CONFERENCE DIPLOMACY AS THE MACHINERY FOR MANUFACTURING CONSENT: *PAX AMERICANA* AND THE CASE OF THE *OUTER SPACE TREATY* AND THE WORLD TRADE ORGANIZATION

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This article critically engages with the role of the United States in leading two projects of institution building under international law from the perspective of neo-Gramscian critical theory. Gramscian theories of hegemony, conceived originally in the context of Italian workers' council movements and the anti-fascism of the early 1920s, have been appropriated to explain hegemony in post-positivist international relations theory and global political economy. This article posits that such theories are similarly useful in understanding the nature of international legal institutions and the work of international law in systemic ordering. This analysis suggests that hegemony takes place when materialism and legitimacy, mutually constituted, are mechanised in such a way as to stabilise one state's authority as the predominant state. In carrying out a dual intervention and deconstructing the institutionalisation of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies and the dispute settlement mechanism of the World Trade Organization, which remain major instruments serving the economic and security apparatus of the United States today, this article demonstrates that international institutions and conference diplomacy, which provide the forum in which convergent norms and expectations about state behaviour are developed, are essential machinery in the manufacturing and maintenance of consent in hegemonic systems.

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I Introduction

The principle of sovereign equality in international law is so resolutely central to the constitution of international institutions, that the tendency to overlook its origins, justifications and practical effects is anomalous within the study of law and politics.[1] Often, sovereign equality is conceived of as juridical fact, so essential to the rights and obligations of statehood that to question its role in governing relations between states is unnecessary or suppositional. This tendency is surprising given that the principle's normative coexistence among states is challenged by the sui generis hegemonic dominance of the United States following the Second World War, facilitated by international institutions designed to buttress the liberal world order.[2] Given this, international legal analysis can be criticised for assuming relative equality, or 'post-hegemonic' conditions, between states.[3] Traditionally, international lawyers have valued institutions for their capacity to solve coordination problems and assert that institutional authority is derived from state consent, sovereignty, self-determination and, occasionally, endowments of jurisdiction. Politicking between states becomes an obstacle to establishing, reforming and enforcing the law but is held as distinct from the law itself. Generally speaking, international relations theorists challenge this idealistic conception of international law by directing their focus towards the study of power asymmetries in international forums and the importance of social norms, recognition and social identity.[4] Efforts to rectify this disciplinary incongruence and better define the relationship between dominant powers and international law have largely focused on questions of compliance and withdrawal,[5] and studies directed at the political conditions and power relations driving the instrumentalisation of international law are few.[6] Concerning the latter, neo-Gramscian critical theory has emerged as a crucial exception. Gramsci's theory of hegemony, conceived originally in

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1 Sovereign equality is most famously expressed in art 2(1) of the *Charter of the United Nations* and embodies the concept of juridical equality between states, demonstrating the reluctance of states to recognise formal structures of inequality in international relations. The extent to which sovereign equality is tempered by procedural rules instating 'legalised hegemony' differs among various institutions and is the subject of much debate: see Gerry Simpson, 'The Great Powers, Sovereign Equality and the Making of the United Nations Charter' (2000) 21 *Australian Year Book of International Law* 133.

2 See Robert O Keohane, 'The United States and Postwar Order: Empire or Hegemony?' (1991) 28(4) *Journal of Peace Research* 435, 438.

3 See Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) *European Journal of International Law* 369, 372; Lisa L Martin, 'Interests, Power, and Multilateralism' (1992) 46(4) *International Organization* 765, 769.

4 For a realist perspective, see John J Mearsheimer, 'The False Promise of International Institutions' (1994) 19(3) *International Security* 5. For a neoliberal institutionalist view, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005).

5 A note on terminology: 'dominant' and 'hegemonic' state are used interchangeably in this article to represent a state holding a preponderance of material resources and demonstrating hegemonic leadership. This is distinct from a 'great power', which references a powerful state in the realist or institutionalist tradition, thus ignoring the element of leadership.

6 See, eg, BS Chimni, 'Marxism and International Law: A Contemporary Analysis' (1999) 34(6) *Economic and Political Weekly* 337, 337; Krisch (n 3) 372; Michael Byers, 'Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective' (1995) 17(1) *Michigan Journal of International Law* 109, 135.

the context of Italian workers' council movements and the anti-fascism of the early 1920s, has been appropriated to explain hegemony in the international context.[7] Accordingly, Gramscian analysis of leadership and the supporting basis for hegemony in civil society can be recast to consider the social basis of power relations in the emergence of multilateral institutions. Specifically, this analysis has sought to understand the relationship between the principle of sovereign equality and its legal relations, and the existence of hegemony based on the predominant power of some states.

Considering the above, this inquiry will consider two projects of institution building carried out by the international community under the leadership of the US, within a neo-Gramscian schematic. It will argue that in the cases of the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* ('*OST*')[8] and the World Trade Organization, hegemonic leadership has mobilised to create legal institutions founded upon equality rhetoric but facilitative of material dominance. Methodologically, this article will consider the hegemonic management of conference diplomacy with the foremost consideration of what privileges can be extracted by dominant powers either at the expense of, or in fulfilment of, the realisation of the preferences of weaker states. Notably, it will identify the role of hegemonic states in norm creation and address the use of the legal consequences of sovereign equality as a bargaining tool. 'Management' will be conceived of in a binary sense, whereby material preponderance and norm socialisation are both tools exercised by hegemonic states in the pursuit of preference instrumentalisation. Therefore, conference diplomacy is the forum in which hegemonic states socialise other states to accept the norms and structures underpinning the existing order, whereby socialisation is constitutive of persuasion, as states accept and internalise the normative claims of the hegemon, and of coercion, with the manipulation of material incentives.[9]

Analysis of the circumstances leading to the establishment of the *OST* and the WTO provide an interesting complement to one another for multiple reasons. First, each exhibits precedential circumstances for the creation of a hegemonic system: recent victory in war by a dominant power with concentrated material capabilities that demonstrates leadership.[10] Second, each coincides with an effort

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[7] See Andreas Bieler and Adam David Morton, 'A Critical Theory Route to Hegemony, World Order and Historical Change: Neo-Gramscian Perspectives in International Relations' (2004) 28(82) *Capital and Class* 85, 107 ('A Critical Theory Route').

[8] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*OST*').

[9] G John Ikenberry and Charles A Kupchan, 'Socialization and Hegemonic Power' (1990) 44(3) *International Organization* 283, 284.

[10] Hegemonic-order theories stress the importance of hegemonic war as a '"field clearing" event', creating a clean foundation upon which the hegemon can build in their image: Daniel H Nexon and Iver B Neumann, 'Hegemonic-Order Theory: A Field-Theoretic Account' (2018) 24(3) *European Journal of International Relations* 662, 679. The Second World War was certainly one of these events. So was the Gulf War: by rejecting Cold War brinkmanship and conceding to the US, the Soviet Union manifested a crisis in Soviet foreign policy, lost their influence over their Middle Eastern clients and contributed to their ultimate demise, leading to the subsequent ascendency of the US as a unipolar hegemon: see Andre Gunder Frank, 'Third World War: A Political Economy of the Gulf War and the New World Order' (1992) 13(2) *Third World Quarterly* 267, 280.

of hegemonic expansion conducted by the US, with multilateralism as the primary vehicle to achieve global leadership, yet differs in their historical context. Therefore, a theoretical link may be drawn between hegemonic behaviour in a balance-of-power situation and periods of unipolar dominance. Third, the extent to which existing legal infrastructure provide a foundation for the processes of conference diplomacy is markedly different in each project, thus providing a logical point of contrast. The normative legacy of the *General Agreement on Tariffs and Trade* ('*GATT*') means that the WTO's constitutive agreements represent an effort of norm reinterpretation as opposed to the process of norm invention carried out in the creation of the *OST*.[11] The alternative, to present two opposing examples of hegemonic behaviour, entering into agreement and withdrawing, struggles to call into question a general pattern of institutions and relationships. Instead, this article seeks to answer the call for neo-Gramscian abstraction by articulating a critical theory of how hegemonic regimes are called into existence and, as such, considers a common object of domain across incommensurate legal areas.[12]

The article will proceed as follows. Part I introduces neo-Gramscian theories of international relations as they apply generally to hegemony, before narrowing in on international institutions and hegemonic management of conference diplomacy. It will briefly address classical theories of international relations as they pertain to multilateralism before discussing the relationship between power and leadership in conference diplomacy. The article does not intend to reinterrogate neo-Gramscian analysis but rather provide a sketch of hegemonic systems sufficient to structure the remainder of the article. Part II will consider the case of the *OST*, specifically, its designation of space as a global commons and the procedural consequences thereof. It will interrogate the conference diplomacy facilitated by the United Nations Committee on the Peaceful Uses of Outer Space ('UNCOPUOS') and the role of dominant powers in mobilising their superior material capabilities and demonstrating leadership in pursuing multilateralism as opposed to unilateral space development. Part III will turn to the development of dispute procedure in the establishment of the WTO, drawing attention to the favourable precedential normative conditions for the expansion of US hegemony. It will argue that aggressive trade liberalisation was the primary goal of US negotiation and was mandated by the compulsory jurisdiction of WTO dispute settlement, causing a global reduction in market barriers in favour of US trade and capital. It will further consider the role of developing states in accepting the dominant ideology of trade liberalisation and the constraining effect this had on their capacity to secure preferential or differentiated treatment. Part IV will conclude that in both instances the US effectively managed the outcome of conference diplomacy through a combination of coercive bargaining tactics and norm socialisation.

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[11] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('*GATT*').

[12] See generally Julian Saurin, 'The Formation of Neo-Gramscians in International Relations and International Political Economy: Neither Gramsci nor Marx' in Alison J Ayers (ed), *Gramsci, Political Economy, and International Relations Theory: Modern Princes and Naked Emperors* (Palgrave Macmillan, rev ed, 2008) 27.

II A CRITICAL THEORY OF HEGEMONY

As distinguished from conventional theories of international relations, which, given their preoccupation with producing theories of universal validity, tend to reduce hegemony to a singular function of material resources, neo-Gramscian theories, first advanced by Robert Cox, seek to provide a historically embedded, broad critical theory of the relations between states.[13] This critical theory redefines hegemony through an empiric-historical analysis of the prevailing world order, specifically questioning how norms, institutions and distributions of power become legitimised.

Cox agrees with the premise that the state is the primary aggregation of political power in international relations (while acknowledging the influence of transnational capital as a distinct 'actor') and yet is critical of theory that confines its study to the state as the sole unit of analysis.[14] As such, neo-Gramscian theories of international relations seek to dissolve the barriers placed between state and civil society commonplace in classical international relations study.[15] What emerges is a world order defined in terms of social relations and based on the foundation of consent which manifests in a dialectical agreement as to norms and ideas, structured by institutions and supported by material resources. Therefore, hegemony is a form of dominance within the world order that is

> based on a coherent conjunction or fit between a configuration of material power, the prevalent collective image of world order (including certain norms) and a set of institutions which administer the order with a certain semblance of universality …[16]

In respect of this world order, neo-Gramscian theory warns against reification. Rather, organisational relations are subject to change and maintenance, requiring each hegemonic system to be conceptualised as a historically specific and peculiar configuration of socio-economic and political forces.[17] As such, a hegemonic leader can be expected to act to ensure their continued supremacy, garnering the consent of weaker states without recourse to force. This is achieved, in part, by the institutionalisation of general rules of behaviour that embody the material interests of the hegemon, whereby those interests are portrayed as universal as opposed to parochial, causing the legitimisation of the

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13 See, eg, Robert Cox, *Production, Power, and World Order: Social Forces in the Making of History* (Columbia University Press, 1987) ('*Production, Power, and World Order*').

14 Cox problematises hegemony at three levels: the social relations of production, the social formation of states (comprising 'historically contingent state-civil society complexes') and the structure of world order. As such, social forces and capital modes of production, as well as states, are the main collective actors under hegemony: see Bieler and Morton, 'A Critical Theory Route' (n 7) 87–8. The case studies under analysis warrant further discussion as to the role of transnational capital in the maintenance of hegemony. The privatisation of space exploration and use, coupled with the institutionalisation of the private actor in international commerce leads one to consider the hegemony of transnational capital and the extent to which it has been facilitated by a state-crafted institutional system that favours private wealth. That said, this article confines further analysis to the role of hegemonic states in institutional building.

15 Cox, *Production, Power, and World Order* (n 13) 409.

16 Robert W Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory' (1981) 10(2) *Millennium: Journal of International Studies* 126, 139 ('Social Forces, States and World Orders').

17 Anne Showstack Sassoon, *Gramsci's Politics* (Hutchinson Education, 2nd ed, 1987) 121–2.

hegemon's pre-eminence. So, where the state-civil society complex 'nationalises' the ideology of the powerful social classes through national political frameworks and socio-economic structures,[18] the social interaction of states 'globalises' that same ideology, manifesting the outward expansion of the ideology of the most powerful states as universal international phenomena.[19]

Here, where hegemonic behaviour is directed at manufacturing consent, as opposed to exercising brute military or economic force, the importance of conference diplomacy emerges. The manipulation, promotion and evolution of values and understandings through negotiation preceding the adoption of treaty law form part of the institutional, moral and ideological context that shapes the thoughts, actions and behaviour of states. Through the forces introduced above, dominant powers can manipulate conference diplomacy to institutionalise their preferred norms and imbue them with universal character.

This article considers the management of conference diplomacy by hegemonic states in the creation of international law and shall confine further delineation of the relevant hegemonic theory to these circumstances, noting that the construction of international law and institutions is merely a static moment in the maintenance and development of the prevailing world order. For context, this Part will next consider pertinent classical theories of international relations regarding the role of great powers in creating international law in order to foreground the exploration of neo-Gramscian critical theory to follow.

A *Realism, Institutionalism, Constructivism and Multilateralism*

It is generally accepted that dominant states have been the central driving forces behind the restructuring of international law following the end of the Second World War and have accordingly made extensive use of the international legal system to their benefit.[20] Similarly, there is broad agreement with the claim that international institutions act as both resources and constraints for predominant states.[21] Again, it is widely observed that both of these remarks are particularly valid in the period of progressive development of international law accompanying the early days of the United Nations treaty system, in which

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[18] Bieler and Morton, 'A Critical Theory Route' (n 7) 91–2.

[19] See Robert W Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method' (1983) 12(2) *Millennium: Journal of International Studies* 162, 168–74 ('Gramsci, Hegemony and International Relations').

[20] For a summary of several statements regarding the role of dominant states in crafting the international legal order, with reference to the theoretical background of each, see Bieler and Morton, 'A Critical Theory Route' (n 7) 96–9.

[21] See, eg, Bruce Cronin, 'The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations' (2001) 7(1) *European Journal of International Relations* 103, 105; Nico Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law' in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) 135.

anticipatory lawmaking on the rhetorical basis of sovereign equality between states became the norm.[22]

Recognising that juridical equality in a system in which goods are distributed unevenly results in de facto inequality in terms of a state's opportunities, their capacity for meaningful participation and the unequal impact of the law, classical international relations scholarship turns to 'power resources' and the way they are utilised with varying effect by states.[23] Realist theorists of international relations conceive of international law and its institutions as a function of power, serving the interests of states. Therefore, 'hegemony' is a way of attributing predominant power to the most materially endowed states in an international system, describing their disproportionate economic, military and security capabilities, resulting in a situation of vastly unequal interstate relations. Such a system is dominated by a competitive and '"lawless" hegemon',[24] who may engage legal institutions to enforce rules that serve its interests at the expense of others.[25] An idealistic sense of international law is therefore incompatible with realist conceptions of hegemony, in that law is instrumentalised by dominant powers to induce compliance from weaker states where possible, and eschewed for political means where it is not.[26] As noted by Ian Hurd in critique, such a model of dominance based on the singular strategy of coercion faces a narrowing of global acceptance of great power privileges and a rise in anti-hegemonic sentiment in backlash, which leads to system instability, and therefore fails to explain protracted periods of hegemonic dominance.[27]

Recognising this, neoliberal institutionalists acknowledge the utility of multilateral institutions and the promulgation of international law from within them in the competitive pursuit of preference realisation. Here, multilateralism is conceived of as a series of strategic decisions by states to cooperate with each other for mutual or relative gain.[28] Acting in their own self-interest and according to instrumental cost–benefit calculations, states create collective institutions and establish 'fixed' legal principles to avoid the large transaction costs entailed by constant renegotiation.[29] So, international law and institutions stabilise the international order: fixed institutional structures are less vulnerable

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22 See Gerry Simpson (n 1) 138–9, 142–4, 154–7; Peter MR Stirk, 'The Westphalian Model and Sovereign Equality' (2012) 38(3) *Review of International Studies* 641, 657–9; Gennady M Danilenko, 'Outer Space and the Multilateral Treaty-Making Process' (1990) 4(2) *High Technology Law Journal* 217, 233–4; Lora Anne Viola, Duncan Snidal and Michael Zürn, 'Sovereign (In)Equality in the Evolution of the International System' in Stephan Leibfried et al (eds), *The Oxford Handbook of Transformations of the State* (Oxford University Press, 2015) 221.

23 For the classical definition of 'power resources', see Joseph S Nye Jr, 'Soft Power' (1990) 80 (Autumn) *Foreign Policy* 153.

24 Krisch (n 3) 370.

25 Cronin (n 21) 106.

26 Krisch (n 3) 370.

27 Ian Hurd, 'Breaking and Making Norms: American Revisionism and Crises of Legitimacy' (2007) 44(2–3) *International Politics* 194, 209–10.

28 Tom Farer, 'Diplomacy and International Law' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 2013) 493, 502–3.

29 Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984) 80–4.

to shifts in power than ad hoc political arrangements, preserving hegemonic order even where the material strength of the hegemon declines.[30] Yet, as pointed out by Duncan Snidal, an institutional perspective as derived from rational choice is methodologically limited, in that it assumes that states are anomic actors with fixed preferences, derived from factors exogenous to the international system.[31] As such, rationalist theories loses their explanatory force in situations of change.

Alternatively, constructivists deal with the social aspect of international lawmaking, introducing a purposive element to the nature of international organisations.[32] By this analysis, states are enmeshed in norms and ideational standards with constraining effects.[33] Constructivists identify the dynamic and culturally responsive nature of the international order, whereby interests and identities of states are socially constituted through interaction.[34] Accordingly, multilateralism is an accepted form of politicking through which states seek legitimacy against a backdrop of normatively acceptable action.[35] While successfully identifying that legitimacy and ideas shape the attitudes of states, constructivism has been generally criticised for its underrating of coercion in the absence of social recognition, and it is thus suggested that its employment occludes debate as to the relationship between means and ends in the mobilisation of coercion and force in securing legitimacy.[36] Further, scholars have pointed to the lack of solidarity and the disrespect for norms dominating the modern international system and have thus rejected constructivism's ontological assumption as to the existence of an 'international community'.[37]

With each of these methods, given ceteris paribus, one could outline a sketch of international society based on the prevailing social and power relations at the time of writing and produce a framework for action or a vague prediction about the world order as it may develop.[38] However, each approach is independently at risk of being entirely abstract, as they isolate their subject matter from broader contexts and favour analytical subdivision between units of analysis.[39] In this respect, while none of the above theories should be considered incompatible with neo-Gramscian critical theory, they are most useful when extracted from a methodological grounding in positivism in favour of historicism.[40]

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[30] Ibid.

[31] Duncan Snidal, 'Rational Choice and International Relations' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (SAGE Publications, 2002) 73, 74–6.

[32] Emanuel Adler, 'Constructivism and International Relations' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (SAGE Publications, 2002) 95, 95.

[33] See ibid 102–3.

[34] Ibid.

[35] Ibid 104.

[36] See Cox, 'Social Forces, States and World Orders' (n 16) 136–7.

[37] See, eg, Perla Issa, 'Interview with Dr Ghassan Abu Sitta: "There Is No International Community"' (2018) 47(4) *Journal of Palestine Studies* 46, 54.

[38] Cox, 'Social Forces, States and World Orders' (n 16) 137.

[39] Ibid 126.

[40] Robert W Cox and Timothy J Sinclair, 'Realism, Positivism, and Historicism (1985)' in Robert W Cox and Timothy J Sinclair (eds), *Approaches to World Order* (Cambridge University Press, 1996) 49, 51–2.

B *Multilateralism According to Neo-Gramscian International Relations Theory*

If classical theories of international relations are concerned with defining ontological units of analysis and problem-solving state behaviour but disagree in terms of the forces defining social power relationships, neo-Gramscian analysis seeks to resolve these differences and deconstruct international relations and social transformation from within a historical materialist problematic.[41] Such analysis can be perceived as an attempt to close the gap between concepts that label a preponderance of material resources as the defining characteristic of power and those that ontologically centre norms and ideas as primary organisational forces.

In the creation of international institutions, both elements come to the fore.[42] On the one hand, material strength allows hegemonic states to wield negotiating force in conference diplomacy; their participation is generally essential to the success of the project, they are capable of manipulating the material circumstances of subaltern states, and they may make a disproportionate contribution to the costs of collective action through funding and other resource provision.[43] On the other hand, hegemonic states can be constrained by the normative values of the system they occupy when creating law, motivating them to participate in the shaping of norms in the pursuit of legitimacy to improve the stability of the hegemonic system and to limit the threat of a hegemonic challenge. Conference diplomacy provides a forum for this socialisation. As Nico Krisch outlines:

> The establishment of institutions, even if initially based on the converging self-interests of states, can transform the standards of legitimacy in international society and thus make later attempts by rising powers to change the institutional structure more difficult: other states have then become subject to hegemonic socialization.[44]

As such, the creation of international law legitimises the extraction of special privileges by hegemonic powers upon whom advantageous rights and responsibilities are conferred to the exclusion of subaltern states. Accordingly, Cox identifies the key purposes of international organisations under hegemony: multilateralism functions as the process through which hegemony and ideology are developed, embodies rules that facilitate the expansion of hegemonic world orders, is a product of the hegemonic world order and therefore replicates unequal power relationships, ideologically legitimates the norms of the hegemonic system, coopts the elites of peripheral states and absorbs counter-

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[41] Bieler and Morton, 'A Critical Theory Route' (n 7) 86.

[42] Krisch concludes that international law is itself a multilateral institution and therefore existing theories about institutions can be drawn upon to theorise about international law: Krisch (n 3) 372.

[43] 'Subaltern', 'smaller' and 'weaker' are used interchangeably in this article to discuss a relatively static group of secondary states, including periphery states. 'Subaltern' is used to denote the critical theory of subjugation, adopting the language of neo-Gramscian critical theory. 'Smaller' and 'weaker' are used for clarity and pragmatism when describing conference diplomacy below.

[44] Krisch (n 3) 375.

hegemonic ideas.[45] As a result, multilateral arrangements, both institutional and otherwise, tend to be defined in universal terms, with hegemonic systems often favouring the expression of law in terms of sovereign equality as opposed to creating standards of equality in fact. This, as well as the unequal application of the law, is accepted by all states in the system, not just its beneficiaries.

In demonstrating leadership in the formation of international law, a hegemonic state induces the buy-in of other states in favour of normative orientations that serve their interests. Recognising the distinctive utility that arises from international law's ability to forge a synthesis of interest among states, a hegemon will often make pragmatic concessions to subaltern states to avoid their defection and will make commitments that they will act as a guarantor of public goods and system maintenance.[46] Demonstrably, power as a precondition of hegemonic ordering derives from a varying mixture of the hegemon's material and security resources and their ability to wield authority with legitimacy, mobilising an amalgam of coercion and consent to institutionalise their dominance through the practice of international lawmaking.

It is useful to draw a contrast here with Joseph Nye's influential account of 'soft power' as a tool with which consent is maintained in international relations.[47] Soft power is conceived of as the function of, inter alia, a state's culture, political values and foreign policy in so far as each is perceived to be legitimate and moral by the international community.[48] Nye agrees with the idea of cooption of systemic norms as distinct from coercion and similarly concludes that a hegemon would be remiss to eschew the pursuit of legitimacy as a means to maintain dominance in any given international system.[49] He departs from a neo-Gramscian schematic, however, when he posits a lack of interconnectivity between soft and hard (or coercive, to use this article's terminology) exercises of power.[50] As the sections below detail, the two cannot be thought of as distinct, and, in fact, it is the mobilisation of soft power (or tools of manufacturing consent) that provide the preconditions for the stability of hegemonic dominance in international systems.[51] Similarly, Nye posits a level of distance between soft power resources and the positive behaviour of states. By this account, while the state may influence the perception of legitimacy attached to soft power resources through various policy refractions, the state is ultimately not a benefactor of how they may be employed in international arenas and therefore does not actively manipulate them for the sake of hegemonic legitimating strategy.[52] So, there is an essential inconsistency between the two theories, such that we might put

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[45] Cox, 'Gramsci, Hegemony and International Relations' (n 19) 172–3.

[46] Ibid.

[47] Joseph S Nye Jr, 'Public Diplomacy and Soft Power' (2008) 616(1) *Annals of the American Academy of Political and Social Science* 94, 95.

[48] Ibid.

[49] Ibid 106.

[50] Ibid 107–8.

[51] Geraldo Zahran and Leonardo Ramos, 'From Hegemony to Soft Power: Implications of a Conceptual Change' in Inderjeet Parmar and Michael Cox (eds), *Soft Power and US Foreign Policy: Theoretical, Historical and Contemporary Perspectives* (Routledge, 2010) 12, 19–21.

[52] Nye (n 47) 105.

Nye's account of the formation of hegemonic systems to one side for the purpose of this article's analysis.

This section provides a description of neo-Gramscian methodology's dialectical effort to reconcile both sides of the epistemological divide in conventional international relations scholarship. The moment of hegemony thus takes place when materialism and legitimacy, mutually constituted, are mechanised in such a way to stabilise one state's authority as the predominant state. International organisations and conference diplomacy thus become essential machinery in the building and maintenance of hegemonic systems, providing the forum in which convergent norms and expectations about state behaviour are developed.

C *Manufacturing Consent*

From the foundation detailed above, we can identify that the emphasis in neo-Gramscian theory is a predominant concern with a state's struggle for consensual leadership. Consent is therefore the necessary precondition of authority, which is itself conceived of as an ideological or moral leadership won by the hegemon after achieving persuasion or acquiescence from subaltern groups. Reminiscent of the agency–structure debate dominating the social sciences,[53] the field of international relations at its intersection with international law remains in a state of disagreement as to the extent of structuration in the world order. Among neo-Gramscian scholars and their critics, this manifests in disagreement as to the nature of manufactured consent and its manner of organisation. Specifically, while in agreement that the measure of consent falls short of enthusiastic support, questions remain as to the extent to which consent is, in fact, distinguishable from coercion. What is, if any, the difference between interventionist or explicit coercion, perhaps manifesting in a threat of force, economic retaliation or bribery, and the latent coercion inherent to the exploitation of capitalistic relationships? For Gramsci, the worker's relationship to capital and the forces of production is inherently exploitative and the interests of capital are coordinated so effectively by the state that the worker is unable to realise their true interests. So, workers deliberately choose to collaborate with (or consent to) capitalism given only an embryonic conception of the alternative, such was the obscured exploitation of wage labour and domination manifest in ideological hegemony.[54] This reasoning has been abstracted to the international by several of Gramsci's successors, whereby inter alia the nature of international capital flows, inequitable contractual relationships between North and South, and the unidirectional extraction of peripheral resources to feed core

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[53] Andreas Bieler and Adam David Morton, 'The Gordian Knot of Agency-Structure in International Relations: A Neo-Gramscian Perspective' (2001) 7(1) *European Journal of International Relations* 5, 10–29.

[54] This derives from Gramsci's interpretation of the Marxist concept of 'false consciousness', which is employed to understand the nature of a worker's acquiescence to the capitalist system of production and is continuously reinterrogated to understand the means to building subaltern hegemony or counter-hegemony. For Gramsci, the 'falseness' of a worker's awareness of their own subjugation derives from the social structures in which they are embedded, as opposed to a personal or uncritical misrecognition. Their embedded position prevents the worker from realising their objective relationship to the means of production: Michael Burawoy, 'The Roots of Domination: Beyond Bourdieu and Gramsci' (2012) 46(2) *Sociology* 187, 203.

consumption has created a 'dependency' relationship between the core and periphery.[55] This, as well as the organisation of the hegemonic ideology of neoliberal globalisation through various international machinations at the behest of hegemonic states, has created conditions for a historic bloc to form and flourish.[56] So, for some, subaltern states exist in an objective state of exploitation such that they, too, are unable to realise their interests. In this sense, subaltern states experience an incorporated and embodied habitus as their internalisation of hegemonic ideology has taken place both unconsciously and universally.[57]

This approach has been widely criticised both within the neo-Gramscian scholarly community and outside of it for its patronising or paternal description of exploited subaltern groups as well as its denial of counter-hegemonic agency.[58] To characterise dependency as so inherently exploitative that subaltern groups are unable to conceptualise or understand the nature of their consent to the hegemonic system is to reify structural relations and abandon the historical materialist methodology, and, by reducing consent to dependency, we ignore the contestations that we empirically observe to dominate conference diplomacy in the institutionalisation of international law and understate the bureaucratic and political structures of the state that underwrite diplomatic decision-making.

In the alternative, however, the maldistribution of resources among states and the accordant inequitable distribution of bargaining power does not permit us to presume that states hold 'pregiven, autonomous' individual agency; nor are they 'choice-making subjects'.[59] Similarly, we cannot separate questions of hegemony from those of accumulation, exploitation, dispossession and conflict.

In identifying the nature of consent in hegemonic systems, specifically those of international law, theory grounded in historicism tells us that we must avoid being monocausal.[60] And yet, we cannot avoid asking ontological questions as to hegemonic structure and change. As Cox himself outlines:

> Ontology lies at the beginning of any enquiry. We cannot define a problem in global politics without presupposing a certain basic structure consisting of the

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[55] For example, Gramscian methodology and reasoning was foundational to the development of world-systems theory. See, eg, Immanuel Wallerstein, *The Capitalist World-Economy* (Cambridge University Press, 1979); Immanuel Wallerstein, 'Dependence in an Interdependent World: The Limited Possibilities of Transformation within the Capitalist World Economy' (1974) 17(1) *African Studies Review* 1.

[56] A 'historic bloc' emerges where the hegemonic class in a particular polity 'maintains cohesion and identity within the bloc through the propagation of a common culture': Cox (n 19) 168. It is a dialectical concept whereby interacting elements of structure and superstructure create an ensemble of activity in which ideas and material conditions mutually influence and reinforce each other to project hegemony into the future: at 167–70.

[57] Burawoy (n 54) 189.

[58] See, eg, Mustapha Kamal Pasha, 'Return to the Source: Gramsci, Culture, and International Relations' in Alison J Ayers (ed), *Gramsci, Political Economy, and International Relations Theory: Modern Princes and Naked Emperors* (Palgrave Macmillan, 2008) 199.

[59] Andreas Bieler and Adam David Morton, *Global Capitalism, Global War, Global Crisis* (Cambridge University Press, 2018) 35 ('*Global Capitalism*'), quoting Roxanne Lynn Doty, 'Aporia: A Critical Exploration of the Agent-Structure Problematique in International Relations Theory' (1997) 3(3) *European Journal of International Law* 365, 366, 377.

[60] Bieler and Morton, *Global Capitalism* (n 59) 28.

> significant kinds of entities involved and the form of significant relationships among them.[61]

Accordingly, we must attempt to recognise the structural essentialism of hegemonic world order whilst rejecting economic determinism. Neo-Gramscian study has directed scholarship towards the social relations of production that form historic blocs in the domestic spheres of hegemonic states, such that a cohesive body of ideology may be globalised and projected onto subaltern states through processes of legitimisation. As noted above, the basic structure defined for this analysis is that of the state itself, which is defined as the condensation of a hegemonic relationship between dominant classes and class fractions.[62] So, it follows that the national context is the only place where a historic bloc can be founded and therefore the same questions of social ontology asked of the global historical structures that constitute world order must also be asked of the historic blocs that form in subaltern states. Alternatively put, consent is necessarily conceived not as a top-down course of action imposed upon a state from outside, but as a product of domestic forces. Understanding that subaltern states necessarily exist in coevolution with civil society requires analysing the conditions of consent as the dialectical product of history and the decisions of subaltern state functionaries. A one-way view of internalisation, like that proffered by structuralists or those neo-Gramscians that deem consent as the 'objectively false' outcome of sheer manipulation, is to overlook the reciprocal interaction between the global and the local, class conflict and mutually reinforcing relations with the global political economy.

Instead, subaltern states are best understood through a return to neo-Gramscian methodology, employed to understand the historically contingent productive functions of the domestic sphere. These operate to create a historic bloc or an alliance between disparate groups and class fractions bound not only by commensurate economic interests but a particular ideology. What separates this process at the subaltern level from the hegemonic are the causal interdependencies and constitutive relationships that exist between subaltern states and exogenous interstate economic and normative structures, from which subaltern states are unable to easily extricate themselves. Subaltern states thus face limited material opportunities and are constrained relative to the strength of norm legitimisation previously undertaken in the system. So, agency is not necessarily determined, but it is shaped and constricted by historical structures.

The case studies below detail how these pressures manifest in conference diplomacy. The co-dependency between subaltern states and historical world structures is revealed in the success of threats of exit, red line negotiation and dictatorial modes of persuasion employed by hegemons. It can also be seen in the adoption of hegemonic normative ideals by subaltern states in the pursuit of relative gains or perhaps as the only viable alternative to material deprivation. In consequence, hegemony remains a tool for the exercise of power. For the hegemon, the productive tension between norms and material resources allows them to manoeuvre the machinery for the organisation of consent over a

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[61] Robert W Cox, 'Towards a Posthegemonic Conceptualization of World Order: Reflections on the Relevancy of Ibn Khaldun (1992)' in Robert W Cox and Timothy J Sinclair (eds), *Approaches to World Order* (Cambridge University Press, 1996) 144, 144.

[62] Saurin (n 12) 36, 41.

disempowered subaltern group. Consent, therefore, is not the absence of contestation but rather a term of art, used to describe a situation in which a state participates in the process of its own subjugation. Thus, manufactured consent is neither false nor given unburdened by both material and normative restraint.

III THE *OUTER SPACE TREATY*

The events preceding the adoption of the *OST* provide a useful vehicle for considering the relationship between dominant powers, conference diplomacy and multilateral institutions. Exaggerated material polarity in the space industries could lead one to conclude that the *OST* is best understood as heavily determined by power inequality. Similarly, the conclusion of a multilateral agreement could be heralded as a great success of plurality, considering the lack of material or technological drivers for cooperation.

The principles established in the *OST* had been previously advanced in various non-treaty forms, including UN General Assembly Resolutions, informal agreements between states and diplomatic statements. The *OST* represented an attempt to combine these agreements into a unitary and coherent international space law, promulgated under the auspices of the UN General Assembly as part of its campaign for the progressive development of international law. At the time, the world was divided into two great power blocs, each comprising either the US or the Soviet Union, their allies and client states. An assortment of neutral European states and the emerging Non-Aligned Movement occupied the peripheries of this otherwise bipolar system. This section will trace the evolution of the major achievement of the *OST* and the characterisation of space as the global commons and in doing so evaluate the extent to which hegemonic management of the negotiations influenced its conclusion.

A *The Commons*

When the *OST* was unanimously adopted by the UN General Assembly in 1966,[63] the legal character of space and celestial bodies was codified into treaty law.[64] In ratifying, states acknowledged that space, as an area outside the bounds of national jurisdiction, could not be subject to national appropriation nor claims of sovereignty.[65] It was to be free for exploration and use by all states in conformity with international law and reserved for peaceful purposes.[66] It was, therefore, to be considered as part of the global commons.[67]

63 UN GAOR, 21st sess, 1499th plen mtg, UN Doc A/PV.1499 (19 December 1966) 11–15.

64 *OST* (n 8).

65 Ibid art II.

66 Ibid art III.

67 'Global commons' is a term of art typically used to reference areas outside the bounds of national jurisdiction in which common-pool resources can be found. The management of global commons areas is the subject of international law, which generally prescribes the freedom of access and use and a prohibition on national appropriation. While the global commons are generally areas subject to the doctrine of the common heritage of mankind ('CHM'), there remains some dispute as to the legal composition of the CHM and whether it can be considered customary international law. For further discussion on the CHM and its relation to the global commons, see generally John E Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2011) 40(1–3) *Denver Journal of International Law and Policy* 447.

1 *A High Seas Analogy*

The *OST*'s adoption represented the culmination of a decade of negotiation that began in 1958 with the ad hoc formation of UNCOPUOS, a body mandated to study the legal problems anticipated to arise from the exploration and development of space, and to recommend accordant legal principles for international consideration and agreement.[68] At the time negotiation began, spacefaring capabilities were even more unevenly distributed than economic or political capabilities: until 1972, only the US and the Soviet Union possessed the ability to send humans into space, place satellites into geosynchronous orbit and launch large space objects into or beyond Earth's orbit. Considering this, realist theorists of international relations would rightly infer that each state's effect on space lawmaking would be commensurate with their spacefaring capacity.[69] Power in negotiations would echo the prevailing distribution of capabilities and be concentrated with the superpowers, allowing the US and the Soviet Union to define the rules governing space activity. Realists would further anticipate that the superpowers would look to create the political conditions that maximised their capacity for unilateral action, granting a wide discretion for states to prosecute space activity. Intergovernmental management or oversight of space activity is unlikely, and, aiming to further entrench their duopoly on space technology, law that seeks to alleviate the barriers to entry into the space industries caused by high technological and financial capitalisation costs would be fervently avoided.[70] Clearly, realism struggles to explain the decision of the US and the Soviet Union to treat space as a commons and in doing so grant communal rights to all states to access and exploit space, providing sufficient legal grounds for all members of the international community to demand participation in lawmaking with respect to its use.

At the commencement of negotiations, the superpowers did not have consensus among themselves, and, as each was unable to coerce the other, convergence had to occur through diplomacy. It should be noted that, in the case of shared preferences, as the sole providers of the good in question, the US and the Soviet Union could have imposed their will and brought the remainder of the international community into line with their state practice with a crystallising effect on customary rules. Nevertheless, they disagreed, and UNCOPUOS was considered the appropriate forum to solve the ensuing coordination problem.

Rather than conceiving of a completely new system of regulatory principles to define the legal character of space, the international community chose to consider the implications of treating space as akin to either the High Seas or

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68 *International Co-Operation in the Peaceful Uses of Outer Space,* GA Res 1472 (XIV), UN Doc A/RES/1472(XIV) (12 December 1959) para 1(a).

69 See Cronin (n 21) 106.

70 These assumptions derive from the basic tenets of realist theory, whereby states can be expected to avoid cooperation if the consequences of doing so are likely to improve the relative positions of their rivals.

national airspace.[71] Each analogy intimated very different basic rules for state activity in space. The High Seas analogy suggested that space would be open to access and exploitation by all states in accordance with international law, that national appropriation and claims to sovereignty were to be prohibited,[72] and that states were to maintain jurisdiction over their nationals and 'flagged' vessels.[73] Alternatively, the national airspace analogy would lead to the upward extension of national jurisdiction. States would be required to seek advance authorisation to transit and act within another state's national airspace, while maintaining enforcement jurisdiction over all persons or craft within their own territory.[74] The disagreement between the US and the Soviet Union concerned which analogy was most appropriate, as each had distinct consequences for the superpowers' security interests.[75] With military brinkmanship between the two driving both to seek security advantages over the other, space presented an opportune vehicle to gain at the other's expense by utilising newly developed technologies. The Soviet Union was predominantly concerned with intercontinental rocketry for the long delivery of nuclear weapons. With little opportunity to establish US-proximate military bases in foreign states, the proliferation of US military bases on allied territory throughout the Pacific, the Middle East and Western Europe made the development of weaponry capable of reaching the continental US a priority for the Soviets.[76] By contrast, the major security challenge facing the US was the collection of reconnaissance information.[77] While they were aware that the Soviet Union had an interest in intercontinental weapon development,[78] its closed political system prevented the US from keeping abreast of Soviet progress.[79] Space reconnaissance technology would permit the US to penetrate behind the closed borders and opaque domestic politics, and keep track of Soviet weapons development.[80] For this reason, the

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71 The legal principles pertaining to the High Seas were yet to be codified into the *Convention on the High Seas*, but the topic had nonetheless been subject to considerable debate, and a general consensus was held by the international community as to its basic form: Ad Hoc Committee on the Peaceful Uses of Outer Space, Legal Committee, *Report under Paragraph 1 (d) of General Assembly Resolution 1348 (XIII)*, UN GAOR, UN Doc A/AC.98/L.7 (27 May 1959) 2.

72 Early drafts of the *Convention on the High Seas* circulated by the International Law Commission, mandated to codify the law of the sea by the United Nations General Assembly, guaranteed all states freedom of navigation on the High Seas protected from intervention by other states and established a qualified right to fish, subject to a state's additional treaty obligations and with regard to the sustainability of living resources: 'Articles concerning the Law of the Sea with Commentaries' [1956] II *Yearbook of the International Law Commission* 265, 278 art 27, 286 art 49.

73 Ibid 278 art 29.

74 *Convention on International Civil Aviation*, signed 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) arts 1, 3.

75 M J Peterson, 'The Use of Analogies in Developing Outer Space Law' (1997) 51(2) *International Organization* 245, 252–3.

76 Ibid. See also Howard J Taubenfeld, 'Consideration at the United Nations of the Status of Outer Space' (1959) 53(2) *American Journal of International Law* 400, 400.

77 Peterson (n 75) 253.

78 See *Summary Record of the 983rd Meeting*, UN GAOR, 1st Comm, 13th sess, 983rd mtg, Agenda Item 60, UN Doc A/C.1/SR.983 (13 November 1958) 199–200 [6]–[7] ('*Summary Record of the 983rd Meeting*').

79 Peterson (n 75) 253.

80 See generally Columbia Law Review Association, 'Legal Aspects of Reconnaissance in Airspace and Outer Space' (1961) 61(6) *Columbia Law Review* 1074.

US favoured the High Seas analogy, which would protect their freedom of overflight and allow the collection of reconnaissance information without interference. For the Soviet Union, there existed a clear information imbalance in their favour that they sought to protect. By pursuing an analogy with national airspace, they were signalling a preference to reserve their right to prevent transit through their 'airspace' and intervene with any space reconnaissance satellites that might be employed against them.[81] Both states communicated these positions in competing draft resolutions submitted to the First Committee of UNCOPUOS.[82]

Negotiating records show that most states, including Non-Aligned states, found a High Seas analogy more persuasive for several reasons. Some posited that a lack of protest to the launch and operation of orbiting telecommunication satellites offered proof of the impossibility of national appropriation in space.[83] Others emphasised the 'absurdity' of the indefinite upward extension of sovereign authority.[84] There was significant support behind the call to recognise space as owned by,[85] or belonging to, the common domain,[86] which could be limited only by properly established international law, a view that was actively proffered by US delegates.[87] This informal coalition in favour of US preferences drove the Soviet Union to withdraw their draft resolution,[88] arguing that unanimity was both essential to the progression of space law and proving impossible to attain.[89] Then, noting that the membership of UNCOPUOS was Western-centric and inequitably representative of US allies, the Soviet Union announced that they would cease cooperation with UNCOPUOS.[90]

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81 John T Phelps II, 'Aerial Intrusions by Civil and Military Aircraft in Time of Peace' (1985) 107 *Military Law Review* 255, 258.

82 *Union of Soviet Socialist Republics: Draft Resolution*, UN DOC A/C.1/L.219 (7 November 1958) Preamble para 4, art (1); *Australia, Belgium, Bolivia, Canada, Denmark, France, Guatemala, Ireland, Italy, Japan, Nepal, Netherlands, New Zealand, Sweden, Turkey, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela: Draft Resolution*, UN DOC A/C.1/L.220 (13 November 1958).

83 *Summary Record of the 983rd Meeting*, UN Doc A/C.1/SR.983 (n 78) [23]–[26].

84 *Summary Record of the 986th Meeting*, UN GAOR, 1st Comm, 13th sess, 986th mtg, Agenda Item 60, UN Doc A/C.1/SR.986 (17 November 1958) [19].

85 Ibid [7].

86 *Summary Record of the 991st Meeting*, UN GAOR, 1st Comm, 13th sess, 991st mtg, Agenda Item 60, UN Doc A/C.1/SR.991 (19 November 1958) [14].

87 *Summary Record of the 982nd Meeting*, UN GAOR 1st Comm, 13th sess, 982nd mtg, Agenda Item 60, UN Doc A/C.1/SR.982 (12 November 1958) [17].

88 UN GAOR, 13th sess, 792nd plen mtg, Agenda Item 60, UN Doc A/PV.792 (13 December 1958) 615 [112] ('*792nd Meeting*'). See also *Summary Record of the 995th Meeting*, UN GAOR, 1st Comm, 13th sess, 995th mtg, Agenda Item 60, UN Doc A/C.1/SR.995 (24 November 1958) [15] ('*Summary Record of the 995th Meeting*').

89 Taubenfeld (n 76) 402.

90 *Summary Record of the 995th Meeting*, UN Doc A/C.1/SR.995 (n 88) [53]. Comprising this body were 18 states, including both superpowers. While negotiations were not confined to this relatively limited membership, they were organised and channelled by it. Membership included Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, the Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America: *Question of the Peaceful Use of Outer Space*, GA Res 1348 (XIII), UN GAOR, 13th sess, 792nd plen mtg, UN Doc A/RES/1348(XIII) (13 December 1958) para 1.

Over subsequent years, the Soviet Union informally engaged in diplomacy with UNCOPUOS members and were kept informed of the direction of Western and Non-Aligned opinions.[91] Their position on the legal character of space shifted in 1960 by acquiescence, when they raised no objection to the launch of the US's first camera-equipped reconnaissance satellite.[92] Then, in 1961, they accepted the *International Co-Operation in the Peaceful Uses of Outer Space* ('*Resolution 1721*'),[93] which expressed agreement on the principle that space was free to use by all states and could be owned by none.[94] Passing unanimously, this resolution ended the debate as to whether to engage a High Seas or national airspace analogy. In 1962, the Soviet Union reengaged with UNCOPUOS and agitated to have the use of space for the collection of intelligence information in the territory of foreign states declared inconsistent with *Resolution 1721* as an alternative means to prevent US reconnaissance.[95] This position was later abandoned, when tensions between the Soviet Union and China escalated, causing the former to realise the value of remote reconnaissance given the similarly restrictive nature of Chinese domestic politics.[96]

This tug of war between the US and the Soviet Union is easily comprehended by classical international relations theory: each dominant power pursued a position that aligned with their security interests and altered their position as those security interests changed. There is some suggestion that the pressure applied by smaller states to the Soviet Union, in withholding consent, drove the Soviet Union to reconsider.[97] As a result, it was the US that neutral and Non-Aligned states coalesced behind. This is, in part, attributable to the reluctance of states to put forward proposals inconsistent with the preferences of a superpower, representing strategic self-interest on the part of smaller powers, whose connection to the space lawmaking process remained fragile and who therefore tactically employed cooperation as opposed to competition. It is also attributable to the successful persuasion of smaller states by the US, in providing acceptable normative justifications for their preferences as opposed to making material threats. The High Seas analogy was more consistent with the pervasive equality norms in the UN system, and as will be discussed in Section B, this made it the more permissible option to remaining states. Accordingly, we can situate UNCOPUOS within a collection of international norms and recognise the success of the US's legitimating justification in achieving their security preference.

2 *Consensus*

In the period following the acceptance of *Resolution 1721*, smaller states reaped the fruits of their labour. Now that the analogy for the legal character of

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[91] See Peterson (n 79) 255.

[92] See Columbia Law Review Association (n 80) 1079.

[93] *International Co-Operation in the Peaceful Uses of Outer Space*, GA RES 1721 (XVI), UN Doc A/RES/1721(XVI) (20 December 1961).

[94] Ibid para 1(b).

[95] Committee on the Peaceful Uses of Outer Space, *Union of Soviet Socialist Republics: Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space*, UN Doc A/AC.105/L.2 (10 September 1962) para 8.

[96] Peterson (n 75) 255.

[97] See ibid.

space was decided, it was to be determined how the overarching principles were to apply to specific situations of a distinctly 'space-like' character with implications for the rights of spacefaring states. In doing so, smaller states were able to pull the US (the Soviet Union had at this stage withdrawn from UNCOPUOS negotiations) towards a more communitarian definition of the 'commons' than it may have otherwise preferred, thus securing their position at the bargaining table.

At the time, it was the practice of auxiliary bodies of the UN General Assembly to self-select their decision-making procedure, and weighted or simple majority votes were commonplace.[98] Small powers were aware that if replicated in UNCOPUOS, the superpowers, with the support of their corresponding blocs, would be capable of controlling its functions. As such, in 1962, small powers successfully campaigned for the adoption of consensus decision-making procedures, with states thus agreeing that all promulgated agreements created under its auspices be mutually constituted.[99] As the lawmaking function of UNCOPUOS relied on the consent of member states, this agreement, as with any agreement relating to form and function, was non-binding.[100] Accordingly, several delegations took the position that the language of the *OST* should reflect a future commitment to consensus-building.[101] The notion of sovereign equality was a prevailing norm of key importance following the enactment of the *Charter of the United Nations* and the flurry of activity to follow, and accordingly, remained fresh in the mind of member states.[102] Thus, it was proposed that the *OST* would qualify the freedom to act in space with a requirement that any activity be carried out 'on a basis of equality' ('the provision').[103]

Recognising this as a 'red line' for small states, the US hinged their support for the provision on two key security preferences, threatening the relegation of the provision to the treaty's preambular paragraphs and thus depriving it of binding force.[104] First, on the question of demilitarisation, there was an appetite among Non-Aligned states to restrict the 'use' of space to exclusively peaceful

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[98] Louis B Sohn, 'Voting Procedures in United Nations Conferences for the Codification of International Law' (1975) 69(2) *American Journal of International Law* 310, 320–2.

[99] Eilene Galloway, 'Consensus Decisionmaking by the United Nations Committee on the Peaceful Uses of Outer Space' (1979) 7(1) *Journal of Space Law* 3, 7.

[100] Sohn (n 98) 311.

[101] Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, *Summary Record of the Fifty-Seventh Meeting*, UN GAOR, 5th sess, UN Doc A/AC.105/C.2/SR.57 (20 October 1966) 10.

[102] See, eg, Simpson (n 1).

[103] *Draft Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, the Moon and Other Celestial Bodies*, UN Doc A/AC.105/C.2/L.13 (16 June 1966) art 1. See also Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, *Summary Record of the Sixty-Third Meeting*, UN GAOR, 5th sess, UN Doc A/AC.105/C.2/SR.63 (20 October 1966) 5 ('*Sixty-Third Meeting*').

[104] The threat of relegation was communicated by Italy and India. Both Italy and India were aligned with the US-led negotiating bloc and were, therefore, verbalising collectively held negotiating positions: *Sixty-Third Meeting*, UN Doc A/AC.105/C.2/SR.63 (n 103) 3; Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, *Summary Record of the Sixty-Fourth Meeting*, UN GAOR, 5th sess, UN Doc A/AC.105/C.2/SR.64 (24 October 1966) 7 ('*Sixty-Fourth Meeting*').

purposes.[105] As alluded to, while it was not a priority of the US to pursue intercontinental rocket technology, the development of ballistic, particularly nuclear-equipped, weapons remained a central aspect of their security strategy, as was reconnaissance.[106] The use of orbital patterns and high-Earth atmosphere was considered essential to the proper functioning of these practices and thus too intrinsically linked to their security calculations to be sacrificed.[107] Accordingly, the US acceded to a departure from the ordinary language of the Treaty, which referred to space in its totality, limiting demilitarisation commitments to the surface of celestial bodies.[108] Second, many states sought further clarification on the extent to which exploitation could be considered a 'use' pursuant to art 1, going so far as to propose that any exploitation of space be centrally administered by an international body.[109] Recognising that any resource-based advantage that they held in terms of space exploration would be compounded in the field of exploitation, the US argued that the treaty was ill-equipped to deal with problems beyond 'the present stage of knowledge and development',[110] and thus questions relating to settlement and exploitation did not require priority treatment.[111] So, the US offered their support for the provisions' inclusion in the operative text, thus providing for conditions of international cooperation in space on the basis of equality.[112]

Accordingly, it is correct to assert that in real terms the existing distribution of capabilities and power among states prevailed in the conclusion of the *OST*. It would also be true to characterise the utilisation of conference diplomacy by smaller states as overachieving, in securing equal standing in an industry they had little to no hope of participating in. However, despite enshrining de jure sovereign equality into the *OST*, the terms of the arrangement were almost entirely dictated by the US. Utilising their superior material resources, the necessity that they participate in any legal regime seeking to regulate space and their concomitant influence, the US were able to extract privileges that guaranteed freedom of action and allowed them to continue space development unperturbed. On the one hand, establishing the commons represented a ceding of authority by the US to the international community: they would now need to persuade other states into accepting their position in future matters. On the other

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105 See, eg, Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, *Report of the Legal Sub-Committee on the Work of its Second Session (16 April – 3 May 1963) to the Committee on the Peaceful Uses of Outer Space*, UN GAOR, UN Doc A/AC.105/12 (6 May 1963) 3 [6].

106 Peterson (n 75) 252.

107 See ibid 253.

108 Committee on the Peaceful Uses of Outer Space, Legal Sub-Committee, *Summary Record of the Sixty-Fifth Meeting*, UN GAOR, 5th sess, UN Doc A/AC.105/C.2/SR.65 (24 October 1966) 9; *OST* (n 8) art IV.

109 *Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space*, UN GAOR, UN Doc A/4141 (14 July 1959) 69 [30] ('*Report of the Ad Hoc Committee*').

110 Ad Hoc Committee on the Peaceful Uses of Outer Space, Legal Committee, *Report under Paragraph 1 (d) of the General Assembly Resolution 1348 (XIII)*, UN GAOR, UN Doc A/AC.98/L.7 (27 May 1959) 8.

111 Paul G Dembling and Daniel M Arons, 'The Evolution of the Outer Space Treaty' (1967) 33 *Journal of Air Law and Commerce* 419, 422, quoting *Report of the Ad Hoc Committee* (n 109) 69 [30].

112 *Sixty-Fourth Meeting*, UN Doc A/AC.105/C.2/SR.64 (n 104) 6.

hand, it entrenched a system whereby the US retained a veto-like ability to prevent lawmaking antithetical to their interests.

Mirroring the regime discourse of neoliberal institutionalists, both the superpowers and smaller states compromised to coordinate relative gains. Realist expectations are indeterminate in predicting the complexion of this bargain. That being said, the above discussion of the *OST* provides an accurate illustration of the role of international institutions as conceived of by both realists and neoliberal institutionalists: international organisations are merely forums for the expression of power relationships.[113] While realists and neoliberal institutionalists may disagree on the value of cooperative strategy and the capacity of international institutions to provide solutions to complex coordination problems, they nonetheless agree on the role of institutions to channel state power, concern themselves with the maximisation of strategic gain and recognise that states use international institutions to signal their preferences. Therefore, international law borne from such institutions remains an epiphenomenal response to politics and power dynamics. Here, the competing interests of the three major negotiating coalitions ultimately converged around the position of a dominant power and its allies. As a result, a measure of sovereign equality was established, improving the position of smaller states relative to the former status quo and their negotiating rivals. Even so, the security interests of a dominant power were realised and their stranglehold over the resources of space development secured. Nevertheless, such classical theories are ill-equipped to ground an analysis of the garnering of consent as carried out by the US.

B *Why Multilateralism?*

This narrative, describing how the defining principle of the *OST* came to be, drawing a direct and exclusive link between power and the creation of law, ignores the socialising and legitimising effect of norms in an international system on hegemonic actors. Political power does not operate on its own, nor is it self-constitutive. Rather, it is wielded by actors, guided by the pursuit of preferences and with an understanding of both the material and normative conditions in which they operate. To reduce the *OST* to a function of political power is to ignore its historical and social context. At this point, realist and institutionalist theories of international relations lose their explanatory force and it becomes necessary to resituate the *OST* in its contemporaneous international system, pursuant to neo-Gramscian methodology.

As great powers, both the US and the Soviet Union harboured the material capabilities to pursue their respective space development goals and were endowed with sufficient resources to do so without reliance on the cooperation or support of other states. As Bruce Cronin suggests,

> [g]reat powers win wars and dominate the global economy. Leaders of hegemonic states thus often believe that they can convert their resources into preferred outcomes and therefore are more likely to pursue risky unilateral adventures.[114]

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[113] Cronin (n 21) 115.
[114] Ibid 112.

Consequently, some scholars have argued that US material capabilities allow it to stand outside the international community, granting it the accordant absolute autonomy (for reasons stemming from Soviet Cold War praxis, their lack of participation in late-stage negotiations of the *OST* render their role in norm socialisation less relevant to the ensuing discussion).[115] This belief, that hegemonic power entitles states to benefit from unequal rights would suggest that multilateralism is superfluous to hegemonic interaction with other states. This overlooks the relational component to hegemony, conceiving of the international system with only hegemonic states in mind. At the relevant time, the US was situated atop a hierarchical ordering of states in the Western liberal sphere and its subaltern periphery by virtue of those material resources, meaning they were inextricably dependent on the welfare of this system to maintain their position.[116] By this analysis, the adoption of the *OST* could be traced back to the creation of the 'West' at the end of the Second World War, which saw the subsumption of the Allied great powers and a smattering of subaltern states under the tutelage of the United States, a relationship grounded in the dominant ideology of free-market economic compatibility and liberal democracy.[117]

Maintenance of the hegemonic order in a pluralistic system requires both leadership in norm creation by the hegemon, for the purpose of legitimising that leadership, and the consent of the subordinated.[118] Therefore, regardless of material dominance, the hegemon remains entangled in the norms of the system and, accordingly, is 'constituted in such a way that they seek normative justification for their actions'.[119] It follows that a hegemonic state will seek to shape the standards of legitimacy towards the end of institutionalising their preferred norms. Here, multilateralism had become the standard form of international lawmaking, and its increasingly 'egalitarian' form presented a challenge to US dominance. The end of the colonial ordering of states and the accordant elevation of the nation-state as the primary unit of recognition by the international community brought with it the norm of self-determination.[120] With self-determination came sovereign equality. This, as well as the rise of the Soviet Union as a hegemonic challenger and the potential for the emergence of a hostile majority of developing states justified the institutionalisation of US leadership, to rationalise their material dominance in the form of the liberal world order.

Recognising this, foreign policy elites within the US State Department viewed the UN and its progressive development of international law as crucial to the hegemonic ordering of international relations.[121] In this regard, the UN and

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115 See, eg, Stephen G Brooks and William C Wohlforth, 'International Relations Theory and the Case against Unilateralism' (2005) 3(3) *Perspectives on Politics* 509.

116 See ibid 513.

117 Stephen R Gill and David Law, 'Global Hegemony and the Structural Power of Capital' (1989) 33(4) *International Studies Quarterly* 475, 478.

118 Brooks and Wohlforth (n 115) 517.

119 Hurd (n 27) 196.

120 This is a historical abridgement of an expansive subject. This should not obscure the ongoing practice of neo-colonialism. For further detail, see generally Gerry J Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32(2) *Stanford Journal of International Law* 255.

121 Johan Lindeque and Steven McGuire, 'The United States and Trade Disputes in the World Trade Organization: Hegemony Constrained or Confirmed?' (2007) 47(5) *Management International Review* 725, 727.

its auxiliary bodies were employed by US diplomacy as 'the machinery of organizing consent' and the mechanism to popularise their preferred norms in the resulting ordering of states.[122] Concerning space development, the US valued their freedom to act without interference from their hegemonic rivals and the international community. Rather than act unilaterally, the US responded to the disinclination of the Western liberal order to formally recognise hierarchy and took the multilateral route to protect that freedom against potential challenges.

So, unprompted, in 1958, the US asked the UN General Assembly to consider the future of the international regulation of space activity.[123] Then, leading an ad hoc coalition of states, the US introduced the first draft resolution calling for the establishment of UNCOPUOS.[124] In doing so, President Eisenhower spoke of the opportunity that was presented to the international community 'to control the future' of space exploration and asked the international community to allow the US to assume its role at the forefront of it.[125] This conduct reflects the US's understanding that exercising rule by means of international law and basing an institution on consensus decision-making rather than weighted voting might enhance its authority. Thus, by enveloping security preferences in norms of egalitarianism, the US was able to successfully articulate and entrench their chosen rules of conduct in space activity, with the effect of legitimising their future activities in space despite those activities representing a technological manifestation of material dominance. Importantly, the assumption of these norms by the US aided the persuasion of other states in favour of their preferred position.

It is necessary to reiterate that neo-Gramscian theory does not require legitimacy through consent to preclude the existence of coercive behaviour.[126] International organisations can be established through dictatorial tactics, and it often remains those tactics to which dominant powers revert in order to manufacture consent in the absence of organic agreement. Importantly, the discursive processes of negotiation and bargaining and the hegemon's construction of their image is centrally important. For example, while pressing to establish UNCOPUOS as a body comprising 18 members, of which 12 were states with which the US had military agreements, granting them an 'automatic majority', they couched such conduct in the promotion of equitable geographic and technical representation.[127] Moreover, they spoke of their 'good will and [a] desire for harmony'[128] and a belief in the representation of small powers in a properly functioning international community of states.[129]

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122 Cox, *Production, Power, and World Order* (n 13) 409.

123 See *Letter Dated 2 September 1958 from the Permanent Representative of the United States of America to the United Nations, Addressed to the Secretary-General*, UN GAOR, 13th sess, UN Doc A/3902 (2 September 1958).

124 *792nd Meeting*, UN Doc A/PV.792 (n 88) 617–18.

125 Dwight Eisenhower, 'Address by President Dwight Eisenhower to the UN General Assembly' (Speech, UN General Assembly, 22 September 1960).

126 Cox, 'Gramsci, Hegemony and International Relations' (n 19) 164.

127 *792nd Meeting*, UN Doc A/PV.792 (n 88) 616 [125], 618 [138].

128 Ibid 618 [137].

129 Ibid 617 [135].

These ideas permeated most of US diplomacy in the creation of the *OST*. Therefore, while it is also true that the coercive tactics discussed in the previous section were a reflection of the muscle provided by the US's superior material capacity and the power resources accorded as a result, they could be perceived by other states as part of an authentic pursuit of pluralism. In this sense, this process of conference diplomacy can be considered the dialectical socialisation of the international community to the preferred norms of the US. What resulted was the creation of a multilateral agreement that reflected universal values and fostered agreement, in the image of pluralism, thus justifying the future conduct of the hegemon and the vertical power relationships enabling it.

By reframing hegemony as the social relationship between states in a hierarchical system, in which the crucial element is the legitimation of power inequalities, we can better understand why the US chose to enter the multilateral arena when it came to their conduct in space.[130] Therefore, rather than solely being a power struggle based in materialism, the legislation of the commons, consensus decision-making and the freedom to act in space is revealed to be one of the systemic decisions made by a hegemon as part of a successful strategy of legitimation. As such, the conclusion of the *OST* reflects the management of conference diplomacy by the US, both in terms of material strength permitting the extraction of privileges and the utilisation of systemic norms to garner the consent of other states in the system.

IV The World Trade Organization

With the completion of the Uruguay Round of the *GATT*, an exercise of institution building with the participation of a majority of the world's economies saw the late 20th century trend towards the judicialisation of international law reach trade regulation.[131] These negotiations, resulting in the establishment of the WTO and spanning from the Uruguay Round's preliminary musings in 1982 to the adoption of a final text in Marrakesh in 1994, concerned a profusion of subjects ranging from technical formulaic ground rules to broad-principled approaches to trade liberalisation.[132] Necessarily, this discussion will confine its analysis to the negotiations' most salient accomplishment in the context of hegemony: the compulsory jurisdiction of the WTO's Dispute Settlement Mechanism ('DSM').

A *The DSM*

The WTO was conceived at the height of neoliberalism and renewed the *GATT*'s institutional commitment to the expansion of free trade with new stated objectives: the realisation of gains in aggregate welfare through trade liberalisation.[133] Its adoption saw the creation of a rules-based system for

[130] Cronin (n 21) 115.

[131] See, eg, Bernhard Zangl, 'Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO' (2008) 52(4) *International Studies Quarterly* 825.

[132] For a more detailed discussion of the range of topics considered, see generally Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27(1) *European Journal of International Law* 9.

[133] Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (Martinus Nijhoff Publishers, 2010) 20.

resolving trade disputes based on the equal rights and obligations of members, with sanctioned remedies for breach available to all successful complainants, representing a departure from a power-based system of self-help. As such, legalism and automaticity became legal characteristics of the international trade infrastructure, actively limiting the rights of sovereign states to pursue unilateral economic adjustments in addition to existing standards of non-discrimination, reciprocity and national treatment. In contrast to the previous case, the DSM was borne from institutional reform, as opposed to foundation. Given that we could conceive of its adoption as a kind of norm reinterpretation rather than norm creation, to better understand how negotiations resulted in judicialisation and the extent to which they were managed by dominant powers, it is necessary to understand not only the dispute settlement procedures of the WTO but also the regime out of which they emerged.

1 *Preconditions to Institutional Reform*

Despite a global recession, at the time of negotiations, the US had by far the most dominant economy and largely defined international economic practices. It occupied the largest share of global GDP and led numerous export markets, a pre-eminence in trade that was buttressed by the US dollar remaining the key global reserve currency.[134] It registered the largest number of multinational corporations in the world and accordingly its business practices were widely adopted. Simultaneously, the US had effective control over international economic governance as carried out by the International Monetary Fund ('IMF') and the World Bank, as the largest shareholder of both with the accordant de facto veto power, as well as informal sway over appointments to the Executive Board in the former and formal powers of appointment in the latter.[135] Therefore, in a material ordering of states, the US occupied the topmost position.

In its inception, the *GATT* was little more than a reciprocal agreement between states for the progressive reduction in tariffs, subject to most favoured nation and national treatment clauses and accompanied by series of exemptions.[136] 'Safety valves' allowed exemptions to protect important national industries, make balance of payment corrections, safeguard against sudden surges of imports and implement countervailing duties to compensate for another state's improper domestic interventions.[137] These corrective measures were intended to provide a mechanism to prevent distortions to competition while allowing scope for macroeconomic adjustment. In the case of a dispute, a panel was formed at the request of the aggrieved party and endowed with powers to review programs alleged to have a distorting effect on trade. *GATT* panel decisions were political; their entering into legal force required adoption by consensus of *GATT* members, giving the 'losing' party veto control. So, rather

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[134] See generally Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56(2) *International Organization* 339; Michael Mastanduno, 'System Maker and Privilege Taker: US Power and the International Political Economy' (2009) 61(1) *World Politics* 121.

[135] Leo Van Houtven, *Governance of the IMF: Decision Making, Institutional Oversight, Transparency, and Accountability* (Pamphlet Series No 53, August 2002) 11; Stephany Griffith-Jones, *Governance of the World Bank* (Report) 4.

[136] Howse (n 132) 14.

[137] Ibid 14, 16.

than be unbiased interpretations of law, *GATT* panel decisions often sought to craft a political solution most amenable to both parties.[138]

These practices permitted the US and their industrial partners to dominate the trade system under the *GATT*. The communist states were not members of the *GATT* during the Cold War, and despite decolonisation causing an increase in membership, developing states were critical of its practices and not considered full partners in decision-making.[139] Lower tariffs gave US exporters greater access to overseas markets, and the scope allowed for macroeconomic adjustments emboldened the US to coerce structural adjustments in developing countries, while a lack of effective enforcement allowed protectionist policies to flourish in domestic US economic practice.[140] Accordingly, the *GATT* functioned to perpetuate US dominance and reflected the attempt by the US to present their interests as the interests of the entire non-communist world. Therefore, along with their exaggerated influence in World Bank and IMF governance, the *GATT* formed part of a tripartite structure of global economic management enabling the US to 'administer the Bretton Woods Settlement as the economic component of the post-war American hegemony'.[141] Still, a lack of global membership and a dissensus among developing states as to the liberal goals of market freedom in pursuit of comparative advantage demonstrated that the US had failed to establish a discourse about trade beyond the horizons of the West.

2 *The Negotiations*

Beginning in the 1970s, the global economic system suffered a series of shocks, contributing to contortions in the international environment in which the US sought to maintain and extend hegemonic dominance. The collapse of the gold exchange standard, a global recession and stagflation harmed Western economies. The sufficiency of macroeconomic adjustments under the international trade system was challenged, and the Keynesian consensus gave way to a preference for monetary interventions.[142] Similarly, the debt crisis of the 1980s and the structural adjustment programs shouldered by developing countries opened new markets to world trade. At the same time, the Soviet Union began to seriously consider accession to the *GATT* and sought observer status.[143] Accordingly, the fragmentation of the world economy into communist and non-communist spheres attenuated, and what was once a close-knit community of interests within the *GATT* was exposed to more diverse preferences, providing the US an opportunity to project the specific interests of homogenous industrialised states into a worldwide politico-legal phenomenon.

So, following protracted negotiations, the US agreed to constraints on unilateralism and self-help, considering more effective dispute resolution

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138 Ibid 15–16.

139 Ibid 14. See also Derrick Purdue, 'Hegemonic Trips: World Trade, Intellectual Property and Biodiversity' (1995) 4(1) *Environmental Politics* 88, 92–3.

140 See generally Sarah Babb, 'The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates' (2005) 31 *Annual Review of Sociology* 199.

141 Purdue (n 139) 92.

142 Ibid 200.

143 The Soviets' attempt to join negotiations as decision-making partners or by observation was rebuffed, with the US citing 'fundamental, practical and philosophical variance' with *GATT* principles: Peter Naray, *Russia and the World Trade Organization* (Palgrave, 2001) 18.

procedures to be the machinery with which to extend and protect their dominance in the progressive elimination of the market barriers of other states.[144] Prior to agreement, negotiations were dominated by conflict between the US and the European Commission ('EC') over agricultural subsidies, given the EC's hesitation to put an end to their intranational oilseed subsidy regime.[145] This conflict both shaped US preferences and posed a barrier to unmediated diplomacy between the two parties. As such, a *GATT* panel was requested and decided in favour of the US claim that the subsidies were inconsistent with *GATT* obligations of the EC. A second panel found that the EC's attempts to bring oilseed subsidies into congruence with *GATT* rules failed to remedy the impairment in any material way. Regardless, the EC was able to block adoption of the second panel decision, leaving the US no sanctioned opportunity to remedy the injury to their domestic industries.[146] For this reason, US delegates insisted upon reform to dispute procedures, centred on the elimination of 'adoption by consensus'.[147] Simultaneously, US domestic politics was experiencing an ideological shift, and the emergence of the economic neo-right as the dominant political ideology both reframed and problematised the US's relationship with international trade restrictions. No longer preoccupied with the capacity for structural adjustment, the US was focused on the interventionist policies of rival states and sought to eliminate the competitive disadvantages that domestic industries suffered as a result.[148] As such, the US advocated compulsory dispute settlement in the form of the DSM, with the automatic adoption of decisions.[149]

Most negotiating parties agreed to strengthened judicial processes in the form of the DSM, seeking rule integrity.[150] Australia proposed to prohibit parties to a dispute from voting on the adoption of panel decisions; Hong Kong advocated for the formation of a new dispute settlement body to oversee participation of developing states; and a Swiss-Colombian joint submission suggested that arrangements should be made for the 'surveillance' of states to ensure compliance with *GATT* rules.[151] In general, despite emphasising the need for special consideration, developing states supported compulsory dispute resolution as it presented an opportunity for small traders to correct the violations of larger traders in an apolitical setting.[152]

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144 Howse (n 132) 18.

145 Kendall Stiles, 'Negotiating Institutional Reform: The Uruguay Round, the GATT, and the WTO' (1996) 2(1) *Global Governance* 119, 135. The European Commission ('EC') is the executive arm of the European Union.

146 Ibid. As a consequence of blocking adoption of the second panel decision, the EC was able to repudiate the first panel decision without remedial consequence, and thus continue their program of subsidisation.

147 Ibid 131.

148 See generally Thomas Palley, 'From Keynesianism to Neoliberalism: Shifting Paradigms in Economics' in Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: A Critical Reader* (Pluto Press, 2005).

149 Stiles (n 145) 124.

150 Ibid 129.

151 Ibid 129–30.

152 Jane Ford, 'A Social Theory of Trade Regime Change: GATT to WTO' (2002) 4(3) *International Studies Review* 115, 132.

Nonetheless, the EC opposed the strengthening of dispute procedures including modification of the consensus rule, for several reasons beyond conflict with the US. Empirically, they were less successful at achieving positive outcomes from *GATT* panel decisions and felt they had more to lose than other industrialised states.[153] Further, decision-making by the EC required unanimity, and, given the disparate preferences of state members, this made the collective implementation of a *GATT* panel report problematic.[154]

Therefore, on the matter of consensus, the Uruguay ministerial meetings produced a deadlock. To resolve the stalemate, a significant majority of states coalesced behind a conciliatory proposal from Mexico: the automatic adoption of panel reports unless rejected by a consensus of members.[155] However, the EC was unwilling to abandon their right to reject a panel decision by withholding consent, and both the Uruguay and Montreal ministerial meetings passed without agreement.[156] In 1988, the US took matters into their own hands and passed the *Omnibus Trade and Competitiveness Act* (‘*Act*’).[157] The Act granted the US executive a mandate to retaliate unilaterally against claims of unfair practice of other states, vesting enforcement authority with the Office of the United States Trade Representative along with a proactive responsibility to identify protectionist measures and respond accordingly.[158] As such, the US sought to force the hand of the EC, demonstrating that their superior economic strength was a direct threat to the trade practices of protectionist states through aggressive sanctions and that they were willing to operate outside a multilateral framework if their preferences were not actualised. The result was a shift in the language of *GATT* negotiations; no longer was the abstract question of whether to strengthen the DSM at issue, but rather how much strengthening would cause the US to abandon their unilateral approach. Accordingly, ‘[i]f the strategy of Congress was simply to give notice to trading partners that they faced serious consequences for failure to liberalize their policies, the ploy was remarkably successful’.[159] The EC capitulated under the threat of retaliatory action by the US, and rapid agreement followed.[160] Grounding their support for the negative consensus rule upon the deterrence of US unilateralism, the EC signed on to Mexico’s proposal, and a strengthened DSM was enshrined in the WTO foundational treaty.[161] Demonstrably, US economic predominance permitted the mobilisation of coercion in negotiations, with the effect of managing outcomes.

3 *Consequences for Hegemonic Ordering*

For proponents of a rules-based international system, the strengthened dispute mechanisms of the WTO could be interpreted as a limitation on US power in the

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153 Lindeque and McGuire (n 121) 734–6.
154 Stiles (n 145) 132.
155 Ford (n 152) 132–3.
156 Robert L Paarlberg, ‘How Agriculture Blocked the Uruguay Round’ (1992) 12(1) *The SAIS Review of International Affairs* 27.
157 *Omnibus Trade and Competitiveness Act of 1988*, Pub L No 100–418, 102 Stat 1107.
158 Ibid §1601.
159 Stiles (n 145) 136.
160 Ibid 136–7, 145.
161 Ibid 138.

form of a legalised organisation where all parties carry equal rights and obligations.[162] Recognising this, and given the US's preponderance of material resources, neoliberal institutionalists would imbue the US and their activity in negotiation with instrumental rationality. Accordingly, the cessation of absolute autonomy as to internal economic decisions in favour of international governance may be a considered sacrifice to achieve alternative aims. Certainly, the key US foreign policy goals of free trade in goods and services, freedom of investment and free circulation of capital are progressively realised due to repetitive claims of unfair practice and the resulting enforcement of decisions. In this sense, the DSM exhibits a regulatory function in providing predictability and minimising repeated negotiations with other states, lowering transaction costs.

That being said, the DSM maintains plenty of room for the unilateral exercise of power. In requiring conciliation prior to the formation of a panel, powerful states maintain the advantage over smaller states that could be expected in minilateral or bilateral forums.[163] Further, the enforcement of decisions does not require the rolling back of the injurious policy. Instead, the complaining state is entitled to enact countermeasures to repair the damage to their domestic industry, assuming that the resulting economic cost will motivate the state in breach to reform their practice. However, powerful economies are often capable of 'weathering the storm' and maintaining their competition-distorting policies for long-term advantage.[164] Accordingly, realist suppositions about the freedom from restraint granted to states with a preponderance of material resources may be validated.

This analysis fails to capture the distinctive value of the WTO and its DSM to the US as it was so conceived at the time of its instrumentalisation. The DSM cannot be extracted or understood as distinct from an international trade system structured by US-centric rules, norms and practices. If rationales for state behaviour are limited to the consequences of coercion or self-interest, the subsumption of subaltern states to a trade system in which they can be dominated

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[162] While outside the scope of a consideration of the mechanism by which consent is garnered from subaltern states in the institutionalisation of international law, it is necessary to acknowledge that the US and several of their northern allies have become dissatisfied with the operations of the DSM such that its Appellate Body has entered a state of dysfunction. Mark Daku and Krzysztof J Pelc note that, while the rules of the DSM might provide a prima facie advantage to developing states, they create conditions for the exercise of power in the margins, thus granting dominant states a de facto advantage. They conclude that dominant states might not win an overwhelming number or even a majority of cases but nonetheless succeed in imbuing DSM determinations with their preferred language with consequences for a disproportionate influence over the WTO's knowledge production functions. That being said, they allude to the growing influence of China, as well as smaller states including Thailand and Argentina, and the limitations placed upon the exercise of coercive control as influences on dominant power dissatisfaction with the mechanisms they created through techniques of hegemony. For further commentary on the tools with which power is wielded in the DSM at present and an empirical study of DSM outcomes, see generally Mark Daku and Krzysztof J Pelc, 'Who Holds Influence over WTO Jurisprudence?' (2017) 20(2) *Journal of International Economic Law* 233; Lindeque and McGuire (n 121) 726.

[163] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') art 3(7).

[164] See Zangl (n 131) 847.

can only be understood as a function of material inequality. There is an element of this: powerful states can game the system while weaker states are subject to continued challenges against protectionist practices. The result is a structurally determined system based on hierarchical relations, with the US occupying the hegemonic position. But a focus on material resources ignores the role of authority. The expansion of world trade to include numerous new states made US dominance increasingly precarious, in terms of US capacity to exercise sufficient relational power to coerce compliance from the breadth of trade participants.[165] As such, it was necessary that they establish a credible ideological basis for action, the successful legitimation of which became essential to maintaining their ontological security and the stability of the system.[166] The extension of the free-market argument in conventional economics to world trade represents this legitimation. Where the *GATT* lacked deep integration and failed to establish worldwide hegemonic authority, the WTO does just that. Free trade is rationalised through an organisation that by virtue of its broad membership and equality of access to dispute resolution espouses communitarian practices. Thus, the US wields authority by participating in a collectively and consensually mandated institution and can simultaneously enforce their interests and champion international law. Simply put, ideological values cannot become embedded into the practice of a wide range of systemic actors by top-down instruction. Participation of all trading states in the DSM causes values to become horizontally integrated, as all states can engage the DSM in their self-interest (provided that self-interest aligns with the values predetermined by US leadership in establishing the forum). Therefore, WTO principles of non-discrimination, most favoured nation and trade liberalisation, carried forth from the *GATT*, are internalised, not due to the preponderance of material resources held by the US but by the horizontal process of legitimisation.

B *The Role of Developing States*

The introduction of many new states to the Uruguay Round could have substantially altered the course of negotiations with consequences for the resulting multilateral instrument, weighting the balance of states away from US majority rule. That they did not speaks to the growing consensus around trade liberalisation and market economics from the former non-member states.

To best understand the role of developing states in the conference diplomacy that led to the establishment of the WTO and its DSM, it is necessary to return to the conception of hegemony as a condition in which the supremacy of one social group is instrumentalised through the consensual submission of another social group. Neo-Marxist theories of international relations are regularly mischaracterised and maligned as overly dependent on economic and material analysis; this is certainly true of the discourse surrounding the role of developing

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[165] See Philip G Cerny, 'Dilemmas of Operationalizing Hegemony' in Mark Haugaard and Howard H Lentner (eds), *Hegemony and Power: Consensus and Coercion in Contemporary Politics* (Lexington Books, 2006) 67, 76.

[166] Hurd (n 27) 204.

states in WTO negotiations.[167] These critiques then explain the turn to neoliberalism of developing states by conceiving of the trade system as a structure of collectively shared ideas about trade in which states are constituted as actors.[168] Thus, by entering the system, states are socialised to its ideas at their will. While it is true that the socialising effect of ideas aids in the establishment and stability of hegemony, this interpretation understates the extent to which these ideas are actively mobilised by dominant states as a tool of subjugation and the extent to which material conditions are weaponised as an instrument of coercion. As noted previously, Marx, Gramsci and their contemporaries have always been as concerned with the ideational structures of dominance as with the economic structures that perpetuate class domination.[169] The material circumstances of a subjugated class include social relations between themselves and with the dominant classes, and the physical means of production. Accordingly, the system of domination is upheld only by the consent of the subjugated classes. We can therefore conceive of the role of developing states in this instance as the performance of a social role, contributing to an environment in which the interests of the industrialised states are transferred to universal institutions.

Just prior to the commencement of the Uruguay Round, the anti-free trade identity of developing states began to erode. Governments of developing states had begun the process of integrating formerly isolated economies with global markets, formerly state-owned industries were privatised, financial markets liberalised and foreign investment welcomed.[170] Accordingly, where developing states had once argued for non-market measures in international trade regulation, they now embraced the market form of economic management. Clearly, the adoption of neoliberal trade norms led developing states to have greater involvement in negotiations than they would have had with their policy of non-participation. Accordingly, while they did not have a transformative effect on the outcome of the negotiations, they were able to exert some influence over its direction. It is generally observed that developing interests were best served in drawing attention to the protectionist policies of industrialised states, rather than attempting to carve out exemptions from themselves.[171] As such, mutual self-restraint became a defining characteristic of WTO negotiations, and developing states were able to effectively demonstrate that it was, in fact, industrialised states that were hampering the process of liberalisation. Developing states were further effective in the agenda-setting stage of negotiations,[172] garnering a commitment from the ministerial conference that negotiations would consider

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[167] See, eg, Ford (n 152); Surendra Bhandari, *World Trade Organisation (WTO) and Developing Countries: Diplomacy to Rules Based System* (Deep and Deep Publications, 1998); Pretty Elizabeth Kuruvila, 'Developing Countries and the GATT/WTO Dispute Settlement Process' (1997) 31(6) *Journal of World Trade* 171; Colleen Hamilton and John Whalley, 'Evaluating the Impact of the Uruguay Round Results on Developing Countries' (1995) 18(1) *World Economy* 31.

[168] Ford (n 152) 116.

[169] See, eg, Daniel R McCarthy, 'The Meaning of Materiality: Reconsidering the Materialism of Gramscian IR' (2011) 37(3) *Review of International Studies* 1215.

[170] Ford (n 152) 136.

[171] Ibid 131.

[172] Ibid 126.

the nature of 'special and differential' obligations for developing states.[173] Initially, developing states pressured for alternate procedural rules in the review and enforcement of disputes.[174] Realising that substantive exemptions to dispute settlement were incompatible with aggressive trade liberalisation, developing states abandoned this approach, believing that the new rules redistributed influence within the WTO to countries with fewer material resources.[175] Ultimately, they were able to secure the graduated implementation of WTO rules and a non-binding suggestion that industrialised states provide preferential treatment.[176] Even so, their greatest impact was in their support for the strengthened dispute mechanisms of the WTO. In adopting the norms of the hegemon, developing states were essential in the transformation of global trading culture, but at the cost of effective oppositional tactics and with the consequence of the deferral of decision-making authority to the industrialised states.

This assessment of the behaviour of developing states must be qualified with the knowledge that the turn to trade liberalisation was not unburdened from the influence of industrial states and particularly the US. The preference shift can, in part, be attributed to the structural adjustment programs all but forced on developing states following the debt crisis of the 1980s by the IMF and the World Bank.[177] Here, the US used their authority in both institutions to have US development lending refinanced in the form of conditional and prohibitive transnational structures, which demonstrates the ability of a hegemon to manipulate material conditions of subaltern states as a form of management. So, the acquiescence that a successful hegemonic project produces cannot meaningfully be called agreement; such is the nature of consent in hegemonic structures.

Nonetheless, in adopting the norms of the hegemon, developing states were absorbed into the trade system and its hierarchical structures, not by physical force, but by consensual submission. Accordingly, the global acceptance of neoliberal ideology and the project of trade liberalisation can be seen as the establishment of a particular epistemological discourse or the institutionalisation of a superstructure that is expressed in universal norms, institutions and mechanisms that dictate the rules of behaviour.

V CONCLUSIONS

As this article has sought to reiterate, hegemony is not the same as the coercive dominance of one state in a system. So, hegemonic management of conference diplomacy cannot be understood singularly as the coercive

173 Ibid 123.

174 Ibid 131–2.

175 Ibid 133.

176 *GATT* (n 11) art XXXVI.

177 This is an abridgement of an expansive subject, to which entire disciplines of study are dedicated. It is intended here to qualify the meaning of consent pursuant to neo-Gramscian study of international relations. Additionally, we could address the benefits of trade liberalisation to elite classes in developing states as a motivator for preference formation. See generally David Williams, *The World Bank and Social Transformation in International Politics: Liberalism, Governance and Sovereignty* (Routledge, 2008); Kate Bayliss, Ben Fine and Elisa Van Waeyenberge (eds), *The Political Economy of Development: The World Bank, Neoliberalism and Development Research* (Pluto Press, 2011).

imposition of the will of a dominant state on the other states occupying that system. Instead, it is something much more. Essential to the practice of hegemony is the function of consent. So, an accounting of the various coercive practices mobilised by hegemons and the examples of norm socialisation in any given system fails to capture the particular function of the manufacturing of consent through conference diplomacy. Rather, the two must be conceived of as mutually constituted in such a way that subaltern states consent to the instrumentalisation of a global system that does not necessarily reflect their interests. Through the social relationships developed through conference diplomacy, a hegemonic state may transform the standards of legitimacy in a given system, stabilising their pre-eminence and restricting counter-hegemonic challenge.

Accordingly, the dominance (in terms of material inequality) of one state is not enough to explain how either the *OST* or WTO emerged to disproportionately reflect the interests of the US and their Western compatriots. Instead, conference diplomacy in the production of multilateral instruments facilitates the convergence of the power of the state and the processes of socialisation mediating its expression. As seen in both cases, socialisation works to limit the range of acceptable conduct and confine the development of international law to popularly accepted normative limits. Simultaneously, by demonstrating leadership in norm creation, socialisation is operationalised by dominant states to secure legitimacy and therefore entrench the prevailing hierarchy among states.

In the case of the *OST*, the US (and to a lesser extent the Soviet Union) was constrained by the notion of sovereign equality: a norm of juridical equality between states proliferating within contiguous international organisations. Therefore, international space governance was necessarily going to reflect similar norms if it was to be considered legitimate by the international community. Recognising this, in accepting procedural constraints, the US were carrying out a successful strategy of legitimation. Yet, the brute material advantage of the US and the Soviet Union, each holding a preponderance of space resources (which encompassed the military, economic and technological), meant that not only could the normative predilections of the international society of states be mechanised for legitimacy, but power itself could be wielded in negotiations for favourable results. The entire operation of international space governance is dependent on the participation of the space powers, and for this reason they succeeded in espousing their preferred legal standards. Here, we return to the text of the *OST*. While its language reflects communitarian ideals of freedom, equality and consensus, it places almost no material constraints on states active in space. The US is free to use space for security purposes. Material sharing obligations are non-existent, and thus to exercise their vested freedom to act in space, states must develop their own domestic space industry: an industry characterised by its barriers to entry. Meanwhile, the space prowess of the superpowers exponentially improves, and unilateral space development is normalised.

The WTO's dispute settlement procedures emerged from contrasting normative conditions: the previous *GATT* system reflected ideologies favourable to US economic preferences. However, confronting potential challenges to their

hegemonic dominance and given the opportunity to envelop new actors into a global trade system, the US pursued a more radical form of trade liberalisation that better reflected the dominant domestic ideology. Consequently, the Caesarism of the US in persuading states of the value of trade liberalisation, coupled with coercive structural adjustment programs, led to the espousal of embedded trade liberalisation in WTO structures, with the establishment of the DSM geared towards eliminating market barriers. Developing states secured a concession in the gradual application of provisions, approval for which was conditioned on supporting the dispute procedures. Similarly, developing states played a conciliatory role in resolving conflict between the US and the EC in proposing compromises in consensus practices and giving weight to US preferences. As with the *OST*, US preferences were couched in equality rhetoric, as establishing an enforceable dispute mechanism represented a move to juridical legalism in lieu of former power-based resolution practices. Yet, this rhetoric was mobilised to create a system in which US dominance was maintained and their economic access to international markets improved and entrenched.

The pattern that emerges as to the relationship of dominant states and the institutionalisation of international law is the bifurcation of great power management of conference diplomacy. A preponderance of resources endows a state with influence and strength to be employed towards the extraction of special privileges. Concomitantly, norms and ideologies are deployed to represent the parochial interests of the dominant power as the universal interests of international society, thus legitimising and stabilising the hegemonic system. In sum, power and legitimacy are mutually constitutive and together create conditions facilitating the expansion of the dominant economic and social forces. Therefore, while we may rightfully praise the negotiations of subaltern states in securing relative gains in each case, we cannot separate those gains from the hegemonic system in which they were won.