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Article

Beyond Rationality: A Sociological Construction of the World Trade Organization

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Beyond Rationality: A Sociological Construction of the World Trade Organization

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*This Article critiques the rational-institutional analysis of the World Trade Organization (WTO) that Gregory Shaffer and Joel Trachtman present, and proposes an alternative "sociological" framework. The Article notes that rationalism, although a powerful heuristic of the WTO's operation, inevitably overlooks the WTO's rich social dimensions and thus leaves behind several theoretical blind spots, such as the lack of any satisfying explanation on institutional evolution and development concerns. In an attempt to address these blind spots, the Article offers a sociological-communitarian paradigm that emphasizes cognitive elements, such as ideas, norms, and discourse, to explain the social dynamic within the WTO. Under this new framework, an institutional ontology of the WTO is defined not as a contract (*Gesellschaft*), but as a community (*Gemeinschaft*). Within the WTO's community, its members convey their thoughts and arguments (ideas) through an iterative and ritualized process (discourse) and eventually institutionalize those ideas as norms. The Article also reinterprets rational choice narratives originally provided by Shaffer and Trachtman in a way so that the rationalist-institutional analysis converges with the sociological-communitarian paradigm. The Article concludes that the new paradigm can help WTO members adjust their ways of thinking and generate new ideas and proposals to address some of the chronic problems that the WTO confronts.*

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INTRODUCTION

Since its highly anticipated launch in 1995, after eight years of negotiation under the Uruguay Round, the World Trade Organization (WTO) has been prized as *the* single most successful example of international cooperation.[1] Both the size of its membership[2] and its dispute resolution caseload[3] have continuously increased. Its ever-growing prominence also commands much academic attention. New journals[4] as well as academic programs[5] that specialize in the study of the WTO are frequently commissioned.

A plethora of scholarly projects devoted to the WTO notwithstanding, relatively few have ever tackled a fundamental inquiry: *What constitutes the WTO, and how should we understand it*?[6] Beneath this seemingly polemical

1. Gideon Rachman, *A Bad Year for Diplomats*, ECONOMIST, Nov. 19, 2008, at 73.

2. The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), was established with only twenty-three contracting parties; the number of participatory parties rose to 128 when the WTO was created. Currently, the WTO has a total of 153 members. *Members and Observers*, WORLD TRADE ORGANIZATION, (Sept. 29, 2011, 9:46 AM), http://tinyurl.com/2vons.

3. As of September 20, 2011, a total of 427 disputes have been filed with the WTO. *Dispute Settlement: The Disputes*, WORLD TRADE ORGANIZATION, (Sept. 29, 2011, 9:47 AM), http://tinyurl.com/3obqu.

4. *See, e.g.*, JOURNAL OF INTERNATIONAL ECONOMIC LAW, *available at* http://tinyurl.com/4xbd4b4; WORLD TRADE REVIEW, *available at* http://tinyurl.com/3q5vn9e. The journals were launched in 1998 and 2002, respectively, and mainly publish scholarly literature discussing WTO issues.

5. *See, e.g.*, *The Academy of International Trade and Investment Law 2011*, INST. OF EUROPEAN STUDIES OF MACAO (June 8, 2011, 10:39 AM), http://tinyurl.com/3ele4up (announcing launch of academic program).

6. As to the few scholars who have considered this question, see Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39 (2001); Jeffrey L. Dunoff, *Constitutional Conceits:*

question lurks a fundamental paradigmatic concern. That is, any answer to this inquiry will always rely on a certain framework (methodology) or a set of assumptions; the basis on which inquirers structure their perceptions of the WTO necessarily depend on their initial paradigmatic views.[7]

In their seminal article, *Interpretation and Institutional Choice at the WTO*, Gregory Shaffer and Joel Trachtman attempt to understand the WTO largely under a rationalist (or law and economics) framework.[8] In particular, they draw on the comparative institutional analysis,[9] which focuses on the availability of *alternative choices* in understanding the development of a particular institution. At broad brush, the comparative institutional analysis is derived from the tradition of "new institutional economics," espoused by Douglas North and Oliver Williamson, whose central theme is that all institutions are invariably accompanied by transaction costs and therefore can be replaced by alternatives.[10] According to this approach, the WTO's operation depends on its members' participation in its various institutions, which is in turn determined by the costs and benefits of such participation.

Shaffer and Trachtman view the WTO as a welfare-maximizing contract[11] in which various institutional choices are reduced to individual preferences and economic welfare considerations.[12] The rationalist

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The WTO's 'Constitution' and the Discipline of International Law, 17 EUR. J. INT'L L. 647 (2006); Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT'L ECON. L. 81 (2006); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006).

7. Brian C. Rathbun, *Uncertain about Uncertainty: Understanding the Multiple Meanings of a Crucial Concept in International Relations Theory*, 51 INT'L STUD. Q. 533, 536, 549 (2007).

8. Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103, 105 (2011).

9. Regarding the comparative institutional analysis generally, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994) (describing which institutions — markets, legislatures, or courts — can best implement social policy goals); NEIL K. KOMESAR, LAW'S LIMITS (2001) (arguing that the interactions between law-making institutions molds the supply of and demand for law). *See also* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQUIRY 261 (2004) (reviewing NEIL K. KOMESAR, LAW'S LIMITS (2001)); David A. Luigs, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, 93 MICH. L. REV. 1559 (1995) (reviewing NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994)).

10. Shaffer & Trachtman, *supra* note 8, at 107–08; *see generally* DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (James Alt & Douglas North eds., 1990) (defining "institutions" broadly); OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985) (using the "transaction cost" approach in analyzing institutions). Thus, the authors' focus on institutional "alternatives" is derived from both the institutional economics approach and the "comparative institutional analysis" touted by Neil Komesar. *See generally* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 9; KOMESAR, LAW'S LIMITS, *supra* note 9.

11. Shaffer & Trachtman, *supra* note 8, at 111.

12. *Id.* at 105–07. In their article, Shaffer and Trachtman define an institutional choice as an option within a payoff matrix that is calculated according to a form of welfare (cost-benefit) analysis. *Id.*

assumptions in Shaffer and Trachtman's argument, which characterize a state's action as a calculated decision,[13] support a "functional" paradigm. The WTO, as a corporate collectivity, is regarded as an instrument designed to achieve members' common interests within the meaning of Talcott Parson's idea of "goal gratification."[14] According to this paradigm, the WTO is a contract (*Gesellschaft*) in which collective guidelines steer members' behaviors in a way that preserves their original contractual relationship.[15] Similarly, existing WTO norms and other institutional properties, according to the rationalist/functional paradigm, represent "structural and constraining features" that program and determine members' behaviors.[16]

The problem with the rational choice model or rational institutionalism is that it replaces *real* actors whose rationality is in fact bounded[17] with flawlessly rational (hypothetical) actors.[18] As a result, although the underlying logic of Shaffer and Trachtman's thesis may appear rational, it also represents a certain myth in that such logic is constructed within a narrow set of assumptions and is not axiomatic in and of itself.[19] Given the reality of trade negotiations, titular institutional choices are hardly deliberate or even calculating. Theories relying on the power of rational choice and efficiency do not properly characterize most political bargains because those bargains are often negotiated on a highly contingent basis across issue areas,[20] whereas the notion of efficiency is often theorized

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

14. Guy E. Swanson, *An Organizational Analysis of Collectivities*, 36 AM. SOC. REV. 607, 619–20 (1971).

15. *Id.* at 620.

16. Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 326 (1996).

17. Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw out That Baby*, 87 CORNELL L. REV. 309, 315 (2002). The idea of "bounded rationality" has alternatively been described as "cognitive loafing" or "cognitive illusions." *Id.* at 315–16. According to the bounded rationality argument, public officials may be motivated by objectives aside from mere reelection ("hacks"). *Id.* at 311, 322, 336.

18. Shaffer & Trachtman, *supra* note 8, at 132; *see generally* BO ROTHSTEIN, SOCIAL TRAPS AND THE PROBLEM OF TRUST (2005); FRITZ W. SCHARPF, GAMES REAL ACTORS PLAY (1997); Vivien A. Schmidt, *Taking Ideas and Discourses Seriously: Explaining Change through Discursive Institutionalism as the Fourth "New Institutionalism,"* 2 EUR. POL. SCI. REV. 1 (2009).

19. W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS (2d ed. 1987); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 410–11 (1999). Additionally, the rational choice model (law and economics) is often criticized for holding unrealistic assumptions as to "perfect foresight and complete information about the future." Andrew Keay & Hao Zhang, *Incomplete Contracts, Contingent Fiduciaries and a Director's Duty to Creditors*, 32 MELB. U. L. REV. 141, 156 (2008).

20. 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., 2009).

around a specific issue. Thus, in a normal political bargaining situation, *ex ante* rational choices may be either nonexistent or ambiguous.

Rationalism's theoretical omission is revealing. It ignores the critical issue of the social formation of preferences and this phenomenon's potential to implement change, because it assumes that actors are rational and seek to maximize only preprogrammed profits or self-interests.[21] A paradigm premised on rationalism cannot conceive of the idea that WTO institutions[22] can shape and change what WTO members think of themselves and the nature of their perceived interests through "frames of reference" and "normative orientations."[23] Under the rationalist paradigm, we cannot adequately explain how WTO members build their self-understandings (identities), as distilled from their own social practices.[24] This is an unfortunate omission in that it hinders us from understanding the rich complexity of existing social, in particular "discursive," dimensions within the WTO.[25]

This paradigmatic deficit of rationalism translates into certain theoretical blind spots. First, if the WTO is viewed as a functional tool (contract) for members, then it is assumed that its terms are predetermined and there exists very little room for institutional *change*. Change is either "assumed away"[26] or viewed as a *re*programming of an institution due to unexpected external shocks.[27] Second, the rationalist fear of inefficient or excessive delegation to the judiciary is accompanied by an interpretive obsession with deriving the ordinary meaning of texts arising under the Vienna Convention on the Law of Treaties. This textualist determinism, which is characterized by an assumption of preprogrammed institutional choices, largely overlooks the possibility that WTO norms can *endogenously* emerge through the social interactions and discourse amongst actors within the WTO.

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21. K. Thelen & S. Steinmo, *Historical Institutionalism in Comparative Perspective*, *in* STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 8, 16 (Kathleen Thelen & Sven Steinmo eds., 1992).

22. It should be noted that sociologists emphasize the "social and cognitive" aspects of institutions, while rational-choice scholars focus on their "structural and constraining" features. Finnemore, *supra* note 16, at 326.

23. THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 COMP. POL. 231 (1995).

24. Schmidt, *supra* note 18, at 9.

25. Alexander E. Wendt, *The Agent-Structure Problem in International Relations*, 41 INT'L ORG. 335, 359 (1987).

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

27. Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 662 (2006).

Third, Shaffer and Trachtman's rationalist premise leaves normative considerations, such as participation, transparency, accountability, and legitimacy, largely unaddressed. While the authors acknowledge that these considerations both "will often be valued in themselves" and contribute to rationalist goals (such as "articulating and furthering other individual preferences"), they do not elaborate what those "values" are.[28] Fourth, as Shaffer and Trachtman admit, any international political process is vulnerable to various "biases" due to the asymmetrical distribution of power and resources among the WTO members.[29] Both in a negotiation and a litigation setting, powerful and resourceful bureaucrats and interest groups from developed countries tend to prevail over developing countries.[30] As a positive approach, which contrasts a normative one, rationalism suggests no solution to the normative concerns related to this inability of many developing countries to properly represent their positions.

The aforementioned paradigmatic limitations endemic to the rationalist approach expose its "disciplinary isolation"[31] and call for a new framework. In particular, both international relations scholars and international lawyers have recently begun to take seriously various *social* dimensions, such as the constructive role of ideas and norms, of the political and legal institutions of an international organization.[32] This Article argues that a "sociological" (or "constructivist" in international relations theories) approach to understanding the WTO[33] can remedy those theoretical blind spots left by the rationalist paradigm. The sociological approach challenges main rationalist assumptions, such as the idea of fixed preferences, by emphasizing cognitive elements, such as ideas, norms, and discourse, in explaining the social dynamic within an international organization.[34]

Under this new framework, an institutional ontology of the WTO is defined not as a contract (*Gesellschaft*), but as a community (*Gemeinschaft*).[35]

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28. Shaffer & Trachtman, *supra* note 8, at 109.

29. *Id.* at 127.

30. *Id.* at 144; Joseph A. Conti, *Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization*, 35 LAW & SOC. INQUIRY 625, 626–27 (2010) (observing salient disparities in the levels of member participation in WTO dispute settlement proceedings).

31. Finnemore, *supra* note 16, at 325.

32. *Id.*

33. *See generally* Colin Hay, *Constructivist Institutionalism*, *in* OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 56, 64-65 (R.A.W. Rhodes et al. eds., 2006) (discussing constructive institutionalism); John L. Campbell & Ove Pedersen, *Introduction*, *in* THE RISE OF NEO-LIBERALISM AND INSTITUTIONAL ANALYSIS 1, 9–13 (John L. Campbell & Ove Pedersen eds., 2001) (discussing discursive institutionalism).

34. Vivien A. Schmidt, *Discursive Institutionalism: The Explanatory Power of Ideas and Discourse*, 11 ANN. REV. POL. SCI. 303, 304 (2008).

35. *See generally* Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483 (2004) (criticizing a

Within the WTO community, members convey their thoughts and arguments (ideas) through an iterative and ritualized process (discourse)[36] and eventually institutionalize those ideas as norms. More specifically, WTO members understand and react to each other's behaviors within the WTO through a process of normative discourse, i.e., by referencing WTO norms. As a *language* (a "symbolic mode of communication"[37]), WTO norms form a "duality of praxis"[38] in that they are employed to transmit ideas while, at the same time, they replicate and naturalize themselves.[39] WTO norms provide WTO members with a "generative grammar" and "underlying principles of order and meaning" that buttress the WTO's operation.[40] Thus, WTO norms play a critical role in socially constructing the WTO via discourse.

The new paradigm stands in stark contrast to the rationalist paradigm, which regards institutions as a matter of "choices," such as "incorporation of international standards, judicial balancing, delegation to markets, national deference, and process-based review."[41] Under a communitarian, sociological framework, however, patterns of normative discourse within the WTO are influenced by history and are shaped as a result of different discursive conditions. As such, rather than a product of preset choices, the WTO community emerges and evolves over time in a less rigid manner. It is not a set of preprogrammed institutional choices informed by fixed preferences that define the WTO as it exists today; instead, the WTO is an evolving entity based on sedimented discourses, such as various institutional rules and practices (*acquis communautaire*).

The WTO discourse develops in certain distinctive spheres, such as during peer review in committees and during the adjudicatory process that takes place within the WTO dispute resolution mechanism, in which different social actors communicate via shared WTO norms.[42] These discursive spheres cultivate different kinds of socially meaningful patterns

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contractarian (*Gesellschaftian*) view on the WTO and offering a sociological (communitarian) framework instead).

36. Schmidt, *supra* note 34, at 305; For a discussion regarding how iteration can influence international policy, see John K. Setear, *Ozone, Iteration, and International Law*, 40 VA. J. INT'L L. 193 (1999).

37. Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 60 n.176 (2000).

38. ROY BHASKAR, THE POSSIBILITY OF NATURALISM 38, 43–44 (3d ed. 1998).

39. David Dessler, *What's at Stake in the Agent-Structure Debate?*, 43 INT'L ORG. 441, 467 (1989) (observing that "[r]ules are . . . media through which action becomes possible and which action itself reproduces and transforms").

40. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 380 (1982).

41. Shaffer & Trachtman, *supra* note 8, at 152.

42. Susan Park, *Norm Diffusion within International Organizations: A Case Study of the World Bank*, 8 J. INT'L R. & DEV. 111, 113 (2005).

of practice, which subsequently generate socially acceptable norms in various forms, such as committee decisions, recommendations, or panel reports. Moreover, these institutionalized forms of WTO discourse, i.e., committee deliberation and adjudication, help to develop numerous derivative (secondary) discourses as a result of everyday interactions and communications among individual economic players, such as manufacturers, importers, and retailers, as well as other types of interlocutors, including nongovernmental organizations (NGOs), media outlets, and members of academia.

The recent transformation of the international trade environment warrants the adoption of a communitarian paradigm in order to understand the WTO. The contemporary trade patterns shaped by new phenomena, such as global supply chains[43] and cross-border mergers and acquisitions, tend to increasingly defy the reciprocal and mercantilist logic on which conventional trade negotiations used to be based. This shifting Zeitgeist in international trade is in fact deeply associated with broader trends, such as "postnational constellation,"[44] in which states no longer monopolize international economic relations and various individual economic players, such as importers and distributors, also take the center stage. Thus, the existing understanding of international organizations demands a new dimension that recognizes more of the cognitive and communicative aspects of international institutions.

A cognitive-communicative reconstruction of the WTO may give rise to a view of the law that contains "egalitarian content."[45] As Shaffer and Trachtman admit, a rationalist perspective of the WTO leaves developmental concerns, such as the chronic lack of resources in developing countries, largely unaddressed.[46] Once we characterize the WTO as a community, any developmental disparity tends to become increasingly "intolerable"[47] because such disparity generates communitarian risks that threaten the smooth operation of the WTO. In order to resolve this issue, the new communitarian paradigm can help WTO members adjust their way of thinking and generate new ideas and proposals to address these chronic problems.

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43. *See* Daniel Ikenson, *Made on Earth: How Global Economic Integration Renders Trade Policy Obsolete*, TRADE POL'Y ANALYSIS, No. 42, (Cato Inst. Ctr. for Trade Policy Studies, Washington, D.C.), Dec. 2, 2009, at 1 *passim* (underscoring the recent global sourcing and production trends that tend to make conventional trade policies outdated). Regarding a theoretical analysis on global supply chains, see notably RONALD W. JONES, GLOBALIZATION AND THE THEORY OF INPUT TRADE (2000) (discussing the fragmentation of global production processes).

44. JÜRGEN HABERMAS, THE DIVIDED WEST 172 (Ciaran Cronin trans., Polity Press 2006).

45. *Id.* at 131.

46. Shaffer & Trachtman, *supra* note 8, at 127.

47. Amartya Sen, *Global Doubts*, HARV. MAG., Sept.–Oct. 2000, at 68.

Against this background, this Article critiques the rationalist framework underlying Shaffer and Trachtman's institutional analysis of the WTO and, at the same time, offers an alternative — sociological and communitarian — framework.[48] The Article unfolds in the following sequence. Part I recounts Shaffer and Trachtman's rationalist approach, which is based on concepts such as contract, choice, and institutions. It notes that the authors view the WTO as a set of institutional and interpretive choices that are designed to maximize both economic and political welfare (efficiency). Part II presents an alternative approach based on such notions as norms, discourse, and community. First, it highlights certain theoretical blind spots of rationalism due to its paradigmatic assumptions. This Part then offers a sociological approach to the WTO in an attempt to address those blind spots. It illustrates the rich social dynamics within the WTO community characterized by cognitive elements, such as norms, ideas and discourse. Concomitantly, it reinterprets rational choice narratives that the authors originally provided. The Article concludes that the new paradigm may disabuse the WTO constituencies of a fatalistic yet erroneous conviction that "legal provisions can be nothing other than reflections of unstable and shifting interest constellations among powers,"[49] and help reinstate the "inspirational notions of virtue and of humans as social beings."[50]

Finally, a word of caution is in order. This Article does not argue that the new sociological paradigm should supplant the rationalist approach that Shaffer and Trachtman employ. Nor does it suggest that the blind spots of the rationalist framework render it obsolete.[51] No paradigm is perfect. What the Article does attempt to achieve is to contribute to a more complete understanding of the WTO by providing an alternative paradigm and narrative. It also identifies a zone of convergence where the two paradigms may harmonize. In this regard, the general critique in this Article can also apply to other rationalist literatures to the extent that they

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48. Sociological approaches to understanding the WTO are rare. Regarding a notable exception, see Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System*, 19 EUR. J. INT'L L. 277 (2008) (applying a "symbolic-interactionist" approach to the relationship between the WTO and regional trading agreements). In general, traditional international relations (IR) scholars have only recently begun to break from their tendency of disciplinary isolation and recognize *social* aspects of political life (including the role of norms and culture), which IR-dominated theories, such as realism and liberalism, do not consider. *See, e.g.*, Finnemore, *supra* note 16, at 325.

49. HABERMAS, *supra* note 44, at 167.

50. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 103 (2000).

51. *See* Jack L. Goldsmith & Eric A. Posner, *International Agreement: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003).

view international relations as a collection of contractual arrangements, as opposed to a community comprised of social interactions.[52]

I. THE ORIGINAL (RATIONAL) FRAMEWORK: INSTITUTIONS, CHOICES & CONTRACT

In their paper *Interpretation and Institutional Choice at the WTO*, Gregory Shaffer and Joel Trachtman aim to "develop a new framework for understanding the drafting and interpretation" of the WTO by exploring and analyzing various institutional choices made by WTO members and the WTO tribunal (panels or the Appellate Body).[53] The authors focus on two dimensions of institutional choices: temporal and spatial.[54] The temporal dimension involves institutional choice-making at two different stages: a "treaty drafting" (*ex ante*) stage and a "treaty interpretation" (*ex post*) stage. Different patterns — and concerns — of institutional choices arise within each stage. The spatial dimension, meanwhile, refers to a range of "social decision-making processes" transpiring in different institutional loci, such as domestic, regional, international, political, administrative, judicial, and market fields.

It is quite obvious that Shaffer and Trachtman's overall analysis is based on the "law and economics" approach, or more broadly, "rationalism." In particular, they draw on the comparative institutional analysis approach, which focuses on the role of the availability of alternatives in understanding a particular institution.[55] The authors also rely heavily on the "public choice theory," which assumes that public officials, such as judges or WTO panelists, attempt to maximize their self-interests, including by aggrandizing their political welfare through empire-building.[56] To the extent that these officials are rational actors, "they will always move in a direction that can be determined by external observation."[57] Based on these theoretical grounds, Shaffer and Trachtman view the WTO as a welfare-maximizing "contract"[58] in which institutional choices are reduced

52. Regarding another piece of literature that is representative of the rationalist framework, see ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 121 (2008) ("Our basic rational choice assumptions imply that states will only enter into agreements when doing so makes them (or at least, their policy-makers) better off."). Guzman argues that states comply with international law to maximize their interests, which are influenced by principles of reputation, reciprocity, and retaliation. *Id.* at 33–48, 71.

53. Shaffer & Trachtman, *supra* note 8, at 105.

54. *Id.* at 105–06.

55. *See id.*

56. Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 490–91 (1996); Rubin, *supra* note 17, at 310–11; Spence & Cross, *supra* note 50, at 102.

57. Rubin, *supra* note 17, at 311.

58. Shaffer & Trachtman, *supra* note 8, at 111.

to and defined by individual preferences and concerns of economic welfare.[59] Thus, all institutional choices revolve around the ultimate rationalist goals of welfare maximizing and transaction-cost minimizing.

The theoretical foundations of the authors' analyses cause Shaffer and Trachtman to interpret various aspects of the WTO's structural design and operation in a purely rationalist framework. For example, Shaffer and Trachtman rely on the efficiency concern (the "cost of specification") central to the rationalist paradigm to suggest that there is an institutional choice between *rules* and *standards* in the treaty-drafting stage.[60] They assume that broader standards may be more efficient than specific rules given the specification cost inherent in drawing narrow rules.[61]

Similarly, the authors regard the Appellate Body's celebrated interpretation in *Shrimp-Turtle*[62] of the *chapeau* (the preambular language) under the General Agreement on Tariffs and Trade (GATT) Article XX as a rational interpretive choice. In *Shrimp-Turtle*, the United States banned the importation of shrimp harvested by certain developing countries, such as India, Malaysia, and Indonesia, on the ground that these countries' harvesting practices also incidentally killed endangered sea turtles.[63] The United States claimed this trade restriction was justified because it was designed to protect the environment and thus was an allowed restriction under the general exception clause of GATT (Article XX(g)).[64] Nonetheless, the Appellate Body found that the U.S. ban failed to comply with the introductory language of Article XX (the *chapeau*), which stipulated that allowed justifications for failure to comply with GATT should not be abused (i.e., that restrictions should not amount to being "arbitrary" or "unjustifiable").[65] The Appellate Body concluded that the United States' failure to engage in multilateral negotiations with the targeted parties, which were available to the United States under preexisting environmental treaties, such as the Inter-American Convention for the Protection and Conservation of Sea Turtles, violated the *chapeau*.

According to Shaffer and Trachtman, the Appellate Body's prescription, i.e., multilateral negotiations, represents an example where members of the

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59. *Id.* at 111, 116–17.

60. *Id.* at 112.

61. *Id.*

62. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Appellate Body and Panel Report, as amended, (adopted on Nov. 6, 1998) [hereinafter *Shrimp-Turtle*].

63. *Id.*

64. *Id.* at 55–56; General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. XX(g) ("relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption").

65. *Shrimp-Turtle*, *supra* note 62, at 75; General Agreement on Tariffs and Trade, *supra* note 64, art. XX, pmbl.

WTO made a rationalist interpretive choice by delegating its authority to strike a balance between free trade and environmental protection to a subset of WTO members (disputants).[66] The authors argue that one can understand this choice only by recognizing "the competing priorities held by the affected parties, because this type of decision involves commensuration between diverse values."[67] Therefore, their view is that affected parties in a given dispute can weigh and balance, in an optimal manner, the free trade value and the environmental protection value among themselves. Furthermore, arguing from the political efficiency (public choice) perspective,[68] Shaffer and Trachtman observe that the Appellate Body's decision was warranted, as long as it will not generate negative externalities.[69] That is, the Appellate Body's decision is politically expedient and thus desirable, because the issue only concerns a limited number of affected parties, as long as these members' multilateral negotiation does not somehow undermine the economic welfare of unaffected WTO members.

Not only do the authors rely on the rationalist paradigm to explain institutional choices made by the WTO as a general body, but they also employ the public choice theory in conjunction with the rationalist framework to compare institutional choices against the choices facing individual WTO members. As discussed above,[70] public choice theorists argue that public officials behave in a rational manner in order to maximize their own self-interests; the public choice theory assumes that public officials will only act in ways that will enable them to maintain or increase their political power. Thus, Shaffer and Trachtman note that choices made within the WTO can be justified in two different ways: in pursuit of empire-building ("public choice welfare") and in pursuit of trade liberalization ("public interest welfare").[71]

Given the preceding discussion of their thesis, it is clear that Shaffer and Trachtman are concerned primarily with the concepts of efficiency, institutional choice, and public welfare. Although the authors' rationalist framework considers a particular hypothetical institutional arrangement as a particular "*social* decision-making process" or "participation,"[72] it largely brackets the social dynamics themselves. Thus, despite their claim that

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66. Shaffer & Trachtman, *supra* note 8, at 125–26.

67. *Id.* at 126.

68. Shaffer and Trachtman argue that political efficiency, which materializes in the form of an expedited political decision-making process, is the result of the involvement of a limited number of parties (governments) who are concerned with specific disputes that have only sub-multilateral impact. *Id.*

69. *Id.* at 126.

70. *See supra* text accompanying note 56.

71. Shaffer & Trachtman, *supra* note 8, at 108 n.8.

72. *Id.* at 106.

they would adopt a "law and society" perspective, the social, or sociological, aspects of the institutional process (decision-making) are not fully considered. Instead, an institutional choice amounts to no more than the selection of an option in a payoff matrix under a cost-benefit analysis driven by welfare and efficiency concerns.[73]

Take the example of the term "participation." In Shaffer and Trachtman's article, it is not used as a sociological concept, but rather as a rationalist concept. Shaffer and Trachtman argue that the idea of member participation involves the allocation of authority through the "incorporation of international standards, judicial balancing, delegation to markets, national deference, and process-based review,"[74] through various hypothetical (alternative) institutional arrangements.[75] WTO member participation is a proxy for understanding how members seek to maximize the WTO's welfare,[76] because individual preferences can be inferred from behaviors such as participation.[77] Participation is a "method of gauging welfare through revealed preferences."[78] Thus, the authors suggest that "participation lies at the heart of key economic concepts such as transaction costs, externalities, and resource allocation efficiency."[79] As a result, participation-based criteria can translate eventually into welfarist terms, rather than into any sociological phenomenon.[80]

The authors' institutional scrutiny delivers a powerful heuristic on the WTO and its affairs. However, rationalism does not address "accounts based on post hoc observation of values or ideology."[81] Of course, "[l]imiting the number of variables that a theory considers can increase both its explanatory content and its capacity to concentrate the scholarly mind."[82] This explains why the rationalist framework is capable of generating such a good deal of significant research, such as that of Shaffer and Trachtman.[83] By restricting the assumptions of the paradigm upon which it relies, the authors' analysis, steered by institutional and interpretive choices, not only delivers convincing narratives on the WTO's

73. *Id.*
74. *Id.* at 152.
75. *Id.* at 106–07.
76. *Id.* at 106.
77. *Id.* at 108.
78. *Id.*
79. *Id.* at 107 n.5 (quoting Neil Komesar, *The Essence of Economics: Law, Participation and Institutional Choice (Two Ways)*, *in* ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT 165, 170 (Sandra Batie & Nicholas Mercuro eds., 2008)).
80. *Id.* at 106–08.
81. Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 392 (1988).
82. *Id.*
83. *Id.*

present operation, but also retains a predictive force on its future development.

II. AN ALTERNATIVE (SOCIOLOGICAL) FRAMEWORK: NORMS, DISCOURSE, & COMMUNITY

A. Rationalism's Blind Spots

No paradigm is perfect; it cannot explain or address everything. Rationalism is not an exception to this principle. Most importantly, it overlooks ("brackets") the possibilities of the formation of and change in preferences, because it assumes that actors are rational and thus seek to maximize only fixed, preprogrammed profits or self-interests.[84] Thus, it is beyond rationalism's theoretical reach to consider that WTO institutions can conversely construct what WTO members think of themselves and their perceived interests, through "frame[s] of reference"[85] and "normative orientations."[86] This is an unfortunate omission because it disenables us from discovering the social, in particular "discursive," dimensions of the WTO.[87] As a result, under the rationalist paradigm, we cannot adequately explain how WTO members build self-understandings (identities) that are distilled from their own social practices (*acquis communautaire*). This paradigmatic deficiency translates into several blind spots.

The first blind spot is that Shaffer and Trachtman's rationalist methodology is largely silent on the concept of institutional *change* or evolution. In their Article, the authors discuss a form of *ex ante* institutional programming (specifically, the process of treaty creation) that is susceptible to a rationalist-positivist model. During this stage, sovereign states may determine in advance what they desire, based on rationalist calculations, by inserting favorable clauses within a treaty. Various *ex post* institutional arrangements are later constructed as a result of the interpretation of this treaty. Although Shaffer and Trachtman would argue that all of these *ex post* institutional arrangements and adjustments are rationally predetermined designs, the reality is that they may be more of a reflection of change that emerges over time within the WTO. Unfortunately, a rationalist paradigm cannot take these changes into account, due to its assumption that an institution is defined only by predetermined preferences based on welfare-maximizing considerations; an institutional change is either "assumed away"[88] or viewed as a

84. Thelen & Steinmo, *supra* note 21, at 8, 16.
85. Koelble, *supra* note 23, at 232.
86. DiMaggio & Powell, *supra* note 23.
87. Wendt, *supra* note 25, at 359.
88. Katznelson & Weingast, *supra* note 26, at 7.

*re*programming of an institution due to unexpected external shocks.[89] In sum, the rationalist framework envisions very little room for institutional change.

Second, despite its evident methodological merits, discussed above,[90] rationalism's conscious limitation on the scope of the study of an institution has its own weakness. Its analysis requires too many additional hidden assumptions because it brackets too many operational variables. Therefore, rationalism unavoidably leaves lingering "uncertainty" behind its analysis. For example, even if the Appellate Body's judicial balancing of certain WTO standards may be justified in rationalist terms, i.e., in accordance with the "cost of specification," it is less clear that the Appellate Body's balancing would necessarily lead to an efficient outcome.[91]

The limitation on variables is also a problem because it means that a rationalist hypothesis must rely primarily on special cases. For example, under a rationalist paradigm, the use of non-WTO norms (such as international regulatory standards) in a WTO dispute may generate welfare — both economic and political — efficiency, but *only* if certain conditions are met. These conditions include: that non-WTO norms can properly deliver necessary information; that they are not abused for protectionist purposes; and that the use of such expertise (or expert organizations) does not favor any particular members over others.[92] In sum, in order to maintain its validity, a rationalist proposition necessitates a number of preconditions to be met; these preconditions, however, tend to be found predominately in special, not general, cases.

Third, the authors' rationalist approach to WTO dispute resolution tends to place too high of a value on textualism and thus undermines jurisprudential evolution within the WTO.[93] The rationalist concern about the inefficient or excessive delegation to the judiciary is necessarily accompanied by an obsession with interpreting texts in their ordinary meaning in accordance with the Vienna Convention on the Law of Treaties. The reliance on textualism within the WTO is justified from a rationalist perspective as a deliberate institutional arrangement between

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89. Helfer, *supra* note 27, at 662.

90. *See supra* Part I.

91. Shaffer & Trachtman, *supra* note 8, at 112.

92. *Id.* at 134–35, 140.

93. *See, e.g.*, Henrik Horn and Joseph H.H. Weiler, *European Communities — Trade Description of Sardines: Textualism and its Discontent*, *in* THE WTO CASE LAW OF 2002, *at* 248, 262 (Henrik Horn and Petros C. Mavroidis eds., 2005). *See also* Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 617 (2002) (arguing that the Appellate Body relies on strict textual interpretation in its adjudications so as to avoid criticism that it has modified WTO members' rights and obligations in the WTO treaty).

contracting parties (states) to maximize their joint welfare. It might be seen as "empowering the choices of WTO members and constraining the discretion of judges" or "giv[ing] primacy to the political branches that formulated the treaty, rather than to the judicial process."[94] Thus, the texts to be applied by the WTO are thrust upon the institution from the outside as an outcome of a deliberate, and thus rational, institutional choice. However, this textualism or theory of judicial restraint, reflecting the fear of "judicial usurpation,"[95] cannot adequately explain the growth of law *within* the WTO.[96] Rationalist determinism, characterized by preprogrammed institutional choices, is largely oblivious to the possibility that WTO norms endogenously emerge through a social dynamics (discourse) in the WTO.

The fourth blind spot that Shaffer and Trachtman's rationalist premise creates is that the paradigm leaves "normative" considerations, such as issues of participation, transparency, accountability, and legitimacy, largely unaddressed. For example, WTO members may make an explicit rational institutional choice to defer to a WTO tribunal to construct standards to be applied in future disputes, rather than nailing down precise texts in advance as rules. According to the rationalist framework, this delegation of discretion to future WTO authority is a rational choice to the extent that it is "justifiable in welfare terms."[97] At the same time, however, the authors concede that such an ostensibly rational choice is subject to certain criticism from a "participatory" perspective, because it creates problems of judicial activism.[98] While Shaffer and Trachtman simply acknowledge that normative considerations (i.e., participation, transparency, accountability, and legitimacy) "will often be valued in themselves" in addition to contributing to rationalist goals (such as "articulating and furthering other individual preferences"), they do not articulate what those values are.[99]

The reason that many of these participatory and procedural values cannot be fully accounted for in rationalist terms is because they are of a cognitive-endogenous nature.[100] In other words, these values emerge from internal social dynamics generated by reflective interactions, such as

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94. Shaffer & Trachtman, *supra* note 8, at 116–17. Similarly, Kal Raustiala observes that the WTO risks generating "quasi-constitutional" rules ("generativity") as a result of secretive WTO tribunal proceedings. Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 415 (2000).

95. Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 172 (1892).

96. *Id.* (observing that the growth of law via judicial legislation is not only "desirable" but also "necessary").

97. Shaffer & Trachtman, *supra* note 8, at 112.

98. *Id.*

99. *Id.* at 109.

100. *Cf.* Finnemore, *supra* note 16, at 329 ("Organizations exist, proliferate, and have the form they do not because they are efficient but because they are externally legitimated.").

discourse amongst WTO members. There exists an inevitable tension between the narrowly-bounded version of the rationalist paradigm, which is premised upon the "logic of interest," and a broader framework that is based also on a "logic of appropriateness."[101] While the former paradigm concerns material-exogenous parameters, such as interest, power, and utilities, the latter concerns cognitive-endogenous ones, such as culture, values, and norms. While the former paradigm views an institution as a constraining structure, the latter views it as a "construct" of ideas.[102] Interestingly, as discussed above,[103] Shaffer and Trachtman's conceptualization of the rationalist framework may be broad enough to recognize both material-exogenous and cognitive-endogenous concerns; their argument does theoretically allow for the concepts of "political welfare" and "political efficiency" to be interpreted in light of participatory concerns.[104] However, the extension of the logical assumptions of the rationalist paradigm to cognitive-endogenous ones would require too great a stretch in its parameters and would expose the paradigm to self-contradiction. Thus, despite their claims of taking account of normative considerations, Shaffer and Trachtman present a paradigm that cannot credibly do so.

Fifth, Shaffer and Trachtman's rationalist paradigm fails to address the fact that certain regulatory traditions that implicate human culture or values defy a rationalist approach in the area of risk regulation. That is, a rationalist approach to certain issues will not be able to account for the idea that different societies might be sensitive to different kinds of risks. Shaffer and Trachtman acknowledge that the rationalist institutional choice to delegate certain fact-finding authority to experts in WTO litigation may cause accountability concerns because the reliance on private individuals in veiled investigations may seem undemocratic.[105] These concerns also manifest in the well-documented debate over the definition of "risk" between rationalists and culturalists.[106] Rationalists, such as Cass

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101. The "logic of interest" refers to the rationalist notion of evaluating behavior according to economic and other utilitarian benefits; the "logic of appropriateness," meanwhile, denotes a sociological approach of judging behavior according to cultural propriety. JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 22–25 (1989).

102. Schmidt, *supra* note 34, at 303 ("[N]orms are dynamic, intersubjective constructs rather than static structures.").

103. *See supra* text accompanying notes 54–58.

104. For example, the authors recognize that an explicit cost-benefit analysis adopted by the Appellate Body, even if it may improve economic efficiency, would still be undesirable from the political welfare perspective, considering the incommensurability among different "values and concerns." Shaffer & Trachtman, *supra* note 8, at 144 (citing Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1998)).

105. *Id.* at 137.

106. *Id.*

Sunstein, tend to construct the concept of risk rather strictly, i.e., as something objective and calculable. Thus, they view any aversions to risk as stemming from certain psychological errors ("heuristic biases") or unwarranted fears of political pandering ("populism").[107] In contrast, culturalists, such as Dan Kahan and James Boyle, believe that such "technocratic rationality" undermines legitimate debates in national democracies in that a narrowly-defined value (technology) may usurp diverse yet rich voices.[108] These diverging concepts of risk play a vital role in allocating regulatory power between the WTO and regulating states.

The Appellate Body in the *Hormones* case adopts the culturalist view of risk. This case involved a European import ban on U.S. beef treated with growth-promotion hormones, which the United States argued was scientifically justified. Specifically, the Appellate Body ruled that:

> [T]he risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health *in the real world where people live and work and die*.[109]

Thus, in *Hormones*, the Appellate Body rejected the application of a rational approach by refusing to evaluate two situations that could have been scientifically compared to each other, i.e., naturally occurring hormones in food and artificially injected hormones found in food.[110] In fact, the Appellate Body viewed these two situations as incommensurable, claiming that there was some "fundamental distinction," and held that any attempt to compare them would be absurd.[111]

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107. MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS 103 (2009); CASS SUNSTEIN, THE LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 25, 126 (2005).

108. POLLACK & SHAFFER, *supra* note 107, at 103; James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 751 (1985); Dan Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1072 (2006).

109. Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶187, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998) (emphasis added) [hereinafter *Hormones*]. Regarding this case, see David A. Wirth, *European Communities — Measures Concerning Meat and Meat Products (Hormones), International Decisions*, 92 AM. J. INT'L L. 755, 755 (1998); *see also* Ilona Cheyne, *Risk and Precaution in World Trade Organization Law*, 40 J. WORLD TRADE 837, 842 (2006) (highlighting the limited value of risk assessment because of its accompanying inherent tendency to interpret complex data and competing opinions in a subjective manner).

110. *Hormones*, *supra* note 109, ¶ 246.

111. *Id.* ¶ 221. However, scientists have observed that taking different pathways in consuming hormones, i.e., whether eating meat that had hormones that were naturally present or were artificially injected, does not significantly lead to disparate health impacts, as long as the residual level of these hormones in the human body remained within the limit set by international standards, such as the Codex standards. Panel Report, *European Communities — Measures Concerning Meat and Meat Products*

Unfortunately, despite the fact that the Appellate Body recognized cultural and sociological concerns, it has also suggested implementing a form of utilitarian judicial balancing, which could be highly problematic in the face of diverse values.[112] The *Korean Beef* case concerned a Korean regulation (a "dual retail" system) that required a separate retail outlet for imported beef from that exclusively reserved for indigenous Korean beef (*Hanwoo*). Striking down the regulation as unnecessary to prevent fraudulent practices, the Appellate Body held that:

> In sum, determination of whether a measure . . . may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case, a process of *weighing and balancing* a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[113]

A rationalist scholar would argue that this weighing and balancing test forces the regulating country to pick the most *rational* option among a set of policy alternatives available to the country. In fact, although the Appellate Body in *Korean Beef* did not conduct an explicit cost-benefit evaluation,[114] it still second-guessed the domestic government's regulatory determinations on critical issues, such as the appropriate level of trade protection, and thus prioritized one policy goal (i.e., the free movement of beef) over others (e.g., consumer protection). Specifically, the Appellate Body concluded that allowing regular policing over the fraudulent labeling of imported beef as Korean beef would be less trade restrictive, and thus more rational, than forcing beef retailers to split their retail outlets into one for foreign beef and the other solely for Korean beef, even though that would have better protected consumer interests and values.[115]

Although the Appellate Body's holding in *Korean Beef* may seem to fit well under a purely rationalist paradigm, the test in *Korean Beef* in fact promotes the weighing and balancing of conflicting *values*, i.e., the free trade value (the "accompanying impact of the law or regulation on imports

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(Hormones), ¶ 8.187, WT/DS26/R/USA (Aug. 18, 1997).

112. Shaffer & Trachtman, *supra* note 8, at 141–42.

113. Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (*adopted* Jan. 10, 2001) (emphasis added) [hereinafter *Korean Beef*].

114. Shaffer & Trachtman, *supra* note 8, at 142; *see also* Donald H. Regan, *The Meaning of Necessary in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REV. 347 (2007) (arguing that the WTO Appellate Body has not actually engaged in any genuine "balancing" despite its eponymous undertaking).

115. *Korean Beef*, *supra* note 113, at ¶ 181.

or exports") and the regulatory value (the "importance of the common interests or values protected by that law or regulation").[116] However, as discussed above, the Appellate Body's earlier position in *Hormones* rejected the use of a weighing and balancing test; the Appellate Body found that there was no useful judicial balancing test to apply because the two regulatory situations in question were incomparable.[117] In sum, it is hard to aver that the Appellate Body has adopted the rationalist approach (of weighing and balancing) in its judicial review on risk regulation because there are also elements of culturalism within its decisions. If the Appellate Body has actually embraced the rationalist paradigm and its accompanying weighing and balancing test, the Appellate Body will invite a great deal of criticism from domestic regulators, because such judicial balancing sacrifices regulatory values in favor of efficiency (i.e., free trade).

The final blind spot of the rationalist framework, as the authors admit, is that it cannot respond to the fact that an international political process is still vulnerable to various biases due to the asymmetrical distribution of power and resources among WTO members.[118] Both in a negotiation and a litigation setting, powerful and resourceful bureaucrats and interest groups from developed countries tend to prevail over developing countries.[119] Powerful countries are thus able to externalize their domestic interests and preferences in the international trade setting. As long as these domestic, often mercantilist, interests shape states' actions, the WTO *qua* organization might not be able to fulfill its original goals, such as "an integrated, more viable and durable multilateral trading system."[120] For example, the Doha Development Round is still in disarray after a decade of negotiations, mainly because its original development dimension has not materialized amid major trading nations' obsession with a reciprocal — "balanced," to use a euphemistic term — deal.[121] Unfortunately, the rationalist paradigm, with its assumption of predetermined institutional choices defined only by efficiency concerns, fails to recognize or suggest a solution for this problem in the WTO.

Granted, Shaffer and Trachtman occasionally admit these rationalist limitations. Anchored by their reliance on rationalism, however, their

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116. *Id.*

117. *See, e.g.*, Richard Warner, *Does Incommensurability Matter? Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287 (1998) (calling to attention occasions in which reasons behind policy choices are incommensurable).

118. Shaffer & Trachtman, *supra* note 8, at 127.

119. *Id.* at 144; *see also* Conti, *supra* note 30, at 626–27.

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

121. Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573 (2010) (criticizing the United States's obsession with the titular "balanced" approach to the Doha Round negotiations).

sporadic acknowledgement of the paradigmatic dilemma does not invite a paradigm shift. Even when they attempt to introduce complementary methodologies, such as the law and society approach, what they mostly offer are mere glimpses into these frameworks and not a full-scale adoption of them. Moreover, even these cursory overviews are often captured by rationalist terms. For example, Shaffer and Trachtman recognize that WTO members, businesses, civil society, and even academics compose an "interpretive community."[122] This is rather surprising in that this term signifies a nonrationalist tradition; in fact, competing paradigms, such as constructivism, often employ it instead. Nonetheless, the authors understand this social dynamic (that of meaning-giving) only as a structure of constraint, rather than as a social construct itself. As a result, although Shaffer and Trachtman's framework recognizes that the existence of the interpretive community constrains the discretion of the WTO's tribunal as a rational (political) actor,[123] it fails to understand that the community to which the WTO tribunal itself belongs constructs the very interest and the identity of the WTO members by relying on shared social meanings and norms.[124]

Thus, although Shaffer and Trachtman raise the possibility of "social processes involving interpretive communities,"[125] they nonetheless fail to articulate what such social processes are made of. They do not articulate the social possibility that the communitarian solidarity within the WTO, enabled by "generative grammar" and "underlying principles of order and meaning," shapes the contour of GATT/WTO's institutional development.[126] They do not view WTO norms as a discursive device being operated upon under the "shared understandings or behavioral expectations" of WTO members.[127] Likewise, they do not elaborate upon the microscopic social dynamics transpiring within the interpretive communities of the WTO, such as the process of "judicial internalization," in which members of these communities as interlocutors or norm-sponsors actively mobilize international law in domestic litigations in an attempt to incorporate the former into the latter (i.e., "transnational public

122. Shaffer & Trachtman, *supra* note 8, at 119.

123. *Id.* at 120–22.

124. Sungjoon Cho, *Reconstructing an International Organization: A Paradigm Shift in the World Trade Organization* 20 (Apr. 26, 2010) (unpublished manuscript) (available at http://ssrn.com/abstract=1823564).

125. Shaffer & Trachtman, *supra* note 8, at 120.

126. Ruggie, *supra* note 40, at 380.

127. Brunnée & Toope, *supra* note 37, at 67; *see also* Finnemore, *supra* note 16; March & Olsen, *supra* note 13; Karol Soltan, *A Social Science That Does Not Exist*, *in* REDISCOVERING FULLER 393 (William J. Witteveen & Wibren van der Burg eds., 1999).

law litigation").[128] In sum, the authors' paradigmatic (rationalist) schema largely brackets *social* aspects of the WTO operation.

B. *New Framework: The Sociology of the WTO*

The aforementioned paradigmatic limitations endemic to the rationalist approach call for a new framework. Although a new paradigm of the WTO would not entirely supplant the rationalist understanding of the WTO, it could still remedy some of its theoretical blind spots. In this regard, this Article proposes a sociological (constructivist) approach to understanding the WTO, under which we may reconstruct the WTO as a community (*Gemeinschaft*).[129] Steve Brint conceptualizes a *Gemeinschaft* as a group of significant properties that is defined by social relations, rather than a tangible, material location, such as a town.[130] This is easily translated to the context of the WTO, because the WTO's community is based not on blood or ethnicity, but on certain social bonds or cognitively-shared grounds.[131]

The sociological interpretation of the WTO draws on socio-cognitive (intersubjective) parameters, such as "dense and demanding social ties" and "common beliefs in an idea system."[132] The GATT/WTO's enduring operational efficacy for the last six decades can be explained in sociological terms, in that its members have been able to interact, communicate, and eventually converge their expectations through a medium of norms, such as jurisprudence, that are informed by their shared goals, such as free trade and global market integration. It is WTO norms and social structures that determine how members perceive their interests and identities within the context of the WTO's object and purpose.[133] Therefore, under a sociological approach, WTO membership is not reduced to a mere sum of

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128. Harold Koh raises the possibility of incorporation of international law into domestic law by implicitly interpreting the latter to be consistent with the former or by explicitly allowing and developing the idea of "transnational public law litigation." Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2657 (1997).

129. *See generally* Cho, *supra* note 35.

130. Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOC. THEORY 1, 3–4 (2001) (reinterpreting Ferdinand Tönnies' classical concept of *gemeinschaft* as a set of human relations against the contemporary background).

131. *But cf.* Elisabeth Zoller, *Institutional Aspects of International Governance*, 3 IND. J. GLOBAL LEGAL STUD. 121, 123 (1995) (arguing that an international *society* is not an international *community* in that the former lacks the "commonness" located exclusively in national communities).

132. Brint, *supra* note 130, at 3–4.

133. *Contra* Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325–26 (1998) (identifying a new (constructivist) trend amongst international relations scholars of studying international organizations with an emphasis on certain cognitive factors, such as norms, cultures, and identities).

material rights and obligations; rather, it entitles members to certain assurances and a sociological sense of belonging.

WTO members understand and reflect on each other's behaviors through a shared normative discourse, i.e., by referencing WTO norms. Offering the "logic of appropriateness"[134] as well as "semantic regularities"[135] to members, WTO norms generate certain "patterns of practice" as well as "shared understandings or behavioral expectations."[136] As a result, members are able to build a collective identity ("we" or community) among themselves.[137] Within the WTO community, 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."[138]

The recent transformation of the international trade environment further warrants a communitarian paradigm shift in the WTO. Since the GATT's inception, the global market has become increasingly integrated. Contemporary consumers and producers interact across borders. More consumers consume both goods and services abroad. Thanks to technological and telecommunication innovations, producers can now optimize their production chains across multiple countries through global supply chains.[139] Now, the main actors of international trade are not states, but various individual economic players, such as suppliers, manufacturers (from all different production stages), importers, distributors, wholesalers, retailers, shippers, bankers, forwarders, insurers, and consumers. In this "postnational constellation,"[140] trade relations are no longer defined in statist, reciprocal, mercantilist, and thus confrontational terms that pit domestic producers against foreign producers.[141] Instead, the center of attention shifts from sovereign states to those individual economic players who participate in and now drive the development of the international trading community. As a result, a pure rationalist framework that focuses

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134. March & Olsen, *supra* note 101, at 23.

135. PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 139 (1987).

136. Brunnée & Toope, *supra* note 37, at 67; *see also* Finnemore, *supra* note 16, at 325–26; March & Olsen, *supra* note 101, at 184; Soltan, *supra* note 128, at 393.

137. *See* Chios Carmody, *A Theory of WTO Law*, 11 J. INT'L ECON. L. 527, 535 (2008) (characterizing the WTO as a "constitutional" instrument that "seeks to protect the distribution of expectations concerning the trade-related behavior of governments").

138. Francis J. Mootz III, *Natural Law and the Cultivation of Legal Rhetoric*, *in* REDISCOVERING FULLER, *supra* note 127, at 425, 442.

139. *See supra* note 43.

140. HABERMAS, *supra* note 44, at 172.

141. "Developments in the production, exchange, and/or use of private goods and nonspecific assets will more and more be shaped and determined primarily by transnational or global factors and trends." Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT'L ORG. 595, 621 (1995).

on the role of state actors in empire-building is becoming deficient in understanding the development of the contemporary WTO.

Finally, a shift to the communitarian paradigm is necessary once it is recognized that the rationalist approach ignores the disparity in development amongst the members of the WTO community. If we characterize the WTO as a community, such developmental disparity tends to become increasingly intolerable,[142] as it generates communitarian risks that threaten the smooth operation of the community. For example, when poverty begets violence, such as pirates, civil wars, and terrorism,[143] the WTO's community suffers because there is often a corresponding disruption of supply chains and subsequent loss of employment. The recent global financial crisis has only aggravated the existing developmental disparity. The world's poor will suffer from the crisis long after more developed countries recover from it.[144] Here, the new (communitarian) paradigm can help WTO members gradually change their way of thinking and generate new ideas and proposals to address these long-unattended concerns. In sum, a new (*Gemeinschaftian*) paradigm for the WTO can complement the old paradigm (rationalism), in that the former can illuminate some of blind spots left by the latter and thus offer the WTO a new pathway towards addressing some of its contemporary issues.

III. APPLYING THE NEW FRAMEWORK TO THE WTO

A. Institutional Evolution From Within

Under the rationalist framework, it is assumed that the WTO is an embodiment of institutional "choices," which are the product of a cost-benefit analysis between institutional "alternatives," such as the "incorporation of international standards, judicial balancing, delegation to markets, national deference, and process-based review."[145] In contrast, under the communitarian framework, the WTO is also a reflection of the intersection of various emerging patterns of normative discourse within the WTO that are influenced by historical developments and different

142. Sen, *supra* note 47, at 68.

143. *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 (Padideh Ala'i et al eds., 2006) (warning that trade marginalization and consequent international developmental difficulties (global poverty) tends to give rise to conflicts).

144. Cho, *supra* note 121, at 35 (observing that the recent global financial crisis would wreak havoc on poor countries, even though it originated from rich countries).

145. Shaffer & Trachtman, *supra* note 8, at 152.

discursive conditions.[146] After all, why and how states formulate their choices depend on how they define their interests and identities.

Because the WTO community develops over time, it should not be viewed as a set of preprogrammed institutional choices informed by fixed preferences, but as an evolving entity that stems from developing, institutional discourse, such as various institutional rules and practices (*acquis communautaire*). This recognition of a historical dimension of the WTO critically distinguishes the new paradigm from the rationalist approach. As discussed above,[147] one of the blind spots left by rationalism is its lack of satisfactory explanation as to the real phenomenon of institutional change. The sociological (constructivist) paradigm can address such a deficiency, because it deals within cognitive parameters, such as cultures, values, and discourse, that necessarily analyze changes in a dynamic fashion. Thus, under the new paradigm, institutional change can be explained because the WTO is viewed as being constantly subjected to an evolutionary or adaptive process of continuous, incremental institutional development that is premised upon WTO members' reflection of the past.

Not only would a sociological paradigm be useful for better understanding institutional change generally, but it can also be used to recognize the role of WTO committees in contributing to this evolution of the WTO. Relying on the rationalist paradigm, Shaffer and Trachtman consider WTO committees, such as the Antidumping Committee or the Committee on Regional Trading Agreements, as preprogrammed, political decision-making processes that aim to alleviate the adjudicative burdens of WTO tribunals by elaborating on the textual meanings of certain provisions.[148] Thus, WTO committees exist to reduce transaction costs borne by WTO members in resolving disputes; they are designed to apply, but not expand upon, preexisting institutional choices. Under the new paradigm, however, these committees can be viewed to offer an "iterative process" of "justificatory discourse."[149] Through continuing discourse (peer reviews) in the committee discursive sphere, WTO members may expand their shared normative values by expressing them in various legal materials, such as guidelines or recommendations. In turn, these legal materials encourage future discourse in the area of international trade matters that they address, be it in antidumping, sanitary, or any other area of regulation.

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146. *See supra* text accompanying notes 135–42.

147. *See supra* text accompanying notes 89–90.

148. Shaffer & Trachtman, *supra* note 8, at 123–24.

149. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 25–27 (1995).

Through the perspective of the sociological paradigm, the WTO's delegation of responsibility to other international organizations or international standard-setting bodies may also be understood to be motivated by reasons beyond mere economic welfare efficiency.[150] Such delegation can be viewed instead as the WTO's creation of cross-institutional platforms that allow for "*inter*-discourse" between the WTO and non-WTO regimes. These discursive platforms are explicitly recognized in different international documents, such as in Articles 3.5 and 12.3 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). Article 3.5 requires the SPS Committee to "develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations."[151] Article 12.3 also mandates the SPS Committee to "maintain close contact with the relevant international organizations," such as the Codex Alimentarius Commission, in order to "secur[e] the best available scientific and technical advice."[152] Thus, not only is the WTO itself influenced by discursive developments, but it also communicates with other organizations to build a more extensive international dialogue based on shared norms and values. The sociological framework, unlike the rationalist one, recognizes these interplays and seeks to integrate them into the overall understanding of the WTO.

B. *Adjudicative Discourse*

The sociological paradigm is also able to bring additional explanatory insight as to the condition of the judicial institutions and legal functions of the WTO. According to Shaffer and Trachtman, rationalist paradigms regard the extensive delegation of interpretive power to WTO tribunals as a rational institutional choice, made during the initial stage of treaty drafting and characterized by a generally ineffective decision-making process dominated by consensus rule.[153] However, contrary to this rationalist viewpoint, the state of WTO tribunals is not static. There is an *endogenous* sociological dynamic amongst WTO members, wherein they engage in continuing discourse relating to the nature of WTO adjudication (adjudicative discourse). Not only as disputing parties, but also as interested parties, WTO members collectively contribute to the adjudicative discourse and influence the jurisgenerative, or jurisprudential,

150. *Cf.* Shaffer & Trachtman, *supra* note 8, at 114.

151. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 3.5, 1867 U.N.T.S. 493 (1994).

152. *Id.* art. 12.3.

153. Shaffer & Trachtman, *supra* note 8, at 123–24.

process through different modes of argumentation, persuasion, and deliberation. Moreover, this adjudicative discourse does not take place only to passively deduce predetermined texts, as rationalists may claim. Instead, such discourse "seek[s to build] consistency that connects past, present, and future"[154] conditions of the WTO, not by blindly sticking to its framers' intentions, but by seeking the "exigencies of contemporary life."[155]

In addition to its contribution in reframing the role of WTO tribunals, the new paradigm sheds fresh light on the WTO tribunals' various interpretive choices. According to Shaffer and Trachtman and the rationalist paradigm, even judicial interpretation is a matter of institutional design (choice) in a welfare-maximizing contract. Therefore, the rationalist scholar is only concerned about what kinds of norms have actually been delegated to WTO tribunals to apply or impose in accordance with the WTO Dispute Settlement Understanding. For example, according to Shaffer and Trachtman, Article 17.6(ii) of the Antidumping Agreement is a conscious choice by WTO members to "constrain treaty interpretation of particular provisions by assigning particular interpretive rules to them."[156] Under Article 17.6(ii), a panel must defer its interpretive power to a domestic antidumping authority if the latter's determination rests on one of possible interpretations that the former may permit. Article 17.6(ii) could arguably be seen as a method of constraint; for example, to the United States, this article was a "Trojan horse" within the Antidumping Agreement because it would safeguard U.S. sovereign authority in regulating allegedly dumped imports.[157] However, the Appellate Body rejected what would have been a rationalist interpretation of Article 17.6(ii) by claiming that it held interpretive competence vis-à-vis WTO members. This claim of power by the Appellate Body can best be understood under the sociological framework; its decision largely drew on preceding communications and advocacy from parties who were interested in increasing the role of the WTO within the antidumping arena.[158]

Another difference between rationalism and the new sociological framework is how each paradigm perceives the WTO tribunals' authority (discretion) in applying non-WTO laws, such as multilateral environmental agreements (MEAs), in accordance with Article 31.3(c) of the Vienna Convention on the Law of Treaties. On its face, Article 31.3(c) *mandates* that WTO tribunals take into account any applicable, relevant non-WTO

154. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 335 (1995).

155. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 96 (2005) (quoting *Competence of the General Assembly for the Admission of a State to the UN*, 1950 I.C.J. 4, 17–18).

156. Shaffer & Trachtman, *supra* note 8, at 117.

157. Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT'L L. 621, 663–64 (2010).

158. *Id.* at 644–49.

international law.[159] Therefore, from a rationalist standpoint, a WTO panel *must* cite an MEA in a WTO dispute where both parties are also parties to that MEA because Article 31.3(c) reflects a preprogrammed choice that was designed to increase the efficiency or political welfare of the WTO.[160] Therefore, this mandatory nexus between WTO norms and non-WTO norms might be justified in welfarist terms. The utilization of non-WTO norms may increase "welfare efficiency" in the WTO operation because such utilization brings outside expertise to the WTO to solve its problems.[161]

The dilemma with interpreting the Article 31.3(c) mandate as only a product of rational, institutional choice, as opposed to also being subjected to normative discourse amongst the parties involved, is that it makes the rationalist paradigm vulnerable to two main problems. First, merely ratifying an MEA does not ensure the presence of adequate discourse or shared grounds between parties concerned. More often than not, developing countries ratify those agreements largely as a badge of honor, without any serious discussion or due administrative and financial capacity to implement them. Second, if one interprets Article 31.3(c) *a contrario*, should a WTO tribunal not use an MEA in a dispute between a party and a nonparty to the MEA? According to *Shrimp-Turtle*, an MEA may still be referenced to evaluate the WTO behavior of an MEA-member party.[162] Such member's normative behavior within the WTO context is thus regulated by the MEA and then socially configured and reconfigured vis-à-vis another member who is *not* a party to the MEA.[163] This process tends to generate a new social dynamic made up of narratives, rhetoric, claims, and arguments involving WTO norms as they relate to an MEA.

When the rationalist paradigm views the intersection between the WTO and non-WTO organizations as simply a decision on the part of the WTO to either apply (impose) non-WTO norms or not, it tends to overlook more subtle, nuanced discursive possibilities of "*inter*-discourse"[164] between the WTO and non-WTO systems. This interdiscourse is not a matter of any external imposition of norms in an authoritative or

159. Vienna Convention on the Law of Treaties art. 31.3(c), May 23, 1969, 1155 U.N.T.S. 331("There shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.").

160. *See supra* text accompanying note 145.

161. Shaffer & Trachtman, *supra* note 8, at 134–35.

162. *Shrimp-Turtle*, *supra* note 62.

163. The Appellate Body failed to fully capture the subtle discursive connection implicit under Article 31.3(c) of the VCLT when it took a binary, choice-based approach in *Mexico-Soft Drinks*, ruling that it might not "determine rights and duties *outside* the covered agreements." Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, ¶ 56, WT/DS308/AB/R (Mar. 6, 2006) (emphasis added).

164. GOODRICH, *supra* note 135, at 146–51.

hierarchical sense; instead, it should be viewed more as a nuanced frame of reference in a cognitive sense. The strength of this discursive link between the two systems depends on the extent of the range of shared cognitive grounds between parties concerned, i.e., whether government officials recognize a particular non-WTO norm in their everyday regulation or administration of affairs and whether such norm is part of the practical legal discourse amongst affected practitioners.

Importantly, certain legal technicalities, such as "judicial notice,"[165] may shield those interlocutors' exercise of cognitive (communicative) rationality from a potential positivist attack under the WTO treaty. The WTO community's discursive sphere as defined in a strict jurisdictional term is confined to the titular "covered agreements" under the Dispute Settlement Understanding (DSU). Specifically, a WTO member has no *right* under the WTO treaty to sue another member for the latter's violation of non-WTO treaties, such as the International Monetary Fund Agreement or the International Labor Organization Charter. Nor is a WTO panel empowered to apply non-WTO norms in adjudicating WTO disputes raised under covered agreements. Thus, the rationalist paradigm argues that these limitations may be understood as rational constraints created by sovereign WTO members who view non-WTO norms as irreconcilable with the WTO's original contractual terms, whose primary function is to increase economic efficiency and trade liberalization.[166]

From a sociological standpoint, however, the aforementioned constraints on the application of non-WTO norms simply reflect the current discursive conditions in which the WTO's community is situated as they relate to non-WTO norms. The current discourse merely signals that, as of right now, there is an institutional boundary to the shared grounds between the WTO and non-WTO legal systems. The so-called "fragmentation" of international law is more of a natural (discursive) status of international law than of a matter of institutional choice.

Thus, the moment we understand WTO norms as a language or a communicative medium, we can liberate our discussion of WTO norms from rationalist assumptions and move forward in the future development of the WTO. To remain sustainable in the international political arena, the WTO community must continue to communicate with its environment and expand its discursive sphere (shared grounds) to non-WTO legal systems.[167] Of course, this communication should begin with indirect,

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165. *Cf.* FED. R. EVID. 201. ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

166. Shaffer & Trachtman, *supra* note 8, at 131–33.

167. *See generally* Sungjoon Cho, *Toward an Identity Theory of International Organizations*, 102 AM.

osmotic processes (e.g., simply judicially noticing or taking into account non-WTO laws), rather than in direct, concrete terms (e.g., applying non-WTO laws). Through these indirect processes, judicial notice, as an objective assessment of facts within the meaning of the DSU, can be more of a discursive platform, on the basis of which WTO tribunals may recognize and utilize non-WTO norms in a cognitive sense. In that way, WTO tribunals are able to take non-WTO norms into account, but do not need to be confronted with a rationalist (binary) choice as to whether to *apply* them in contravention to preexisting WTO constraints.

A word of caution should be added here, however. Even though WTO tribunals do retain certain discretion to consult non-WTO norms, as implied in *EC — Biotech*,[168] such discretion should not be reduced merely to individual judges' preferences in a public choice model. According to the new sociological paradigm, the inclusion of non-WTO norms should be a discursive reflection of the culture, values, and norms of the interpretive *community* within the WTO.[169] This discourse endeavors to preserve a connection to its environment, including non-WTO legal systems, by expanding the discursive sphere. Thus, through different forms of discourse, including adjudication, various interlocutors (e.g., traders, trading nations, and the WTO tribunals) should expand their cognitive boundaries to include non-WTO laws in order to produce better arguments and decisions within the WTO system.

C. Risk Regulation

Another normative dilemma that the rationalist approach cannot reconcile is the debate between rationalists and culturalists as to the role of risk regulation.[170] For example, the recent dogmatic disputes between the

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SOC'Y INT'L L. PROC. 157 (2008). Shaffer and Trachtman present a similar perspective in rationalist terms. According to the authors, the WTO tribunal may opt to "accommodate conflicting provisions" in non-WTO agreements, despite textual constraints, when it feels the need to protect the WTO regime from certain challenges to its legitimacy or to mitigate the tensions that a contrary decision would create as a result of the current fragmented state of the international law system. Shaffer & Trachtman, *supra* note 8, at 29.

168. Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, (Sep. 29, 2006). In this case, a WTO panel struck down the EU's moratorium on the approval of genetically modified organisms (GMOs) for procedural reasons (undue delay). *Id.* It also invalidated some members' import bans on GMOs on the ground that such a ban prevents members from conducting risk assessments, which may have resulted in the allowance of certain GMOs, given the sufficiency of available, relevant scientific information. *Id.* The panel ruled that Article 31(3)(c) should be interpreted to "*mandate* consideration of other applicable rules of international law . . . which are applicable in the relations between all parties to the treaty which is being interpreted." *Id.* ¶ 7.70 (emphasis added).

169. Shaffer & Trachtman, *supra* note 8, at 29. (observing from a constructivist perspective that social context may inform judicial interpretation).

170. *Id.* at 137.

United States and Europe over the safety of hormone-treated beef and genetically modified food raises questions as to the blind faith accorded to the mainstream version of science, upon which rational paradigms often rely to justify sanitary regulations.[171] The sociological framework would instead turn to the study of philosophy, in particular that of hermeneutics, to suggest that there is room for reconciliation between the two parties through continuing dialogue and, subsequently, "a lessening of distance"[172] between the two conflicting perspectives.

To achieve this result, WTO members should fully utilize various procedural mechanisms that are made available for regulatory dialogue through major WTO agreements, such as the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).[173] For example, the SPS Committee provides a special peer review procedure called "specific trade concerns," in which WTO members resolve controversial SPS issues through discussions and consultations with each other.[174] Thus, members can endeavor to resolve conceptual disagreements by exploiting the multiple avenues that have been made available for such regulatory dialogue.[175]

D. Development

The new sociological framework may also proffer prescriptive responses to some of the normative dilemmas that the rationalist approach is incapable of coping, due to its paradigmatic limitations. As discussed above, rationalism neither recognizes nor offers a solution to the developmental disparity amongst WTO members.[176] Under the new sociological paradigm, such developmental disparity is treated as a serious problem to the development of discursive spheres. All participants to the development of the WTO discourse must be able to communicate competently, since the WTO's "jurisgenerative communicative power" can only originate from "undamaged intersubjectivity found in nondistorted communication."[177]

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171. *See generally* Sungjoon Cho, *Book Review*, 104 AM. J. INT'L L. 324 (2010) (reviewing MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS (2009)); Sungjoon Cho, *From Control to Communication: Science, Philosophy and World Trade Law*, 44 CORNELL INT'L L. J. 249 (2011).

172. Axel Honneth, *On the Destructive Power of the Third: Gadamer and Heidegger's Doctrine of Intersubjectivity*, 29 PHIL. & SOC. CRITICISM 5, 5 (2003).

173. *See generally* Sungjoon Cho, *Of the World Trade Court's Burden*, 20 EUR. J. INT'L L. 675 (2009).

174. Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/36 (Jul. 11, 2005).

175. Cho, *supra* note 173.

176. *See supra* text accompanying note 120.

177. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 147, 148 (William Rehg trans., MIT Press 1996).

Yet, many developing countries cannot effectively participate in the WTO discourse transpiring in various spheres, such as in adjudication and committee meetings, because they lack the financial and technical capabilities to do so. As a result, these discursive spheres are deprived of the "discourse ethics"[178] or "ideal speech situation"[179] that is a critical prerequisite for any genuine discourse. Because the sociological framework recognizes the danger of unbalanced representation in discursive spheres, it also calls for international development organizations, such as the World Bank and United Nations Conference on Trade and Development (UNCTAD), NGOs, and individual developed countries to extend more financial and technical assistance to those developing countries, in order to foster more well-rounded, global communication.

E. Paradigmatic Reconciliation: A Zone of Convergence

This Article contrasts the new sociological framework with the rationalist approach advanced by Shaffer and Trachtman in their analysis of the WTO based on institutional and interpretive choices. The Article presents the former as a methodological response to certain dilemmas that the latter inevitably ignores or cannot resolve. However, the fact that these two paradigms arise from different sets of assumptions does not necessarily disallow a zone of theoretical convergence between the two frameworks. Even a market-based model of institutional understanding may be amenable to a sociological approach. Likewise, markets may expand the discursive sphere by inviting diverse economic — and *social* — actors, such as traders, environmentalists, consumers, and regulators, to engage in a constructive discourse on particular issues.[180]

This zone of convergence can be seen, for example, in the issue of eco-labeling (such as the labeling of items as "dolphin-safe" or "GMO-free"). Regulation of eco-labels may be interpreted to both promote free trade by increasing certainty over labeled products *and* serve the cause of environmental protection, which emerged from the discursive process of consumer decision-making.[181] Admittedly, such convergence requires certain conditions to be met, rendering it a special case. Eco-labeling works only when no market failures, such as "information asymmetries, externalities, and collective action problems,"[182] exist and consumers are

178. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION xix *passim* (1990).

179. JÜRGEN HABERMAS, ON THE PRAGMATICS OF SOCIAL INTERACTION: PRELIMINARY STUDIES IN THE THEORY OF COMMUNICATIVE ACTION 97 *passim* (Barbara Fultner trans., MIT Press 2001).

180. Shaffer & Trachtman, *supra* note 8, at 146.

181. *Id.*

182. *Id.*

well informed about the issue, meaning that they lack any cognitive errors, such as the tendency to believe that they can predict the future based on their own narrow experiences (availability heuristics).[183]

The zone of convergence also appears when we examine the evaluative criteria used by the rationalist paradigm in a sociological light. For example, the economic efficiency that accompanies trade liberalization is a key yardstick for rationalism. However, that same criterion may still be satisfied within a sociological framework. In the so-called "ideal speech situation," market participants — including not only trading nations, but also individual economic players — are assumed to be able to communicate competently enough to hold socially meaningful discursive exchanges that are guided by trade norms as they manufacture, transport, insure, forward, export, import, distribute, retail, and consume. In this ideal social situation, a socially well-integrated market is also likely to be efficient in an economic sense. Jerry Muller aptly observes that:

> In a commercial society based upon exchange, every man "becomes in some measure a merchant.". . . The pursuit of self-interest in the market, with its division of labor and his resulting dependence on others, leads him to *adapt his behavior to the expectations of others*. The market itself is therefore a *disciplining institution*.[184]

In sum, the paradigmatic convergence between the rationalist (economic) and the sociological approach corresponds to a broad notion of rationality. Rationality refers not only to being efficient in economic terms (instrumental rationality), but also to being appropriate in a cognitive and communicative sense. Thus, an extended concept of rationality can embrace both the economic and the sociological framework.

CONCLUSION

This Article argued that the rationalist framework Shaffer and Trachtman adopt in their analysis of the WTO cannot provide a complete picture of the WTO because it excludes the WTO's *social* dimension. In response to this dilemma, the Article offered a sociological (constructivist) paradigm that recognizes the existence of reflective, diverse communication amongst WTO members that serves as a norm-building process. Under this new paradigm, the WTO is viewed as a community (*Gemeinschaft*) and not as a mere contractual tool to be used to carry out predetermined choices.

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183. *See* Amos Tversky & Daniel Kahnema, *Judgments under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124–31 (1974).

184. JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN MODERN EUROPEAN THOUGHT 72 (2002) (emphasis added).

This Article and the sociological framework that it presents can be used to shed light on the current Doha crisis, which is suffering from mercantilist competition concerns that may be justified on rationalist grounds, but not on normative ones.[185] Pursuing "rational" bargains may not deliver us to the goal of a development round. Perhaps we should reorient ourselves from a logic of calculation to the logic of discourse. The power of discourse and communication can close the gaps between trade norms and trade realities. Therefore, the new paradigm may disabuse WTO constituencies of a fatalistic yet erroneous conviction that "legal provisions can be nothing other than reflections of unstable and shifting interest constellations among powers"[186] and help reinstate the "inspirational notions of virtue and of humans as social beings."[187] In this sense, the new paradigm proposed in this Article may generate a "moral" thesis that advocates human progress in the WTO.[188]

185. *See supra* text accompanying note 124.

186. HABERMAS, *supra* note 44, at 167.

187. Spence & Cross, *supra* note 50, at 103.

188. 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 world peace).