸ See Goodrich, *supra* note 277, at 138.

³⁵⁹ Gerald Postema describes this sociological aspect of norms as a “congruence thesis.” Postema argues that “legal norms and authoritative directives can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in the society in generally.” Gerald J. Postema, *Implicit Law*, 13 LAW & PHIL. 265, 273–74 (1994).

³⁶⁰ Francis J. Mootz III, *Natural Law and the Cultivation of Legal Rhetoric*, in REDISCOVERING FULLER 442 (William J. Witteveen & Wibren van der Burg eds., 1999).

³⁶¹ ROY BHASKAR, THE POSSIBILITY OF NATURALISM, 38, 43–44 (3d ed. 1998) (observing that WTO norms, as a language, form a “duality of praxis” where they are employed to transmit ideas).

³⁶² See *Sovereignty*, *supra* note 73, at 46 (observing that international economic law (IEL) might be the most “populated” subject of international law in terms of the “numbers of persons and hours spent working on IEL, as well as the amount of practice”).

³⁶³ See 1 J. INT’L ECONOMIC L. 1 (1998).

³⁶⁴ See 1 WORLD TRADE REV. 3 (2002).

³⁶⁵ A number of scholars have identified this phenomenon under various labels. See generally Schmidt, *supra* note 48, at 2. See also Peter M. Haas, *Introduction: Epistemic*

they collectively preserve and develop trade law ideas and discourses in what Vivien Schmidt calls a “coordinative policy sphere.”³⁶⁶ As “sentient” agents,³⁶⁷ they do not mechanically apply pre-existing legal texts but creatively criticize, deliberate, and construct policies and norms. Granted, those discursive agents may initially confront each other with different “terms” of discourse as their meaning structures channeling their thoughts and actions diverge.³⁶⁸ Yet the dialectical interactions among themselves, which is endemic to the discourse, tend to lead it toward a converging point. Notably, discourses transpiring within the WTO by those discursive agents do not only concern particular policies or programs; they also touch upon a deeper “public philosophy” that is often “left unarticulated as background knowledge” to most actors in the WTO.³⁶⁹ Therefore, when these discursive agents (such as the WTO Appellate Body members) reconstruct trade norms via “constitutional” adjudication against parochial interests, they explicitly or implicitly engage in a discourse on the very *telos* of the WTO.³⁷⁰

From this standpoint, trade norms are no longer exogenously given as mere records of a sovereign contract. Instead, trade norms are now “endogenously” self-generating via intersubjective, communicative, and cultural discourses among participants of the world trading community, which connotes not only state actors but also individual economic players, such as producers, investors, importers, consumers, and even scholars and policymakers.³⁷¹ A plethora of discursive practices and rituals, most of which have been institutionalized as norms—substantive (such as

Communities and International Policy Coordination, 46 INT’L ORG. 1 (1992) (“epistemic communities” of elites with shared ideas); POLICY CHANGE AND LEARNING: AN ADVOCACY COALITION APPROACH (Paul A. Sabatier & Hank C. Jenkins-Smith eds., 1993) (“advocacy coalitions” of elites with shared ideas and policy access); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (“advocacy networks” of activists contesting ideas in international politics); Neil Fligstein & Iona Mara-Drita, *How to Make a Market: Reflections on the European Union’s Single Market Program*, 102 AM. J. SOCIOLOGY 1 (1996) (“entrepreneurs”); Jobert, *supra* note 194 (“mediators”).

³⁶⁶ See Schmidt, *supra* note 48, at 2.

³⁶⁷ *Id.* at 3.

³⁶⁸ See Schmidt, *supra* note 8, at 303–09; WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* (1993).

³⁶⁹ See Schmidt, *supra* note 8, at 308.

³⁷⁰ See Schmidt, *supra* note 48, at 12; Cho, *supra* note 276 (viewing that the WTO was able to reconstruct trade norms regarding antidumping practices despite the United States’ sovereignty-maximizing interpretation of its zeroing practice).

³⁷¹ Cf. GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003) (highlighting private parties’ influences in the WTO dispute resolution process).

jurisprudence) and procedural (such as the DSU)—over the past six decades, are reflections of the social order within the context of the WTO.³⁷² “They are signals and symbols of the appropriateness of events, not in the sense that what happened needs to be viewed as desirable or pleasant, but in the sense that what happened can be viewed as having occurred in the way things happen.”³⁷³

Ironically, certain *material* incentives also contribute to this development of endogenous legal discourses. As individual economic players, or transnational businesspeople, are saddled with cross-border mergers, multinational joint-ventures, and global supply chains, they understandably seek stability and predictability informed by rule of law, such as *lex mercatoria*, rather than unpredictable domestic politics. For the same reason, individual economic players also tend to have the WTO’s *modus operandi* based on a consistent set of norms equivalent to a *jus gentium* or common law of international trade rather than on whimsical political contingencies.³⁷⁴ As Jürgen Habermas aptly observed, normative discourses can “transform mentalities” of government official and citizens, and thus internalize the “new legal construction of the international community.”³⁷⁵

2. The Egalitarian Content of International Trade Law

Critically, the ultimate destination of this cognitive-communicative construction of international trade law is a long-forgotten “egalitarian content” of law.³⁷⁶ Legal discourse retains its egalitarian nature with inclusiveness and perspective-taking.³⁷⁷ This embedded egalitarianism has largely been eclipsed by realism, under which law is merely “reflections of unstable and shifting interest constellations among powers.”³⁷⁸ In this sense, constructivism inoculates the “pernicious effects of the self-interest theory” which “bring[] out the worst in us” by “encouraging us to expect

³⁷² March & Olsen, *supra* note 17, at 742.

³⁷³ Martha S. Feldman & James G. March, *Information in Organizations as Signal and Symbol*, 26 ADMIN. SCI. Q. 171 (1981).

³⁷⁴ See CHO, *supra* note 303 (contending that a *jus gentium* of international trade generates legitimacy by transcending narrow and overly contextualized legal doctrines when managing the clash between free markets and state regulation).

³⁷⁵ DIVIDED WEST, *supra* note 30, at 177.

³⁷⁶ *Id.* at 131.

³⁷⁷ *Id.* at 185.

³⁷⁸ *Id.* at 167.

the worst in others.”³⁷⁹

The current WTO system has at least demonstrated some possibilities for a kind of egalitarian legal discourse. For example, the WTO’s High Court—the Appellate Body—highlights the vitality of taking into account the predicaments faced by other trading in implementing one’s own domestic policies when such policies exert negative externalities on those trading partners.³⁸⁰ The Appellate Body mandates a regulating country to reach out to its trading partners and establish some cooperative arrangements to avoid these negative (trade-restrictive) impacts. Cooperation, which may be defined as one party’s behavioral change “contingent on” that of others, is a benign, albeit not inevitable, consequence of discourse.³⁸¹ For example, the WTO’s side agreements, such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), impose on WTO members a plethora of procedural disciplines, such as notification, transparency, and reason-giving. These disciplines intend to facilitate regulatory dialogue and cooperation between regulating countries and those affected by the former’s regulations.³⁸² In short, these legal—both textual and interpretive—changes under the new WTO system signify a paradigmatic shift from *control* to *communication*.³⁸³

The aforementioned egalitarian trade discourse symbolizes an institutional maturity under which the WTO can grow out of its narrow-minded pro-trade bias and embrace a “trade constitution” within the WTO system.³⁸⁴ On account of this emerging communicative paradigm, a new form of cognitive connection tends to emerge between exporting and importing (regulating) countries that enhances trade sensitivity in the latter’s regulatory process. With such trade sensitivity, the importing (regulating) country is more willing to consider any negative trade impact

³⁷⁹ WENDT, *supra* note 36, at 368 (quoting ROBERT FRANK, *PASSIONS WITH REASON* xi (1988)).

³⁸⁰ See Report of the Panel, *United States-Standards for Reformulated and Conventional Gasoline*, adopted on May 20, 1996 WT/DS2/9; *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on Nov. 6, 1998 WT/DS58.

³⁸¹ *Two Approaches*, *supra* note 14, at 380 (arguing that cooperation is a deliberate, not automatic, process where individuals change their behavior contingent on changes in the other’s behavior).

³⁸² See e.g., Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT’L L. 575, 596 (2009) (observing that the SPS Agreement monitoring process “serves as a catalyst for dialogue,” which allows for the exchange of information and situates the committee as “an interlocutor in the process of international harmonization”).

³⁸³ See Sungjoon Cho, *From Control to Communication: Science, Philosophy, and World Trade Law*, 44 CORNELL INT’L L. J. 249 (2011).

³⁸⁴ See CHO, *supra* note 303 (arguing that “a unified and integrated set of trade rules” or a “common and general norm” is required for a stable trade system).

that its regulation may exert on the exporting country. Here, various avenues of *legal* discourse under the WTO system, such as the notification and enquiry function under the SPS Agreement, help both importing and exporting countries stay tuned to the same cognitive radar. Eventually, such a cognitive bond between importing and exporting countries empowers the WTO to overcome an original pro-trade bias under the old GATT by contributing to a more effective reconciliation between trade and non-trade (e.g., the environment) values. This normative dimension of a trade constitution cannot be fully captured by Gesellschaftian properties (i.e., interest, bargain, and negotiation).

Concededly, constructivism cannot simply assume away Hobbesian competition. The enduring protectionism may still undermine the emerging Gemeinschaftian discourse within the WTO community of law. For example, powerful trading nations want to negotiate away their compliance with an adjudicated decision. The U.S. defied the WTO and refused to fully comply with the 2004 WTO Appellate Body decision ordering the elimination of certain cotton subsidies. Instead, the U.S. linked these subsidy cuts to the agricultural negotiation under the current Doha Round.³⁸⁵ Therefore, one should not equate a new paradigm with the reality.³⁸⁶ There may still be some gaps between the idealist structure envisioned by the new paradigm (constructivism) and a certain type of reality that the conventional paradigm (realism) may explain better. As the former GATT official Jan Tumlir aptly observed, WTO members might be tempted to discard any new way of thinking in the face of protectionist pressure from their home fronts in a “cycle of learning and unlearning.”³⁸⁷ In this regard, constructivism could, and should, not claim a disciplinary monopoly in understanding the WTO. After all, any communitarian bond in the WTO might be loose enough to yield occasionally to materialistic considerations.

Nonetheless, the new paradigm *does* provide us with creative pathways toward a better future. The constructivist narrative on the WTO’s community (Gemeinschaft) based on legal discourse offers a powerful avenue in reconstructing the WTO’s *nomos* in a way that can effectively transform mercantilist politics. The WTO’s community could raise the *cost* of maintaining mercantilism-protectionism by altering the nature of national

³⁸⁵ Frances Williams, *Brazil Wins Go-Ahead for US Sanctions*, FIN. TIMES, Sep. 1, 2009.

³⁸⁶ In fact, this constructivist thinking can be traced back to Grotius, Kant, Hegel, and more recently to Karl Deutsch, Ernst Haas, and Hedley Bell. WENDT, *supra* note 36, at 3.

³⁸⁷ KENT JONES, *THE DOHA BLUES: INSTITUTIONAL CRISIS AND REFORM IN THE WTO* 16 (2010) (quoting Jan Tumlir).

interests in trade relations. In the WTO community of law, a wide array of individual economic players, such as importers, transporters, insurers, bankers, wholesalers, retailers, and consumers, can benefit from an orderly and stable legal environment, while politically well-connected domestic producers might still prefer lobbying politicians for special interests. Therefore, in the WTO's community where both trading nations and individual economic players interact and communicate with one another via a language of (international trade) law, mercantilism-protectionism results in an enormous decrease in the collective welfare—both domestically and internationally—only to serve a handful of special interests.

In sum, the WTO's community as a community of *law* could help modify the Gesellschaftian nature of power and interest. Then, it can serve a broader circle of economic participants within the global trading system by envisaging an expanded horizon of collective gains from trade that used to be eclipsed by the old mercantilist-protectionist paradigm.³⁸⁸

CONCLUSION

This Article argues that the old paradigm on IOs characterized by realist political bargain (*Gesellschaft*) cannot fully capture new social realities around contemporary IOs in which ideational factors, such as ideas, values, culture, and norms, have become more salient and influential not only in explaining but also in prescribing state behaviors. In response to this challenge, the Article offers a new paradigm informed by constructivism that highlights a reflective, intersubjective communication among IO members and consequent norm-building process. Under this new paradigm, one can understand an IO as a “community” (*Gemeinschaft*), not as a mere contractual instrument of its member states. The Article applies the new paradigm to the WTO as it explains the WTO's institutional evolution from a power-oriented, tariff-reducing *contract* to a norm-oriented world trading *community*.

The paradigm shift proposed in this Article holds both descriptive and normative connotations. On the one hand, the Article highlights the increasing unfitness of the old paradigm as it elucidates new social realities around IOs. For example, the Article argues that the constructivist understanding of the WTO system could explain, better than realism, why trade disputes, albeit often escalated, do not entail trade wars akin to the interwar economic balkanization. The “complex interdependence” among WTO members, which is defined by its characteristic high frequency-

³⁸⁸ See *Uncertainty*, *supra* note 54, at 551.

density of their interactions, multiple issues involved, and multiple channels of communication (private and public; formal and informal), has nurtured a solid communitarian bond harnessed by sophisticated trade norms.³⁸⁹ This fateful tiding tends to make the use of retaliation less practical, if not completely obsolete.³⁹⁰ This complex interdependence in trade relations, evidenced by such phenomena as global supply/production chains, cross-border mergers and acquisitions, foreign direct investments, and international trade finances, has shifted WTO members' worldviews from a zero-sum world to a *positive*-sum world.³⁹¹ Under this unique condition, WTO members tend to define their self-interests differently from what realists would do.³⁹²

On the other hand, however, the Article also sheds light on the *future* of IOs—how to redesign and reform the current IOs. Polemical as they may seem, the aforementioned diverging views on IOs denote a fundamentally paradigmatic concern. In other words, these different views betray certain assumptions that an inquirer unconsciously holds in constructing the reality around an IO.³⁹³ We may see only what we are prepared to see.³⁹⁴ Moreover, how we understand the reality, in turn, determines how we *change* it. Given the ubiquity of IOs, whose coverage ranges from the financial crisis (International Monetary Fund)³⁹⁵ to development (World Bank),³⁹⁶ in the era of globalization,³⁹⁷ one may not

³⁸⁹ Cf. ROBERT KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 24-29 (1977) (observing that various complex economic and other interdependencies were increasing and that this increase nurtures cooperation); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335, 350 (1989) (observing that complex interdependence in Western Europe and North America involving “high levels of interaction on many issues, via multiple channels, public and private, formal and informal” makes military force irrelevant and instead emphasizes the pursuit of wealth).

³⁹⁰ See Abbott, *supra* note 391.

³⁹¹ *Id.*

³⁹² See Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 529 (Ada W. Finifter ed., 1983) (observing that the search for power is not always an overriding state interest and that states will define their self-interests differently given different systemic conditions).

³⁹³ *Uncertainty*, *supra* note 54, at 536, 549 (observing that identities and norms provide “ontological security” where states are socialized into particular socially constructed understandings of what is appropriate behavior (norms) for an actor (identity)).

³⁹⁴ RALPH WALDO EMERSON, 9 *JOURNALS OF RALPH WALDO EMERSON: 1820-1876* (1913), at 549.

³⁹⁵ INTERNATIONAL MONETARY FUND, <http://www.imf.org> (last visited Feb. 20, 2012).

³⁹⁶ *Ten Things That You Never Knew about the World Bank*, THE WORLD BANK, <http://digitalmedia.worldbank.org/tenthings/en/1.php>.

take lightly this ontological inquiry of the IO.

For example, the old paradigm, if left unchecked, will lead eventually to a normative tension among trading nations by aggravating mercantilist competition, as witnessed in the current Doha crisis.³⁹⁸ As long as negotiators are obsessed with a mirage of perfect “bargain,” the normative foundation of the Doha Round, i.e., “development,” will never fully materialize. Here, the new paradigm is capable of providing us with a creative pathway toward a better future. The power of discourse, communication, learning, and enlightenment in the WTO’s legal community is capable of closing the frustrating gaps between trade norms and trade realities. Only this endogenous, self-generating process can emancipate the WTO system from an exogenous realist, and at the same time defeatist, trap under which “legal provisions can be nothing other than reflections of unstable and shifting interest constellations among powers.”³⁹⁹

In conclusion, the new paradigm’s constructivist narratives toward an IO’s community (*Gemeinschaft*) offer a powerful avenue in reconstructing an IO in a way that can effectively address chronic cooperation deficiencies that an IO is and will be experiencing in the future. Within the community, states do not need to agree on everything: they could just “get used to” and eventually “make sense of” one another.⁴⁰⁰ After all, the main message of the new paradigm is a “moral” thesis, which aspires to espouse “human progress” via IOs.⁴⁰¹

³⁹⁷ See FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* v (2d ed. 1993) (observing that it would be only a “modest exaggeration” to claim that IOs now cover every practical aspect of human enterprise). See generally THE AMERICAN SOCIETY OF INTERNATIONAL LAW, *INTERNATIONAL LAW: 100 WAYS IT SHAPES OUR LIVES* (2006).

³⁹⁸ Cho, *supra* note 2, at 576, 585-86 (observing that mercantilist stances adopted by developed countries aggravated tensions with developing countries and arguing that WTO members should view the Doha Round as a *Gemeinschaftian* enterprise, not as a “*Gesellschaftian* set of mercantilist bargains”).

³⁹⁹ DIVIDED WEST, *supra* note 30, at 167.

⁴⁰⁰ SEN, *supra* note 7, at 85, 99.

⁴⁰¹ PIETRA RIVOLI, *THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY: AN ECONOMIST EXAMINES THE MARKETS, POWER, AND POLITICS OF WORLD TRADE* 214 (2005) (quoting former Secretary of State Cordell Hull who observed that free trade would lead to word peace).