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Reconstructing World Politics: Norms, Discourse, and Community

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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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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

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).


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 methodology: it explains why and how states behave in a particular situation. This thread of thought, loosely coined “rationalism,” is a dominant paradigm among contemporary international relations (IR) scholars. 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, discourse, and learning, which do influence, and even


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-liberal 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. 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. 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”). 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. 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. This Article aims to animate the latter—“sociological”—framework that remains hitherto under-explored in international studies. Importantly, the starkly


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


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 EDEGWORTH, 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”).


Epicurean propensity for parsimony ("the propensity to account for all appearances from as few principles as possible")\(^9\) 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-packaged 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 \textit{yin} and

\(^{19}\) \textit{SEN}, \textit{supra} note 7, at 24.
\(^{20}\) \textit{Two Approaches}, \textit{supra} note 14, at 392.
\(^{21}\) \textit{Id}.
\(^{22}\) \textit{SEN}, \textit{supra} note 7, at 8.
\(^{23}\) \textit{Id.} at 15.
\(^{25}\) Stephen Bell, \textit{Institutionalism: Old and New}, in \textit{GOVERNMENT, POLITICS, POLICY AND POWER IN AUSTRALIA} 1, 8 (Dennis Woodward, Andrew Parkin & John Summers eds., 2002).
\(^{26}\) \textit{Id}.
\(^{27}\) Kathleen Thelen & Sven Steinmo, \textit{Historical Institutionalism in Comparative Politics}, in \textit{STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS} 1, 8 (Kathleen Thelen & Sven Steinmo eds., 1992).
\(^{28}\) Bell, \textit{supra} note 25; see also \textit{THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS} (Walter W. Powell & Paul J. DiMaggio eds., 1991).
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” instilled a strong sense of collectivity (“mentalités collectives”) in the Hobbesian international sphere. Here, the sociological approach defines states as social actors, rather than atomistic individuals. The internal dynamics among social actors both condition and constitute their own perception of challenges and responses, which conventional IR theorists tend to discount. Therefore, the sociological paradigm is capable of probing those issues that rationalism removes from the research agenda under its own assumptions. In particular, this Article employs an IR version of a sociological framework, i.e., “constructivism.”

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. In other words, “power and interest explanations presuppose ideas.” Therefore, constructivists focus on certain “discursive conditions,” which may justify a rationalist explanation.

Constructivism enables us to conceptualize an “imagined community” that exists in a cognitive dimension comprised of norms and legal discourses. 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. 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.”

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.” 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.


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

43 Id. at 36.
processes.”\textsuperscript{44} Thus, norms channel social actors’ behaviors via the “reasoning process,” which is operated by discursive merits and generalizable rules.\textsuperscript{45}

 Nonetheless, this Article neither denounces rationalism nor oversubscribes to constructivism.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{48}

 What this Article \textit{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,\textsuperscript{49} it can certainly lay bare that even these material elements “take on significance as states develop shared expectations

\textsuperscript{44} Id.

\textsuperscript{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”).

\textsuperscript{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, \textit{What Makes the World Hang Together?: Neo-Utilitarianism and the Social Constructivist Challenge}, 52 INT’L ORG. 855, 882 (1998) [hereinafter \textit{Neo-Utilitarianism}].

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

\textsuperscript{48} Vivien A. Schmidt, \textit{Taking Ideas and Discourses Seriously: Explaining Change through Discursive Institutionalism as the Fourth \textquoteleft New Institutionalism,	extquoteright} 2 EUR. POL. SCI. REV. 1, 16 (2009).

\textsuperscript{49} See ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 134 (1999).
through interaction.”

Insofar as the old paradigm is unbefitting 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.

On balance, an IO’s true reality may best manifest as a double helix structure of the two paradigms, under which any single paradigm may not claim its disciplinary monopoly.

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.

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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.”

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].

Finally, some cautionary notes are in order. First of all, this Article does not claim that constructivism should evenly apply to all IOs. Constructivism, in and of itself, is oriented to a “conditional, context-specific” approach to investigating an IO. 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. 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. Critically, an IO’s community is not a logical evolution from a domestic constitution, but rather a noble systematization of international relations themselves.

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. Most of about two hundred international organizations now operating were established post-bellum.

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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.


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.” 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.” 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.

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, is susceptible to “realism”.

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63 U.N. Charter pmbl.
64 WHO Constitution, art.1.
65 See Reinalda, supra note 62.
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. 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.

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 an 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.\textsuperscript{70}

While realism represents a rationalist understanding of an IO,\textsuperscript{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.\textsuperscript{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.\textsuperscript{73} The realist methodology had nearly become a “tacit ontology,”\textsuperscript{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”\textsuperscript{75} or “statist ontology.”\textsuperscript{76} Under this paradigm, an IO could not claim its own “ontological independence”\textsuperscript{77} separate from states. Even an IO’s “causal status,” under


\textsuperscript{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. \textit{See Two Approaches}, \textit{supra} note 14 (citing Herbert A. Simon, \textit{Human Nature in Politics: The Dialogue of Psychology with Political Science}, 79 \textit{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.


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

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

\textsuperscript{75} Barnett & Finnemore, \textit{supra} note 70, at 706.

\textsuperscript{76} \textit{Id.} at 700.

\textsuperscript{77} \textit{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.\footnote{John J. Mearsheimer, The False Promise of International Institutions, 19 INT’L SECURITY 5, 7 (1995).} According to the old paradigm, IOs “have no independent effect on state behavior”\footnote{Id.} 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.\footnote{March & Olsen, supra note 17, at 735–36.} 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.”\footnote{STEPHEN R. BELL, AUSTRALIA’S MONEY MANDARINS: THE RESERVE BANK AND THE POLITICS OF MONEY (2004).}

Realism, based on “overly simplistic behavioural assumptions,”\footnote{Two Approaches, supra note 14, at 390–91.} tends to bracket complex social interactions that lead to the formation of preferences.\footnote{See supra note 29.} Since realists tend to address only “one dimension of a multidimensional reality,” it tends to “reify[ ] contemporary political arrangements.”\footnote{See Ira Katznelson, The Doleful Dance of Politics and Policy: Can Historical Institutionalism Make a Difference?, 92 AM. POL. SCI. REV. 191 (1998).} 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.\footnote{DIVIDED WEST, supra note 30, at 161 (viewing that a gestalt shift depends on the world society’s cultural and economic dynamics).}

Historical developments reflected in an IO’s institutional (normative) design shape states’ behaviors, which are “culturally and structurally thick, not just strategically lean.”\footnote{See supra note 29.}

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.\footnote{DIVIDED WEST, supra note 30, at 161 (viewing that a gestalt shift depends on the world society’s cultural and economic dynamics).} 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 independence. For example, it was no coincidence that in its youth, the WTO
was in its ascendency when the old realist paradigm emphasizing the theme of power and security declined at the end of the Cold War. Thus, with the advent of the new millennium, the prominence of the old (obstructionist) absolute sovereignty, and its descriptive power, has begun to decline, if not disappear entirely. This “postnational constellation,” 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” 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.”

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*” tends to reconfigure the traditional Hobbesian existential premise of states, i.e., anarchy, into a civilized status of “membership” in an international community. 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.” In this context, Professor Joseph Weiler

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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”).
91 DIVIDED WEST, *supra* note 30.
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).
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,
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. This frustrating prospect tends to deter small countries from filing complaints against powerful countries in the first place. 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. In this process, the desperate voices of powerless developing countries tend to be silenced. This marginalization of developing countries within IOs raises various developmental concerns. Two interrelated, and disheartening, contemporary global trends—the widening global income gap and ever-increasing abject poverty in the least-developed countries (LDCs) —have forum for power politics” (emphasis added).

“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).


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

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 unilateralsim”,\(^{112}\) 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.'
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.”\textsuperscript{117} Unilateralist and parochial trade politics have increasingly become a hallmark of U.S. trade policy since the end of the Cold War.\textsuperscript{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.

\textbf{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{118} \textit{Id.}
\textsuperscript{120} \textit{Id.}
close the discrepancy between its epistemology and ontology.\textsuperscript{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).\textsuperscript{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.\textsuperscript{123} Under this basically “causal” setting, one of the classical logics, \textit{modus tollens}, tends to prevail. In other words, “even a single counterfactual occurrence” may lead to the refutation of norms or their efficacy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{121} Id. at 764–66.

\textsuperscript{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., \textit{supra} note 72, at 410–11; Richard W. Scott, \textit{Organizations: Rational, Natural, and Open Systems} (2d ed., 1987).

\textsuperscript{123} Kratochwil & Ruggie, \textit{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.” \textit{Id.}

\textsuperscript{124} Id. at 767.

\textsuperscript{125} Id.

\textsuperscript{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.”\(^{134}\)


\(^{128}\) 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.” Finnmere & 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.


\(^{133}\) 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. 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.

The challenge that liberal theorists face in international relations is how to coordinate these different liberal preferences among states with minimum transaction costs. 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.

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. 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.

Therefore, the neoliberal paradigm portrays an IO as a Lockean architecture that denotes a cooperative rivalry among members to attain
certain common regulatory goals. Neoliberalism is similar to the regime theory in that it highlights a regularized institutional mechanism with which to monitor and coordinate states’ behaviors. 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. After all, according to one survey, 57 percent of WTO memberships by population belong to the titular “non-liberal” group. 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

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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.” 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. According to David Baldwin, 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 bias as it presupposes that international institutions are mediums that “rational, self-interested actors” establish to “enhance efficiency in obtaining the actors’

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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).
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.”

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. 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. For example, some scholars submit that rational actors may comply with international law out of a fear of “reputation” costs. 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. More importantly, states may often comply with international law without any rational (cost-benefit) basis.

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. Consequently, rationalism largely “reproduce[s] the...
status quo.” 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.” 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, such an exclusivist dimension of sovereignty tends to foreclose many necessary inquiries. As long as sovereignty means “the ability to afford not to learn,” its mere invocation may shrink future institutional possibilities, including various institutional changes. 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—
normative—constraint on actors’ behavior.\footnote{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).}

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.”\footnote{Schmidt, *supra* note 48, at 5.} 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.”\footnote{Schmidt, *supra* note 48, at 13.} 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.\footnote{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).} 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.”\footnote{Schmidt, *supra* note 48, at 9.}

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.\footnote{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).} 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.\footnote{Id. at 444, 461.} 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
enablement and constraint” to state actions.\textsuperscript{169} Another epistemological characteristic of structural theory is “reductionism.”\textsuperscript{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.\textsuperscript{171} In this structure, domestic politics eventually externalize international outcomes.\textsuperscript{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.\textsuperscript{173} The new paradigm should overcome the over-determinacy 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”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{177}

\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} at 448.
\textsuperscript{171} \textit{WALTZ, supra} note 67, at 18, 39–40, 60, 91.
\textsuperscript{172} \textit{Id.} at 39, 60; see Judith Goldstein & Lisa L. Martin, \textit{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).
\textsuperscript{173} \textit{Dessler, supra} note 167, at 448.
\textsuperscript{174} \textit{Id.} at 462.
\textsuperscript{175} Guy E. Swanson, \textit{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).
\textsuperscript{176} \textit{Finnemore, supra} note 35, at 325.
\textsuperscript{177} \textit{Id.} Notably, “sophisticated” versions of liberalism appear to converge with constructivism. See \textit{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.\textsuperscript{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. \textit{It constrains only; it is not generative}.\textsuperscript{179}

Against this background, political scientists have recently presented various strands of institutionalism (“new institutionalism”) based on different \textit{logics} from rationalism. While rationalism (or rationalist institutionalism) represents a “logic of calculation,”\textsuperscript{180} “historical liberalism as “sociological Liberalism,” which highlights the “transformative effect of transnational contacts and coalitions on national attitudes and definitions of interests.” \textit{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. \textit{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. \textit{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.” \textit{Id.}

\textsuperscript{178} Finnemore, \textit{supra} note 35, at 327–28.
\textsuperscript{179} \textit{Id.} at 333 (emphasis added).
\textsuperscript{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.\footnote{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”).} First of all, historical institutionalism focuses on a historical path-dependency of an organization in its creation and evolution of an integrated system.\footnote{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).} 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.”\footnote{See Hall & Taylor, supra note 83, at 939.} 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.\footnote{See Schmidt, supra note 48, 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).} 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.\footnote{See Hall & Taylor, supra note 83, at 949.} 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.\footnote{See Nichols, supra note 149, at 485; Hall & Taylor, supra note 83, at 949.} Thus, sociological institutionalism highlights the logic of “appropriateness” based on the culture and values (“how reality is structured”)\footnote{WENDT, supra note 36, at 143.} 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).
adopted by the law and economics approach. 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.” Among these scholars, some spotlight the “ideas” side (e.g., “ideational turn,” “ideational institutionalism,” and “constructivist institutionalism”); others emphasize the “discourse” side (e.g., “discourse analysis” and “référentiel” (frame of reference)).

B. Constructivism

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

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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).
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).
model of reality to the reality of the model.” 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. In this regard, a mere equilibrium of competing *political* vectors cannot fully explain the existential foundation of an IO and its norms. 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. 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.

Crucially, this new paradigm can explicate the nascent phenomenon of *community* within an IO. 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. Therefore,

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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).
202 Id. at 522.
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, are central parameters to constructivism vis-à-vis “exogenous” factors such as power, interest, or domestic politics.

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.” 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. 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.”

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.”

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,” 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. 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.”

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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.
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.
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
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. 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.” 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. Therefore, an essential element of community of law is the “self-awareness” by participants of the community of the “apolitical context” of their operation.

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).

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).


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).

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 level\(^{221}\); 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

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\(^{219}\) “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.


\(^{225}\) Adler, *supra* note 40, at 322.


\(^{227}\) Wendt, *supra* note 224.
without “selective incentives.” Such observation is not merely utopian but empirically proven. Admittedly, the intersubjective qualities of social identities are not necessarily cooperative; they can be “conflictual,” as was seen in the Cold War. Nonetheless, this “intersubjective framework of meaning” structures the “internationalization of political authority,” whose elements include not only power but also legitimate “social purposes.” Importantly, it is norms that bring to terms these sociological behavioral patterns among actors. IO norms, such as institutional practices and jurisprudence, 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.”

228 Id. at 386.
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. 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.
232 According to Jutta Brunnée and Stephen J. Toope, a strong sociological tradition, in particular Anthony Giddens’ “structuration theory,” shaped the development of constructivism. Structurationalists 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.
233 See generally JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAWMAKERS (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).
234 Two Approaches, supra note 14, at 384.
granted by participants as social facts that are not to be challenged.”

In other words, state members “proceed on the performative assumption that speakers and hearers understand a grammatical expression in identical ways.” In this sense, norms can be viewed more as a “rhetorical and symbolic resource,” rather than as an “articulate mandate.” 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.”

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. 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. 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. As Martha Finnemore observed, organizations exist not solely because they are efficient but because as social goods they are perceived to be legitimate. Thus, the new theory also allows us to grapple with the “historical and cultural particularity” of an IO qua independent entity.

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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 **KRATCHEWIL**, supra note 45, at 97.
240 **International Regimes**, supra note 197 at 384. In fact, this socio-idealistic 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,” 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. 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. 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.

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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).


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

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.”

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


See supra note 61.

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).

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.’’).


Id.
sanctity of “bargains” based on the *quid pro quo* principle.\textsuperscript{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,\textsuperscript{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.\textsuperscript{256}

An earlier pattern of GATT jurisprudence attests to this contractual aspect. For example, the remedial prototype of the GATT was “nullification or impairment,”\textsuperscript{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,\textsuperscript{258} regardless of whether the measure at issue conflicted with GATT provisions.\textsuperscript{259} Therefore, early GATT panels often explored whether and

\textsuperscript{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”).

\textsuperscript{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).


\textsuperscript{257} GATT, supra note 253, at art. XXIII.

\textsuperscript{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).

\textsuperscript{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.\textsuperscript{260}

\section*{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

\footnotesize{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. \textit{See generally} Cho, \textit{supra} note 257 (discussing and critiquing non-violation provisions of GATT/WTO dispute settlement system).

\textsuperscript{260} \textit{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.” \textit{Id.} ¶ 17 (emphasis added). The panel eventually recommended that Italy should remove the “adverse effects” which Law No. 949 had caused to the UK. \textit{Id.} ¶ 20.}
entirely in one country ("mono-location"), led naturally to a "producer-oriented" trade policy. 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. 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”). Under this sophisticated web of global sourcing networks, once parochially defined domestic trade interests have now expanded to every niche throughout the world. “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.”

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

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262 See Sovereignty, supra note 73, at 237–38.
263 See Territoriality, supra note 31.
264 See supra note 262.
266 Id.
iPod manufacturing powerfully demonstrates.\textsuperscript{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.\textsuperscript{268} The old obsession with a “national origin” has increasingly become trifling in this new era of global sourcing.\textsuperscript{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”\textsuperscript{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 predetermined commercial rents. Thus, the prevailing concept of trade has shifted from a “zero-sum” (mercantilist) or us \textit{versus} them image to that of “positive-sum” or us \textit{and} them. Here, trading nations have become partners rather than rivals.\textsuperscript{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.\textsuperscript{272} It is within this altered context in which constructivism can offer an appropriate tool to expound a \textit{norm}-oriented evolution in the


\textsuperscript{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. \textit{See} Aileen Wang & Koh Gui Qing, \textit{Foreign Investment in China Down First Time in 28 Months}, REUTERS, Dec. 15, 2011.

\textsuperscript{269} \textit{Sovereignty}, supra note 73, at 11.

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


operational governance of the world trading system. 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. 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.

Decades of institutional evolution under the GATT had begun to form a new legal dynamic. 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.” 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

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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).
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”).
important to the community of law than its material consequences, i.e.,
nullification or impairment, such as the decrease of export. In fact, any
violation would ipso facto constitute a nullification or impairment. 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. 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,” as is often the case in a private contract. For example,
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. 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.”

According to his economic logic, powerful (and wealthy) WTO members might be tempted to buy out their violations with impunity. 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.”

The realist-Gesellschaftian paradigm’s other normative deficiency is that it is inherently vulnerable to capture: domestic politics, engineered by interest groups, shape or constrain 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.

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).

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).


Id.; see also Cho, supra note 257.

See Two Approaches, supra note 14, at 387.

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).

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, 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, modern trade policies are based on a parochial assumption that exports are good and imports are bad. 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. 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. 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
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.
298 See BETWEEN FACTS AND NORMS, supra note 41, at 40.
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).
cater to protectionist needs. 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. 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. 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. Under the realist logic, powerful members such as the U.S. and the EU could not reconcile between themselves. 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.

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

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303 See notably Kono, supra note 302 (contending that core NTBs are clearly protectionist by restricting import supply).
305 Bradford, supra note 288, at 17.
306 Id.
308 Id.
Such marginalization, prone to create frustration and resentment from developing countries,\textsuperscript{309} innately militates against its normative agenda, in particular its integrationist telos. 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.\textsuperscript{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.\textsuperscript{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 \textit{normatively} justified\textsuperscript{313} and how WTO members perceive, and eventually reform, this new regime, as revealed in certain contentious issues, such as AIDS drugs and human health.\textsuperscript{314}

As the Hobbesian “competition bias”\textsuperscript{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

\textsuperscript{309} See B.S. Chimni, \textit{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, \textit{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).

\textsuperscript{310} Emmerson, \textit{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).

\textsuperscript{311} Bradford, \textit{supra} note 288, at 15.

\textsuperscript{312} \textit{Id}.

\textsuperscript{313} \textit{Id.} at 3.


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, moldovan fruits, 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.
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 crisis as well as the deadlock of the Doha Round talks. 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. To that extent, the global trading system is never immune to the old Hobbesian economic balkanization.

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’

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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”).

actions and interactions like a contract (Gesellschaft), but rather a systemic social construct (Gemeinschaft) that ascribes cognitive values (meanings) to members’ behaviors. 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.”

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).

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” 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.” Likewise, WTO tribunals often adopt “teleological” interpretations to make sense of particular decisions against a broad theme of WTO’s object and purpose. After all, as long as the WTO remains a legal institution, it cannot fully separate its regulation of participants’ behaviors from collective goals.

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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).
335 GATT pmbl. (1948).
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.\textsuperscript{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”)\textsuperscript{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.\textsuperscript{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.\textsuperscript{341} “Social structures have an inherently discursive

\textsuperscript{340} Robert Zoellick, Pittsburgh Should Be a Turning Point for the Poor, FIN. TIMES, Sep. 24, 2009.
\textsuperscript{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.
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, 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. 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.” In sum, WTO members see themselves as a “we” bound by common norms as a “symbolic mode of communication.” Therefore, in this WTO’s Gemeinschaft, trading partners should be perceived more as “customers, suppliers, and potential collaborators instead of competitive threats.” 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.

Since the WTO discourse assumes a legal vehicle (such as rhetoric, arguments, and narratives) to channel individual ideas to collective action, the WTO’s “logic of communication” or its members’ “communicative action” 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. Certain “semantic regularities,” such as case law and precedents, administer the WTO’s community in that

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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.
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” aspects 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” in the WTO’s history, institutional evolution, and internal dynamics. 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.” 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.

The growing prominence of international trade law, both in academia and in practice, helps this lingua franca of international trade law circulate farther. 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. A few years later, none but the WTO Secretariat itself embarked on the publication of the World Trade Review (WTR) for a similar purpose. 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” 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”).
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.” As “sentient” agents, 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. 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. 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.

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. A plethora of discursive practices and rituals, most of which have been institutionalized as norms—substantive (such as...
jurisprudence) and procedural (such as the DSU)—over the past six decades, are reflections of the social order within the context of the WTO.\textsuperscript{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.”\textsuperscript{373}

Ironically, certain \textit{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 \textit{lex mercatoria}, rather than unpredictable domestic politics. For the same reason, individual economic players also tend to have the WTO’s \textit{modus operandi} based on a consistent set of norms equivalent to a \textit{jus gentium} or common law of international trade rather than on whimsical political contingencies.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{376} Legal discourse retains its egalitarian nature with inclusiveness and perspective-taking.\textsuperscript{377} This embedded egalitarianism has largely been eclipsed by realism, under which law is merely “reflections of unstable and shifting interest constellations among powers.”\textsuperscript{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

\begin{footnotesize}
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\item March & Olsen, \textit{supra} note 17, at 742.
\item See Cho, \textit{supra} note 303 (contending that a \textit{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).
\item \textit{DIVIDED WEST}, \textit{supra} note 30, at 177.
\item \textit{Id.} at 131.
\item \textit{Id.} at 185.
\item \textit{Id.} at 167.
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the worst in others.”

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. 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. 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. In short, these legal—both textual and interpretive—changes under the new WTO system signify a paradigmatic shift from control to communication.

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. 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

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379 Wendt, supra note 36, at 368 (quoting Robert Frank, Passions with Reason xi (1988)).
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”).
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. Therefore, one should not equate a new paradigm with the reality. 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.” 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

386 In fact, this constructivist thinking can be traced back to Grotius, Kant, Hegel, and more recently to Karl Deutsch, Ernst Haas, and Hedley Bull. WENDT, supra note 36, at 3.
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. This fateful tiding tends to make the use of retaliation less practical, if not completely obsolete. 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. Under this unique condition, WTO members tend to define their self-interests differently from what realists would do.

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. We may see only what we are prepared to see. 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) to development (World Bank), in the era of globalization, one may not

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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.


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. 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.”

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. After all, the main message of the new paradigm is a “moral” thesis, which aspires to espouse “human progress” via IOs.

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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).