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THE SOCIAL FOUNDATIONS OF WORLD TRADE

Norms, Community,
and Constitution

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University Printing House, Cambridge CB2 8BS, United Kingdom

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www.cambridge.org

Information on this title: www.cambridge.org/9781107036611

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First published 2015

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Cho, Sungjoon, author.

The social foundations of world trade : norms, community
and constitution / Sungjoon Cho.

pages cm – (Cambridge international trade and economic law ; 15)

ISBN 978-1-107-03661-1 (hardback)

1. Foreign trade regulation – Social aspects. 2. International economic relations – Social aspects. I. Title.

K3943.C517 2014

382'.9–dc23

2014021020

ISBN 978-1-107-03661-1 Hardback

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THE SOCIAL FOUNDATIONS OF WORLD TRADE

As the former head of the WTO Pascal Lamy has highlighted, world trade traditionally involves state-to-state contracts and is based on an anachronistic “monolocation” production/trade model. It therefore struggles to handle new patterns of trade such as global value chains, which are based on a “multilocation” model. Although it continues to provide world trade on a general level with a powerful heuristic, the traditional “rationalist” approach inevitably leaves certain descriptive and normative blind spots. Descriptively, it fails to explain important ideational factors, such as culture and norms, which can effectively guide the behavior of trading nations with or without material factors such as interests and utilities. Normatively, the innate positivism of the traditional model makes it oblivious to the moral imperatives of the current world trading system, such as development. This book emphatically redresses these blind spots by reconstructing the WTO as a world trade community from a social perspective.

SUNGJOON CHO is Professor of Law at IIT Chicago-Kent College of Law, where he teaches international law, international trade law, international business transactions, and comparative law.

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To my family

PREFACE

This book is the culmination of what I have tried to convey, explicitly and implicitly, about the world trading system since I began my graduate study in 1996. In a nutshell, this book explores and utilizes a *social* perspective of the WTO and its operation. Here, WTO members are defined as social, rather than rational, actors. The seed of this perspective was sown in my pre-academic career as a trade official. What I witnessed in Geneva could not be explained exclusively by calculation, strategies, and interests. While these factors did loom large, an undeniably real, if not always overt, social dynamic was also present. Even when driven by strategic considerations, WTO members had to know WTO norms to square their positions within the normative framework. Trade officials were obliged to learn all the relevant WTO agreements, decisions, case law, and other practices, even before they established the strategies. Not every move made by WTO members appeared to be out of calculation: in fact, most members seemed to be doing what they were doing because they took the actions for granted in the most unspectacular fashion. They were speaking the WTO language (norms).

Indeed, we can explain the WTO and its operation in a non-rational, non-consequentialist manner.¹ Rather than dismissing rationalism, this alternative – social – framework complements it by offering constructive criticism on the former's inevitable paradigmatic blind spots. While indubitably beneficial, rationalism might degenerate into scientism if it is not hardened by such criticism. After all, values and ideas are not apologetic epithets, nor should they be equated with simple-mindedness. This book proposes a new optic that spotlights hitherto under-diagnosed problems within the WTO community, such as development failure. From a disciplinary standpoint, this book gathers insights from post-Weberian interpretive sociology, informed by phenomenology, as well as sociology's recent scholarly reincarnations in the area of International

¹ See, notably, Martha Finnemore, *National Interests in International Society* (1996).

Relations (IR), such as constructivism. Readers might identify in this book footprints of intellectual legacies pioneered by Edmund Husserl, Max Scheler and Alfred Schutz. In addition, this book is inspired by Anthony Giddens's concept of "structuration,"² which Alexander Wendt applied in the IR field. Thus, this book emphasizes the mutual construction of agency and structure. While the social structure represented by the WTO language shapes WTO members' actions, their *interactions* simultaneously constitute the very structure of the WTO. As Pierre Bourdieu would have noticed, while the gravitational force from the WTO field wields symbolic power over WTO members, it is the very members that often defy such gravity and reconstruct the field.

This book's methodological approach is intentionally eclectic. I introduce diverse theoretical lenses that explain particular social aspects of the WTO operation. While this book features each theory's fortes, it also heeds each theory's inevitable ontological assumptions.³ For example, Chapter 4, which discusses the *intra*-community dynamics, relies mainly on symbolic interactionism, developed by George Herbert Mead and Herbert Blumer, as it focuses on interaction in the form of discourse and the accompanying symbolization via norms *qua* language. In contrast, Chapter 5, addressing the *extra*-community dynamics, draws on structuralism–functionalism, along the intellectual heritage of Émile Durkheim and Niklas Luhmann, as it deals with the WTO's configuration with its environment.

At this juncture, a note of caution is in order. Some observations and arguments from the social science literature cited in this book do not necessarily dovetail with the unique context of the WTO. Indeed, social science literature often focuses on particular organizations or events. Although I am fully attentive to the risk of contextual mismatch, I still take a liberal approach in citation, as if a *bricoleur* would. After all, essential paradigmatic insights from social science that this book aims to draw tend to outweigh the risk of clutter. Nonetheless, I tender my apologies if any of such citation does violence to those original works.

As my profuse references indicate, I am not the first one who has brought a sociological inquiry to the world trade system. Nor do I intend

² Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (1984).

³ See Jonathan A. Turner, "Review Essay: The Theory of Structuration," 91 (1986) *American Journal of Sociology* 967.

to put the last word on this endeavor. My sincere hope is that this work will, in its own right, illuminate parts of the field worth re-examining.

In reaching this point, this book was touched by so many great minds. Joseph Weiler, my mentor and the main supervisor from my doctoral study, taught me the importance of “thinking about thinking” in an osmotic manner and constructed my academic identity. My other supervisors, Anne-Marie Slaughter and William Alford, who later became my good friends, were always sources of backing and encouragement. I also have to thank John Jackson, José Alvarez and Don Regan, my teachers from my years in Ann Arbor, whose excellent teaching and thoughtful guidance empowered me to continue my academic pursuit in Cambridge, Massachusetts. I am so grateful to Alexander Wendt for his special support in this project. As a stranger in the IR field, in particular constructivism, I benefited greatly from his gracious advice in writing this book. My close friend and colleague, David Gerber, took all the trouble to read the whole manuscript and gave me many critical suggestions, which were instrumental in finishing this book. Ever since I began my academic career in the law school, I have turned to David on a wide range of questions. He has always been considerate and supportive. I am blessed that my office is next to his. Moshe Hirsch and Jeffrey Dunoff not only endorsed my thesis in its early stage, but also offered me a number of valuable suggestions throughout the writing process.

I am also indebted to a number of outstanding scholars from whom I learned so much in various venues and occasions. In deep appreciation, I write down their names here, with sincere apologies to those whom I might impudently omit: Harold Koh, Peter Katzenstein, John Gerard Ruggie, Martha Finnemore, Petros Mavroidis, Ernst-Ulrich Petersmann, Steve Charnovitz, David Gantz, Rob Howse, William Davey, Thomas Cottier, Claire Kelly, Oona Hathaway, John Barceló III, Greg Shaffer, Joel Trachtman, Alan Sykes, Keith Hylton, Tom Ginsberg, Andrew Guzman, Debra Steger, Seung Wha Chang, Joost Pauwelyn, Paul Stephan, Frank Garcia, Larry Helfer, Karen Alter, Richard Steinberg, John McGinnis, Jide Nzelibe, Philip Nichols, Chris Brummer, David Zaring, Rachel Brewster, Anu Bradford, Terry Halliday, Bruce Carruthers, Ian Hurd, Jürgen Kurtz, Susan Frank, Amelia Porges, Mark Wu, Fiona Smith, Julia Qin, Chi Carmody, Lorand Bartels, James Gathii, Padideh Ala’i, Chantal Thomas, Thomas Lee, Andrew Lang, Tomer Broude, Simon Lester, Won-Mog Choi, Dukgeun Ahn, Jaemin Lee, Markus Wagner, Pasha Hsieh, Joe Conti, Jason Yackee, Elizabeth Trujillo, Sonia Rolland, John Ohnesorge, Sida Liu, and Alex Huneeus.

Additionally, I thank Kevin McClure, Cecilia Suh, Tiffany Eng, Rosalyn Essen, Kathleen Mallon, Jacob Radecki and Laura Caringella for their dedicated assistance in research and proofreading this book. My wholehearted thanks to Kim Hughes and the staff of Cambridge University Press for their patience and hard work. Finally, I dedicate this book to my family, whose love and sacrifices sustain my life.

Parts of this book are based on some of my past publications, such as Sungjoon Cho, "Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism," 42 (2001) *Harvard International Law Journal* 419; Sungjoon Cho, "Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma," 6 (2005) *Chicago Journal of International Law* 625; Sungjoon Cho, "A Quest for WTO's Legitimacy," 4 (2005) *World Trade Review* 391; Sungjoon Cho, "From Control to Communication: Science, Philosophy and World Trade Law," 44 (2011) *Cornell International Law Journal* 249; Sungjoon Cho, "Beyond Rationality: Toward a Sociological Construction of the World Trade Organization," 52 (2012) *Virginia Journal of International Law* 321; Sungjoon Cho, "Reinventing the Development Wheel of the World Trading System," 16 (2013) *Journal of International Economic Law* 481; Sungjoon Cho and Claire R. Kelly, "Are World Trading Rules Passé?" 53 (2013) *Virginia Journal of International Law* 623; Sungjoon Cho, "How the World Trade Community Operates: Norms and Discourse," 13 (2014) *World Trade Review* 685; Sungjoon Cho, "An International Organization's Identity Crisis," 34 (2014) *Northwestern Journal of International Law and Business* 359.

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Introduction: reconstructing the world trading system

No science can be more secure than the unconscious metaphysics which tacitly it presupposes.

– Alfred North Whitehead¹

I. Overview: making sense of world trade in the twenty first century

A. *The contract model and its discontents*

International trade has become an integrated part of our everyday lives. Many, if not all, of the foods we eat and the clothes we wear today are consequences of trade, one way or another. Not a single day passes without contemporary media covering several reports on world trade. During the past six decades of the modern trading system, the volume of world trade increased more than twenty times.² During the same period, the average tariff rate on manufactured products in developed countries decreased from 40 percent to less than 4 percent.³ It appears that those rounds of trade negotiations for the past six decades have paid off.

The typical pattern of conventional trade negotiations is reciprocal bargain. For example, Country A would cut its own tariffs on goods that Country B exports in return for the latter cutting its tariff on goods that the former exports. In other words, each country's market opening, measured by tariff concession, was (and still is) the price that the country paid to gain its own market access to its trading partner. Indeed, political

¹ Alfred North Whitehead, *Adventures of Ideas* (1967), p. 197.

² World Trade Organization (WTO), "The WTO in Brief (Part 1), The Multilateral Trading System: Past, Present and Future," www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (last visited November 4, 2013).

³ WTO, "The World Trade Report 2007" (2007), pp. 207, n.53, 209.

scientists and legal scholars alike have long regarded the world trading system, represented by the General Agreement on Tariffs and Trade (GATT) and more recently the World Trade Organization (WTO), as a contract among its sovereign signatories.⁴ The GATT members in fact labeled themselves as “contracting” parties. The chief goal of this world trade contract is to liberalize trade and to monitor protectionism.

The contract model makes sense at least for the following three reasons. First, reciprocal bargains on tariff reduction have historically been a main engine for market opening, as discussed above. Second, this agency-oriented model enables scholars to build sophisticated theories using various econometric methodologies (models). Third, traditional public international law also deems a treaty, such as the GATT and the WTO, a sovereign contract, as stipulated in the Vienna Convention on the Law of Treaties.⁵

However, the traditional state-to-state contract model has recently become anachronistic as it hardly captures the new pattern of trade. The prototypical GATT was based upon single-country production, a “monolocation production” model of trading patterns, while the contemporary equivalent is, by far, more complex, as it involves value-added production in multiple countries, that is, a “multilocation production” model.⁶ Until relatively recently, most products were harvested or manufactured entirely in a single country and shipped to another country. For example, if Argentina produced and shipped wheat to England, this trade was understood as if Argentina exported and England imported. Under this unsophisticated trading paradigm, trade policies were prone to capture by domestic producers, as trading nations competed against each other to maximize net exports (exports minus imports).⁷

⁴ See, e.g., John W. Evans, “The General Agreement on Tariffs and Trade,” 22(1) (1968) *International Organization*, 72. Cf. Jutta Brunnée and Stephen J. Toope, “Constructivism and International Law,” in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012) (observing that both realists and neo-liberal institutionalists consider international law as instrumental and thus secondary to power and interest).

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331; Draft Articles of State Responsibility on the Internationally Wrongful Acts, in Report of the International Law Commission, 53rd Sess., UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

⁶ See WTO, “Made in the World,” tinyurl.com/8ydmkfv (last visited February 20, 2012); see also Paul Krugman, “The Move Towards Free Trade Zones,” (November/December 1991) *Federal Reserve Bank of Kansas City, Economic Review*, 5, 15–18, available at tinyurl.com/kpn7e9e.

⁷ See “International Trade Policy,” *World Savvy Monitor*, (October 2008), tinyurl.com/blbfxf.

Now, the old production-trade model has increasingly become unsustainable with the advent of new trade realities, such as the global factory.⁸ For example, Indian textiles may be shipped to China, turned into clothes, and eventually exported to the United States. Recent technological innovations and other logistic breakthroughs have facilitated this new trend.⁹ In this new production and trade pattern, global business is “nonterritorial . . . , decentered yet integrated space-of-flows, operating in real time.”¹⁰ Under these circumstances, each negotiating country might not be able to represent a single, converging national position, considering the complicatedly disparate nature of interest matrices held by numerous economic players participating in various global value chains (GVCs).

Likewise, the GVC revolution has also altered the nature of trade barriers. Within GVCs, not only direct barriers but also those barriers between third parties may clog an upstream or downstream flow of international commerce.¹¹ In other words, any remote, unknown trade restriction by an anonymous trading nation might affect one’s own trade interest. This new possibility eloquently demonstrates the hidden yet firmly existent organic interconnection among economic actors, both state and individual, within the contemporary world trading system. It would be in any trading nation’s interest not to disrupt these tightly knit value chains.¹²

This transformed trade reality goes beyond the typical assumption of the contract model. Here, it is nearly impossible to satisfy the cardinal condition for reciprocity, i.e., equivalence, which is the baseline postulate

⁸ Network Global Agenda Councils, World Economic Forum, Report 2011–2012, *Global Trade System*, available at tinyurl.com/mrqrbgf.

⁹ APEC Policy Support Unit, Asia Pacific Economic Cooperation, Issues Paper No. 1, Concepts and Trends in Global Supply, Global Value and Global Production Chains (2012), p. 7, available at tinyurl.com/mavm95d.

¹⁰ Sungjoon Cho, “Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma,” 5 (2005) *Chicago Journal of International Law*, 625, 668 n.187; John Gerard Ruggie, “Territoriality and Beyond: Problematising Modernity in International Relations,” 47 (1993) *International Organization* 139, 172.

¹¹ See OECD, WTO, and UNCTAD, “Implications of Global Value Chains for Trade, Investment, Development, and Jobs,” (Prepared for the G20 Leaders’ Summit) (August 6, 2013), www.oecd.org/trade/G20-Global-Value-Chains-2013.pdf.

¹² See Fredrik Erixon, Dir., “Paper Presentation at ISDP Conference in Beijing: The Twilight of Soft Mercantilism: Europe and Foreign Economic Power,” European Centre for International Political Economy (Jul. 2009), p.3 available at tinyurl.com/mcsth22 (observing that serious disruptions of global commerce based on dense production networks tend to threaten economic welfare of trading nations).

of the contract model.¹³ The reciprocal balance, which connects trading nations in a mechanical, not organic, manner, would be very difficult, if not impossible, to compute. In fact, conventional trade statistics cannot accurately picture the new trade landscape as it is predicated on the monolocation production model that focuses mainly on gross volume of export and import.¹⁴ It is prone to a mercantilist state-to-state rivalry for trade surplus, yet incapable of portraying underlying sophisticated transnational business transactions.

Moreover, the contract-bargain model tends to naturalize protectionism as an inevitable status quo. The model remains largely neutral to protectionism as a normative concern. Note that the transition to free trade has never been fully completed. Although states agreed to lower levels of protection through negotiations over time, they did not relinquish primarily protectionist stances *vis-à-vis* each other.¹⁵ While trade is more open and fewer barriers now exist than during the interwar period,¹⁶ the current system is still a *managed* trade system¹⁷ with a *quid pro quo* negotiation structure that pits one party against another.¹⁸ This structural deficiency has been dramatically exposed in the aftermath of the global financial crisis, which has spread rampant protectionism across trading nations.¹⁹ While

¹³ Robert O. Keohane, "Reciprocity in International Relations," 40 (1986) *International Organization*, 1, 17.

¹⁴ See Pascal Lamy, Director-General, "Keynote Address at the Launching of the WTO and IDE-JETRO Joint Publication 'Trade Patterns and Global Value Chains in East Asia'," WTO (June 6, 2011), available at tinyurl.com/kadq9dl.

¹⁵ See Sanford Gaines, "The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures," 22 (2001) *University of Pennsylvania Journal of International Economic Law*, 739, 833 ("The GATT is replete with qualifications and exceptions that soften the effect or limit the reach of even its central tenets."); Robert Batemarco, "Why Managed Trade is Not Free Trade," 47 (1997) *Freeman* 488, 488–9, available at tinyurl.com/knk3248 (explaining that after the Second World War, politicians began to move away from free trade and back toward protectionist ideals, while still remaining in a world of managed trade).

¹⁶ See Craig K. Elwell, Cong. Research Serv., RL 32059, *Trade, Trade Barriers, and Trade Deficits: Implications for US Economic Welfare* (2006), p. 6.

¹⁷ See Robert Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime," 96 (2002) *American Journal of International Law*, 94, 97.

¹⁸ See Daniel Ikenson, "Made on Earth: How Global Economic Integration Renders Trade Policy Obsolete", in *Trade Policy Analysis* (Cato Inst., No. 42, 2009), p. 10, available at tinyurl.com/mbtfydl.

¹⁹ See OECD, WTO, and UNCTAD, "Report on G20: Trade and Investment Measures," (Mid-October 2012 to Mid-May 2013), June 17, 2013, available at www.oecd.org/daf/inv/investment-policy/9thG20report.pdf. [hereinafter "Report on G20"]; Simon J. Evenett, "Protectionism's Quiet Return: GTA's Pre-G8 Summit Report," June 12, 2013, available at www.globaltradealert.org/12th_GTA_Report.

trade-facilitating measures have declined, trade-restrictive measures have surged. Only 20 percent of past crisis measures have been removed.²⁰

Worse still, the debacle of the Doha Round negotiations, which instilled a sense of helplessness into the WTO, reveals the fatal flaw of the traditional contract-bargain framework. The contract model is inherently insensitive to normative concerns, such as “development.” You are never safe when your neighbor’s house is burning. “(P)overty anywhere constitutes a danger to prosperity everywhere.”²¹ This collective risk is yet another confirmation of the undeniable fact that our existences are all connected. In fact, such a flash of enlightenment spurred the launch of the Doha Development Round shortly after the 9/11 terrorist attacks. The Doha Round’s ill fate should not be trivialized as yet another anecdote of a deal fallen apart, as would be perceived by the contract model. The Doha Ministerial Declaration emphasized that the Doha Round is a “development” round that should focus on eliminating the chronic agricultural protection practiced by developed countries.²² This normative mandate quickly evaporated, however, as main stakeholders in developed countries increasingly considered the Doha mandate as mere charity.²³

To most developed countries, the Doha Round is simply another “commercial” deal in which they should increase their access, or exports, to emerging markets.²⁴ Under this mindset, each negotiating country holds its

²⁰ Report on G20, *supra* note 19.

²¹ Constitution of the International Labor Organization, Annex (Declaration Concerning the Aims and Purposes of the International Labor Organization), (1944), ¶ I(c), available at www.ilo.org/public/english/about/iloconst.htm#annex.

²² “International trade can play a major role in the promotion of *economic development* and the *alleviation of poverty*. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The *majority* of WTO members are *developing countries*. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.” World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 ILM (2002), p. 746 (emphasis added).

²³ See David S. Christy, Jr., “Round and Round We Go . . .,” (Summer 2008) *World Policy Journal*, 19, 24 (contending that “[a]ffixing the label ‘development’ to the Round may have warmed a few hearts, but it has not filled any bellies.”); Simon J. Evenett, “What Can Researchers Learn from the Suspension of the Doha Round Negotiations in 2006?” (University of St. Gallen Department of Economics, Discussion Paper No. 2007–17, 2007), p. 5 (observing that the ambiguous and confusing “development” mandate of the Doha Round discouraged corporate executives from attending WTO Ministerial Conferences).

²⁴ International Center for Trade and Sustainable Development, “Political Positioning Dominates Opening Day of WTO Talks,” *Bridges Daily Update*, July 22, 2008, available at tinyurl.com/l48oqtx.