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Assessing the Potential Impact of Emerging Powers on the International Order Through an Appraisal of their Engagement with International Law: The Case of Brazil

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Assessing the Potential Impact of Emerging Powers on the International Order Through an Appraisal of their Engagement with International Law

The Case of Brazil

A thesis in fulfilment of the requirements for the degree of

Doctor of Philosophy

Roberta Chardulo Dias de Andrade

UNSW
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Abstract

Interest by scholars of International Relations in global power transitions is perhaps as old as the discipline itself and has given rise to a rich body of literature. A recent line of enquiry in this literature has been whether the increasing international clout of non-Western states, including Brazil, China, and India, will lead to a strengthening or weakening of the existing international order. It is widely recognised in the literature that international law has been integral to the liberal international order. However, little attention has been paid to how rising powers have engaged with international law in a way that considers the specific detail of the law and with what implications for the international political order. This dissertation argues that such an omission has resulted in analyses of rising powers that are at best incomplete, as they have tended to downplay the extent to which international law has been integral to the distribution of power in the liberal international order. They have therefore also paid insufficient attention to the ways in which changing interpretations of international law can affect the global distribution of power, and vice versa. Drawing on the Theory of International Law as Ideology as developed by Shirley Scott and using the case of Brazil, it demonstrates that the nature of a rising power's engagement with specific provisions embedded in international law can in fact serve as a useful indicator of whether it is effectively strengthening or undermining the international order. The dissertation employs a comparative and interpretative methodology to investigate the nature of Brazil's engagement with international law through the example of two of the country's most celebrated diplomatic initiatives: the United States – Subsidies on Upland Cotton dispute initiated in 2002 in the World Trade Organisation and the 'Responsibility while Protecting' proposal presented to the United Nations Security Council in 2011. Overall, the findings of this dissertation indicate that the implications for the international order of the diplomatic initiatives taken by rising powers may be more significant but also more nuanced than has so far been assumed and lead us to question the usefulness of the dichotomous characterisation of a state as either revisionist or status quo.

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Abstract

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To all who have helped me, I dedicate this thesis to you.

Table of Contents

List of Acronyms and Abbreviations

AMS	Aggregate Measure of Support
BASIC	Brazil, South Africa, India, and China
BRIC	Brazil, Russia, India, and China
BRICS	Brazil, Russia, India, China, and South Africa
CBDR	Common but Differentiated Responsibilities
CCC	Corporate Credit Corporation of the United States
CSC	Cognitive Structure of Cooperation
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECOSOC	Economic and Social Council of the United Nations
EC	European Communities
EU	European Union
FSC	Foreign Sales Corporation
G20-Finance	Group of 20 Finance Ministers
G20-T	Group of developing countries formed during Doha Round
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSM-102	General Sales Manager 102
GSM-103	General Sales Manager 103
GSP	Generalised System of Preferences
IBRD	International Bank for Reconstruction and Development
ICISS	International Commission on Intervention and State Sovereignty
ILI	International Law as Ideology
IMF	International Monetary Fund
ITO	International Trade Organisation
LDCs	Least-Developed Countries
MFN	Most-Favoured Nation
MTN	Multilateral Trade Negotiations
NATO	North Atlantic Treaty Organisation
NIEO	New International Economic Order

OECD	Organisation for Economic Cooperation and Development
OTC	Organisation for Trade Cooperation
QR	Quantitative Restriction
R2P	Responsibility to Protect
RwP	Responsibility while Protecting
SCGP	Special Credit Guarantee Programme
SCM	Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
USDA	United States Department of Agriculture
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WSOD	World Summit Outcome Document
WTO	World Trade Organisation

List of Tables

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Note on Sources

The analysis undertaken in this dissertation is primarily one of treaty interpretation and of interpretation of other primary documents in relation to those treaties. It is therefore a document-intensive analysis. The volume of documents consulted means that attaching all primary documents as appendices to this dissertation is not feasible. This note clarifies where key documents consulted throughout this analysis can be located.

- *Treaties and agreements*

All treaties and agreements consulted in this dissertation can be found online and the hyperlinks are provided in the first footnote entry for each treaty.

- *Telegrams, memorandums, and other historical documents*

The hyperlinks for all historical documents are provided in the footnote entries for each source. Documents accessed through the *Foreign Relations of the United States* series are identified in each footnote entry by their number and the number of the series, with hyperlinks also provided.

- *Documents pertaining to the United States – Subsidies on Upland Cotton dispute*

These documents can be accessed on the WTO website through the WTO's document search engine by using the document symbol 'WT/DS267' – https://docs.wto.org/. The full documents of Brazil's first and second submission to the Panel are not available online and were obtained through the Brazilian Government's information access system (Sistema de Acesso à Informação) available to Brazilian citizens. Scanned copies of the documents are on file with the author. Summaries of these documents can, however, be accessed through the WTO's document search engine using the document symbol 'WT/DS267'. All submissions made by the United States to the Panel and the Appellate Body can be found on the United States Trade Representative's website and the hyperlinks are provided in the first footnote entry for each source.

- *Documents pertaining to the Responsibility while Protecting initiative*

The 'Responsibility while Protecting' Concept Note can be found on the United Nations website and the hyperlink is provided in the first footnote entry for the document. Hyperlinks for speeches and statements by, *inter alia,* government officials of Brazil as well as other countries are provided in the footnote entries for each source. Security Council and General Assembly

documents can be found in the United Nations website and the hyperlink is provided in the first footnote entry for each document.

PART ONE

INTRODUCTION

This dissertation is an inter-disciplinary study of the phenomenon of rising powers and current global power shifts and is situated at the intersection of International Relations and International Law. Studies on global power transitions have long been an integral part of the agenda of International Relations scholars, and more recently the emergence of non-Western states such as Brazil, China, and India as more influential players in global politics and governance has yielded a rich body of literature. It has been common for scholars to ask whether these states are seeking to integrate into and uphold the existing international order, arguably led by the United States and the West, or whether they are seeking to overturn it and develop alternative orders. The debate has focused on the implications of rising powers for the liberal international order. Existing studies of rising powers have, however, generally eschewed analysing the engagement of rising powers with international law.

This dissertation seeks to provide a more nuanced and balanced account of rising powers by proposing that the nature of their engagement with international law can be a useful indicator of the potential impacts of rising powers on the liberal international order. It seeks to do so by adopting a post-positivist theoretical framework developed by Shirley Scott, namely the Theory of International Law as Ideology, that accounts for the centrality of international law to the existing international order, that reconciles law to politics and power, and that is external to the International Law discipline whilst still allowing for an understanding of international law as a variable in its own right. The particular case of Brazil is used to demonstrate that a perspective that takes into account the engagement of rising powers with international law adds nuance to the existing debate by shedding fresh light on the sheer complexity of current global power transitions in a way that has not been fully teased out before. This dissertation also establishes a basis upon which the engagement of other rising powers with international law can be investigated.

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1.

Outlining the Task

1.1 Rising powers and implications for the liberal international order

That the existing international order is currently undergoing a process of power and normative transition is hardly contested today.[1] Over at least the last two decades, the growing global clout of so-called rising or emerging powers, the most notable of which have generally been assumed to be the BRICS countries,[2] namely Brazil, Russia, India, China, and South Africa, has attracted considerable attention from scholars of International Relations. These countries have come to be, jointly and individually, increasingly instrumental players in debates on issues of global governance, including climate change, humanitarian intervention and responsibility to protect (R2P),[3] international trade regulation, and the reform of international institutions.[4]

According to Andrew Hurrell, these predominantly non-Western states 'share a belief in their entitlement to a more influential role in world affairs'.[5] This has been expressed time and again by the BRICS countries themselves. In a joint statement in Brasilia in 2010, for example, these states claimed to 'share the perception that the world is undergoing major and swift changes that

[1] See, e.g., Matthew D. Stephen and Michael Zürn, "Rising Powers, NGOs, and Demands for New World Orders," in *Contested World Orders: Rising Powers, Non-Governmental Organisations, and the Politics of Authority Beyond the Nation-State,* eds. Matthew D. Stephen and Michael Zürn (Oxford: Oxford University Press, 2019); John J. Mearsheimer, "Bound to Fail: The Rise and Fall of the Liberal International Order," *International Security* 43, no. 4 (2019): 7–50; G. John Ikenberry, "Why the Liberal Order Will Survive," *Ethics & International Affairs* 32, no. 1 (2018): 17–29; Edward Newman and Benjamin Zala, "Rising Powers and Order Contestation: Disaggregating the Normative from the Representational," *Third World Quarterly* 39, no. 5 (2018): 871–888; Matthew D. Stephen, "Emerging Powers and Emerging Trends in Global Governance," *Global Governance* 23, no. 3 (2017): 483–502.

[2] The term BRICs was first coined by Goldman and Sachs economist, Jim O'Neill, who predicted the increasing international influence of Brazil, Russia, India, and China due to their high economic growth rates. Upon the addition of South Africa, the group became known as the BRICS. See, Fabiano Mielniczuk, "BRICS in the Contemporary World: Changing Identities, Converging Interests," *Third World Quarterly* 34, no. 6 (2013): 1075. Without seeking to judge the merits, or lack thereof, of such a grouping of countries, this dissertation refers to the BRICS simply for the sake of simplicity.

[3] See, e.g., Oliver Stuenkel, "The BRICS and the Future of R2P: Was Syria or Libya the Exception?," *Global Responsibility to Protect* 6, no. 1 (2014): 3–28; Andrew Garwood-Gowers, "The BRICS and the Responsibility to Protect in Libya and Syria," in *Shifting Global Powers and International Law: Challenges and Opportunities,* eds. Rowena Maguire, Bridget Lewis and Charles Sampford (Abingdon, Oxon: Routledge, 2013), 81–99.

[4] Leslie E. Armijo and Cynthia Roberts, "The Emerging Powers and Global Governance: Why the BRICS Matter," in *Handbook of Emerging Economies*, ed. Robert E. Looney (New York: Routledge, 2014), 504.

[5] Andrew Hurrell, "Hegemony, Liberalism and Global Order: What Space for Would-Be Great Powers?," *International Affairs* 82, no. 1 (2006): 2.

highlight the need for corresponding transformations in global governance in all relevant areas'.[6] More recently, after a meeting at the margins of the G20 Summit in Osaka, Japan in June 2019, BRICS leaders highlighted in a joint statement their role as the main drivers of economic growth over the last decade and stressed the urgent need for reform of global governance institutions, including the World Trade Organisation (WTO) and the International Monetary Fund (IMF), to reflect this reality.[7] It is, indeed, now difficult to conceive of negotiations on major international issues without taking into account the views and interests of those countries. Amrita Narlikar suggests:

> That both the aspirations of rising powers and their visions of global order are taken seriously is evident not only in the bilateral deals that major powers have signed with them but also in the attempt to integrate them at the heart of some of the mechanisms of global governance.[8]

Hurrell argues, however, that these states 'have all historically espoused conceptions of international order that challenged those of the liberal developed West'.[9] This has led to a significant debate in International Relations and related disciplines as to what the future of the existing structures of global governance will look like as a result of the rise of new powers. As Stephen and Parízek have noted, for example, while it is clear that rising powers such as China, India, and Brazil have 'shifted the distribution of international power, the implications of this shift for the global political and economic order are the subject of debate.'[10] Scholars have considered, *inter alia*, how to define the foreign policy orientation of these predominantly non-Western states, whether rising powers are revisionist in nature, and to what extent and how their emergence may affect the existing liberal international order, arguably dominated by the United States and its Western allies.

1.1.1 Has the rising powers debate moved on?

The fast pace with which international politics unfolds at times renders the study of contemporary events a risky endeavour. This has certainly been the case with the so-called rising powers; while a decade ago their rise was hailed as a virtually inevitable state of affairs, more recently their

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[6] BRIC, "Communique from BRIC Summit," *Communique.* Brasília, Brazil, 15 April 2010, http://www.reuters.com/article/brics-statement-idUSN1513243520100416.
[7] BRICS, "Joint Media Statement at the BRICS Informal Leaders' Meeting on the Margins of the G20 Summit," *Press Release*. Osaka, Japan, 27 June 2019, http://www.itamaraty.gov.br/pt-BR/notas-a-imprensa/20556-reuniao-informal-de-lideres-do-brics-a-margem-da-cupula-do-g20-comunicado-conjunto-de-imprensa-osaka-28-de-junho-de-2019. Author's translation.
[8] Amrita Narlikar, "Negotiating the Rise of New Powers," *International Affairs* 89, no. 3 (2013): 562.
[9] Hurrell, "Hegemony, Liberalism and Global Order," 3.
[10] Matthew D. Stephen and Michal Parízek, "New Powers and the Distribution of Preferences in Global Trade Governance: From Deadlock and Drift to Fragmentation," *New Political Economy* (2018): 1.

relevance in international politics, and the relevance of studying rising powers, has been increasingly questioned. As Andrew Hurrell has noted, the story of the decline of the West and the rise of the rest has seemingly not unfolded as it had been predicted and deep economic and political crises in many of the rising powers has led some to conclude that 'the story has ended and that it was much ado about nothing.'[11] According to Suzanne Nossel, the world's rising powers have simply fallen and the position of the United States as the 'indispensable nation' has remained largely unscathed.[12]

The real challenge to the liberal international order seems now to come from within the system itself. As Hurrell has again noted, '[t]he spread of backlash politics and populist nationalism and the specific rhetoric and policies of the Trump administration place the primary challenge to the existing global order at the centre of the system.'[13] Where, then, does this leave us? A possible conclusion would be that the rising powers debate has simply moved on and that the focus of scholars and foreign policy analysts should now be directed exclusively towards threats stemming from those states at the system's core. This dissertation, however, takes the position that 'such a conclusion is profoundly mistaken', as advanced by Andrew Hurrell himself, [14] and that if we are going to understand with some level of nuance and clarity current power transitions and changes to the existing global order, wherever they may stem from, it is necessary to maintain focus on the foreign policy orientations of the emerging world. There are at least two compelling reasons for this.

First, although it is true that several rising powers, including the BRICS states, have experienced recent economic and political crises, scholars largely agree that the 'distribution of power in the international system has already been fundamentally altered since the 1990s'.[15] As Matthew Stephen highlights, for example, in the G20, the economies in gross domestic product (GDP) terms of Organisation for Economic Co-operation and Development (OECD) and non-OECD members are now evenly split and so '[t]he attention currently lavished on stalling growth in emerging markets is a sign of their importance for the global economy, not their peripherality.'[16] Whether the main threat to the international order stems from the US and UK or from another

[11] Andrew Hurrell, "Beyond the BRICS: Power, Pluralism, and the Future of Global Order," *Ethics & International Affairs* 32, no. 1 (2018): 90.
[12] Suzanne Nossel, "The World's Rising Powers Have Fallen," *Foreign Policy,* 6 July 2016, https://foreignpolicy.com/2016/07/06/brics-brazil-india-russia-china-south-africa-economics-recession/
[13] Hurrell, "Beyond the BRICS," 91. Miles Kahler has similarly suggested that the greatest threat of international order stagnation comes from the established powers themselves, more specifically the United States and United Kingdom. Miles Kahler, "Global Governance: Three Futures," *International Studies Review* 20, no. 2 (2018): 239 – 246.
[14] Hurrell, "Beyond the BRICS," 92.
[15] Stephen, "Emerging Powers and Emerging Trends," 486.
[16] Stephen, "Emerging Powers and Emerging Trends," 487.

source, it is still unfeasible to think of the future of global governance without taking into account emerging powers. Their preferences and foreign policy orientations, therefore, do matter.

Second, while the United States has been by and large the primary leader as well as beneficiary of the existing international order, it is not enmeshed with that order. In other words, the United States 'does not embody that order; it has a relationship with it,'[17] which has been characterised by positive leadership though not dominance. A retreat by the United States from its leadership position in the international order, therefore, has been argued by some authors to be likely to leave open a global leadership vacuum.[18] While it might be much too simplistic to conceive of this as a simple leadership shift from one country to another, it seems likely that a retreat from the United States will simply fuel attempts by rising powers to play even stronger roles in global governance institutions. A prime example of this can in fact be observed in the WTO, where withdrawal of American leadership for the multilateral trading system has coincided with and arguably led to increased leadership by emerging countries such as Brazil, China, and India. Less support from the United States for the existing international order, therefore, means that we should be paying more, not less, attention to the emerging world and the nature of its relationship with the international order.

1.2 Literature review

If we are going to situate the current debate on rising powers within a broader body of research, it would be most appropriate to place it within that which concerns global power transitions more generally. International power transitions have long been a focus of scholars of International Relations, with E. H. Carr,[19] A. F. K Organski,[20] and Robert Gilpin,[21] but a few examples. While debates about power transitions have traditionally been dominated by scholars of the realist school of International Relations, the rise of non-Western states more recently has been investigated by scholars of different theoretical traditions, most notably, neoliberal institutionalism and constructivism. Different theoretical assumptions and methodologies adopted by scholars have not only led to different questions being asked of the rise of new powers but have also meant that

[17] Ikenberry, "Why the Liberal Order Will Survive," 20.
[18] See, e.g., James F. Paradise, "China's Quest for Global Economic Governance Reform," *Journal of Chinese Political Science* 24 (2019): 471–493; Astrid H. M. Nordin and Mikael Weissmann, "Will Trump Make China Great Again? The Belt and Road Initiative and International Order," *International Affairs* 94, no. 2 (2018): 231–249; Hal Brands, "The Unexceptional Super Power: American Grand Strategy in the Age of Trump," *Survival* 59, no. 6 (2017): 7–40.
[19] E. H. Carr, *The Twenty Years' Crisis, 1919 – 1939: An Introduction to the Study of International Relations* (London: Macmillan, 1951).
[20] A. F. K. Organski, *World Politics* (New York: Alfred K. Knopf, Second Edition, 1968).
[21] Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981).

authors have gone about answering such questions in different ways; hence, yielding different conclusions.

The more recent literature on rising powers has, therefore, been largely heterogenous. In this literature, it has been most common for authors to devote attention to answering whether rising powers are seeking to integrate into the existing international order (making them status quo powers) or to overturn it and develop alternative global governance structures (making them revisionist powers).[22] An equally important, and perhaps broader, question has been what the implications of rising powers might be for the liberal international order. This is the facet of the rising powers debate with which this dissertation is concerned. In attempting to answer these questions, scholars have necessarily taken a stance on the meaning of power, the nature of rising powers' preferences and interests, and how these interests and preferences are defined. Before moving on to surveying the existing scholarship, it is useful briefly to consider the particular branch of this literature concerned with definitions and to situate within it the position adopted in this dissertation.

1.2.1 On definitions: who are the rising powers and how do we identify them?

In attempting to investigate shifts in international power dynamics, scholars of International Relations have necessarily had to address the problems that come with dealing with the concept of 'power'. Those scholars have, indeed, devoted considerable attention to deciphering the idea of power and have questioned how to define it, what constitutes it, and what kind or dimension of power is necessary for a country to rise to great power status in international relations. According to Barton et al, '[w]hile there is some consensus that power should be defined as the ability to get others to do what they otherwise would not do, measurement is another problem'.[23]

It has been common for IR scholars to draw on the work of historian Paul Kennedy, most notably his book *The Rise and Fall of Great Powers*, where Kennedy argues that a state needs both economic and military power in order to be considered a great power.[24] Other ways of measuring power have been offered, for example, by the National Intelligence Council of the United States through their Multi-Component Global Power Index, where different aspects of power, such as 'GDP, population size, military spending, and technology' are considered to forecast the growth

[22] See, e.g., John J. Mearsheimer, "The Gathering Storm: China's Challenge to US Power in Asia," *The Chinese Journal of International Politics* 3, no. 4 (2010): 381–396; G. J. Ikenberry, "The Rise of China and the Future of the West," *Foreign Affairs* 87, no. 1 (2008): 23–37; Miles Kahler, "Rising Powers and Global Governance: Negotiating Change in a Resilient Status Quo," *International Affairs* 89, no. 3 (2013): 711.
[23] John H. Barton et al., *The Evolution of the Trade Regime: Politics, Law and Economics of the GATT and the WTO* (New Jersey: Princeton University Press, 2006), 10.
[24] See, Paul Kennedy, *The Rise and Fall of Great Powers* (London: Random House, 1987).

of a state in terms of power.[25] Other authors have deemed non-material sources of power to be an important, though not the sole, determining factor of a state's position in the international order.[26]

It is, nonetheless, perhaps fair to say that no agreement has yet been reached among IR scholars as to what kind or dimension of power is necessary for a state to rise in international relations,[27] leading Gian Luca Gardini to pose in 2016 the following questions:

> What is an emerging power and what attributes define it? The emergence or rise is from what to what? Also one may wonder when the rise in fact culminates in the status of internationally accepted great power, provided that it is possible to circumscribe and identify such a category.[28]

In the most recent literature, rising or emerging powers have generally been identified to be states that are placed outside or on the margins of the multilateral institutions and structures that constitute what Hurrell has called the 'Greater West'[29] and that have aspirations to shape the international order.[30] Stefan Schirm has identified rising powers as states that 'articulate a wish to change the distribution of power in the international system and to assume leadership roles in global governance'.[31] According to Harold Trinkunas, this desire to alter international power dynamics is precisely what distinguishes emerging or rising powers from middle powers, the latter of which are seen to be generally content with the status quo.[32] In this dissertation, therefore, Brazil, China, India, and, perhaps to a lesser extent, South Africa are considered to be emerging or rising powers.

1.2.2 The general framing of the rising powers debate

Let us now review the existing literature on whether rising powers are status quo or revisionist and whether they are likely to undermine or uphold the liberal international order. In doing so,

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[25] United States National Intelligence Council, *Global Trends 2030: Alternative Worlds*, December 2012, 17, https://globaltrends2030.files.wordpress.com/2012/11/global-trends-2030-november2012.pdf.
[26] See, e.g., Joseph S. Nye, *The Powers to Lead: Soft, Hard, and Smart* (Oxford and New York: Oxford University Press, 2008).
[27] Barton et al, for instance, suggest that measurements of power are contingent upon a specific context: 'But in a specific negotiating context, like trade negotiations, in which only some dimensions of power are likely to be brought to bear, the measure of power must be more tailored'. See, Barton et al., *The Evolution of the Trade Regime*, 10.
[28] Gian Luca Gardini, "Brazil: What Rise of What Power?," *Bulletin of Latin American Research* 35, no. 1 (2016): 7.
[29] Hurrell, "Hegemony, liberalism and global order," 3.
[30] See, e.g., Harold Trinkunas, *Brazil's Rise: Seeking Influence on Global Governance* (Washington, DC: Brookings Institution, April 2014), 5, https://www.brookings.edu/wp-content/uploads/2016/06/Trinkunas-Brazils-Rise.pdf; See also, Gardini, "Brazil: What Rise of What Power?," 7.
[31] Stefan A. Schirm, 'Leaders in Need of Followers: Emerging Powers in Global Governance', *European Journal of International* Relations 16, no. 2 (2010): 198.
[32] Trinkunas, "Brazil's Rise," 5.

we will pay particular attention to how the debate has been framed by scholars within the three main theoretical schools of International Relations that have thus far engaged in this debate, namely realism/neorealism, neoliberal institutionalism, and constructivism.[33]

Rising Powers as a Threat to the Liberal International Order

Largely informed by considerations of power and security, realist and neorealist scholars have taken the anarchical structure of the international system as the key determinant of the interests and actions of rising states, which are expected to seek to increase their (material) power in order to challenge the rules laid out by the US and the West and to 'pursue alternative visions of world order'.[34] Stressing the Hobbesian character of the international order, Stewart Patrick has suggested that, historically, power shifts have led to conflict and tension and therefore the rise of new powers is expected to result in increasing instability.[35] Similarly, referencing the rise of China, John Mearsheimer has argued that as 'survival is a state's most important goal', rising powers will likely attempt to maximise their power internationally, leading to friction and potentially war as already established states would attempt to contain such changes in power dynamics.[36] As such, to some scholars 'eras of power transition present a heightened risk of conflict, as incumbents react to stave off relative decline in the face of confident challengers'.[37] As highlighted by Melissa Conley Tyler and Michael Thomas, according to this perspective, the rise of these states will lead to an unstable multipolar system and this is, in fact, their joint goal.[38]

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[33] While one might voice reservations about categorising the literature as such, not least because many of the arguments developed in this body of literature are more nuanced than any sort of camp categorisation might express, this approach is adopted here for the simple purpose of highlighting and ordering the major themes that have emerged from each broad camp and their primary weaknesses.

[34] Amrita Narlikar, cited in Oliver Stuenkel and Matthew M. Taylor, "Brazil on the Global Stage: Origins and Consequences of Brazil's Challenge to the Global Liberal Order," in *Brazil on the Global Stage: Power, Ideas, and the Liberal International Order,* eds. Oliver Stuenkel and Matthew M. Taylor (New York: Palgrave Macmillan, 2015), 7. Note here that Narlikar does not seem to hold this position herself, but simply highlights the position of realist and neorealist scholars.

[35] Stewart Patrick, "Irresponsible Stakeholders? The Difficulty of Integrating Rising Powers," *Foreign Affairs* 89, no. 6 (2010): 45.

[36] John J. Mearsheimer, "China's Unpeaceful Rise," *Current History* 105, no. 690 (2006): 160–161. Within the structural realist (or neorealist) theoretical tradition a distinction can be drawn between offensive and defensive realists, the former claiming that the anarchical nature of the international system leads states to attempt to maximise power and the latter maintaining that the primary goal of states in an anarchical system is to maximise security, which leads states to adopt predominantly defensive strategies. By this distinction, Mearsheimer would be placed in the offensive realism category. While this distinction is acknowledged here, it will not be delved into further it has been primarily offensive realists who have engaged in the current rising powers debate. For a distinction between offensive and defensive realism in relation to rising powers, see Steven E. Lobell, "Realism, Balance of Power, and Power Transitions," in *Accommodation Rising Powers: Past, Present, and Future,* ed. T. V. Paul (Cambridge, UK: Cambridge University Press, 2016): 33–52.

[37] Kahler, "Rising Powers and Global Governance," 711.

[38] The basic arguments made by scholars who claim that rising powers are a threat to the liberal international order is aptly summarised by Conley Tyler and Thomas, though their focus is primarily on the BRICS as a

Others have argued that rising powers are 'irresponsible stakeholders' as, while they are happy to challenge the political and economic institutions of the existing order, they are not prepared to take on the global responsibilities that are required of rising powers.[39] Former Mexican Foreign Minister Jorge Castañeda has maintained that the attitude of the five BRICS countries towards human rights and democracy, for example, is indicative that they are not ready for a 'prime time' role on the international stage, calling them 'neophytes whose participation in international institutions may undermine progress toward a stronger international legal order'.[40] As highlighted by Conley Tyler and Thomas, persistent vetoes by Russia and China, and abstentions by Brazil, India, and South Africa on Security Council resolutions authorising intervention in Syria to deal with humanitarian crisis has been seen by some commentators as evidence that these rising powers are unable to shoulder the responsibilities of great powers.[41]

Other authors have argued that some rising powers, in particular Brazil, China, and India, are advocating an alternative economic model to the one already in place.[42] They are seen to employ, for instance, policies that favour protectionism and state intervention 'rather than relying on self-regulated market growth'.[43] China's policies, for example, are commonly argued to be a clear 'violation of the norms underpinning the international financial system.'[44] This alleged disregard by emerging powers for key principles and beliefs of Western liberalism has led some authors to interpret the rise of new powers as posing a threat to the liberal international order.

Rising Powers as Likely to Integrate into a Heavily Institutionalised and Rules-Based International Order

On the other side of the spectrum and perhaps providing a more optimistic view of the future, some scholars have argued that whilst power transitions are still 'fraught with danger' they need not necessarily lead to war or to a complete overturn of the existing order.[45] Susanne Gratius, for instance, has suggested that the inclusion of emerging powers like Brazil, China, India, and South Africa in the 'world's elite' will probably take place without a traumatic overturn of the

group and not necessarily as individual states. Melissa Conley Tyler and Michael Thomas, "BRICS and Mortar(s): Breaking or Building the Global System?," in *The Rise of the BRICS in Global Political Economy*, eds. Vai Io Lo & Mary E. Hiscock (Cheltenham: Edward Elgar, 2014), 254–258.

[39] See, e.g., Patrick, "Irresponsible Stakeholders?," 44. See also, Jorge G. Castañeda, "Not Ready for Prime Time: Why Including Emerging Powers at the Helm Would Hurt Global Governance," *Foreign Affairs* 89, no. 5 (September-October 2010): 109–122.

[40] Castañeda, "Not Ready for Prime Time," 122.

[41] Conley Tyler and Thomas, "BRICS and mortar(s)," 258.

[42] Kahler, "Rising Powers and Global Governance," 713.

[43] Chin and Thakur cited in Kahler, "Rising powers and global governance," 173.

[44] Conley Tyler and Thomas, "BRICS and mortar(s)," 256.

[45] Ikenberry, "The Rise of China," 26–27. See also, G. John Ikenberry and Thomas Wright, *Rising Powers and Global Institutions: A Century Foundation Report* (New York: The Century Foundation, 2014).

established world order.[46] She further suggests that 'the international system is both complex and contradictory at the same time' and, as such, the world is not a static place and scenarios often predicted by realists and their 'neo' counterparts 'tend to be off the mark'.[47] This perspective on the rising power debate, mostly though not solely informed by neoliberalism and liberal institutionalism, takes into account the particular institutional character of the current order as an important variable determining the preferences of rising powers and the nature of their rise.

Perhaps the most notable body of work in the liberal institutional camp is that by Princeton scholar G. John Ikenberry. In attempting to answer the question as to whether rising powers are likely to undermine or strengthen the liberal international order, Ikenberry has long contended that the heavily institutionalised and rule-based character of the existing order makes it mutually advantageous for both established and rising powers to maintain existing structures of global governance.[48] He suggests that, whilst there are different factors influencing how a rising power engages with the international order, such as their position within a given regime or their level of satisfaction with the order, an even more decisive factor 'is the character of the international order itself – for it is the nature of the international order that shapes a rising state's choice between challenging that order and integrating into it'.[49] Ikenberry highlights that the liberal international order is underpinned by a 'durable infrastructure' that includes 'a sprawling array of international institutions, regime, treaties, agreements, protocols, and so forth',[50] which makes it 'hard to overturn and easy to join'.[51]

Of course, not all scholars from the neoliberal institutionalist tradition predict the future to be as optimistic and straightforward as Ikenberry. Matthew Stephen, for instance, whilst emphasising the institutionalised character of the liberal international order, maintains that because rising powers are unlikely simply to accept existing rules of global governance, they are rendering parts of it 'dysfunctional, layering onto it and complicating it'.[52] At the same time, however, he maintains that rising powers are working within the international order and not seeking to

[46] Gratius does not include Russia in her analysis, as she does not consider it to be an emerging power. Rather, she argues that it was a once great power that is now in decline. See, Susanne Gratius, "The International Arena and Emerging Powers: Stabilising or Destabilising Forces?" (working paper, Peace and Security Programme, FRIDE, 2008), 7, https://www.researchgate.net/profile/Susanne_Gratius/publication/228386802_The_international_arena_and_emerging_powers_stabilising_or_destabilising_forces/links/0046352e109be610dd000000/The-international-arena-and-emerging-powers-stabilising-or-destabilising-forces.pdf.
[47] Gratius, "The International Arena and Emerging Powers," 1
[48] See, e.g., Ikenberry, "The Rise of China and the Future of the West," 23–37; G. John Ikenberry, "The Future of the Liberal World Order," *Foreign Affairs* 90, no. 3 (2011): 56–62; Ikenberry, "Why the Liberal World Order Will Survive," 17–29. Miles Kahler makes a similar point. Kahler, "Rising Powers and Global Governance," 711.
[49] Ikenberry, "The rise of China," 27.
[50] Ikenberry, "Why the Liberal World Order Will Survive," 19–20.
[51] Ikenberry, "The rise of China," 24; Ikenberry, "Why the Liberal World Order Will Survive," 17–29.
[52] Stephen, 'Emerging Powers and Emerging Trends," 490.

overthrow it, as some realists might predict.[53] In another study, Matthew Stephen and Michal Parízek adopt a preference-based approach and draw on the particular example of the WTO to suggest that, while it is almost a given that power dynamics within the WTO have fundamentally changed due to the rapid economic growth of states like Brazil, China, and India, 'this will only generate conflict to the extent that their preferences diverge from those of established powers'.[54] Stephen and Parízek, therefore, take not only the preferences of rising powers themselves, but also, and most importantly, those of established powers as the key determinant of whether conflict will ensue from current changes in global power distribution.[55]

Notwithstanding the different conclusions reached by those scholars that emphasise the centrality of international institutions to the international order and thus to the rise of new powers, one central feature that links their work is the assertion that, contrary to the views of realist and neorealist scholars, institutions play a significant role in shaping the interests and preferences of rising powers and, hence, in shaping outcomes in an ever-changing international system.

Rising Powers as Norm Entrepreneurs and Shapers

The third perspective, perhaps more focused on process as indicative of outcomes rather than predictions, has approached the rising powers debate from an angle that accounts for the engagement of these states with the international order in a normative sense. Rather than simply trying to determine whether rising powers will seek to overturn or integrate into the existing order, these scholars, mostly informed by the constructivist theoretical tradition and placed at the boundary of positivism and post-positivism, have sought instead to highlight the ways in which rising powers have engaged in processes of norm entrepreneurship and contestation.[56] This approach is based on the basic argument that, as Tim Dunne and Sarah Teitt have put it,

> Understanding global power shifts requires more than adopting bipolar framings in which new world powers are represented either as compliant partners or spoilers—rather, we make the case for a constructivist analysis of the complex processes of adaptation and resistance among the major powers in the system.[57]

[53] Stephen, "Emerging Powers and Emerging Trends," 490.
[54] Stephen and Parízek, "New Powers and the Distribution of Preferences," 6.
[55] Stephen and Parízek, "New Powers and the Distribution of Preferences," 1–24.
[56] See, e.g., Suraj Jacob, John A. Scherpereel, and Melinda Adams, "Will Rising Powers Undermine Global Norms? The Case of Gender-Balanced Decision-Making," *European Journal of International Relations* 23, no. 4 (2017): 780–808.
[57] Tim Dunne and Sarah Teitt, "Contested Intervention: China, India, and the Responsibility to Protect," *Global Governance* 21, no. 3, (2015): 372.

Cristina Stefan has, similarly, argued for the need to 'advance scholarship that explores how non-Western agents shape norms within the structures of the "liberal international order"'.[58] She has done so by highlighting Brazil's role as a norm shaper in the context of debates on R2P and the use of force for protection purposes. Other authors have, similarly, sought to demonstrate by different methodologies the ways in which rising powers are playing a more central role in the development, shaping, and reforming of norms of global governance and with what implications.[59] Jamie Gaskarth has, for example, analysed how Brazil, China, and India have sought to challenge and reframe the notion of responsibility in light of debates about Security Council reform, while Kenkel and Destradi have sought to explain why and how Brazil and India have contested norms concerning humanitarian intervention.[60]

Constructivist and norms scholars have, therefore, tended to characterise the debate on rising powers and current global power transitions in terms of a process of contestation over, and resistance to, existing and emerging international norms, whereby rising powers are increasingly reluctant to be seen as simply norm 'takers' and seek greater authority over the shaping of norms in international politics.[61] Those scholars have, nonetheless, not eschewed making assessments about potential consequences to the existing international order of increasing norm contestation brought about by the rise of new powers. Jacob et al have, for example, traced the gender of ambassadors sent by certain countries both to rising and established powers to conclude that the rise of China and India may be impacting the entrenchment of the 'global gender-balanced decision-making norm and progressive global norms more broadly.'[62] In *Post-Western World: How Emerging Powers Are Remaking Global Order,* Oliver Stuenkel suggests that the increasing engagement of rising powers in processes of norm contestation and shaping will eventuate in an international order that is, as the name of his book suggests, inherently post-Western.[63]

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[58] Cristina G. Stefan, "On Non-Western Norm Shapers: Brazil and the Responsibility while Protecting," *European Journal of International Security* 2, no.1 (2017): 91.
[59] See, e.g., Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta, and Bruce Jones, "A Hesitant Rule Shaper?," in *Shaping the Emerging World: India and the Multilateral Order,* eds. Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta, and Bruce Jones (Washington, DC: Brookings Institution, 2013), 3–21; Kai M. Kenkel and Marcelle T. Martins, "Emerging Powers and the Notion of International Responsibility: Moral Duty or Shifting Goalpost?," *Brazilian Political Science Review* 10, no. 1 (20160: 1–27; Mathilde Chatin, "Brazil: Analysis of a Rising Soft Power," *Journal of Political Power* 9, no. 3 (2016): 369–393; Marco Vieira, "Rising States and Distributive Justice: Reforming the International Order in the Twenty-First Century," *Global Society* 26, no. 3 (2012): 311–329; Stuenkel, "Brazil and Responsibility to Protect," 375–390.
[60] Kai M. Kenkel and Sandra Destradi, "Explaining Emerging Powers' Reluctance to Adopt Intervention Norms: Normative Contestation and Hierarchies of Responsibility," *Revista Brasileira de Política Internacional* 62, no. 1 (2019): 1–20.
[61] See, e.g., Oliver Stuenkel, *Post-Western World: How Emerging Powers Are Remaking Global Order* (Cambridge: Polity Press, 2016).
[62] Jacob, Scherpereel, and Adams, "Will Rising Powers Undermine Global Norms?," 780–808.
[63] Oliver Stuenkel, *Post-Western World*.

An emerging perspective within this camp has called for greater attention to be devoted to a distinction between contestation by rising powers over normative structures underpinning the liberal international order and contestation over the representativeness of international institutions. Andrew Hurrell has, for instance, pointed to a distinction between questions raised by rising powers in relation to procedural and representative legitimacy, on the one hand, and those in relation to international norms, on the other, albeit suggesting that the two have often been blurred by rising powers themselves.[64] Edward Newman and Benjamin Zala have perhaps gone further by criticising the general tendency by scholars in the existing literature to conflate challenges by rising powers to the dominance by Western states of global governance institutions with challenges to 'the deeper "collective expectations about proper behaviour for a given identity"'; only the latter, they argue, constitutes true normative contestation.[65] For Newman and Zala, however, 'contestation over representation' seems much more clearly indicative of the aspirations of rising powers than genuine normative contestation and, thus, may be better suited to understanding the nature of current global power transitions.[66] That being the case, the authors suggest, 'the prospects for peaceful accommodation [of emerging powers] are much better.'[67]

Overall, by accounting for the engagement of rising powers with normative structures, this perspective places emphasises on the power of ideas and ideational structures as key variables in socio-political processes and highlights how these sustain the existing global order. In doing so, constructivists and norm theorists not only recognise the fluid and normatively (as opposed to structurally) contingent nature of a rising power's interests and preferences but also highlight the agency of rising powers in shaping the very ideas that underpin international relations.

1.2.3 The missing piece: accounting for the engagement of rising powers with international law

The primary normative system in the international order is that of international law. Ian Hurd has, for example, suggested that the 'international rule of law is often seen as a centrepiece of the modern international order'[68] and has become the very 'language of foreign policy and international affairs'.[69] G. John Ikenberry has similarly contended that,

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[64] Hurrell suggests that '[a]ny self-respecting realist would expect these states to use the normative potential of the system to increase their power and legitimacy'. Andrew Hurrell, "Power Transitions, Global Justice, and the Virtues of Pluralism," *Ethics & International Affairs* 27, no. 2 (2013): 198–199.
[65] Edward Newman and Benjamin Zala, "Rising Powers and Order Contestation: Disaggregating the Normative from the Representational," *Third World Quarterly* 39, no. 5 (2018): 874.
[66] Newman and Zala, "Rising Powers and Order Contestation," 875.
[67] Newman and Zala, "Rising Powers and Order Contestation," 883.
[68] Ian Hurd, "The International Rule of Law: Law and the Limits of Politics," *Ethics & International Affairs* 28, no. 1 (2014): 39.
[69] Ian Hurd, "The Empire of International Legalism," *Ethics & International Affairs* 32, no. 3 (2018): 269.

> The postwar Western order has an unusually dense, encompassing, and broadly endorsed system of rules and institutions. Whatever its shortcomings, it is more open and rule-based than any previous order. State sovereignty and the rule of law are not just norms enshrined in the United Nations Charter. They are part of the deep operating logic of the order.[70]

The international law-based character of the international order is reflected in the considerable increase in emphasis on international law, in both quantitative and qualitative terms, to address international problems since the end of the Second World War.[71] Scott suggests that '[p]erhaps the most obvious characteristic of the international legal system in the US era has been its sheer size, not only in terms of participating states, but also in terms of the amount of law and the topics it addresses'.[72] This has led some authors to point to the growing 'legalisation of world politics'[73] as a key feature of the existing international order established by the United States and its Western allies.[74] It follows from this argument that, because the existing 'political order is dependent on the law […] the changes that take place in international law will constitute the basis of this new world order'.[75]

If, then, we accept that the law-based character of the international order itself shapes the rise of new powers and that ideas do have normative power and are key variables in the course of international relations, as suggested by liberal institutionalist and constructivist scholars respectively, it is at least curious – if not outright surprising – that, despite the extensive character of the existing literature, little attention has been paid to assessing the engagement of rising powers with international law. It is true that some scholars, mostly situated within the liberal institutionalist camp, have sought to assess the engagement of rising powers with norms and rules as they relate to international institutions[76] and have taken account of the complex and contingent

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[70] Ikenberry, "The rise of China," 27.
[71] Shirley V. Scott, *International Law in World Politics: An Introduction* (Boulder/London: Lynne Rienner, 2017), 129.
[72] Shirley V. Scott, "Looking Back to Anticipate the Future: International Law in the Era of the United States," in *Shifting Global Powers and International Law: Challenges and Opportunities,* eds. Rowena Maguire, Bridget Lewis, and Charles Sampford (Abingdon, Oxon: Routledge, 2013), 16.
[73] Scott, "Looking Back to Anticipate the Future," 17.
[74] While it is recognised here that the system of international law well precedes United States' hegemonic leadership, the argument developed here is based on the idea that 'the enormous expansion of international law, both qualitatively and quantitatively, and of a ruled-based approach to the conduct of foreign relations has been very influenced by US leadership.' See, Scott, *International Law in World Politics*, 1.
[75] Muthucumaraswamy Sornarajah, "The Role of the BRICS in International Law in a Multipolar World," in *The Rise of the BRICS in Global Political Economy*, eds. Vai Io Lo & Mary E. Hiscock (Cheltenham: Edward Elgar, 2014), 291
[76] For different analyses of the engagement of rising powers with norms and rules as aspects of institutions, see, e.g. Matthew Stephen, "Rising Regional Powers and International Institutions: The Foreign Policy Orientations of India, Brazil and South Africa," *Global Society* 26, no. 3 (July 2012): 289–309; Ikenberry and Wright, "Rising powers and global institutions;" Kahler, "Rising Powers and Global Governance."

relationship between these rules and institutions and changes in 'the rise and fall of state power', to borrow Ikenberry's words.[77] However, much less attention has been paid to analysing the engagement of rising powers with international law as a variable in its own right, that is, in a way that pays attention to specific legal detail.

For a debate that seeks to assess the potential impacts of rising powers on the liberal international order, this seems a significant omission. This is the case most basically because it downplays the extent to which the specific legal detail embedded in the system of international law has been integral to perpetuating and legitimising a particular normative and power status quo and may, as such, not only be contested by rising powers with significant consequences for global order, but also determine the extent to which rising powers will choose to work within the existing order in the first place.[78] Scott illustrates this point by suggesting that, more than simply constituting the "rules of the game", international law determines how easy or difficult it might be for a rising power to insert and assert itself as a key player in the international order:

> It was not only the complexity of the institutionalization of the international order, but the specific legal provisions that constitute the framework of that order, that have determined the extent to which China has to date chosen to work within the current order. Most fundamentally, every international organization has a multilateral treaty as its constitutive foundation, and the specific provisions of that treaty – both its substantive provisions and those addressing the operation of the organization – membership, voting rights, treaty amendment and so on, are integral to the ensuing political dynamics. As such, they could be expected to facilitate, or indeed to stymie, the ambitions of a rising power.[79]

Constructivist scholars, on the other hand, particularly those concerned with the dynamics of norm development, while highlighting the centrality of norms to the international order, have tended to treat political and legal norms as having much the same weight. However, '[i]f one is conceptualising the power of ideas then it seems inadequate to treat as equivalent the components of documents with a range of legal status'.[80] Indeed, it would be reasonable to suggest that a normative challenge by a rising power to the political norm of R2P, for example, would be

[77] Ikenberry, "Why the Liberal World Order Will Survive," 20.
[78] This idea is developed by Scott in an unpublished manuscript that considers whether international law has facilitated the rise of China. Shirley V. Scott, "The Role of International Law in Facilitating the Rise of China," (unpublished manuscript).
[79] Shirley V. Scott, "The Role of International Law in Facilitating the Rise of China" (unpublished manuscript).
[80] Shirley V. Scott, *The Political Interpretation of Multilateral Treaties* (Leiden: Martinus Nijhoff, 2004), 11. See, also, Shirley V. Scott and Roberta C. Andrade, "Sovereignty as Normative Decoy in the R2P Challenge to the Charter of the United Nations," *Global Responsibility to Protect* 11, no. 2 (2019): 203ff.

fundamentally less significant than a challenge to a legal norm such as, say, the Article 2(4) prohibition on the first use of force embedded in the Charter of the United Nations.

Where scholars have attempted to make an explicit connection between the subject of rising powers and international law, they have done so primarily from within the International Law discipline itself. Legal scholars have tended to focus on examining the ways in which the rise of new powers might impact the international legal system. Some authors, for example, have argued that the rise of China, India and other Asian countries will bring international law to an 'Asian Century',[81] while others have maintained that the system of international law will become more 'selective'.[82] Other authors, such as Eric Posner and John Yoo, have considered how international law may be applied to future conflicts that may arise due to shifting power dynamics, especially between the United States and China.[83]

The merits of these assessments notwithstanding, the tendency in the International Law discipline has been for scholars to analyse potential changes to international law brought about by changes in power dynamics as an end in itself, without generally seeking to ascertain potential *political* ramifications that may ensue. This may very well be attributed to the inability of international lawyers to grasp 'the uneasy relationship that has long existed between power and international law'.[84] Authors writing from within the legal discipline have, thus, tended to account for international law as distinguishable from, and superior to, international politics. As suggested by Scott, however, the 'questions asked by political scientists are not the same as those asked by international lawyers; legal questions are themselves part of the subject matter that is the object of a political analysis of international law'.[85] A political question of international law must, therefore, be answered from a position that is external to the legal discipline.

It must be noted, however, that a few authors within the International Law discipline have attempted to account for the political implications of the engagement of rising powers with international law, a notable example being Rowena Maguire, Bridget Lewis and Charles Sampford's edited collection called *Shifting Global Powers and International Law.* However, and stemming perhaps from the very nature of edited collections, the type of analysis and level of

[81] David P. Fidler, 'The Asian Century: Implications for International Law," *Singapore Yearbook of International Law* 9 (2005): 19–35. See also, Onuma Yasuaki, *A Transcivilisational Perspective on International Law* (Leiden and Boston: Martinus Nijhoff, 2010).
[82] See, e.g., Paul B. Stephan, "Symmetry and Selectivity: What Happens in International Law When the World Changes," *Chicago Journal of International Law* 10, no. 1 (2009): 91–123.
[83] Eric A. Posner and John C. Yoo, "International Law and the Rise of China," *Chicago Journal of International Law* 7, no. 1 (2006): 1–15.
[84] William W. Burke-White, "Power Shifts in International Law: Structural Realignment and Substantive Pluralism," *Harvard International Law Journal* 56, no. 1 (2015): 2.
[85] Scott, *The Political Interpretation of Multilateral Treaties*, 6.

attention devoted to the engagement of rising powers with specific legal provisions of international law, and the political implications of this, varies in each chapter. Andrew Garwood-Gowers, for instance, offers an analysis of the attitude of the BRICS states towards the emerging R2P principle through an investigation of the voting pattern of these states in the Security Council with relation to resolutions on Syria and Libya,[86] whilst R. Mohamad considers the activity of the BRICS in the International Criminal Court.[87]

Perhaps most attentive to the political implications of the engagement of emerging states with specific legal provisions is Rowena Maguire's chapter considering the rise of Brazil, South Africa, India and China – often termed the 'BASIC states' – within the climate change regime.[88] Maguire considers the centrality of the common but differentiated responsibilities (CBDR) principle to the existing climate change regime and explores the attitude of the BASIC nations towards this principle as well as other legal provisions contained in the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol. Despite the usefulness of Maguire's chapter, the fact that it is one of the few that comes close to fulfilling the task at hand in an entire volume is only illustrative of the lack of literature placing a systematic focus on the engagement of rising powers with international law in a way that not only takes into account specific legal detail but that is also able to determine the implications of such engagement for the international political system as a whole.

A second noteworthy example is Sornarajah's article entitled 'The role of the BRICS in international law'. In this article Sornarajah maintains that international law has been instrumental to the United States, as world hegemon, for building the international order on its preferred ideas of democracy and market capitalism and, as such, changes to international law will have an impact on the international order.[89] Although his main conclusion is that the rise of the BRICS is bringing about a competing world order that challenges the already existing principles underlying the Western liberal order, and despite the fact that he is writing from within the International Law discipline, Sornarajah does not delve into an analysis of the specific legal detail that makes up the international legal system and the ways in which the BRICS are engaging with these specific provisions.[90] His analysis, therefore, falls short of providing an in depth assessment of the

[86] Garwood-Gowers, "The BRICS and the Responsibility to Protect," 81–99.
[87] Rahmat Mohamad, "The Role of the International Criminal Court and the Rome Statute in International Criminal Justice Standard Setting," in *Shifting Global Powers and International Law: Challenges and Opportunities,* eds. Rowena Maguire, Bridget Lewis, and Charles Sampford (Abingdon, Oxon: Routledge, 2013), 100–115.
[88] Rowena Maguire, "The Rise of the BASIC Group Within the Climate Change Regime: The Challenge of Ensuring Equitable Mitigation Obligations," in *Shifting Global Powers and International Law: Challenges and Opportunities,* eds. Rowena Maguire, Bridget Lewis, and Charles Sampford (Abingdon, Oxon: Routledge, 2013), 116–131.
[89] Sornarajah, "The role of the BRICS in International Law," 288.
[90] Sornarajah, "The role of the BRICS in International Law," 305.

engagement of rising powers with international law as a variable in its own right and of the ways in which such engagement may affect the international order as a whole.

In summary, we have identified that there has been a general lack of attention in studies of rising powers to international law as a variable in its own right. On the one hand, the fundamental theoretical assumptions of realist and neorealist scholars have led them largely to eschew altogether ideational factors from their accounts of current power transitions. Insofar as the phenomenon of rising powers is of an inherently political character, the focus of realists and neorealists on power and security seems appropriate, as clearly illustrated, for instance, in the tensions between the United States and China over the South China Sea. The primary shortcoming of the (neo)realist argument, however, is that in the name of simplicity and cutting through the complexities of the international system it fails to take into account the complex inter-play between power and ideational factors that characterise current power transitions. Neoliberal and liberal institutionalist scholars, on the other hand, have tended to emphasise the centrality of international institutions and the rule of law characteristic of the existing order as key factors influencing and determining the nature of current power transitions. These scholars have, however, largely considered international law to the extent that it relates to and underpins international institutions and have generally not paid attention to the specific detail of the law. Lastly, scholars within the constructivist and norms theory camps, whilst accounting for the normative underpinnings of the liberal international order, have tended to treat purely political and legal norms as having much the same weight. International Law scholars have, for their part, made explicit links between legal detail and rising powers, but the questions asked by these scholars have tended to be questions *in* law as opposed to *of* law. However, if we are to answer questions about an inherently political issue such as the phenomenon of rising powers, questions *in* law seem inappropriate.

1.3 Theoretical framework: The Theory of International Law as Ideology

We have ascertained that it is necessary to consider the engagement of rising powers with international law in order to assess the potential implications of their rise for the liberal international order. We must now identify an appropriate theoretical framework through which to approach this task. On the basis of the gaps identified above, it is proposed here that an appropriate framework through which to analyse the engagement of rising powers with international law needs to meet three basic requirements: it must be a framework that accounts for the centrality of international law to the existing international order, that is able to reconcile law to power and politics, and that sees international law from a position external to the legal discipline whilst still paying attention to the specific detail of the legal provisions embedded in the system of

international law. A particularly useful starting point here is Shirley Scott's Theory of International Law as Ideology (ILI theory).[91]

ILI theory was first devised as a grand theory of international law and international relations and has been subsequently refined through different questions being asked of the theory.[92] Its foundational proposition is that the idea of international law has functioned as an ideology underpinning the existing international order without which this order would not function as it does currently. Insofar as an ILI framework is attentive to the centrality of ideas to international relations, it is compatible with constructivist scholarship but, given its emphasis on the relationship between discourse and power, it might best be characterised as 'critical constructivist'.[93] Let us now review the primary assumptions upon which ILI theory rests so as to determine whether it meets the requirements of our task identified above.

Centrality of international law to the operation of the existing international order

As suggested above, many authors have pointed to the idea that international law has been a key characteristic of the liberal international order. Some authors have attributed this to a characteristic intrinsic to the United States itself. Scott, indeed, suggests that the United States is a country 'built on law' and this has been 'extended to US foreign relations'.[94] David Rivkin and Lee Casey comment that:

[91] See, e.g., Shirley V. Scott, "International Law as Ideology: Theorising the Relationship Between International Law and International Politics," *European Journal of International Law* 5, no. 3 (1994): 313–325; Shirley V. Scott, "Explaining Compliance with International Law: Broadening the Agenda for Enquiry," *Australian Journal of Political Science* 30, no. 2 (1995): 288–299; Shirley V. Scott, "Beyond 'Compliance': Reconceiving the International Law-Foreign Policy Dynamic," *Australian Year Book of International* Law 19 (1998): 35–48; Shirley V. Scott and Radhika Withana, "The Relevance of International Law for Foreign Policy Decision-Making When National Security Is at Stake: Lessons from the Cuban Missile Crisis," *Chinese Journal of International Law* 3, no. 1 (2004): 163–188; Shirley V. Scott, "Is There Room for International Law in Realpolitik?: Accounting for the US 'Attitude' Towards International Law," *Review of International Studies* 30, no. 1 (2004): 71 – 88; Shirley V. Scott and Olivia Ambler, "Does Legality *Really* Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq," *European Journal of International Relations* 13, no. 1 (2007): 67–87.

[92] For an application of ILI theory to norm emergence and contestation, see Scott and Andrade, "Sovereignty as Normative Decoy," 189–225. For a study of ILI theory as applied the phenomenon of subsequent treaties see, Orli Zahava, *Interpretation of Subsequent Multilateral Disarmament Treaties: An Examination of Legal Integration and Political Harmonisation in the Nuclear Arms Control Regime* (PhD diss., UNSW Sydney, 2018).

[93] Shirley V. Scott, "Intergovernmental Organisations as Disseminators, Legitimators, and Disguisers of Hegemonic Policy Preferences: The United States, the International Whaling Commission, and the Introduction of a Moratorium on Commercial Whaling," *Leiden Journal of International Law* 21, no. 3 (2008): 588.

[94] Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012), 9–10.

> Law and its rhetoric have always played a far more important role in the United States than in almost any other country. We are a nation bound together not by ties of blood or religion, but by paper and ink. The Declaration of Independence itself was, at its heart, an appeal to law […]. Today almost every key policy issue in the United States is framed as a legal question.[95]

According to Scott, strategic use of international law was in fact pivotal to the rise of the US as world hegemon and to the maintenance of the international order in its favour.[96] The fact that international law is not tangible in nature means that its source of power originates ultimately from an ideal of international law.[97] To accept this proposition requires recognition that ideas have some form of power.[98] Drawing on the work of ideology scholar John Thompson, Scott suggests that underlying every power structure is an idea or set of ideas that is implicitly accepted by all members of that structure.[99] Analysed in terms of power, an idea is referred to as an ideology.[100]

In order to apply ideology theory to international law, the entire international order must be considered as one power structure. The ideology of international law, then, is integral to the international system:

> Without the idea the system would not operate as it does currently. This is a bold statement. It points to the fact that, far from being irrelevant, international law is, in its own right, a prime, though not the sole, determinant of relative power positions in international politics.[101]

The idea of international law refers to a rulebook image of international law; the legal positivist notion that international law is a finite set of rules that are neutral and can be applied equally to all states at any point in time on all occasions. This image of international law is comprised of a number of sub-principles that underpin legal discourse, the primary principle being that international law is separate and superior to politics.[102] Other principles are that:

- It is possible to distinguish objectively between legal and illegal action.
- The rules of international law are compulsory.

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[95] David B. Rivkin, Jr. and Lee A. Casey, "The Rocky Shoals of International Law," *National Interest* 62, no. 1 (2000): 35–36.
[96] Scott, "Is There Room for International Law," 73.
[97] Scott, *International Law, US Power*, 16.
[98] See, Scott, "International Law as Ideology," 317
[99] Scott, "International Law as Ideology," 318.
[100] Scott, *International Law, US Power*, 212.
[101] Scott, "International Law as Ideology," 318.
[102] Scott, "Beyond 'Compliance'," 44.

- International law is politically neutral or universal in the sense that it treats all States equally.
- International law is, at this point in time, (virtually) static.
- International law is (virtually) self-contained.
- It is possible to apply the rules of law objectively so as to settle a dispute between States.
- International law is (virtually) comprehensive – it can deal with any issue that arises between States.[103]

The centrality of international law to the existing order is therefore confirmed by ILI's main contention that the idea of international law underpins the international order in such a way that, without the ideology, the order would not operate as it currently does. It seems then that looking at the engagement of rising powers with international law through an ILI lens would give us important new insights on the potential implications of these powers for the existing order.

Reconciling international law to power

A critical approach to ideology theory postulates that an ideology does not need to be true or even perceived to be true to be able to underpin a power structure.[104] It is indeed easy to recognise that the principles that constitute the rulebook image of international law are not necessarily true. International law, for example, does not always treat states equally nor is the boundary between legal and illegal action always clear-cut. Following the logic of ideology theory, Scott argues that it is precisely by perceiving and drawing attention to the discrepancy between the ideal and the reality of international law that states can use the ideology as a power mechanism through which to pursue their interests and improve their position in the political order. It is thus a key argument of the ILI framework that the 'idea of international law is an important form of power in international politics'.[105]

Indeed, Scott suggests that the US has made strategic use of international law by associating it with human rights and democracy as well as peace and justice and aligning its actions with this ideal of international law in order to gain legitimacy for its actions.[106] Whilst the ideology of international law has been skilfully and quite successfully used by the United States as a source of power through which to pursue its foreign policy preferences and establish itself as international hegemon, Scott's adoption of a neutral conception of ideology means that the idea

[103] Scott calls it a rulebook because if a lawyer were asked to provide advice on a specific international issue, according to the ideal, they would be able to open the book that contains all rules of international law and identify the appropriate law to draw on. See, Scott, "Beyond 'Compliance'," 44.
[104] Scott, "Explaining Compliance with International Law," 293.
[105] Scott, "International Law as Ideology," 324.
[106] Scott, "Looking Back to Anticipate the Future," 22.

of international law is not only used to uphold the status quo. Although generally functioning in favour of the most powerful, the ideology of international law can also be used to bring about change in favour of the less powerful and, therefore, acts as 'a mechanism of change within the political structure'.[107] The ideology of international law, therefore, remains a source of political power on which all states can draw. Radhika Withana suggests that:

> Less powerful States can work to improve their position in the international political order via international law, for example, by demonstrating how aspects of the law do not accord with the idea that international law is politically neutral or universal in the sense that it treats all States equally. Any obvious discrepancy between the idea and reality must be rectified so that the ideology can continue as an integral element in the distribution of power within the political order.[108]

As a sub-system of international politics, the system of international law is constantly developing and expanding in order to absorb or defeat new ideas, norms and rules. 'As new issues arise so international law expands to cover those areas in a manner such that the system retains the appearance of neutrality'.[109] If new legal provisions appear to be in conflict with the ideology, the entire system would become weak. The emergence of new international norms regarding the equality of indigenous peoples before international law, for example, resulted in a change in the international legal system to include such norms so as to retain its appearance of being 'fair'.[110] The fact that the idea of international law is integral to the global distribution of power and underpins the modern international order as a whole, means therefore that it can be used as a power source by all states through which to improve their position in the international order.[111] Unlike realist and neorealist scholars would seem to believe, an ILI theorisation perceives power to emanate from non-tangible sources, as well as 'tangible factors such as military and economic might'.[112] Scott indeed suggests that '[w]hen issues are to be settled other than by military means, legal skill is an important form of national power'.[113]

External from the International Law discipline

Suggesting that the power of international law derives from the ideology of international law

[107] Shirley V. Scott, "Building Bridges with Political Science?: A Response from the Other Shore," *Australian Year Book of International Law* 16 (1995): 277.
[108] Radhika Withana, *Power, Politics, Law: International Law and State Behaviour During International Crises* (Leiden and Boston: Martinus Nijhoff, 2008), 78.
[109] Scott, "Building Bridges with Political Science," 279.
[110] Scott, "Explaining Compliance with International Law," 293.
[111] Scott and Withana, "The relevance of International Law," 182–183.
[112] Scott, *International Law in World Politics*, 15.
[113] Scott, *International Law in World Politics*, 131.

requires one to make assumptions about international law that are external to the legal discipline. Scott argues that, as an ideology underpinning the political system, acceptance of the idea of international law is more than simply the medium of communication between states:[114] it is a condition for membership of the political system.[115] States must therefore uphold the ideology in their communication with each other in order to confirm their membership in the order. For Scott, acceptance of the ideology constitutes a state's *political*, as opposed to *legal*, obligation towards international law. In an analysis of the use of force by the United States against Iraq in 2003, for example, she suggests that widespread disapproval of the United States' behaviour occurred not so much because it undermined rules of international law on the use of force as because it undermined the political obligation of the United States towards international law.

> There is little doubt that a state is under a *legal* obligation to comply with international law. What is law, after all, but a system of rules, principles, norms, and concepts specifying the rights and obligations of its subjects? [...] What I am suggesting is that a state may also be under a distinct *political* obligation towards international law. That obligation would appear to be broader than the legal obligation; it would include 'respecting' and 'supporting' the system rather than compliance per se.[116]

The International Law discipline has tended to focus almost exclusively on a state's *legal* obligation to international law; that is, whether that state is complying or not complying with the specific legal provisions to which it is bound. An analysis of a rising power's engagement with international law from within the International Law discipline may, therefore, focus on that state's compliance with international law and how this may affect the international legal order. Similarly, when looking at multilateral treaties, for example, international lawyers may focus on the specific legal details of the treaty text to determine the provisions and rules with which state parties to that treaty are required to comply.[117] Underlying these analyses, however, is the positivist assumption internal to the legal discipline itself that international law as a set of rules and principles governing state relations is something that can either be complied with or not. However, as Scott suggests,

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[114] International law is commonly perceived to be a means of communication between states. See, e.g., Charlotte Ku and Paul F. Diehl, "International Law as Operating and Normative Systems: An Overview," in *International Law: Classic and Contemporary Readings*, eds. Charlotte Ku and Paul F. Diehl (Boulder: Lynne Rienner, 1998), 3–15.

[115] See, e.g., Scott, "International Law as Ideology," 318; Scott, "Explaining 'Compliance'," 294.

[116] Shirley V. Scott, "Identifying the Source and Nature of a State's Political Obligation Towards International Law," *Journal of International Law and International Relations* 1, (2004): 51. Emphasis in original.

[117] This kind of analysis of a multilateral treaty would be undertaken as per Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Scott suggests that the VCLT is 'appropriate to the interpretation of a treaty when the question asked of the treaty text is one internal to the international legal system'. See, Shirley V. Scott, "The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality;" *New Zealand Journal of Public and International Law* 5, no. 1 (2007): 103–104.

'the questions asked by political scientists are not the same as those asked by international lawyers'.[118]

A political scientist may be less concerned with questions of compliance than questions of what the political consequences of such compliance (or lack thereof) may be. Similarly, these scholars may be concerned not with the specific legal detail contained in the treaty *per se*, but rather with how this legal detail relates to broader structures of power of which the treaty is a part. Indeed, Scott posits that 'a multilateral treaty is both a legal and political entity and that a treaty needs to be read differently if it is to be understood […] as a political phenomenon as distinct from […] a normative legal document'.[119] By perceiving international law to have functioned as an ideology underpinning the international order, an analysis of a rising state's engagement with international law from an ILI vantage point allows us to drop assumptions that are internal to the legal discipline and to approach international law from a political point of view, thus focusing on a state's *political* obligation to international law and, therefore, on the political power of international law.

1.3.1 Statement of ILI theory

We have determined that ILI theory as developed by Scott is an appropriate theoretical framework through which to undertake an analysis of a rising power's engagement with international law, for it conceives of the centrality of international law to the international order, it reconciles politics and power to law, and it is situated outside the International Law discipline, thus allowing us to ask questions *of* international law rather than *in* international law. It is now necessary to articulate precisely what ILI theory has to say about global power shifts and, more specifically, about how the engagement of rising powers with international law could be expected to impact the existing international order.

At the core of ILI theory rests the idea that the ideology of international law has been integral to the liberal international order. At the core of this statement lies an underpinning assumption that ideas do have power and that they are necessary, though not necessarily sufficient, causal factors in processes of socio-political change.[120] According to Scott, 'even where other forms of power are at work, an overall change in that international order cannot occur without change in the "cognitive structure" integral to that order'.[121] It follows from this that changes to the ideology of international law can be expected to lead to changes in the international order; conversely,

[118] Scott, *The Political Interpretation of Multilateral Treaties*, 6.
[119] Scott, "Reconciling Text with Political Reality," 109.
[120] Scott, *The Political Interpretation of Multilateral Treaties*, 9.
[121] Scott, *The Political Interpretation of Multilateral Treaties*, 9.

changes to the international order can be expected to result in changes in the ideology.[122] In order to understand this, however, it is first necessary to delve into the structure of international law so as to unpack the elements that make up the international legal system and grasp exactly what instruments are in place for emerging powers to engage with.

1.3.2 The logical structure of the system of international law[123]

International law can be defined as a 'system of rules, principles, and concepts that governs relations among states and, increasingly, international organisations, individuals, and other actors in world politics'.[124] Simply put, international law is a system of ideas governing international relations. One of the main characteristics of the international system is anarchy, or in other words, its lack of a central government. This means that states are seen as sovereign equals within the horizontal system of international law, which, in turn, suggests that international law is, at least in theory, universal and neutral.[125] International law, therefore, creates a common language through which sovereign states can communicate, interact, and address issues in international relations.[126]

Whilst international law is integral to international politics, it is crucial to recognise the extent to which the international legal system is distinct from the international political system. Indeed, Scott suggests that international law 'is a discrete entity distinguishable, even if with somewhat blurred boundaries, from the political milieu in which it operates'.[127] As a logical structure of ideas, the best way to represent the system of international law from an ILI vantage point is in the form of a pyramid, which 'emphasise[s] the importance to the unity of the system of its foundation philosophy'.[128] The components of the international law pyramid can be described as follows:

> At the base is a theory or philosophy of international law that justifies and unifies the system of international law. Level 2 consists of a body of principles and rules that relate to the operation of the system of international law itself. And at Level 3 is the mass of

[122] This may already be happening with the advent of rhetoric referring to the 'rules-based international order' as a more or less replacement for international law. See, e.g., Shirley V. Scott, "In Defence of the International Law-Based Order," *Australian Outlook,* 7 June 2018, https://www.internationalaffairs.org.au/australianoutlook/in-defense-of-the-international-law-based-order/.
[123] This section draws on Scott, *International Law in World Politics*, 99–110.
[124] Scott, *International Law in World Politics*, 1.
[125] This is, in fact, one of the principles that underlie the rulebook image of international law as proposed above. See, e.g., Scott, "International Law as Ideology."
[126] See, Ku and Diehl, "International Law as Operating and Normative Systems."
[127] Scott, *International Law in World Politics*, 75
[128] Scott, *International Law in World Politics*, 296.

rules, principles, and concepts concerning all the substantive issues that arise in relations between states'.[129]

The underlying theory of the modern international legal system, placed at the base of the pyramid, is generally seen as legal positivism.[130] The main premise of legal positivism is that law is created by people. If people are the developers of law at the domestic level, at the international level states are the actors involved in creating law. This is central to a legal positivist philosophy because it suggests that international law, and therefore its binding character, derives from state consent.[131] At Level 2 we can find international law relating to the functioning of the international legal system itself, which may, for example, include rules 'regarding who can participate in the negotiation of a treaty, who can initiate proceedings before the International Court of Justice, for how long a treaty will last, and so on'.[132] Finally and at the top of the pyramid, Level 3 contains those 'rules, principles, and concepts' that determine how substantive issues of international relations are to be governed, managed or solved.[133] Level 3 may include, for example, international law concerning when states are allowed to use military force, how to tackle climate change, how to deal with the issue of proliferation of nuclear weapons, and the regulation of international trade.

The 'logical' character of this structure, therefore, derives from the notion that each level of the pyramid logically depends on the other levels. As a logically structured system, international law 'includes components with varying susceptibilities to change' and, as suggested by Scott, it is to be expected that '[t]hose elements higher up the structure are more easily modified than those at the base of the pyramid on which they depend'.[134] Legal positivism, as the underlying theory at the base of the system of international law, would therefore be more difficult to challenge and modify than, for instance, a multilateral treaty on climate change or international trade. Consequentially, it can also be expected that a modification in the underlying philosophy of the system would lead to much wider and impacting changes to the international order as a whole than would changes in a single multilateral treaty. Nevertheless, for the system to retain its cohesion, the components on all levels must logically reinforce each other, meaning that changes to a single multilateral treaty would likely lead to some, even if small, changes in the overall system of international law.

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[129] Scott, *International Law in World Politics*, 99.
[130] Scott notes that whilst some elements of natural law remain relevant to modern international law, the philosophy or theory better able to understand where international law comes from and why states comply with it is legal positivism. See, Scott, *International Law in World Politics*, 100.
[131] Scott, *International Law in World Politics*, 102.
[132] Scott, *International Law in World Politics*, 103.
[133] Scott, *International Law in World Politics,* 104.
[134] Scott, *The Political Interpretation of Multilateral Treaties*, 20.

Multilateral treaties are the main source of law in the modern international legal system and can, therefore, serve as the basis against which to analyse a state's engagement with international law. Multilateral treaties have, indeed, been the preferred mechanism to deal with some of the most serious and important collective action issues in international relations, such as climate change, use of force, proliferation of nuclear weapons, and international trade. The treaty regimes[135] established to deal with these particular issues are, in fact, often seen as key pillars of the international system.[136] It is to be expected then that the nature of Brazil's engagement with international law as established by such treaty regimes would not only have important implications for the specific regimes in question but also for the wider international order.

1.3.3 Applying an ILI theorisation to international law as established by multilateral treaty regimes

Assessing how a rising power engages with the legal provisions and principles contained in multilateral treaties, therefore, requires unpacking the actual treaty document so as to reveal precisely how the legal detail contained within the treaty relates to the broader political structure to which the treaty is integral. This requires applying an aspect of International Law as Ideology theory that is capable of accounting for the political power of international law at a treaty regime level.[137] In doing so, it is necessary to theorise the relationship between the entire system of international law and multilateral treaties, which is made easier by the fact that international law and treaties have an ontology in common: that is, ideas. Indeed, Scott suggests that:

> A treaty is a structured collection of ideas, which exists within a system of international law, the essence of which is also ideas expressed in language; international law is a system of ideas within and about the conduct of international relations. States sometimes seek to mediate their positions through the use of force; where they cooperate to mediate their positions, the essence of that process is a process of interacting ideas; the actual

[135] A treaty regime is referred to here as 'multilateral agreements among states which aim to regulate national actions within an issue-area' or, in other words, all of the law dealing with one particular issue. This is to be distinguished from other definitions of 'regime' often used in Political Science, such as 'patterned behaviour' or 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.' See, Stephan Haggard and Beth A. Simmons, "Theories of International Regimes," *International Organization* 41, no. 3 (1987): 493–495.

[136] The rationale for the selection of case studies in this dissertation is discussed below. For an example of these treaties being referred to as the cornerstones of global governance, see Shirley V. Scott, "The Problem of Unequal Treaties in Contemporary International Law: How the Powerful have Reneged on the Political Compacts within which Five Cornerstone Treaties of Global Governance are Situated," *Journal of International Law and International Relations* 4, no. 2 (2008): 101–126.

[137] See, e.g., Scott, *The Political Interpretation of Multilateral Treaties*; Scott, "Reconciling Text with Political Reality;" Scott and Andrade, "Sovereignty as Normative Decoy."

> historical mechanism of international cooperation can be identified operating on the level of cognitive factors.[138]

Theorising the relationship between international law and multilateral treaties in terms of ideas goes beyond simply perceiving treaties as the main source of international law towards understanding that there is a logical interrelatedness between the structure of ideas contained within a multilateral treaty and the stability of the system of international law as a whole. In order to understand the ideational or cognitive structure embedded in a multilateral treaty as it relates to the broader political context of which the treaty is a part, Scott has developed a unit of analysis called a Cognitive Structure of Cooperation (CSC).

According to Scott, a CSC 'consists of a set of inter-related cognitive elements integral to the process of international negotiation on an issue of mutual concern which may then be incorporated in a multilateral treaty'.[139] As such, a multilateral treaty does not come out of nowhere but is rather a confirmation of a structure of ideas or, in other words, a CSC that precedes the actual legal text. Indeed, Scott suggests that a treaty is seen 'as embedding an already agreed conceptual approach to the collective management problem'.[140] The final treaty which states sign, ratify, or accede to is, as such, the result of a process of interactions between states at the cognitive level.

Whilst for identification and analytical purposes a CSC is treated as a relatively static unit, it is important to note that, in reality, this is not the case.[141] As a sub-system of international politics, it is to be expected that international law and, as a consequence, the CSC instantiated in a multilateral treaty, is in a constant process of change. Indeed, as suggested earlier in this chapter, as new issues arise in international relations, international law has to change in response. Much like the system of international law, a CSC can be represented 'as a cognitive pyramid: a set of inter-related ideas at the core of a process of interaction and cooperation'.[142]

> At its base is the logical underpinning of the whole structure: a principle or small set of inter-related principles to be referred to as the foundation ideology. The other CSC elements depend logically on the foundation ideology. The CSC is thus an hierarchically-ordered structure in which each component is logically prior to all those above it. In addition to the foundation ideology, the core components of the CSC are a goal common to the negotiating States; an issue to which pursuit of this goal on the part of the various

[138] Scott, *The Political Interpretation of Multilateral Treaties*, 8.
[139] Scott, "Reconciling Text with Political Reality," 110.
[140] Shirley V. Scott, "Does the UNFCCC Fulfil the Functions of a Framework Convention? Why Abandoning the United Nations Framework Convention Might Constitute a Long Overdue Step Forward," *Journal of Environmental Law* 27, no. 1 (2015): 9.
[141] Scott, *The Political Interpretation of Multilateral Treaties*, 20.
[142] Scott, *The Political Interpretation of Multilateral Treaties*, 12.

States gave rise; [and] a solution, as the agreed means by which to manage the issue of mutual concern'.[143]

As presented above, it is possible to suggest that the entire system of international law is, in fact, 'a grand CSC' addressing how sovereign states should interact and, as such, 'what we know as international law – its principles and rules – could be viewed as the solution to the CSC issue'.[144] The various legal instruments that comprise the system of international law therefore can be understood as located on Levels 2 and 3 of the international law cognitive pyramid. The entire system of international law is, in turn, underpinned by the ideology of international law, which is closely related to the philosophy of legal positivism or legalism.[145]

Table 1. CSC of International Law-International Politics[146]

CSC Issue:	How inter-state relations are to be conducted in a world of sovereign nation-states.
Legitimation Goal:	Pursuit of national interests.
CSC Solution:	The system of public international law.
Foundation Ideology:	The ideology of international law: • International law is ultimately distinguishable from, and superior to, politics. • It is possible to distinguish between legal and illegal action. • The rules of international law are compulsory. • International law is politically neutral or universal in the sense that it treats all States equally. • International law is, at this point in time, (virtually) static. • International law is (virtually) self-contained and comprehensive. • It is possible to apply the rules of law objectively so as to settle any dispute between States.

Much like identifying the power of international law to stem from the idea, or ideology, of international law allows one to understand the ways in which international law can be used as a tool of political power, conceiving the political power of multilateral treaties to stem from the ideational structure, or the CSC, embedded in the treaty and underpinned by the foundation ideology allows one to understand a multilateral treaty as a reflection of broader political

[143] Scott, *The Political Interpretation of Multilateral Treaties*, 12.
[144] Scott, *The Political Interpretation of Multilateral Treaties*, 21.
[145] Scott, *The Political Interpretation of Multilateral Treaties,* 21.
[146] This table draws on Scott, *The Political Interpretation of Multilateral Treaties,* 21-22.

dynamics at play.[147] This means that a CSC can be used as a means of changing or sustaining structures of power:

> By asserting that a key principle or small group of inter-related principles or ideology, is integral to a structure of power relationships, it is claimed that ideas are a necessary though not necessarily a sufficient, explanation of an historical trajectory. It is postulated that, as the group of inter-related ideas on which international cooperation is focused, the CSC will evolve to reflect changes in structural relations; conversely the CSC can be used as an avenue to political change.[148]

As perceived from an ILI theorisation, a multilateral treaty serves two mutually constitutive purposes. On the one hand, a treaty is a legal document that establishes the legal framework through which states are to address substantive issues of international relations and has, therefore, a clear legal goal, such as mitigating climate change, curtailing the proliferation of nuclear weapons, or preventing war. On the other hand, a treaty is also a political document insofar as it is integral to the broader political context of which it is a part and imposes limitations on the ability of states to pursue a self-interested goal that is common to all negotiating parties, pursuit of which gave rise to the need to negotiate the treaty in the first place.[149] An ILI analysis of a multilateral treaty, thus, takes as a starting point the realist premise that states are self-interested actors that seek to maximise their relative power and security whilst at the same time recognising that multilateral treaties have important political significance and that international law is 'a force to be reckoned with in world politics'.[150]

It is in this sense that Scott suggests that a 'multilateral treaty addressing an issue on which political positions vary lives a double life […]'.[151] As well as a document imposing legal obligations on states, a multilateral treaty embodies a political compromise that has been agreed upon by states on the basis of the conceptual elements that make up the CSC embedded in the treaty. In order to maintain the coherence of the international legal system, the elements of a CSC embedded in a multilateral treaty must, therefore, not only be logically interrelated within themselves but also logically derive from and reinforce the ideology of international law that underpins the international system. Let us now look at each of the components of a Cognitive Structure of Cooperation in more detail in order to understand their significance within the structure.

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[147] Scott, *The Political Interpretation of Multilateral Treaties*, 9.
[148] Scott, *The Political Interpretation of Multilateral Treaties*, 117.
[149] Scott, "Reconciling Text with Political Reality," 110.
[150] Scott, "Reconciling Text with Political Reality," 109.
[151] Scott, "Reconciling Text with Political Reality," 109.

1.3.4 Discerning the Cognitive Structure of Cooperation embedded within a multilateral treaty

The CSC Issue

The CSC issue refers to the issue of mutual concern that gave rise to the need for a multilateral treaty. As the issue may not be explicitly stated in the final treaty text, in order to identify it, an investigation of 'the political context that gave rise to the treaty negotiations' is required.[152] Scott argues that epistemic communities or communities of interest play a crucial role in identifying and defining the issue in need of a solution, which does seem to have an impact on the effectiveness of the subsequent process of cooperation.[153] In attempting to identify the CSC issue, it is important to note that discourse concerning a multilateral treaty often portrays the CSC issue as largely conflated with the foundation ideology, but drawing a distinction between these two CSC elements is essential in order to gauge the political meaning of a multilateral treaty.[154]

The Legitimation Goal

The legitimation goal is a goal common to all states in the CSC, pursuit of which, if unrestricted, has the potential to result in conflict and, as such, gave rise to the issue that made it necessary to negotiate a multilateral treaty. Simply put, the legitimation goal is, in realist terms, the self-interested goal of states. This self-interested, realist, goal common to states is called a 'legitimation goal' for it needs to be accepted, or legitimated, by other states. According to Scott, the process of negotiating a multilateral treaty is one of both negotiating common constraints on pursuit of the legitimation goal, whilst at the same time allowing for the continuous pursuit of that goal albeit within limits, a fact which necessarily implies acceptance of pursuit of the legitimation goal by other states. As Scott has noted, 'for state A to receive acceptance of State B for a particular goal requires State A to also accept pursuit of that goal on the part of State B.'[155]

ILI theory postulates that there is a clear distinction between the legitimation goal common to states and the legal goal of a treaty, 'which tends to be far more lofty and high-minded – such as the protection of children, the marine environment – or […] the global climate'.[156] Identifying the legitimation goal of states requires asking whether there was a common objective pursued by states that, if not regulated, might not be achieved by any state or might drive states into conflict

[152] Scott, "Reconciling Text with Political Reality," 111.
[153] Scott cites Susan Carr and Roger Mpande to support the argument that the 'precise definition of the issue does matter to the course of international cooperation'. Scott, "Reconciling Text with Political Reality," 111.
[154] Scott, *The Political Interpretation of Multilateral Treaties,* 112.
[155] Scott, *The Political Interpretation of Multilateral Treaties,* 14.
[156] Scott, "Does the UNFCCC Fulfil the Functions," 9.

with each other.[157] It is important to note, however, that the legitimation goal is rarely, if ever, explicitly stated in the treaty text and can therefore be theoretically deduced.

The Foundation Ideology and the CSC Myth

An ILI theorisation of multilateral treaties posits that the components of a CSC, whilst logically dependent on each other, 'are not of equal significance to the CSC structure'.[158] Underlying the entire CSC pyramid, we can find a principle or set of inter-related principles that is accepted by all members of the CSC and that lends cohesion to the entire structure. The foundation ideology provides the common language through which states are able to mediate their positions regarding the legitimation goal and the solution to the CSC issue. The foundation ideology

> provides the basis on which States mediate their positions regarding the common goal so as to generate a solution; a CSC can be recognised as having begun to emerge when two or more States begin to negotiate regarding pursuit of a common legitimation goal so as to reveal acceptance of the same foundation ideology.[159]

The foundation ideology, therefore, defines and justifies the limits imposed on the self-interested goal of states and provides the rationale for coming up with a particular solution to the issue of mutual concern. As such, the foundation ideology 'is likely to have been a pervasive idea in the contemporary intellectual milieu, an idea that was unlikely to have been questioned by members of the epistemic community involved in the creation of the regime'.[160] Applied to the issue of mutual concern, the ideology, in a well-designed regime, will appear logically to lead to the chosen solution; it will ideally be perceived as the only possible solution.[161] According to Scott, a tight issue-ideology-solution nexus is usually characteristic of robust or resilient regime,[162] which may be defined as 'a measure of the capacity of an institution to survive various pressures intact in the sense of withstanding the impact of destabilising forces without suffering collapse or experiencing transformative change.'[163]

Within a treaty regime, therefore, the foundation ideology has the most importance for its serving as the conceptual link between the multilateral treaty, and the system of international law within which the treaty is embedded, and the political dynamics of which the treaty is an integral part.

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[157] Scott, "Reconciling Text with Political Reality," 111.
[158] Scott, "Reconciling Text with Political Reality," 112.
[159] Scott, "Reconciling Text with Political Reality," 112.
[160] Scott, *The Political Interpretation of Multilateral Treaties,* 15.
[161] See, e.g., Scott, "Does the UNFCCC Fulfil the Functions," 11.
[162] Shirley V. Scott, "Comparing the Robustness and Effectiveness of the Antarctic Treaty System and the UNFCCC Regime," *Australian Journal of Maritime & Ocean Affairs* 11, no. 2 (2019): 96.
[163] Oran R. Young, *The Institutional Dimensions of Environmental Change: Fit, Interplay, and Scale* (Cambridge, MA: MIT Press, 2002), 7.

Closely related to the foundation ideology is the CSC myth, which can best be characterised as a story told in support of an ideology.[164] The CSC myth stems from an application of the foundation ideology to the subject matter at hand and reiteration of the myth serves to reinforce the verity of the foundation ideology and, hence, to strengthen the CSC structure as a whole.

The CSC Solution

The solution is the agreed means through which states can solve or avoid the issue of mutual concern despite their ongoing pursuit of their self-interested, or legitimation, goal. Despite its name, the solution is unlikely to actually solve or completely eliminate the problem. Rather, as Scott argues, the solution is devised simply to manage the issue of mutual concern in a way that imposes limits on the self-interested, legitimation goal but at the same time allows states to 'resume whole-hearted pursuit of the […] goal'.[165] Because during treaty negotiations it is expected that states will seek to impose greater constraints on other states' pursuit of the legitimation goal, while at the same time securing as great as possible freedom for itself to pursue that goal, a skilfully designed multilateral treaty is one in which the CSC solution appears as neutral and fair to all states when in reality it places some states at a more favourable position in relation to pursuit of self-interest than others.[166]

The CSC solution therefore constrains and at the same time legitimises pursuit by states of their realist, self-interested, goal that gave rise to the need to negotiate a treaty in the first place.[167] Understanding the CSC solution as such has implications for our understanding of the robustness as well as effectiveness of a treaty regime. Because the CSC solution represents the common limits states agree to place on their pursuit of self-interest, the solution must be perceived by CSC members as the logical embodiment of an application of the foundation ideology to the issue of mutual concern and appear as the only one possible. Where this is the case, we can say that the CSC, and hence the multilateral treaty, contains a tight logical nexus and a high degree of robustness.[168]

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[164] Scott, *The Political Interpretation of Multilateral Treaties,* 14.
[165] Scott, *The Political Interpretation of Multilateral Treaties*, 16.
[166] Scott, *The Political Interpretation of Multilateral Treaties,* 16.
[167] The idea that rules of international law serve, in fact, to legitimate or permit self-interested actions by states has been highlighted by some authors. Ian Hurd has, for example, suggested that the rule banning war embedded in Article 2(4) of the UN Charter has in fact served to legitimise certain categories of war. See, Ian Hurd, "The Permissive Power of the Ban on War," *European Journal of International Law* 2, no. 1 (2016): 1–18. From an ILI theory vantage point, international law serves both to place a constraint on pursuit by states of self-interest, whilst at the same time legitimising pursuit of that self-interested goal, though within limits, with if anything renewed strength and free from the threat of conflict.
[168] See, e.g., Scott, "Comparing the Robustness and Effectiveness," 96.

Effectiveness, on the other hand, can be measured from an ILI theory vantage point in terms of the extent to which the CSC solution serves to address the issue of mutual concern that arose from unrestrained pursuit by states of their common legitimation goal so as to enable states to resume pursuit of that goal with if anything renewed strength.[169] Put differently, 'the treaty could perhaps be considered effective to the extent that it permits States to get on with their pursuit of the legitimation goal, albeit within agreed limits, without the issue to which it had given rise threatening to stymie that pursuit.'[170] ILI theory therefore prompts us to re-think how to assess treaty effectiveness and to ask: 'effective for whom'?[171] This is a measure of effectiveness that differs from, but is not necessarily incompatible with, that commonly offered by neo-liberal scholars, for whom effectiveness tends to be characterised in terms of the extent to which multilateral treaties have served to 'solve the problem they were established to solve.'[172]

Table 2. The Elements of a CSC

CSC Issue:	The issue that prompted states to begin negotiations for the establishment of a multilateral treaty.
Legitimation Goal:	The self-interested, *realpolitik,* goal of states pursuit of which gave rise to the CSC issue.
CSC Solution:	The agreed means by which states will place a constraint on pursuit of the legitimation goal, thereby managing the CSC issue. Once in place, the solution is expected to allow states to resume pursuit of the legitimation goal with, if anything, renewed strength.
Foundation Ideology:	The philosophical underpinning of the CSC. The foundation ideology lends coherence to the entire structure and justifies the limits placed on pursuit of the legitimation goal. It is a principle or set of inter-related principles that underpins negotiations.
CSC Myth:	A story told in support of an ideology generally directed to the lay person.

The Community of Interest and CSC/Regime Hegemon

The community of interest is made up of those states that express interest in negotiating a solution to the issue of mutual concern. States participating in the community of interest are to be distinguished from participants in the CSC, which can be identified via their negotiating a limit on pursuit of the legitimation goal on the basis of the same foundation ideology.[173] The

[169] Scott, "Comparing the Robustness and Effectiveness," 96.
[170] Scott, *The Political Interpretation of Multilateral Treaties,* 216.
[171] See, Scott, *The Political Interpretation of Multilateral Treaties,* 215; Scott, "Comparing the Robustness and Effectiveness," 96.
[172] Scott, "Comparing the Robustness and Effectiveness," 96.
[173] Scott, *The Political Interpretation of Multilateral Treaties,* 15.

community of interest may, as such, include CSC as well as non-CSC members and it may also encompass various CSCs. This means that a power differential is established between CSC members and non-CSC members in the community of interest.[174] An unequal power structure is also likely to appear within the CSC itself, where usually one or a small number of states have preponderance over the definition of the various elements of the CSC; where this seems to be the case, the state or group of states can be dubbed the CSC hegemon.[175]

1.3.5 Statement of ILI theory: conclusion

International law is a sub-set of international politics in a way that is not true vice versa. As applied to multilateral treaty regimes, ILI theory allows us to appreciate a multilateral treaty as representing the confirmation of a process of negotiations between states about how to address a substantive issue of international relations, whereby states collectively decide not only on how to define the issue itself but also how they will go about addressing the issue and, most importantly, the rationale for choosing one particular course of action over any other. As the result of a fundamentally political compromise, the structure of ideas and, hence, the legal detail embedded within the treaty are integral to the set of power relations around that issue area; the CSC both reflects and helps determine a structure of power relations.[176]

Confirmation of a CSC into a multilateral treaty, however, is not the end of the story; because international law is a sub-system of international politics in a way that is not true vice-versa, the CSC and hence the treaty regime must evolve to keep pace with political change. New issues may arise and new solutions be proposed on the basis of rival ideologies, but because the foundation ideology underpinning the CSC 'serves as the conceptual link between the CSC as a set of interrelated ideas and the set of political relationships in which the treaty is embedded',[177] states must uphold that ideology if the CSC, and hence the socio-political structures within which it is embedded, is to remain strong. At the same time, if the CSC, and hence the power structure to which the CSC is integral, is to remain strong, members must act where necessary to modify the foundation ideology so that it can withstand criticism and confrontation by other ideologies.'[178] According to Scott, a feature of a strong CSC, and hence treaty regime, is the operation of a mechanism of regime self-correction whereby a new treaty or normative proposition within an existing regime that does not reinforce the original CSC nexus is rejected in favour of one that

[174] Scott, *The Political Interpretation of Multilateral Treaties,* 19.
[175] Scott, *The Political Interpretation of Multilateral Treaties,* 19.
[176] Scott, *The Political Interpretation of Multilateral Treaties,* 17.
[177] Scott, "Intergovernmental Organisations as Disseminators," 587.
[178] Scott, *The Political Interpretation of Multilateral Treaties,* 24.

does.[179] Scott has dubbed this the 'stability dynamic' so as to highlight that in order to remain stable a CSC must necessarily contain a certain degree of dynamism.[180]

If we accept that underpinning every socio-political structure lies an idea or set of inter-related ideas integral to that structure and, therefore, that ideas are necessary, though not sufficient, factors in a process of socio-political change, then:

> [A]ny perceived change in those ideas is either a force for change in its own right or reflects change elsewhere. This means that tracing change within the cognitive structure embedded within the multilateral treaty is a short cut to tracing broader political dynamics at play […] change cannot occur within the political relationships in which the treaty is embedded without corresponding change to the CSC and vice versa'.[181]

We can expect therefore that tracing the engagement of a rising power with the CSC embedded at the heart of multilateral treaties can be indicative of potential changes to the CSC and more broadly to the structure of power relations of which the CSC forms the backbone. Conversely, direct challenges by a rising power to the power structure internal to the treaty regime poses a direct challenge to, and would prompt change in, the ideational structure at the heart of the treaty.

On this basis we stipulate that, in ILI terms, whether a rising power is revisionist or status-quo would depend largely on the nature of the rising power's interaction and attitude to the various elements of the CSC at the heart of a multilateral treaty. Of most threat to a treaty regime would be a direct challenge to the foundation ideology, as this would constitute a fundamental challenge to the very philosophical premised upon which the treaty regime is built. Where a rising power directly challenges the foundation ideology underpinning a regime, therefore, it can be considered a revisionist state in relation to that regime. Because in a tight CSC the solution is expected to follow from an application of the foundation ideology to the issue of mutual concern, a secondary challenge would be one directed to the solution, which would pose an indirect threat to the ideology. Attempts to reframe the issue to which the treaty was a response can also de-stabilise the logical nexus between the components of the CSC and would pose a less direct challenge.

1.4 Research approach and methodology

Much of the recent literature on rising powers has tended to focus on analysing their emergence and potential impacts on the global order as blocs or coalitions. Concerning the BRICS, for

[179] Scott, *The Political Interpretation of Multilateral Treaties,* 106, 117 and 169.
[180] Scott, *The Political Interpretation of Multilateral Treaties.*
[181] Scott, "Intergovernmental Organisations as Disseminators," 587.

instance, Andrew Cooper has suggested that, although each of these states is different in many ways and they all operate as individual actors in the international system, their power internationally derives from their interactions as a coalition.[182] Working together, Brazil, Russia, India, China, and South Africa are argued to have the power to 'break or bend the established global governance order'.[183]

The position taken in this dissertation is that, whilst there may be some level of utility in taking such a 'bloc' approach, it would be overly simplistic to analyse the engagement of rising powers with the international order as a cohesive group and, as such, to ignore their differences not only in terms of material capabilities, foreign policy traditions, and interests but also in relation to the place of these powers in existing international institutions.[184] As David Bosco and Oliver Stuenkel have noted, notwithstanding the fact that rising powers themselves have tended to emphasise their shared goals and objectives, 'their embrace of these mechanisms does not absolve analysts and scholars of the responsibility to assess the individual approaches of these states'.[185]

1.4.1 Justifying the country selection: The Brazilian case

This dissertation will use the case of Brazil to demonstrate what the nature of a rising power's engagement with international law can tell us about the nature of that country's foreign policy preferences as well as the potential implications for the liberal international order. The justification for choosing Brazil as the focus of our analysis is at least threefold.

The first reason relates to Brazil's own perception of its rightful place in the international order. Much the same as the idea of 'manifest destiny' for the United States, Brazil has long believed in the idea of *grandeza*:[186] that it deserves to have a leadership role in the governance of the international system and to hold 'great power' status.[187] This means that, as Mares and Trinkunas

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[182] Andrew F. Cooper, 'Labels Matter: Interpreting Rising States Through Acronyms," in *Rising States, Rising Institutions: Challenges for Global* Governance, eds. Alan S. Alexandroff and Andrew F. Cooper (Washington, DC: Brookings Institution, 2010), 63.
[183] Cooper, "Labels Matter," 68.
[184] The fact that China is a permanent member of the Security Council and a recognised nuclear power as per the Nuclear Non-Proliferation Treaty, for example, arguably places it in a more privileged position compared to other rising powers and would thus naturally influence how the country engages with the international order.
[185] David Bosco and Oliver Stuenkel, "The Rhetoric and Reality of Brazil's Multilateralism," in *Brazil on the Global Stage: Power, Ideas, and the Liberal International Order,* eds. Oliver Stuenkel and Matthew M. Taylor (New York: Palgrave Macmillan, 2015), 19.
[186] Translated literally from Portuguese, *grandeza* means 'greatness'.
[187] Ralph Espach, "The Risks of Pragmatism: Brazil's Relations with the United States and the International Security Order," in *Brazil on the Global Stage: Power, Ideas, and the Liberal International Order,* eds. Oliver Stuenkel and Matthew M. Taylor (New York: Palgrave Macmillan, 2015), 60. See, also, David R. Mares and Harold A. Trinkunas, *Aspirational Power: Brazil on the Long Road of Global Influence* (Washington, DC: Brookings Institution, 2016).

have highlighted, 'relative standing' has mattered to Brazil.[188] In other words, attaining greater power internationally has mattered to Brazil. In this sense, the country displays the characteristics that are expected of rising powers from a realist point of view; that is, pursuit of greater power within the international system.

The second justification, largely as a result of the first point above, is that throughout at least the first decade of the twenty first century, during which interest in rising powers intensified, Brazil adopted a more assertive foreign policy position, attempting to establish itself as a leader of the Third World and to insert itself into more influential positions within institutions of global governance.[189] During this time, Brazil was one of the most active rising powers in international institutions and contributed proactively to the management of issues of global governance by means, *inter alia*, of explicit foreign policy proposals and initiatives. These initiatives have included, for example, two successfully litigated cases in the WTO against developed-country agricultural subsidy practices, the establishment and leadership during the 2003 Cancún Round of multilateral trade negotiations of the G20 group of developing countries in opposition to dominance by the United States and the European Union of agricultural trade negotiations in the WTO, the attempt in 2010 to mediate with Turkey the relationship between Iran and certain Western countries in relation to Iran's nuclear program,[190] its 'Responsibility while Protecting' (RwP) initiative proposed in 2011 to the Security Council, as well as its involvement since 2004 in the United Nations Stabilisation Mission in Haiti.[191] Brazil has, therefore, so far largely sought to work within existing institutions, as largely predicted by liberal and neoliberal institutionalist scholars.

The final reason for choosing Brazil as our case study relates to the nature of Brazil as a country. Brazil does not have a strong military and therefore is generally characterised as an innately peaceful country. This lack of hard power capabilities distinguishes Brazil from rising powers such as China and India and makes it necessary for the country to look at other power avenues to improve its position in the international system.[192] As Stuenkel and Taylor have noted, 'Brazil has largely eschewed military projection and instead relied largely on instruments of soft power

[188] Mares and Trinkunas, *Aspirational Power*, 180.
[189] Paul Cammack, "The G20, the Crisis, and the Rise of Global Developmental Liberalism," *Third World Quarterly* 33, no. 1 (2012): 5.
[190] Lourdes Casanova and Julian Kassum, "Brazil: In Search of a Role on the Global Stage" (working paper, INSEAD Faculty and Research, 2013), 8.
[191] Paulo Roberto de Almeida and Miguel Diaz, "Brazil's Candidacy for Major Power Status," in *Powers and Principles: International Leadership in a Shrinking World*, eds. Michael Schiffer and David Shorr (Lanham, MD: Lexington Books, 2009), 237.
[192] Andrew Hurrell, "Brazil: What Kind of Rising State?," in *Rising States, Rising Institutions: Challenges for Global* Governance, eds. Alan S. Alexandroff and Andrew F. Cooper (Washington, DC: Brookings Institution, 2010), 141.

to gain influence in world affairs'.[193] Brazil has therefore generally been characterised as a rising power that is not attempting to undermine the existing normative and power status quo per se, but rather simply 'to hasten the transition from the dominance of the developed world to a multipolar order in which international power balances and institutions are more favourable to the assertion of Brazil's interests'.[194] Brazil is seen as a largely non-revisionist country seeking to play the role of 'mediator and consensus seeker through thought leadership.'[195] This is consistent with the assumptions of constructivist and norms theorists.

1.4.2 Rationale for the selection of foreign policy initiatives

We have now determined that this dissertation will analyse Brazil's engagement with international law. Much like the idea of international law, the concept of 'engagement', in the absence of a tangible expression, remains a largely abstract construct and can be taken to mean different things, such as, for example, compliance with law or voting behaviour within a treaty regime. In this dissertation, we will use two foreign policy initiatives by Brazil as proxies by which to analyse how the country has engaged with international law as established by multilateral treaties, namely the 'Responsibility while Protecting' Concept Note, formally proposed by Brazil to the Security Council in 2011, and the *United States – Subsidies on Upland Cotton (US – Cotton Subsidies)* dispute initiated by Brazil in 2002 through the WTO's dispute settlement mechanism (DSM).

The justification for choosing these particular initiatives is based on one primary factor: if we are setting out in this dissertation to draw potential conclusions regarding the likely impact of Brazil as a rising power on the liberal international order through an analysis of the country's engagement with international law, then it is necessary to select for this analysis foreign policy initiatives that are related to treaty regimes that are integral to the existing international order and that themselves were of significant momentum to have an impact within those regimes. This is a requirement that both the RwP initiative and the *US – Cotton Subsidies* case meet precisely.

First, both of these initiatives emerged within multilateral treaty regimes that have largely been considered to be key pillars underpinning the existing international order.[196] The Charter of the United Nations, within which the RwP initiative emerged, is generally understood to have,

[193] Stuenkel and Taylor, "Brazil on the Global Stage," 3. See, also, Marcelo M. Valença and Gustavo Carvalho, "Soft Power, Hard Aspirations: The Shifting Role of Power in Brazilian Foreign Policy," *Brazilian Political Science Review* 8, no. 3 (2014): 67.
[194] Hal Brands, quoted in Peter Dauvergne and Deborah Farias, "The Rise of Brazil as a Global Development Power," *Third World Quarterly* 33, no. 5 (2012): 906.
[195] Oliver Stuenkel, "Brazil and Responsibility to Protect: A Case of Agency and Norm Entrepreneurship in the Global South', *International Relations* 30, no. 3 (2016): 384.
[196] See, e.g., Scott, "The Problem of Unequal Treaties."

perhaps more than any other multilateral treaty, laid the foundations for the liberal international order[197] and it is indeed commonly perceived to function as a constitution for the international community.[198] The WTO is the primary international body governing the conduct of international trade and the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement) is, similarly, perceived to operate as a trade constitution for the international community.[199] Furthermore, the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), is considered to be one of the most successful post-World War Two multilateral institutions.[200]

Second, these initiatives have been heralded as some of the most significant in the history of Brazil's foreign relations and were seen as integral to Brazil's then-assertive strategy to insert and assert itself as a leader of the Third World in existing institutions of global governance. The RwP initiative, for instance, has been heralded as one of Brazil's most notable foreign policy initiatives,[201] which 'represents the culmination, to date, of Brazil's engagement with questions of intervention and normative aspects of its quest for greater global influence'.[202] The *US – Cotton Subsidies* case for its part has been one of the longest, most contentious, and politically-charged to date in the WTO dispute settlement and has been central to Brazil's establishment of itself as a more assertive power to be reckoned with in the WTO.[203] The *US – Cotton Subsidies* dispute is also useful for our task as it allows for a direct comparison between the position taken by Brazil, as a rising power, and that of the United Stated, as an established power.

A further point that supports our choice of foreign policy initiatives is that, whilst Brazil may play an increasingly significant role in these regimes, these are, nevertheless, generally perceived to be 'unequal treaties' which less powerful countries have agreed to despite the fact 'that in several instances [these treaties] appear to have favoured the interests of the most powerful'.[204] If one is analysing the potential impact, if any, for the international order of the rise of non-Western

[197] Ramesh Thakur and Thomas Weiss, "R2P: From Idea to Norm–And Action," *Global Responsibility to Protect* 1, no. 1 (2009): 42.
[198] See, e.g., Bardo Fassbender, "The United Nations Charter as a Constitution of the International Community," *Columbia Journal of Transnational Law* 36, (1998): 529–619.
[199] Renato Ruggiero, former WTO Director-General, cited in Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford: Stanford University Press, 2016), 15.
[200] See, e.g., Judith Goldstein, "Creating the GATT Rules: Politics, Institutions, and American Policy," in *Multilateralism Matters: The Theory and Praxis of an Institutional Form*, ed. John Gerard Ruggie (New York: Columbia University Press, 1993), 201.
[201] See, e.g., Stuenkel, "Brazil and R2P," 384.
[202] Kai M. Kenkel and Cristina G. Stefan, "Brazil and the Responsibility while Protecting Initiative: Norms and the Timing of Diplomatic Support," *Global Governance* 22, no. 1 (2016): 42.
[203] Karen Halverson Cross, "King Cotton, Developing Countries and the 'Peace Clause': The WTO's *US Cotton Subsidies* Decision," *Journal of International Economic Law* 9, no. 1 (2006): 154.
[204] Scott, "The Problem of Unequal Treaties," 101.

powers, it seems reasonable to suggest that these would be pushed for and/or felt more strongly in regimes which are seen to favour the most powerful at the expense of weaker states.

Finally, choosing two different foreign policy initiatives is expected to allow for a more balanced analysis of the nature of Brazil's rise and for more nuance in the assessment of potential implications, if any, for the liberal international order. As Matthew Stephen has indeed suggested, the study of rising powers needs to take into account 'issue-area variation'.[205] This is because whilst rising powers may pursue what Stephen calls a '"grand strategy" in relation to their rivals', their engagement with the existing order, and whether that will lead to cooperation or competition, is likely to be considerably more complex and to differ across issue areas, 'reflecting different class structures, societal interests, and domestic and international institutional structures'.[206] Let us now delve into how this analysis will be undertaken.

1.4.3 Undertaking the analysis

There are three steps to this analysis. Step one consists of discerning the CSC at the heart of the UN Charter and the WTO Agreement so as to shed light on the relationship between the legal detail contained within each treaty and the broader power structure to which each treaty is integral. The CSC embedded within each treaty is considered to have established a normative and power status quo. Discerning the CSC at the heart of a multilateral treaty is an interpretive exercise and will be conducted on the basis of the treaty interpretation guidelines devised by Scott in *The Political Interpretation of Multilateral Treaties*, in particular, the section of the volume called 'Guidelines for Identifying the CSC Embedded in a Multilateral Treaty'.[207]

An ILI interpretation of a multilateral treaty must begin with an analysis of the political context within which the treaty was negotiated so as to identify the community of interest and the CSC issue that gave rise to the need to negotiate a treaty. According to Scott, the title of the treaty may make reference to the CSC issue, but it is usually the case that the issue as it appears in the title of a treaty is that as seen through the lens of the foundation ideology.[208] The CSC issue may also give an indication of the legitimation goal of states which gave rise to the issue in the first place. The legitimation goal is unlikely to be stated in the treaty text or during negotiations and so can be theoretically deduced. In order to determine the legitimation goal of states one should ask: was there a self-interested goal pursued by states that if unconstrained might lead states to enter into conflict or prevent states from achieving that goal at all? The solution is expected to take the form

[205] Stephen, "Rising Regional Powers and International Institutions," 292.
[206] Stephen, "Rising Regional Powers and International Institutions," 298.
[207] Scott, *The Political Interpretation of Multilateral Treaties*, 111–117.
[208] Scott, *The Political Interpretation of Multilateral Treaties,* 112.

of a rule or small set of rules prescribing or proscribing behaviour so as to constrain pursuit of the legitimation goal by states. The solution constitutes the 'crux of the agreement without which the treaty would not hold together.'[209] Finally, the foundation ideology is usually alluded to, though not explicitly stated, in the preamble to a treaty. The ideology constitutes the philosophical underpinning of the CSC, lending coherence to the entire structure, and was likely an almost uncontested idea by those states negotiating the treaty. References to the foundation ideology are therefore likely to be found in the documents of negotiations for the treaty, whereas the CSC myth, which is 'a story told in support of an ideology'[210] may be found in materials intended for the lay person.

On the basis of the guidelines laid out above, this stage of the analysis will rely on both primary and secondary sources, the point of departure being the actual treaty document that established the regimes in question. Secondary sources will be used to understand the political context of which the treaty is a part as well as to confirm with conviction the interpretation of each CSC element. These sources will include, *inter alia*, inter-governmental communications, official government statements, books, journal articles, and news articles.

Having discerned the CSC at the heart of the relevant treaties as indicative of a normative and power status quo, the second step in this analysis involves unpacking the ideational structure of the R2P norm, in the case of the RwP initiative, and that at the heart of the WTO Agreement on Agriculture, in the case of the *US – Cotton Subsidies* initiative. These will then be analysed against the institutionalised CSCs identified in the previous step outlined above. This is a necessary intermediary analysis, albeit for slightly different reasons in each case. In the case of the RwP initiative, an analysis of the ideational structure to which the R2P norm is integral is necessary insofar as the RwP Concept Note was proposed by Brazil as a direct response to the R2P norm, and so understanding in full the potential implications of RwP would require an understanding of the precise ideational elements related to R2P and their relation to the CSC at the heart of the UN Charter. In the case of the *US – Cotton Subsidies* dispute, analysing the Agreement on Agriculture in terms of the CSC embedded within it is necessary insofar it was primarily to this Agreement that the dispute related. Because the Agreement on Agriculture is an integral part of the WTO Agreement, challenges to the ideational structure embedded in the former can be expected to have an impact in the ideational structure at the core of the latter. The analysis of both the R2P and the Agreement on Agriculture will be undertaken on the basis of the same guidelines described above,

[209] Scott, *The Political Interpretation of Multilateral Treaties,* 114.
[210] Scott, *The Political Interpretation of Multilateral Treaties,* 115.

albeit that in the case of R2P due attention will be paid to the fact that it has to date not been embedded into a multilateral treaty.

The third and final step in this analysis consists of situating each Brazilian initiative in relation to the existing CSC structures identified in the first and second steps above. The central premise of ILI theory guiding this analysis is that at the core of every treaty regime lies an idea, understood as an ideology for its role in sustaining a structure of power relations, that will need to be upheld through state discourse in relation to the issue in question if the regime is to remain strong.[211] On the basis of this we are going to seek to answer the following question in relation to each case: Do the initiatives serve to uphold the CSC at the core of each multilateral treaty regime, further strengthen it, or undermine it? Upholding the CSC is done most clearly where states communicate within the treaty regime on the assumption that the foundation ideology underpinning and lending coherence to the entire cognitive structure is true. As Scott notes, it may ultimately be impossible to distinguish between actual and expressed belief in the ideology,[212] but so long as CSC members continue to communicate within the treaty regime in a way that assumes the verity of the foundation ideology, the CSC is in a strong place. '[T]he significance of an ideology resides in the *expression* of ideas rather than in the genuine beliefs of the individuals involved.'[213]

A secondary question is, what conclusions can we draw about the potential implications of each initiative for the multilateral treaty regime within which it emerged? This task is facilitated by the fact that both initiatives chosen are collections of ideas expressed primarily, though not solely, in written text and thus can be neatly situated in relation to each multilateral treaty in question. In seeking to answer these questions, it is necessary to note that not all elements in the CSC structure are of equal significance and, so, of most impact is likely to be rhetoric that relates directly to the foundation ideology as the philosophical premise underpinning, justifying, and lending coherence to the entire treaty regime; but, given that the other CSC elements are in a logical relationship with the foundation ideology, discourse that has bearing on those elements, particularly the solution, is also likely to have an indirect impact on the ideology underpinning the CSC. Discourse relating to the behaviour of states in relation to international law *per se*, as opposed to the cognitive components of the CSC, can be analysed in terms of its relationship to the ideology of international law, the different elements of which have been defined above.

The document selection for this step of the analysis varies depending on the specific case under study. In the case of the *US – Cotton Subsidies* dispute, the analysis will draw primarily on official

[211] Scott, *The Political Interpretation of Multilateral Treaties;* Scott, "Reconciling Text with Political Reality;" Scott, "International Law as Ideology;" Scott, "Explaining 'Compliance'."
[212] Scott, *The Political Interpretation of Multilateral Treaties,* 19.
[213] Scott, *The Political Interpretation of Multilateral Treaties,* 19.

documents submitted by Brazil, by the United States and third parties to the dispute as necessary, to the WTO's DSM. This analysis will also draw on reports issued by the Panel and the Appellate Body. Statements by Brazilian Government officials at the WTO will also be used as necessary. In the case of the RwP initiative, the starting point for the analysis is Brazil's RwP Concept Note presented by the Permanent Representative of Brazil to the United Nations to the Security Council in 2011. Other documents used will include, *inter alia*, presidential statements, statements by the Brazilian Foreign Minister, and official press releases. Finally, secondary sources will be drawn upon to support the arguments developed in relation to both initiatives.

1.5 Delimiting the scope of the present study

Before proceeding to assessing Brazil's engagement with international law, it is useful to clarify what this dissertation does not aim to do. Firstly, this dissertation is not a study of Brazilian foreign policy in general. This means that it does not seek to identify a general approach by Brazil to international law let alone to international relations. Furthermore, it is not a goal of this dissertation to develop an approach to international law that is unique to Brazil nor could it generalise from Brazil's experience.

Second, this dissertation does not seek to provide a causal explanation for Brazilian foreign policy. Rather, and much more narrowly, this dissertation focuses on the ideas proposed by Brazil in the international stage through the example of two particular initiatives and seeks to determine the ways in which these ideas serve to challenge or uphold existing structures of power as underpinned by existing normative structures. In this way, the focus of this dissertation is not as much on cause as it is on process and outcomes.

Finally, and perhaps most importantly, our choice of analysing Brazil's engagement with international law through the example of two particular foreign policy initiatives has meant that the findings of this dissertation are necessarily limited to that of the specific initiatives analysed and in relation to the regimes within which these initiatives emerged. In the case of the *US – Cotton Subsidies* dispute, we were only able to draw conclusions about the dispute in relation to the WTO regime, whereas in the case of the RwP initiative we were only able to draw conclusions about potential impacts on the UN Charter regime. Nonetheless, those initiatives analysed were chosen on the basis of their having emerged within multilateral treaty regimes of such a centrality to the liberal international order that impact on those regimes would likely lead to impact on the international order.

1.6 Conclusion

This chapter has outlined the nature of our task and the main research problem this dissertation is seeking to address. In order to establish why it is important to analyse the nature of Brazil's engagement with international law, it reviewed the literature on rising powers and identified that, whilst much of the existing literature acknowledges the centrality of international law to the liberal international order, there is a general lack of research on the engagement of emerging powers with international law in a way that pays attention to specific legal detail and to the ways in which international law relates to broader structures of power. It was then suggested that undertaking such a task requires drawing on a theoretical framework that allows for an analysis of international law that is able to account for the centrality of international law to the existing system of international politics, that reconciles international law to power, and that is political in nature whilst at the same time being attentive to specific legal detail. It was argued that ILI theory, as developed primarily by Scott, is an appropriate framework through which to undertake this analysis and a statement of ILI theory was presented.

PART TWO

BRAZIL AND THE *US – COTTON SUBSIDIES* DISPUTE

Part Two of this dissertation will analyse the nature of Brazil's engagement with international law through the example of the *United States – Subsidies on Upland Cotton* (*US – Cotton Subsidies*) case successfully litigated by Brazil through the World Trade Organisation's dispute settlement system. Two primary reasons justify this selection. The first is that the *US – Cotton Subsidies* dispute has been one of the most contentious and politically charged World Trade Organisation (WTO) disputes to date and has been central to Brazil's establishment of itself as a more assertive power to be reckoned with in the WTO. Secondly, the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement) has been largely understood to have functioned akin to a trade constitution for the international community.

This analysis will be structured in three parts over the next two chapters. Chapter 2 conceptualises the legal framework within which the *US – Cotton Subsidies* dispute unfolded in terms of the Cognitive Structure of Cooperation (CSC) embedded at the heart of the WTO Agreement. This is the first step in the analysis of Brazil's engagement with international law through the example of the *US – Cotton Subsidies* dispute. Chapter 3 undertakes the second and third steps in our analysis, which involve unpacking the WTO Agreement on Agriculture in terms of the CSC embedded within it and then assessing the implications of Brazil's position in the *US – Cotton Subsidies* for the CSC of the Agreement on Agriculture and for the CSC at the heart of the WTO Agreement (and to which the Agreement on Agriculture is integral).

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2.

The WTO, Free Trade, and Global Structures of Power

This is the first of two chapters devoted to assessing the United States – Subsidies on Upland Cotton (US – Cotton Subsidies) case initiated by Brazil in 2002 through the World Trade Organisation's (WTO) dispute settlement system. The chapter begins with a brief overview of the case so as to contextualise the analysis that is to follow. The chapter then moves on to unpacking the CSC at the core of the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement). This is done with the aim of shedding light on the structure of power relations to which the WTO is integral and that is legitimised by the ideational structure embedded within the WTO Agreement.

2.1 Contextualising the analysis: A brief overview of the *US – Cotton Subsidies* dispute

Brazil has been an active player in the multilateral trade regime since the regime's inception in 1947 through the General Agreement on Tariffs and Trade (GATT).[1] Not only was it a part of the group of states that negotiated the GATT, but it also played a crucial role in pushing for better treatment of developing countries during the life of the GATT regime. Since the establishment of the WTO in 1995, Brazil has further asserted itself as an important trade power, as most clearly evident in its frequent and successful use of the WTO's dispute settlement system to push for change in policies of trade protection and support of primarily developed-country Members.[2] One of Brazil's most successful cases to date has been *United States – Subsidies on Upland Cotton*,[3] through which Brazil successfully challenged subsidies extended by the United States in support of its cotton industry.

The dispute was initiated by Brazil in 2002, shortly after the launch of the Doha Round of multilateral trade negotiations. In 2004, the Panel circulated its report, upholding most of the claims made by Brazil and ordering, *inter alia,* the elimination by the US of a number of export

[1] General Agreement on Tariffs and Trade, 1 January 1948, 55 UNTS 194. https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf. The terms GATT and General Agreement will be used here interchangeably.

[2] Davey noted in 2005 that Brazil had used the system more than any other developing country and that its primary targets were the United States and the EC. William J. Davey, "The WTO Dispute Settlement System: The First Ten Years," *Journal of International Economic Law* 8, no. 1 (2005): 40–41. Based on data from the WTO webpage, this is still the case. See, WTO, "Disputes by Member," 2019, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[3] *United States – Subsidies on Upland Cotton,* WT/DS267. Hereinafter, *US – Cotton Subsidies.*

subsidy measures and significant modification of certain domestic subsidy programmes maintained by the US government.[4] In response to appeal proceedings initiated by the United States,[5] the Appellate Body confirmed most of the Panel's decisions,[6] and in March 2005 the findings and recommendations of the Panel and Appellate Body were officially adopted by the WTO's Dispute Settlement Body (DSB).[7] Following almost ten years of subsequent appeals and findings,[8] including an authorisation by the WTO Arbitrator that Brazil had the right to retaliate against US trade in the areas of goods, services, and intellectual property rights to the order of U$800 million,[9] the dispute was formally concluded by means of a Memorandum of Understanding signed by both parties.[10]

The *US – Cotton Subsidies* dispute has been one of the most contentious and politically-charged in WTO dispute settlement, not only because it dealt with and clarified several issues of first instance in dispute settlement concerning agricultural subsidies and liberalisation, thus having a significant impact on agricultural negotiations in the WTO,[11] but also because it represented the first time that a developed country's agricultural subsidy programme was successfully challenged by a developing country in WTO dispute settlement.[12] The *US – Cotton Subsidies* case has

[4] See, "Report of the Panel," *US – Cotton Subsidies,* 8 September 2004, WTO Doc. WT/DS267/R. See, also, Karen Halverson Cross, "King Cotton, Developing Countries and the 'Peace Clause': The WTO's *US Cotton Subsidies* Decision," *Journal of International Economic Law* 9, no. 1 (2006): 149–195.
[5] See, "Notification of an Appeal by the United States under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")," *US – Cotton Subsidies,* 20 October 2004, WTO Doc. WT/DS267/17.
[6] See, "Report of the Appellate Body," *US – Cotton Subsidies,* 3 March 2005, WTO Doc. WT/DS267/AB/R. See, also, Cross, "King Cotton, Developing Countries and the 'Peace Clause'," 168.
[7] See, "Report of the Appellate Body and Report of the Panel – Action by the Dispute Settlement Body," *US – Cotton Subsidies,* 24 March 2005, WTO Doc. WT/DS267/20.
[8] In 2006, Brazil initiated compliance proceedings claiming that the US had failed to comply with the recommendations of the Appellate Body and the DSB. A compliance Panel was established and subsequently found in favour of Brazil. The United States proceeded to appeal the findings of the compliance Panel, but the Appellate Body once again decided against the United States. In light of the alleged failure by the US to comply with the decisions of the *US – Cotton Subsidies* panels and Appellate Body, Brazil initiated arbitration proceedings and was granted the right to retaliate against US trade in goods, services as well as intellectual property rights by an amount close to U$800 million. A useful timeline of the dispute can be found in Meredith Taylor Black, *King Cotton in International Trade: The Political Economy of Dispute Resolution at the WTO* (Leiden: Brill Nijhoff, 2016), 144–145. See, also, Scott D. Andersen and Meredith A. Taylor, "Brazil's WTO Challenge to US Cotton Subsidies: The Road to Effective Disciplines on Agricultural Subsidies," *Business Law Brief*, (Fall/Winter 2009-2010): 2–10.
[9] Writing in 2016, Meredith Taylor Black has noted that this was one the second highest amounts ever authorised in the history of the WTO and that the decision of the three Arbitrators to allow for cross-sector retaliation 'broke new ground' in WTO dispute settlement. Black, *King Cotton in International Trade,* 239.
[10] "Notification of a Mutually Agreed Solution," *US – Cotton Subsidies*, 23 October 2014, WTO Doc. WT/DS267/46.
[11] See, e.g., Black, *King Cotton in International Trade,* 103; Tim Josling et al., "Implications of WTO Litigation for the WTO Agricultural Negotiations," *IPC Issue Brief*, (March 2006): 10.
[12] Charan Devereaux, Robert Z. Lawrence, and Michael D. Watkins, *Case Studies in US Trade Negotiation, Volume 2: Resolving Disputes* (Washington, DC: Institute for International Economics, 2006), 236.

therefore been framed by some as a 'litmus test of whether the WTO can work for the poor'[13] and has had significant implications for the political dynamics in the WTO.[14]

2.1.1 The analysis ahead

We have now briefly considered the emergence of *US – Cotton Subsidies* dispute initiated by Brazil and have situated it within the context of the WTO. We are now ready to take the first step in our analysis of Brazil's engagement with international law through the example of the country's WTO case against US agricultural subsidies. This step entails discerning the Cognitive Structure of Cooperation (CSC) at the heart of the WTO Agreement. This is necessary most basically because the *US – Cotton Subsidies* dispute was initiated within the dispute settlement mechanism of the WTO and so, understanding the potential implications of Brazil's case for the liberal international order requires us to unpack the legal framework within which the initiative emerged and to situate that legal detail in relation to broader structures of power. Let us now conceptualise the WTO Agreement in terms of the CSC embedded within it.

2.2 Conceptualising the WTO Agreement in terms of the CSC embedded within it

The WTO was established in 1995 by the Marrakesh Agreement[15] and is the primary international body governing the conduct of world trade. Understanding the structure of ideas governing international trade thus requires a CSC analysis of the WTO Agreement. Before proceeding to that, however, it will be necessary to undertake a CSC analysis of the WTO's predecessor, the GATT. The primary reason for this is that, as Wilkinson has noted, '[t]he [World Trade] Organisation's general purpose, core principles, legal framework and operating procedures are all continuations, adaptations, variations or developments of aspects of a trade institution […] the [GATT] – fashioned for the purposes of reconstructing a war-ravaged world economy and resurrecting a system of international commerce'.[16]

The WTO Agreement therefore builds on the GATT. Article 16 of the WTO Agreement confirms this by providing that '[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the [Contracting Parties] to GATT 1947 and the bodies established in the framework

[13] Deveraux, Lawrence, and Watkins, *Case Studies in US Trade Negotiation,* 4.
[14] Cross, "King Cotton, Developing Countries and the 'Peace Clause'," 154. See, also, Black, *King Cotton in International Trade*, 62.
[15] Marrakesh Agreement Establishing the World Trade Organisation*,* 1 January 1995, 1867 UNTS 3. https://www.wto.org/english/docs_e/legal_e/04-wto.pdf.
[16] Rorden Wilkinson, *The WTO: Crisis and the Governance of Global Trade* (Oxford and New York: Routledge, 2006), 22–23.

of GATT 1947.'[17] In order to unpack the CSC at the core of the WTO Agreement we thus need first to discern that embedded in the GATT. We will then be able to assess the ideational continuity (or lack thereof) across both treaties and so will be in a better position to situate the CSC embedded at the core of the WTO Agreement in relation to the structure of power relations of which the WTO Agreement forms the backbone.

2.2.1 Discerning the CSC embedded within the GATT

The GATT was signed in Geneva in 1947 and, upon entering into force provisionally in 1948 pursuant to the Protocol of Provisional Application (PPA),[18] the Agreement became the primary agreement governing international trade, a place which it occupied for over fifty years until the establishment of the WTO in 1995. This section identifies the elements of the CSC instantiated into the GATT.

The CSC Issue and the Legitimation Goal

The first step to undertaking a CSC analysis of a multilateral treaty or agreement[19] is to specify the issue to which the treaty was a response. It will be recalled that, according to ILI theory, the issue of mutual concern emerges from uninhibited pursuit of the legitimation goal by states in a way that, if not addressed, may lead states to enter into conflict or may hinder the ability of states to pursue that goal. As these elements are closely related, we will attempt to identify them in tandem. If we refer to the modern literature on the emergence of the post-war multilateral trade regime, one may assume that the CSC issue could be defined simply as 'trade liberalisation' or 'free trade'. It has, indeed, become somewhat of a truism to suggest the creation of the GATT to have been driven by the need to ensure 'greater freedom of world trade', as Clair Wilcox has put it.[20] While it is true that the regime was in a broad sense a response to the need to avoid a return to the economic depression and instability of the 1930s,[21] the fact that liberal policies are not a guarantee against political or economic crises – indeed, before the outbreak of the First World War major states pursued mainly liberal economic policies,[22] and that stability can arguably be

[17] WTO Agreement, Article 16.
[18] Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 55 UNTS 308. https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf. This will be discussed in more detail below.
[19] The words treaty and agreement will be used here interchangeably to refer to the GATT.
[20] Clair Wilcox, *A Charter for World Trade (New York:* The MacMillan Company, 1949), 131.
[21] 'But from 1939 to 1945 no one concerned with postwar planning could calmly accept the idea of returning to the trading conditions of the 1930's'. Ernest F. Penrose, *Economic Planning for the Peace*, (Princeton, NJ: Princeton University Press, 1953), 88.
[22] Penrose has pointed out that in the years before the First World War broke out, 'a multilateral trading system was flourishing. Obstacles to trade were insignificant compared to those of later years'. Penrose, *Economic Planning for the Peace*, 87–88.

maintained through autarkical measures[23] seems to suggest that trade liberalisation was the issue as seen through the lens of the foundation ideology. Scott has suggested that '[w]hile for some onlookers the regime issue is more-or-less conflated with the ideology, in political terms this distinction is vital'.[24] It is therefore necessary to refer to the negotiating history of the GATT in order to determine with certainty the CSC issue.

The negotiating history of the GATT is complex and the seeds of its creation can be traced back to negotiations primarily between the United States and the United Kingdom in the early years of the Second World War.[25] The way the drafting of the Agreement took place and why it came to fulfil the place it did for over half a century, culminating in the establishment of the WTO cannot be understood entirely without some consideration not only of the fact that the post-war economic planners sought to create a much broader and grander institution, to be called the International Trade Organisation (ITO), but also of the fact that the ITO failed to materialise.[26] That negotiations for the General Agreement were conducted concurrently with negotiations for the ITO Charter and that the text of the Agreement was in large part based on a 1947 draft of the ITO Charter,[27] suggests that the cognitive structure embedded in the GATT is closely related to that which was embedded in the ITO Charter. 'The history of the preparation of GATT is intertwined with that of the preparation of the ITO Charter'[28] and so understanding the negotiating history of the ITO will be necessary to determine the CSC issue.

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[23] According to Bronz, '[e]quilibrium can rest on autarkical policies throughout the world, with a minimum of international commerce, or can be based on expanding international specialisation, with a rising volume of world trade. Equilibrium is possible either way, but the latter alternative offers the world the prospect of a higher standard of living everywhere', see George Bronz, "The International Trade Organisation Charter," *Harvard Law Review* 62, no. 7 (1949): 1089–1090. At the time of writing, Bronz was Special Assistant to the General Counsel, US Treasury Department. He had also been a member of the United States Delegation to the United Nations Conference on Trade and Employment in Havana and to the sessions of the Preparatory Committee for the Havana Conference.

[24] Shirley V. Scott, *The Political Interpretation of Multilateral Treaties* (Leiden: Martinus Nijhoff, 2004), 112.

[25] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, Second Edition, 1997), 35.

[26] Although the ITO Charter was successfully concluded in at the Havana Conference in 1948, it never came into force. This will be discussed in more detail below.

[27] The text of the GATT was based on the Draft Charter of the International Trade Organisation as accepted by states during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in Geneva in 1947. The Preparatory Committee was appointed by a resolution of the Economic and Social Council of the United Nations (ECOSOC) with the objective of preparing a draft charter for an international trade organisation and drawing up an agenda for the international conference, as called for by the US Department of State, during which the text of the charter would be agreed upon. See, Karin Kock, *International Trade Policy and the GATT 1947 – 1967* (Stockholm: Almqvist & Wiksell, 1969), 38.

[28] Jackson, *The World Trading System,* 37. This point should not be underestimated and has been highlighted by various authors. Clair Wilcox, for example, suggested that '[t]he [ITO] Charter and the General Agreement [on Tariffs and Trade], while independent of one another, were conceived and negotiated as related parts of a common plan'. Wilcox, *A Charter for World Trade*, 199. Robert Hudec has

a. Background to Negotiations for the Havana Charter for an International Trade Organisation

The International Trade Organisation was intended to be part of a broader project to establish multilateral economic institutions that would create a 'cooperative international economic environment following the [second world] war'.[29] The first concrete step towards this objective was taken as early as 1944 when the Allied nations signed the Bretton Woods Agreement establishing the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD).[30] This project of post-war economic reconstruction stemmed in large part from the then 'not-so-distant memory' of the economic depression of the 1930s[31] and was, as such, based on two fundamental beliefs. Post-war planners were convinced, firstly, that the economic policies adopted by states in the years following the First World War had served to exacerbate the Great Depression. Second, they believed that such exacerbated conditions of economic contraction and instability as well as practices of economic warfare during the inter-war period were partly to blame for the political deterioration that led to the outbreak of the Second World War.[32]

The inter-war period was indeed characterised by intense and widespread economic stagnation and insecurity. By the time the First World War had come to an end the world economy had been severely damaged. As Wilcox put it, '[t]he economy of Europe was disorganised; productive facilities were destroyed; channels of trade were broken; heavy debts were incurred'.[33] The creation of new states and the revision of old boundaries stimulated economic policies that protected domestic industries, and economic and political instability led governments increasingly to adopt economic policies of protectionism and control.[34] With the advent of the Great Depression, the situation further deteriorated. In May 1930, the US Congress passed the

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contended that '[The GATT's] negotiating history, therefore, is to be found primarily in the larger and more complex negotiations which produced the ITO Charter'. Robert Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworth Legal Publishers, 1990), 3.

[29] Michael Trebilcock, Robert Howse, and Antonia Eliason, *The Regulation of International Trade* (Fourth Edition, Oxon: Routledge, 2013), 23.

[30] Trebilcock, Howse, and Eliason, *The Regulation of International Trade,* 23. See, also, Jackson, *The World Trading System,* 35–36. The International Bank for Reconstruction and Development later became the World Bank.

[31] The idea of memory in relation to the inter-war economic depression is borrowed in part from Rorden Wilkinson, "Language, Power and Multilateral Trade Negotiations," *Review of International Political Economy* 16, no. 4 (2009): 597–619.

[32] See, e.g., Kock, *International Trade Policy and the GATT*, 4; Jackson, *The World Trading System,* 36; Timothy E. Josling, Stefan Tangermann, and T. K. Warley, *Agriculture in the GATT* (London: Macmillan Press, 1996), 1; John H. Barton et al., *The Evolution of the Trade Regime: Politics, Law and Economics of the GATT and the WTO* (New Jersey: Princeton University Press, 2006), 17; Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford: Stanford University Press, 2016), 25.

[33] Wilcox, *A Charter for World Trade*, 5.

[34] Wilcox, *A Charter for World Trade*, 5.

Hawley-Smoot Tariff Act, raising tariffs on imports to the highest level ever.[35] Largely as a response, several countries raised tariffs and imposed quantitative restrictions on imported goods, including Canada, Cuba, France, Mexico, Italy, Spain, Australia, and New Zealand[36] and, in 1932, the nations of the British Commonwealth signed the Ottawa Agreement expanding and consolidating the British System of Imperial Preferences.[37] Noting the severe impact of the Hawley-Smoot Act on international trade, Percy Bidwell suggested in 1932 that '[i]n spite of official denials it is clear that many of the foreign tariff revisions of 1930 were in the nature of reprisals'.[38]

While attempts were made during the 1920s and 1930s to establish order in international commerce, widespread fear of further economic depression led to an intensification of economic nationalist policies, deteriorating further the international economy. Writing in the apex of the Great Depression, Percy Wells Bidwell lamented:

> Where will it all end? Obviously the nations have been led into the tariff orgy of the past two years by a wild spirit of *sauve qui peut*. Each has been determined to ward off disaster from its own producers and its own finances by any means possible. And none was hindered by the knowledge that the inevitable result of such a policy, when relentlessly pursued by eighty or ninety sovereign states, is to drive world prices still lower, to reduce still further the volume of international exchanges, to swell the ranks of the unemployed in industrial centres, and to add to the prevailing financial confusion.[39]

This statement usefully sheds light on the legitimation goal which gave rise to the CSC issue as having been *to protect one's own economy when and as desired whilst at the same time seeking access to the economies of other countries.* Yet, were all states to retain the freedom to adopt protective trade policies at whim, whilst at the same time seeking access to each other's markets, in a world of nation-states where even a minimal amount of trade is necessary, then that pursuit would be self-defeating. This is the case most basically because, as Wilcox has put it, '[w]hen one nation raises its tariffs and when it imposes quotas on imports, it prevents producers of other countries from selling in its markets'[40] and so, were all states to impose restrictions on imports from other countries to protect its own economy from external competition and shock, then no

[35] See, Edward J. Ray, "Changing Patterns of Protectionism: The Fall in Tariffs and the Rise of Non-Tariff Barriers," *Northwestern Journal of International Law and Business* 8, no. 2 (1987): 295.
[36] Wilcox, *A Charter for World Trade,* 8.
[37] See, Robert A. MacKay, "Imperial Economics at Ottawa," *Pacific Affairs* 5, no. 10 (1932): 873–885, discussing the outcome of the 1932 Imperial Economic Conference in Ottawa.
[38] Percy Wells Bidwell, "Trade, Tariffs, the Depression," *Foreign Affairs* 10, no. 3 (1932): 395–396.
[39] Bidwell, "Trade, Tariffs, the Depression," 398. *Sauve qui peut* can be defined literally as 'save who can', meaning 'every man for himself'.
[40] Wilcox, *A Charter for World Trade,* 3.

market access would be possible at all. This is a clear example of the Prisoner's Dilemma[41] at play in the realm of trade, whereby in seeking the best outcome for itself, each state puts others and, as a consequence, itself in a worse position. Although the legitimation goal is unlikely to have been stated anywhere in the treaty text or during negotiations, and can, as such, be theoretically deduced, this interpretation seems accurate insofar as, as Gerard and Victoria Curzon have put it, 'so many of the political ills of the interwar period could be traced back to the mismanagement of economic affairs after Versailles. There was a common desire not to make the same mistake again'.[42] As suggested by Bidwell in 1943:

> We have abundant evidence from the experience of the years 1919-39 that, if the various nations act independently, each for himself and the devil take the hindmost, even the strongest cannot escape disaster. Hence, there will be urgent need for the coordination of national commercial policies, as well as of other branches of economic policy, by some international agency […] [a new international body] will be needed after the war to prevent the recurrence of the exaggerated economic nationalism which wrecked the last peace.[43]

It seems therefore that the issue to which creating an international trade organisation was a response was not one of trade liberalisation per se, but rather one of *regulating the conduct of international trade on an ongoing basis*, which was necessary to avoid a return to the economic instability and insecurity of the 1930s that had contributed to the outbreak of the Second World War. While this is not articulated as such in the ITO Charter and may, in fact, seem somewhat counterintuitive given the association of the ITO (and the GATT) with freeing international trade from regulations,[44] support for this articulation of the CSC issue is found in the fact that expressions of the CSC solution were commonly couched in terms of the creation of a 'code of conduct' for international commerce. As proposed by James Meade in 1942, an international commercial union of countries 'would […] [establish] an agreed code of international trading conduct, and [provide] machinery for interpretation of the convention and for dealing with complaints of infringements'.[45] The idea of a code of conduct was similarly articulated in the US

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[41] According to Lewis, the Prisoner's Dilemma 'represents a set of circumstances under which the equilibrium outcome has both parties to a dilemma consistently choosing a strategy that results in a less favourable outcome than had they both chosen the opposing strategy', see Meredith Lewis, "The Prisoners' Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?," *Journal of International Law* 11, no. 2 (2011): 645.

[42] Gerard Curzon and Victoria Curzon, "The Multilateral Trading System of the 1960s," in *International Economic Relations of the Western World 1959-1971: Part 1 Politics and Trade*, ed. Andrew Shonfield (London: Oxford University Press, 1976): 144. Emphasis in original.

[43] Percy W. Bidwell, "Controlling Trade After the War," *Foreign Affairs* 21, no. 2 (1943): 300.

[44] See, e.g., Wilcox, *A Charter for World Trade.*

[45] Meade was at the time a member of the Economic Section of the British War Cabinet. See, Penrose, *Economic Planning for the Peace*, 90.

Proposals for the Expansion of World Trade and Employment, published by the US Department of State in December 1945 after approximately two years of exploratory conversations on rules of commercial policy between American and British officials:

> it is necessary to establish permanent machinery for international collaboration in matters affecting international commerce, with a view to continuous consultation, the provision of expert advice, the formulation of agreed policies, procedures and plans, and to the development of agreed rules of conduct in regard to matters affecting international trade […] It is accordingly proposed that there be created an International Trade Organisation of the United Nations, the members of which would undertake to conduct their international commercial policies and relations in accordance with agreed principles to be set forth in the articles of the Organisation.[46]

Although it is true that there might have been several other issues with which states were concerned during negotiations for the ITO Charter,[47] ILI theory postulates that there is one primary issue of mutual concern to states to which any given treaty is a response and in this case that was most basically regulating the conduct of international trade on an ongoing basis. Thus, while the ITO Charter did include important provisions dealing with economic development, employment policy,[48] restrictive business practices, and inter-governmental commodity arrangements,[49] 'they are in the Charter primarily because they affect and are affected by international trade policy in its broadest meanings'.[50] Let us now look at the GATT.

b. From ITO Negotiations to the General Agreement on Tariffs and Trade

We have established that the CSC issue, which prompted states to mediate their positions in the field of international commerce by means of a multilateral treaty, was that of regulating the

[46] US Department of State, *Proposals for the Expansion of World Trade and Employment*, Department of State Publication 2411 (Washington, DC: US Department of State, 1945), 10. https://fraser.stlouisfed.org/files/docs/historical/eccles/036_04_0003.pdf.
[47] Penrose has noted, for instance, that American and British officials considered the development of less industrialised countries a 'serious issue'. Penrose, *Economic Planning for the Peace,* 112.
[48] According to Richard Toye, '[o]ne of the most important issues that emerged [during ITO negotiations] was "full employment", which was really a way of expressing concern about the stability of international demand'. Richard Toye, "Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organisation, 1947-1948," *The International History Review* 25, no. 2 (2003): 286.
[49] See, Chapter II on Employment and Economic activity, Chapter III on Industrial Development, Chapter V on Restrictive Business Practices, and Chapter VI on Inter-governmental Commodity Arrangements. Will Clayton has argued that the Charter comprised of six distinct agreements on different topics – 'one on trade policy, one on cartels, one on commodity agreements, one on employment, one on economic development and international investment, and the constitution of a new United Nations agency in the field of international trade'. Will Clayton, 'Foreword', in Wilcox, *A Charter for World Trade*, vii.
[50] William Adams Brown, *The United States and the Restoration of World Trade: An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariffs and Trade*, (Washington, DC: Brookings Institution, 1950), 166.

conduct of international trade on an ongoing basis in order to avoid a return to the economic instability and insecurity of the 1930s. It was with the aim of addressing primarily this issue, therefore, that the US Department of State officially published in December 1945 the above-mentioned *Proposals for the Expansion of World Trade and Employment* proposing the convening of a Conference on Trade and Employment. In 1946, the Economic and Social Council of the United Nations (ECOSOC) established a Preparatory Committee and between 1946 and 1948 four preparatory meetings were held by the Committee with the aim of drafting an international trade organisation charter.[51] Importantly, the US *Proposals* also contained a call for countries to enter as soon as possible into negotiations to reduce trade barriers and to eliminate tariff preferences:

> The proof of any principle is in its application. Therefore, effective preparation for the Conference [on Trade and Employment] must include detailed negotiations on trade barriers to commence as soon as possible. These negotiations should get down to cases, seeking to reduce tariffs, to eliminate preferences, and to lighten or remove other barriers to trade, whatever they may be.[52]

Conterminously with publishing the *Proposals,* therefore, the United States extended to fifteen other countries, considered to be the major trading nations of the world, invitations to participate in 'concrete arrangements for the relaxation of tariffs and trade barriers of all kinds'.[53] During the First Session of the Preparatory Committee in London in late 1946, the United States extended formal invitations to members of the Preparatory Committee. The following year, during a meeting of the Drafting Committee of the Preparatory Committee in Lake Success, New York, a draft agreement on tariffs and trade was produced and, in 1947 at the Second Meeting of the Preparatory Committee in Geneva, while negotiations for the new international trade organisation were still underway, the General Agreement on Tariffs and Trade was concluded.[54] The GATT

[51] The meetings were: 1946 First meeting of Preparatory Committee in London, 1947 Meeting of the Drafting Committee of the Preparatory Committee in Lake Success, 1947 Second Meeting of the Preparatory Committee in Geneva, 1948 Havana Conference on Trade and Employment.
[52] US Department of State, *Proposals for the Expansion of World Trade and Employment*, 3-4.
[53] ECOSOC, "Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions," in *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (London, October 1946, E/PC/T/33), 47. The fifteen other countries were Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Netherlands, New Zealand, Norway, South Africa, the Soviet Union, and the United Kingdom. See, e.g., Wilcox, *A Charter for World Trade,* 40; Kock, *International Trade Policy and the GATT,* 38.
[54] Jackson, *The World Trading System,* 37.

recorded the results of the tariff and preference negotiations undertaken in Geneva and came into force provisionally on 1 January 1948.[55]

The precise reason as to why states engaged in negotiations for the reduction of tariffs and the elimination of preferences at the time they did has been subject to some debate. Some authors have suggested that the GATT was established because negotiations for an international trade organisation charter had become long and laboured and so, as William Diebold has put it '[t]here was a feeling that the processes for reducing trade barriers should be put in operation before new structures of production increased the resistances to trade liberalisation all over the world'.[56] Rorden Wilkinson has provided a similar account of events, suggesting that, due to the sheer number of proposed amendments to the draft ITO Charter at the Havana Conference, ITO negotiations 'proved particularly difficult' and so '[t]he US response was to look for a more effective means of securing trade gains; and it did so in the form of a much more focused, lither "mini-lateral" agreement (the GATT)'.[57] Others have highlighted the desire of the United States Government to make use of the Reciprocal Trade Agreements Act, pursuant to which tariff reductions had been undertaken since 1934, before it expired.[58]

These different interpretations notwithstanding, an investigation of official documents relating to GATT and to ITO negotiations reveals that the General Agreement was negotiated, at least as officially articulated, so as to facilitate or ensure a successful outcome at the Havana Conference. In a resolution calling for tariff negotiations to begin, the ECOSOC stated that 'the task of the Conference will be facilitated if concrete action is taken by the principal trading nations to enter into reciprocal and mutually advantageous negotiations directed to the substantial reduction of tariffs and to the elimination of preferences'. Similarly, the Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment stated that:

[55] The institutional, or lack thereof, nature of the GATT will be addressed in more detail below but suffice to say for now that the GATT came into force provisionally pursuant to the Protocol of Provisional Application on the assumption that it would later be merged into the ITO. The GATT therefore was not an institution and states party to the Agreement were 'contracting parties' as opposed to members. See, e.g., Gilbert R. Winham, "The Evolution of the World Trading System – The Economic and Policy Context," in *The Oxford Handbook of International Trade Law*, eds. Daniel Bethlehem, Isabelle Van Damme, Donald McRae, and Rodney Neufield (New York: Oxford University Press, 2009): 14.

[56] William Diebold recounts that Will Clayton reportedly said that "we need to act before the vested interests get their vests on". William Diebold, "Reflections on the International Trade Organisation," *Northern Illinois University Law Review* 14, no. 2 (1994), 336.

[57] Rorden Wilkinson, *What's Wrong with the WTO and How to Fix It?* (Cambridge: Polity Press, 2014), 50. Note, however, that Wilkinson's explanation does not, in fact, correspond to the unfolding of events in chronological terms as the GATT had already been negotiated when the ITO Charter was finalised at the Havana Conference in 1948.

[58] See, e.g., Jackson, *The World Trading System,* 39; Kock, *International Trade Policy and the GATT,* 62.

> [T]he Preparatory Committee resolved to recommend to the governments concerned that the Committee sponsor traffic [sic] and preference negotiations among its members to be held in Geneva commencing 8 April, 1947. Upon the completion of these negotiations the Preparatory Committee would be in a position to complete its formulation of the Charter and approve and recommend it for the consideration of the International Conference on Trade and Employment which would be in a position to consider the Charter in light of the assurance afforded as to the implementation of the tariff provisions.[59]

While the GATT and the ITO Charter are two legally distinct agreements,[60] the fact that most of the substantive provisions embedded in the GATT corresponded to those embedded in the commercial policy chapter of the ITO Charter[61] might suggest that the CSC issue in both treaties was the same or at the very least closely inter-related. We will proceed on the basis of that assumption to consider the CSC solution so as to be able not only to move onto identifying the foundation ideology underpinning the entire CSC but also to understand the precise place of the GATT in the CSC.

The CSC Solution

It will be recalled that the CSC solution is expected to follow logically from an application of the foundation ideology to the issue of mutual concern in a way that 'legitimates, but also imposes limits on the pursuit of, the legitimation goal'.[62] Because, as argued above, the GATT was part of the broader ITO project and was negotiated to facilitate negotiations for the ITO Charter, we will first seek to identify the solution embedded in the ITO Charter, as the broader and more comprehensive project addressing the issue of regulating the conduct of international trade. We will then be able to move on to identifying the CSC solution embedded in the GATT and to determine precisely where the General Agreement is situated within the broader multilateral trade regulation CSC.

a. Defining the CSC solution at the core of the ITO Charter

[59] ECOSOC, "Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organisation by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee," in *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (London, October 1946, E/PC/T/33), 48.
[60] Wilcox, *A Charter for World Trade*, 73.
[61] Diebold has suggested that the best way to understand the GATT is to conceive of it as the commercial policy chapter of the ITO Charter. See, e.g., Diebold, "Reflections on the International Trade Organisation," 336. This will be discussed in more detail below.
[62] Scott, *The Political Interpretation of Multilateral Treaties*, 126.

Although from a legal perspective all provisions of a multilateral treaty are of equal significance, from an ILI vantage point some provisions are more significant than others, for they 'contain the "crux" of the agreed solution that is being confirmed in the treaty'.[63] Although the ITO Charter is a complex document, addressing virtually all issues relating to international commerce 'in minute detail',[64] rules relating to commercial policy 'were always at the core of the [ITO] effort'.[65] Harry Hawkins, one of America's chief post-war commercial architects, has confirmed this:

> What should be regarded as the core of the [ITO] charter around which the other provisions centre is something on which there is some difference of opinion. But since it is a trade charter designed from the outset primarily to deal with trade problems there is ample ground for saying that the heart of the charter is to be found in the provisions dealing with trade barriers in Chapter IV on Commercial Policy.[66]

It is thus in the chapter pertaining to the commercial policies of states that we can expect to find the CSC solution. Within that chapter, then, what legal rule(s) served as the most central means by which states agreed to constrain pursuit of their common realist goal, to thereby address the issue of regulating the conduct of international trade on an ongoing basis? According to Brown, '[t]he most important general rule of conduct laid down by the Charter in the commercial policy field is that members are under obligation to negotiate for the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce'.[67] This basic obligation is outlined most clearly in Articles 16 and 17 of the ITO Charter. Both articles are relatively long and lay out some rather complex provisions concerning tariffs and trade preferences. Let us now look at each of them.

Outlining what is known as the Most Favoured Nations (MFN) clause,[68] Article 16 contains a positive commitment by Member states to extend general and unconditional non-discriminatory treatment, subject to defined exceptions, to the commerce of all other Members of the ITO. This obligation is expressed in paragraph 1, which requires that, with regards to all policies affecting

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[63] Scott, *The Political Interpretation of Multilateral Treaties*, 111.
[64] Wilcox, *A Charter for World Trade*, 49.
[65] Hudec, *The GATT Legal System*, 11. See also Clair Willcox, suggesting that '[t]he core of the Charter is to be found in provisions that limit the freedom of governments to employ restrictive and discriminatory measures to prevent foreign competition with domestic industry', in Clair Wilcox, "The Promise of a World Trade Charter," *Foreign Affairs* 27, no. 3 (Apr., 1949): 489.
[66] Harry C. Hawkins, "Problems Raised by the International Trade Organisation," in *Foreign Economic Policy for the United States*, ed. Seymour E. Harris (Cambridge, Mass.: Harvard University Press, 1948), 274. Bronz has noted, in fact, that the commercial policy chapter of the ITO Charter is 'as extensive as all of the other substantive provisions combined, and almost all of the annexes and official interpretative notes relate to this chapter. Many provisions classified under other headings also deal essentially with this basic field'. Bronz, "The International Trade Organization Charter," 1092.
[67] Brown, *The United States and the Restoration of World Trade*, 183.
[68] The title of Article 16 is General Most-Favoured-Nation Treatment.

international commerce in general, 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for all other Member countries'.[69] This non-discrimination obligation was seen as a cornerstone of the ITO Charter,[70] although it is subject to important exceptions listed in paragraph 2 of Article 16.

If, then, by Article 16 states commit not to discriminate, unless where explicitly defined in the treaty, against the commerce of any other Member, pursuant to Article 17 states commit, if requested by other Member(s):

> [To] enter into and carry out with such other Member or Members negotiations directed to the substantial reduction of the general levels of tariffs and other charges on imports and exports, and to the elimination of the preferences referred to in paragraph 2 of Article 16 on a reciprocal and mutually advantageous basis.[71]

The rules according to which negotiations are to proceed are then laid out in paragraph 2 of Article 17. Pursuant to sub-paragraph 2(a), negotiations are to be conducted on a selective, product-by-product, basis whereby, it is explicitly noted, 'Members shall be free not to grant concessions on particular products', while sub-paragraph 2(b) provides that '[n]o Member shall be required to grant unilateral concessions, or to grant concessions to other Members without receiving adequate concessions in return'. Finally, sub-paragraph 2(c) stipulates *inter alia* that, where negotiations relate to any specific product to which preferential tariff rates apply, any negotiated tariff reduction 'shall operate automatically to reduce or eliminate the margin of preference applicable to that product' and 'no margin of preference shall be increased'.[72] If and once concluded, such tariff concessions are then, by Article 16, to be extended on a non-discriminatory basis to all other Members.

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[69] Havana Charter, Article 16. Emphasis added. It is noteworthy that the inclusion of the words 'any other country' means that ITO Members would be entitled to treatment no less favourable than that granted to any other country, including non-Members. This is significant insofar as, while Article 16 does not prevent Member states from entering into new or maintaining existing bilateral tariff agreements, 'all concessions under such agreements are generalised to all other members in accordance with the most-favoured-nation as formulated in the Charter'. See Brown, *The United States and the Restoration of World Trade*,186.

[70] Brown, *The United States and the Restoration of World Trade*, 251.

[71] Havana Charter, Article 17.

[72] The proviso 'except as provided in Article 17' included in Article 16 means that margins of preferences exempt from the non-discrimination obligation must, nonetheless, be negotiated away in conjunction with the tariff reductions. It is noteworthy that, pursuant to Article 16, Member states have an obligation to comply with the MFN clause generally and unconditionally, that is, even when it comes to unbound tariffs and non-tariff barriers to trade, as well as to extend MFN treatment to third parties on the tariff concessions during tariff negotiations under Article 17.

Other provisions in the ITO Charter serve to support and facilitate the solution. Provisions dealing with restrictive business practices in Chapter V, for instance, served to supplement provisions on commercial policy by 'preventing the frustration, by agreements between private and governmental enterprises, of governmental action for reducing trade barriers and eliminating discrimination',[73] whereas the employment provisions in Chapter II serve to supplement the commercial policy rules and to ensure the maintenance of adequate levels of production and demand by means of a commitment by members to maintain domestic full employment.[74] Confirming the centrality to the ITO Charter of Articles 16 and 17, Hawkins has noted that '[m]ost of the other provisions of the charter, other than those setting up the trade organisation, may be regarded as in greater or less degree qualifying or supplementing these provisions'.[75]

The CSC solution, therefore, was comprised most basically of two mutually reinforcing obligations: first, an obligation not to discriminate against the commerce of other members, save in specific cases provided for in the treaty, and second, an obligation to enter into periodical negotiations directed to the reduction of tariffs and the elimination of preferences on a reciprocal and mutually advantageous basis, whereby tariff concessions agreed to in the negotiations would serve automatically to reduce or eliminate those preferences excluded from the non-discrimination obligation. Taken together, these provisions were designed to establish a framework for negotiations directed to the progressive reduction of tariffs and other barriers to trade and the elimination of preferences on a reciprocal and mutually advantageous basis. It is noteworthy here however that, as accurately noted by Hawkins, 'the only obligation laid down for the reduction of tariffs [and the elimination of preferences] is the obligation of members to *negotiate* to this end'[76] should any other Member(s) so request. This means that no Member state was expected by Article 17 to reduce tariffs or to eliminate preferences absent a process of reciprocal and mutually advantageous negotiations on a product-by-product basis, although as also noted by Hawkins there is nothing in the ITO Charter that would have precluded states from unilaterally reducing tariffs had they so wished.[77] Let us now look at the GATT.

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[73] Hawkins, "Problems Raised by the International Trade Organisation," 275.
[74] Note, however, that for some countries, provisions dealing with trade barriers were secondary to those dealing with full employment. See, Hawkins, "Problems Raised by the International Trade Organisation," 275–276.
[75] Hawkins, "Problems Raised by the International Trade Organisation," 274. Note however that Hawkins also includes in his statement the prohibition on the use of quantitative restrictions for protective purposes pursuant to Article 20 of the ITO Charter. In the present analysis, however, Article 20 is understood to have functioned as a supporting rule, for its main purpose was to protect the value of the tariff concessions to be negotiated under Article 17.
[76] Harry C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York: Rinehart & Company, 1951), 98. Emphasis in original.
[77] Hawkins, *Commercial Treaties and Agreements,* 98.

b. The GATT as an advanced implementation of the CSC solution embedded in the ITO Charter?

GATT negotiations took place in 1947 in Geneva pursuant to Article 17 of the ITO Charter, as it was drafted at the time, and while negotiations for the ITO were still under way. Article 17(3) of the ITO Charter as finalised at the Havana Conference, accordingly, provides that '[t]he negotiations leading to the General Agreement on Tariffs and Trade, concluded at Geneva on October 30, 1947, shall be deemed to be negotiations pursuant to this article'.[78] The article further stated that '[t]he concessions agreed upon as a result of all other negotiations completed by a Member pursuant to this Article shall be incorporated in the General Agreement on terms to be agreed with the parties thereto'. The General Agreement, thus, recorded the results of what was to be the first of a number of "rounds" of trade negotiations to be held pursuant to Article 17 and under the sponsorship of the ITO.[79] Having identified Articles 16 and 17 of the ITO Charter to have constituted the CSC solution to the problem of regulating the conduct of international trade on an ongoing basis, we can therefore understand the GATT as the embodiment of an advanced implementation of the CSC solution pending completion and entry into force of the ITO Charter.[80]

Upon entry into force of the ITO Charter, the GATT was expected to be 'subordinated to the ITO'.[81] In order to secure the value of those tariff negotiations and bring them into force before the ITO was established, however, GATT negotiators thought it necessary to incorporate those results as well as those general commercial rules designed to protect the value of the tariff negotiations into a legal agreement.[82] As decided during the first session of the Preparatory Committee in London:

> 1. Once agreed upon the tariff schedules resulting from the negotiations among the members of the Preparatory Committee cannot easily be held in abeyance pending action by the International Conference on Trade and Employment and the adoption of the Charter by national legislatures.
>
> 2. It is, therefore, proposed that the tariff schedules be incorporated in an agreement among the members of the Preparatory Committee which would also contain, either by reference or by reproduction, those general provisions of Chapter V of the Charter

[78] Havana Charter, Article 17(3).
[79] Kenneth W. Dam, *The GATT: Law and International Economic Organisation* (Chicago: University of Chicago Press, 1970), 11. See also, Jock A. Finlayson and Mark W. Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," *International Organisation* 35, no. 4 (1981): 562.
[80] In making this connection it is useful to note the close similarity between the wording of paragraph 1 of Article 17 of the ITO Charter and the Preamble to the GATT.
[81] Jackson, *The World Trading System,* 39.
[82] On the various reasons this was needed see, e.g., Jackson, *The World Trading System,* 39–40.

> considered essential to safeguard the value of the tariff concessions and such other provisions as may be appropriate.[83]

It seems therefore that the nature of the GATT as the embodiment of an advanced implementation of the CSC solution at the heart of the ITO Charter indicates that the General Agreement can best be understood as having been an integral part of the multilateral trade regulation CSC that emerged in the aftermath of the Second World War, as opposed to having embedded that CSC proper. This meant that, while the General Agreement contained most of the same provisions of the Commercial Policy chapter of the ITO Charter and, most importantly, virtually all elements of the trade regulation CSC at the heart of the ITO Charter, there were, nonetheless, important differences.

If we were to identify an articulation of the CSC solution in the GATT, we would find it most basically in Articles I and II. However, while Article I of the GATT outlining the general non-discrimination commitment is virtually identical to Article 16 of the ITO Charter,[84] GATT Article II differs in a significant way from its ITO equivalent; whereas Article 17 of the Charter committed Member states to enter into negotiations for the reduction of tariffs and the elimination of preferences if so requested by any other Member(s) and outlined the precise rules to be followed in these negotiations, Article II of the GATT simply articulates an obligation by contracting parties not to impose on the commerce of each other tariffs above the levels agreed during tariff negotiations and recorded in their Schedules of Concessions.[85] The central legal obligation embedded in Article II is the tariff bindings themselves, pursuant to which parties to the GATT commit 'to limit the amount of tariffs they will impose on imports from other GATT contracting parties. These obligations were the original reason for negotiating the GATT agreement'.[86] This is consistent with Brown's assertion that:

> The General Agreement on Tariffs and Trade is a multilateral agreement between sovereign states recording in a series of schedules the customs treatment which each of these states will accord to certain products imported from the others. The schedules were negotiated item by item by the signatories and represent concessions granted in return for

[83] ECOSOC, "Procedures for Giving Effect," 50–51.
[84] According to Brown 'the formulation of the most-favoured-nation clause is the same in both instruments'. See Brown, *The United States and the Restoration of World Trade,* 251.
[85] GATT, Article II:1(a). 'Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule [of Concessions] annexed to this Agreement'.
[86] Jackson, *The World Trading System,* 40. See, also, Robert Hudec suggesting that '[w]hen a government "binds" a tariff it undertakes a legal obligation not to exceed a maximum rate. The GATT was designed to encourage the reduction and binding of tariff rates through negotiation; maintenance of such binding obligations was central to the enterprise'. Robert E. Hudec, *Developing Countries in the GATT Legal System* (Aldershot: Gower for the Trade Policy Research Centre, 1987), 21 at endnote 22.

> concessions received in the course of the negotiations. These concessions are of three principal types – actual tariff reductions, the reduction or elimination of preferential treatment previously accorded to the trade of certain countries, and promises not to raise duties above existing or agreed levels, ordinarily called bindings.[87]

Although negotiations that resulted in the signing of the General Agreement were conducted on the basis of rules laid out in Article 17 of the ITO Charter as drafted at the time, unlike Article 17, Article II of the GATT does not articulate such rules nor does it obligate contracting parties to enter into negotiations if requested by other parties to the Agreement.[88]

Other provisions in the GATT served to protect the value of the tariff concessions registered in the Schedules of Concessions annexed to the General Agreement and made legally binding pursuant to Article II as well as and to ensure that those concessions would not be undermined by other restrictive measures,[89] thus making effective and enabling the proper functioning of the CSC solution. Article III, for instance, sets out the National Treatment obligation, by which states agree not to apply to foreign products, whether directly or indirectly, any 'internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products'.[90] Article XI, perhaps most importantly among all supporting rules,[91] then prohibits use by states of quantitative restrictions for protective purposes on both imports from and exports to other states.[92]

We have therefore established that the CSC solution to the issue of regulating the conduct of international trade on an ongoing basis was a commitment by states to treat the commerce of all states on a non-discriminatory basis, save for certain defined exceptions, and to enter into negotiations directed to the reduction of tariffs and the elimination of preferences on a reciprocal

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[87] Brown, *The United States and the Restoration of World Trade,* 7.
[88] Brown, *The United States and the Restoration of World Trade,* 256.
[89] 'These clauses had evolved in the United States bilateral trade agreements, and were seen as necessary to protect the value of any tariff-reducing obligations […] The general clauses of GATT were recognised as a necessary complement to any tariff reduction agreement, but organisational clauses were a different matter'. Jackson, *The World Trading System,* 37. On this same point see, also, Brown, *The United States and the Restoration of World Trade,* 7; Wilcox, *A Charter for World Trade*, 47; Dam, *The GATT,* 18; Petros C. Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (New York: Oxford University Press, 2005), 22–23.
[90] GATT, Article III:2. The National Treatment obligation can be said to address discrimination at the domestic level. According to Trebilcock, Howse, and Eliason, '[t]he principle of National Treatment set out in Article III of the GATT addresses another form of discrimination, namely where a Member adopts internal or domestic policies designated to favour its domestic producers vis-à-vis foreign producers for a given product, even though the latter may all be treated in a uniform way'. Trebilcock, Howse, and Eliason, *The Regulation of International Trade,* 31.
[91] See, Winthrop G. Brown, "The General Agreements on Tariffs and Trade," in *Foreign Economic Policy for the United States*, ed. Seymour E. Harris (Cambridge, Mass.: Harvard University Press, 1948), 262.
[92] A quantitative restriction is most basically a numerical restriction or limit placed on the quantity (or value) of a product that is allowed importation into a country during a specified period of time. Quantitative restrictions are also called 'quotas'. See, Bronz, "The International Trade Organization Charter," 1095.

and mutually advantageous basis. These obligations were embedded into Articles 16 and 17 of the ITO Charter. As a result of negotiations pursuant to Article 17, the GATT was identified as representing the embodiment of an advanced implementation of the CSC solution and thereby to have been an integral part of the multilateral trade regulation CSC. This meant that, while the GATT contained virtually the same provisions constituting the CSC solution, the positive *obligation* to negotiate for the reduction of tariffs and elimination of preferences on a reciprocal and mutually advantageous basis was nonetheless absent from the General Agreement. Instead, the GATT simply contained an obligation by states not to exceed the tariff concessions given as a result of negotiations and bound in each state's Schedule of Concessions. Let us now move on to identifying the foundation ideology underpinning the solution in the ITO CSC, to which the GATT was integral.

The Foundation Ideology and the CSC Myth

Having identified the CSC issue, legitimation goal, and CSC solution both in relation to the ITO Charter and GATT, we now need to identify the foundation ideology. It will be recalled that the foundation ideology serves to lend coherence to the entire structure for it justifies the limitations states are willing to place on pursuit of their legitimation goal by means of the CSC solution. It is therefore expected that in a tight CSC and robust treaty regime the solution will follow logically from an application of the ideology to the issue of mutual concern.[93] To identify the foundation ideology we therefore need to look for a principle or set of inter-related principles that justified the solution as the best means by which to address the issue at hand. According to Scott, the foundation ideology was likely 'widely accepted as a statement of fact at the time the CSC [emerged]'.[94]

There is little doubt that the principle on the assumed verity of which negotiations for the CSC solution embedded in the ITO Charter and operationalised in advance via the GATT were premised was that of free trade – the basic idea informed by liberal economic theory that freedom of international trade promotes economic growth and higher standards of living for all. The principle was in fact so entrenched in negotiations for the ITO Charter and the GATT that trade liberalisation has often been defined as the very issue that prompted the creation of a post-war multilateral trade regime.

[93] Shirley V. Scott, "Does the UNFCCC Fulfil the Functions of a Framework Convention? Why Abandoning the United Nations Framework Convention Might Constitute a Long Overdue Step Forward," *Journal of Environmental Law* 27, no. 1 (2015): 11.
[94] Scott, *The Political Interpretation of Multilateral Treaties*, 157.

The idea of free trade, although not necessarily new at the time ITO and GATT negotiations took place,[95] was clearly expressed in connection with post-war economic arrangements as early as 1941 with the signing of the Atlantic Charter by the US and UK. In paragraph 4 of the Atlantic Charter, the American and British governments expressed their hopes 'to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity'.[96] This was reinforced in Article VII of the Mutual Aid Agreement signed in 1942 by the United States and the United Kingdom, where, by making reference to the Atlantic Charter, both governments agreed that their relations in the context of war-related financial aid should be based on mutual advantage and the betterment of world-wide economic relations, to which end,

> they shall include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples [and] to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers.[97]

By the time exploratory post-war commercial policy discussions began to take place in 1943 between government officials in the US and the UK, belief in the virtues of free trade was evident on both sides of the Atlantic.[98] Although it is true that neither the Americans nor the British advocated free trade in an absolute sense,[99] '[t]he interrelationship between world prosperity and the volume of international trade was not contested by anyone, economists nor politicians'.[100]

The principle of free trade was then alluded to in Article 1 of the ITO Charter, which, although not a preamble proper, reads much like one. States expressed in Article 1 their goal '[t]o assure a large and steadily growing volume of real income and effective demand, to increase the

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[95] A full account of the development of liberal economic theory and the idea of free trade is outside the scope of this analysis, but for reference see, Robert Gilpin, *The Political Economy of International Relations* (New Jersey: Princeton University Press, 1987). See, also, Jackson, *The World Trading System*, Chapter 1; Peter B. Kenen, *The International Economy* (New York: Cambridge University Press, Third Edition, 1994).

[96] Atlantic Charter, 14 August 1941. http://avalon.law.yale.edu/wwii/atlantic.asp.

[97] Mutual Aid Agreement, 23 February 1942, Article 7. https://avalon.law.yale.edu/wwii/angam42.asp.

[98] The precise means by which to reduce barriers to trade, however, was still the source of much debate and disagreement between and within the US and the UK. See, Penrose, *Economic Planning for the Peace*, 87ff.

[99] The United States, for example, maintained in its 1945 *Proposals* that '[n]o government is ready to embrace "free trade" in any absolute sense.' US Department of State, *Proposals for Expansion of World Trade and Employment*, 2.

[100] Kock, *International Trade Policy and the GATT,* 10.

production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy' as well as '[t]o further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development'.[101] Although it is true that Article 1 makes reference to other principles, most notably the ideas that maintaining full employment is necessary to ensure economic stability and that countries in the initial stages of industrial development should receive special assistance, that four out of the six substantive paragraphs relate to ensuring access, reducing barriers to, or expanding, international trade seems to suggest the centrality of the free trade ideal in the ITO Charter. Similarly, the Preamble to the GATT draws a clear link between the expansion of the production and exchange of goods as well as between the reduction of barriers to trade and rising standards of living and growing volumes of real income.[102]

In close relation to the foundation ideology is the CSC myth, which according to Scott is best understood as a 'story told in support of an ideology'.[103] In this case, the CSC myth can be defined, most basically, as the notion that 'economic theory and judgement are able objectively to dictate appropriate trade policy'. Economic liberalism was the dominant theory at the time and trade policies advocated were justified on the basis of the assumed verity of the calculations and judgements made by economists, which prescribed that minimum government interference in the economy was desirable and would lead to greater economic efficiency and growth.[104] The CSC myth served to strengthen the ideology of free trade by highlighting its objectivity and thus portraying it as fair and universal:

> Like liberalism more broadly, the discourse of [liberal] economics makes claims of universality and neutrality […] [liberalism] presents itself as a scientific, technocratic discourse that has ascertained [the universal and natural "laws of the market". It asserts that free trade and free markets are in the service of "the common good", enhancing general prosperity by creating efficient markets and the conditions for economic growth, whereas state intervention and protectionism are fuelled by narrow, particularistic interests and undermine the general welfare.[105]

[101] Havana Charter, Article 1.
[102] GATT, Preamble.
[103] Scott, *The Political Interpretation of Multilateral Treaties*, 125.
[104] According to Alan Sykes, '[t]he normative economic case for free trade […] in one way or another rest[s] on the premise that government intervention into international trade flows creates economic "inefficiency" and that inefficiency is a bad thing'. Alan O. Sykes, "Comparative Advantage and the Normative Economics of International Trade Policy," *Journal of International Economic Law* 1, no. 1 (1998): 57.
[105] Hopewell, *Breaking the WTO,* 29.

The principle of free trade, as informed and underpinned by liberal economic theory, can therefore be said to be constituted by a group of sub-principles, the most important of which for the purposes of this analysis are three. First is the idea that an open market promotes the international division of labour and increases commercial efficiency, thereby leading to greater national and global economic growth and prosperity.[106] This is based on the notion of 'comparative advantage' developed primarily by David Ricardo in 1817, which suggests that 'in order to maximize their welfare countries should specialize and export their least-cost products (based ultimately on their relative endowment in the factors of production) and trade to receive their higher cost products'.[107] As an essay in *The Economist* stated in a series entitled 'Principles of Trade', an expansion of international exchange is necessary for:

> [T]he nations are so constituted and so placed in the world that their productive abilities differ. In every country there are things that it is cheaper to make than to buy, and other things that it is cheaper to buy than to make – and "cheaper" in this context means cheaper in terms of the ultimate resource of human labour […] Neither the world as a whole nor any individual country in it is so well supplied with material goods that it can afford to dispense with the addition to its standard of living that can be got from international exchange.[108]

Related to the first, the second sub-principle holds at its most basic that higher volumes of international trade promote economic growth and prosperity. As Bronz, who had participated in the United States Delegation to the United Nations Conference on Trade and Employment in Havana, wrote in 1949 'expanding international specialization, with a rising volume of world trade […] offers the world the prospect of a higher standard of living everywhere'.[109] The third and last sub-principle was, in turn, that reducing government intervention in the economy is the most efficient means by which to lead to an expanding volume of international trade or, put differently, that trade liberalisation was the best means by which to expand international trade. This was alluded to at various points in the US *Proposals for Expansion of World Trade and Employment*, where it was argued that in order to expand the volume of commercial exchange countries must 'free their trade from excessive governmental barriers. When that happens and to

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[106] 'Liberals consider free trade to be the best policy because specialisation and the international division of labour increase individual productivity and hence the accumulation of both national and global wealth'. Gilpin, *The Political Economy of International Relations*, 179.

[107] Winham, "The Evolution of the World Trading System," 8. 'Stated in policy terms, the theory teaches that international trade based on the comparative advantages of countries, and not on the artificial incentives resulting from protective trade barriers (such as quotas or tariffs) or stimulants (such as export subsidies), enhances global welfare in the interest of all trading nations'. Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From the GATT 1947 to the WTO Agreement on Agriculture* (The Hague: Kluwer Law International, 2002), 2.

[108] 'The Principles of Trade', *The Economist*, (1 January 1944), 4.

[109] Bronz, "The International Trade Organisation Charter," 1089–1090.

the extent that it happens, more ships will sail with fuller cargoes, more men will be employed, more goods will be produced, and more people will have better things to eat and wear and otherwise consume.'[110]

The Community of Interest and the CSC Hegemon

There are two final CSC components that we will seek to identify so as to conclude the analysis of the CSC at the heart of the ITO Charter and to which the GATT is integral: the CSC hegemon and the community of interest. A CSC can be seen as emerging when two or more states begin negotiations with regards to the legitimation goal on the basis of the same foundation ideology.[111] The CSC of multilateral trade regulation can be said to have emerged when the United States and the United Kingdom began negotiations on the basis of the common belief that freeing international trade would bring mutually beneficial advantages to all. As negotiations evolved, the CSC participants were expanded to include Canada and then, when official negotiations for the ITO began, to include all states comprising the Preparatory Committee that drafted the ITO Charter and participated in the tariff negotiations that produced the GATT.

The CSC participants, however, are to be distinguished from the community of interest, which includes all those states that express an interest in addressing the issue at hand.[112] In the case of the ITO Charter, the community of interest can be said to have constituted all states that participated in the Havana Conference in 1948. While in this case the community of interest included all members of the CSC underpinned by the foundation ideology of free trade that came to be placed at the heart of the ITO Charter, the same cannot be said vice-versa – participation in the free trade CSC was more limited. As explained in a 1945 telegram from the US Secretary of State to the US Ambassador in the United Kingdom, the selection of the Preparatory Committee was made on the basis that those were the major trading nations of the world and that 'some easily understandable objective standard such as this is considered important in justifying exclusion of other countries.'[113] According to Scott, the foundation ideology 'defines potential membership of the CSC and, where relevant, why not every member of the community of interest is a participant in the CSC.'[114]

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[110] US Department of State, *Proposals for Expansion of World Trade and Employment*, 4.
[111] Scott, *The Political Interpretation of Multilateral Treaties,* 15.
[112] Scott, *The Political Interpretation of Multilateral Treaties,* 15.
[113] "Telegram: The Secretary of State to the Ambassador in the United Kingdom (Winant), 9 August 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 45, https://history.state.gov/historicaldocuments/frus1945v06/d45.
[114] Scott, *The Political Interpretation of Multilateral Treaties,* 19. It is noteworthy here, however, that the Soviet Union had been invited to participate in the Preparatory Committee despite being a centrally planned

A power differential exists not only as between the members of the community of interest who are not CSC participants and those states participating in the CSC but also within the CSC itself and, where one state or a small group of states has most influence over definition of the CSC components, that state can be called the CSC hegemon. The CSC hegemon can be identified as the member(s) of the CSC via which negotiations are usually undertaken.[115] While the most powerful members of the CSC can be identified as the United States and United Kingdom, it was the United States that played the role of CSC hegemon for it was most influential in defining the CSC solution.

Scott tells us that in a well-designed treaty, a foundation ideology is expected to dictate what the solution to the CSC issue should be. In the case of the ITO Charter, however, beyond dictating that trade was to be progressively liberalised, an application of the principle of free trade to the issue of regulating the conduct of international trade on an ongoing basis did not serve to specify the means by which such freeing of trade barriers was to be undertaken. Agreeing to a CSC solution mutually acceptable to all CSC participants and that would enable agreement on all other commercial policy provisions required reaching agreement as to the means by which to reduce trade barriers and so, for the greater part of 1945, trade negotiations between government officials in the US, UK, and Canada focused on this topic. On the one hand, Britain and Canada had favoured a method that would involve a reduction at an international conference by all participating nations of all tariff levels by a uniform percentage.[116] This was referred to as the horizontal method. The United States, on the other hand, preferred a method by which tariffs could be reduced selectively or, in other words, on a product-by-product basis, and only in return for reciprocal reductions by other countries.[117]

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economy. That it did not attend any meeting of the Preparatory Committee, including the one during which GATT negotiations took place, or the Havana Conference, seems further to support Scott's assertion that the foundation ideology justifies membership of the CSC.

[115] Scott, *The Political Interpretation of Multilateral Treaties,* 19.

[116] See, e.g., "Telegram: The Ambassador in the United Kingdom (Winant) to the Secretary of State, 28 June 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 34, https://history.state.gov/historicaldocuments/frus1945v06/d34; "Memorandum of Conversation: Informal Discussions on Commercial and Financial Policy Between Officials of the Canadian Government and Officers of the Department of State, undated," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 36, https://history.state.gov/historicaldocuments/frus1945v06/d36.

[117] "Memorandum of Conversation: Informal Discussions on Commercial and Financial Policy Between Officials of the United States and Canada, 9 July 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 35, https://history.state.gov/historicaldocuments/frus1945v06/d35.

This so-called selective method had been employed by the United States in a series of bilateral trade agreements since the enactment of the Reciprocal Trade Agreements Act in 1934. A CSC solution based on this method would, therefore, require states to enter into multiple bilateral negotiations with their primary trading partners with a view to signing a number of trade agreements reducing and binding tariff levels on a reciprocal basis, which would then be extended to other countries through the MFN clause. British and Canadian officials expressed uncertainty as to the merits of this proposed solution. Sir Wilfred Eady from the British Treasury, for example, was reported as having said during a meeting with American officials that 'there was no function for an ITO if a mere bilateral approach were adopted. What was the use […] of an international organisation that could at most tell a country it was not negotiating bilateral treaties fast enough?'[118] Furthermore, British officials stressed that tackling tariff preferences under the British System of Imperial Preferences, which the US had strongly opposed, would depend entirely on the method chosen for the tariff reductions: 'If the horizontal treatment of tariffs went overboard, then horizontal treatment of preferences must go too.' [119]

The CSC solution embedded in Articles 16 and 17 of the ITO Charter – that is, the MFN commitment and the obligation to enter into negotiations directed at the reduction of tariffs and the elimination of preferences on a reciprocal and mutually advantageous basis, was ultimately agreed to on the basis that this was the most the United States was willing to accept and that, as expressed by one Canadian official in July 1945, 'what the rest of the world could do in the way of liberalising trade would be limited to what the United States did.'[120] This confirms our identification of the United States as the hegemon in the CSC at the heart of the ITO Charter. The solution preferred by the United States modified to take account of British preference that action on preferential treatment be taken in conjunction with, and only to the extent of, the tariff reductions.

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[118] "Telegram: The Ambassador in the United Kingdom (Winant) to the Secretary of State, 28 June 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 34, https://history.state.gov/historicaldocuments/frus1945v06/d34.

[119] "Telegram: The Ambassador in the United Kingdom (Winant) to the Secretary of State, 11 August 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 46, https://history.state.gov/historicaldocuments/frus1945v06/d46.

[120] "Memorandum of Conversation: Informal Discussions on Commercial and Financial Policy Between Officials of the United States and Canada, 9 July 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 35, https://history.state.gov/historicaldocuments/frus1945v06/d35.

Table 3. The CSC of the ITO Charter, 1948

CSC Issue:	How best to regulate the conduct of international trade on an ongoing basis so as to avoid a return to the economic insecurity of the inter-war period.
Legitimation Goal:	To protect one's own economy when and as desired whilst at the same time seeking access to the economies of other countries.
CSC Solution:	MFN commitment and obligation to enter into negotiations for the reduction of tariffs and the elimination of preferences on a reciprocal and mutually advantageous basis. This was done first through GATT.
Foundation Ideology:	Free Trade: Freeing international trade promotes economic growth and prosperity in all countries. • An open market promotes the international division of labour and increases commercial efficiency, thereby leading to greater economic growth and prosperity for all. • More trade brings higher standards of living for all. • Reducing government intervention in the economy is the most efficient means by which to lead to an expansion of the volume of international trade.
CSC Myth:	Economic theory and judgement are able objectively to dictate appropriate trade policy.

Conclusions Regarding the Logical Nexus of the CSC Embedded in the ITO Charter and to which the GATT is Integral

We have now identified the multilateral trade regulation CSC at the heart of the ITO Charter and have situated the GATT within that CSC as the embodiment of an advanced implementation of the CSC solution. Let us now assess the logical inter-relatedness between the elements of the CSC so as then to be able to move on to undertaking a CSC analysis of the WTO Agreement. This is necessary because, as theorised by Scott, for a CSC to remain strong the foundation ideology underpinning the entire structure must be upheld throughout the life of the CSC through discourse which assumes its principles to be true and so this means that other elements of the CSC must follow logically from the foundation ideology.[121] The logical nexus of a CSC can be said to be tight when the solution follows logically from an application of the foundation ideology to the issue of mutual concern and thus appears to be the only one possible.[122]

On the basis of the elements identified above, it would be possible to say that the CSC solution did follow logically from an application of the foundation ideology to the issue of mutual concern

[121] Scott, *The Political Interpretation of Multilateral Treaties*, 116.
[122] Shirley V. Scott, "The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality;" *New Zealand Journal of Public and International Law* 5, no. 1 (2007): 113.

and thus that the CSC did contain a tight issue-ideology-solution nexus. As Bronz stated in 1949, at the core of the ITO Charter rested 'elaborate safeguards to stake out the major part of world trade as an area of competitive business where the classical forces of supply, demand, price, and related factors will be free to determine the movement of goods'.[123] The multilateral trade regulation CSC is notable, however, in that while the CSC solution did follow from an application of the foundation ideology to the issue of mutual concern, it did not necessarily appear as the only one possible in ideational terms; indeed, it is possible to suggest that the horizontal, across-the-board, method advocated by Canada and the United Kingdom also followed, at least as tightly, from an application of the principle of free trade to the issue of regulating the conduct of international trade on an ongoing basis. This was expressed, for example, by Canadian officials in 1945, as reported by John Leddy of the Division of Commercial Policy in the US Department of State:

> The adoption of the selective tariff method by the United States would […] require a complete reappraisal of what could be expected to be accomplished in the trade-barrier field as a whole. The Canadian officials had had definite hopes for the horizontal formula because they considered it as the most practicable method, politically and economically, of solving the trade-barrier problem. The proposal for horizontal tariff reduction would represent a fresh approach designed to concentrate emphasis on expanded world trade and international cooperation. Its very magnitude, and the fact that it would deal with all tariffs in all countries with an even hand would assure for it strong support and would weaken the vested minority interests in every country.[124]

Eady from the British Treasury similarly stressed the preference of the British Government for linear tariff reductions, highlighting that the abandonment of this method 'would be the end of all we hope to achieve […] the end of everything worth having' and further stressing that 'the UK would go into [negotiations] with no heart and no expectation of anything worthwhile coming out of it. You could never tell where you stood and where you would come out.'[125]

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[123] Bronz, "The International Trade Organisation Charter," 1092.

[124] "Memorandum of Conversation: Informal Discussions on Commercial and Financial Policy Between Officials of the United States and Canada, 9 July 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 35, https://history.state.gov/historicaldocuments/frus1945v06/d35.

[125] "Telegram: The Ambassador in the United Kingdom (Winant) to the Secretary of State, 28 June 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 34, https://history.state.gov/historicaldocuments/frus1945v06/d34.

It seems, therefore, that for Canadian and British officials a tighter ideational nexus existed if the CSC solution had been premised on a horizontal, across-the-board, method for undertaking tariff reductions but agreement on the solution embedded in Articles 16 and 17 of the ITO Charter was ultimately reached on the basis that it was the only one acceptable to the CSC hegemon. US officials nonetheless couched their justification for the solution on the basis of the foundation ideology of free trade, stressing that the selective, tariff bargaining, approach undertaken pursuant to the Reciprocal Trade Agreements Act since 1934 was

> a proved and practical method of reducing trade barriers and that if all [governments] of [the] United Nations pledged themselves to negotiate as rapidly as possible with their more important suppliers and to generalise benefits, resulting agreements would bring down tariffs all around, get rid of most if not all quantitative restrictions, reduce or completely eliminate preferences and in general reach [the] same object[ive]s as in [the] case of uniform percentage tariff reductions.[126]

Thus, though the CSC solution along the lines proposed by Canadian and British officials might have been perceived to make the overall ideational nexus of the CSC tighter, it is not possible to suggest that the method preferred by the United States did not follow from an application of the foundation ideology to the issue of mutual concern. The sheer extent of trade liberalisation achieved during GATT negotiations, which one author dubbed 'undoubtedly […] the most extensive reduction on trade barriers ever achieved in history,'[127] served to strengthen, and perhaps cement, the link between the CSC solution ultimately agreed to and the foundation ideology.[128] Bargaining and negotiations came to be 'the internationally accepted method for the

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[126] "Telegram: The Ambassador in the United Kingdom (Winant) to the Secretary of State, 28 June 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC: Government Printing Office, 1969), Document 34, https://history.state.gov/historicaldocuments/frus1945v06/d34.

[127] Bronz, "The International Trade Organisation Charter," 1093 at fn. 8. Bronz estimated that around '45,000 tariff items in the schedules of twenty-three countries, covering about half the world's imports, were either reduced or bound against increase. It is estimated that 79% of our imports were affected by concessions we granted (about 30% of the concessions were tariff reductions, the other 70% bindings, mainly on the free list), and equivalent concessions were made in return.' Bronz, "The International Trade Organisation Charter," 1093 at fn. 8. Harry Hawkins similarly suggested that the GATT 'accomplished an extensive downward revision of tariffs by the bargaining process. This agreement resulted from the most extensive tariff negotiations ever undertaken at one time.' Hawkins, *Commercial Treaties and Agreements*, 98.

[128] On the basis of communications between United States and Canadian officials, it would be possible to argue that the most primary reason the GATT was negotiated before the ITO Charter was finalised was in fact to demonstrate the extent of trade liberalisation possible under the selective method and thus to strengthen the nexus between the solution favoured by the United States and the foundation ideology before an official trade conference took place. See, "Memorandum of Conversation: Informal Discussions on Commercial and Financial Policy Between Officials of the Canadian Government and Officers of the Department of State, undated," in *Foreign Relations of the United States: Diplomatic Papers, 1945, The British Commonwealth, The Far East, Volume VI,* eds. John P. Glennon et al. (Washington DC:

reduction of tariffs'[129] and the CSC solution, as operationalised by the GATT, came to be seen as more closely resembling a practical expression of the foundation ideology. As Harry Hawkins stated in 1951, '[t]he policy that will best promote international trade is one that combines negotiable tariffs and the principle of non-discrimination'.[130]

Once in place the solution is expected to place constraints on pursuit of the legitimation goal of states, whilst at the same time allowing states to pursue that goal with if anything renewed strength, though within those agreed limits.[131] By Articles 16 and 17 of the ITO Charter, '[t]hough members are under a general obligation to negotiate on rates and to apply most-favoured-nation treatment, they remain free to maintain or raise any particular tariff that is not bound as a result of the negotiations with other members'.[132] Put differently, by placing an agreed constraint on the ability of Member states to protect their economies, the CSC solution embedded in the ITO Charter would allow them to continue, with if anything greater vigour, protecting their economies when and as desired, though within limits, whilst at the same time seeking ever greater access to the economies of other states free from the fear of widespread economic depression. While appearing to treat all states equally, however, the CSC solution will generally place some states in a better position vis-à-vis pursuit of the legitimation goal, though this inequality is masked by the foundation ideology and further neutralised by the fact that the solution has been confirmed into a treaty and embedded into the system of international law through entry into force of the treaty.[133]

The ITO Charter, however, never came into force[134] and a legal expression of the CSC solution only survived by virtue of it being implemented by – and partly reproduced in – the GATT. The General Agreement 'was conceived as a *product* of the negotiations, not as a framework for

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Government Printing Office, 1969), Document 36, https://history.state.gov/historicaldocuments/frus1945v06/d36.

[129] Hawkins, *Commercial Treaties and Agreements*, 98.

[130] Hawkins, *Commercial Treaties and Agreements*, 74.

[131] Shirley V. Scott, "Intergovernmental Organisations as Disseminators, Legitimators, and Disguisers of Hegemonic Policy Preferences: The United States, the International Whaling Commission, and the Introduction of a Moratorium on Commercial Whaling," *Leiden Journal of International Law* 21, no. 3 (2008): 585.

[132] Brown, *The United States and the Restoration of World Trade*, 186.

[133] Scott, *The Political Interpretation of Multilateral Treaties,* 24.

[134] This outcome is generally attributed to the failure of the Truman Administration not to submit the ITO Charter to Congress for ratification. Because most countries had made their ratification of the ITO Charter contingent upon the United States joining the ITO, non-ratification by the US meant that the ITO could not come into force. Hudec, *The GATT Legal System*, 59. For a discussion about the reasons as to why the Truman Administration decided not to submit the ITO Charter to Congress, see William Diebold Jr., "From the ITO to GATT—And Back," in *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years*, ed. Orin Kirshner (Abingdon, Oxon: Routledge, 2015): 155–156.

conducting them'.[135] As noted above, therefore, it did not articulate the obligation to negotiate nor did it specify the rules by which such negotiations were to proceed or the method by which tariff reductions were to be undertaken, which, as seen above, had been a linchpin of the entire ITO enterprise. The closest the CSC solution ever came to being fully instantiated into the GATT was during the 1955 GATT Review Session, during which Contracting Parties added, *inter alia,* Article XXVIII*bis* to the General Agreement, providing that:

> The contracting parties recognise that customs duties often constitute obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.[136]

Paragraph 2(a) then stipulated that negotiations 'may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned'. Although serving to confirm a framework of negotiations directed to the reduction of tariffs on a mutually advantageous and reciprocal basis as the logical solution to the issue of regulating the conduct of international trade on an ongoing basis, Article XXVIII*bis* nonetheless imposed no actual obligation on contracting parties to negotiate, as had been the case in the ITO Charter,[137] and it left open the methodology issue.

This meant that the precise method by which tariffs were to be reduced (a term that later came to be known in international trade law terminology as 'modalities') itself came to be the object of tariff negotiations.[138] 'By not developing hard-and-fast rules governing the cutting of tariffs, the contracting parties ensured that this would be the subject of debate during future rounds – as has consistently proved to be the case […] The result was to lock into the GATT's evolutionary

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[135] John H. Jackson, quoted in D. M. McRae and J. C. Thomas, "The GATT and Multilateral Treaty Making: The Tokyo Round," *American Journal of International Law* 77, no. 1 (1983): 52. Emphasis in original. See, also, Dam, *The GATT,* p. 57.

[136] GATT, Article XXVIII*bis*. According to Dam this was a 'watered down' version of the Article 17 obligation in the Havana Charter. Dam, *The GATT*, 58 at fn. 7.

[137] Hoda quotes the report of the working party that recommended the addition of Article XXVIII*bis:* '[Article XXVIII*bis*] would impose no new obligations on contracting parties. Each contracting party would retain the right to decide whether or not to engage in negotiations or participate in a tariff conference'. Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (Cambridge, UK: Cambridge University Press, Second Edition, 2018), 2.

[138] Hoda, *Tariff Negotiations and Renegotiations*, 32.

trajectory a measure of contestation over the method of cutting tariffs'.[139] Moreover, and perhaps most importantly, as Dam has noted, '[w]ith the elimination in Article XXVIII*bis* of the Havana Charter's duty to negotiate, the right of a contracting party to refuse to make concessions other than in the pursuit of its own self-interest became even clearer'.[140] The same can be said about the goods to which tariff cuts were to apply; whereas Article 17 of the ITO Charter gave all members the legal right not to offer tariff reductions on any given product, which was in fact facilitated by adoption of the selective method, Article XXVIII*bis* did not include anything of the sort, thereby serving to highlight the political nature of such a decision.

What can be concluded here then is that, as an advanced application of the CSC solution, the GATT was premised on an already agreed-to issue-ideology-solution cognitive package, and thus served to reinforce this nexus. As Brown has noted, the GATT contained an implicit obligation to negotiate.[141] That the ITO Charter never came into force and that the ideational package was never fully instantiated into the system of international law, however, left the CSC more vulnerable to challenge and contestation.[142] Furthermore, a procedural solution that required, even if implicitly, states simply to *negotiate* for the reduction of tariffs and the elimination of preferences did not guarantee that the logical nexus of the CSC would remain tight; because one of the assumptions of the foundation ideology of free trade is that the progressive and continuous removal of trade barriers brings benefits to all, unless such negotiations produced actual trade liberalisation results, the logical nexus of the CSC would only be weakly, if at all, upheld. Much of the evolution of the trade regulation CSC of which the GATT was an integral part can thus be understood in terms of attempts by the most powerful CSC participants, in particular the United States, to retain the original issue-ideology-solution ideational package in light of economic, political, and ideational developments and in spite of this package never having gained full legal expression and full association with the ideology of international law.

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[139] Wilkinson, *Crisis and the Governance of Global Trade*, 50.
[140] Dam, *The GATT*, 58–59.
[141] Brown, *The United States and the Restoration of World Trade*, 256.
[142] Another problem here was the fact that by the Protocol of Provisional Application Parts I and III of the GATT, which contained the MFN clause plus the tariff bindings and mostly procedural provisions, respectively, were to be applied in full, whereas Part II of the GATT, containing most of the substantive provisions protecting the value of the tariff concessions, was to be applied only 'to the fullest extent not inconsistent with existing legislation.' Protocol of Provisional Application, Article 1(a) and Article 1(b). This latter provision has become known in GATT parlance as the 'Grandfather Clause'. Jackson, *The World Trading System*, 40.

2.2.2 From the GATT to the WTO: continuity or change? [143]

Having undertaken an analysis of the emergence of the multilateral trade regime in terms of the CSC embedded in the ITO Charter and to which the GATT was integral, we are now ready to analyse the WTO Agreement in terms of the CSC embedded within it. The WTO was established in 1995 after the conclusion of the Uruguay Round of multilateral trade negotiations, the last under the auspices of the GATT. Although the WTO effectively superseded the GATT as an institution, it nonetheless built on the already-existing ideational structure regulating the conduct of international trade. It is therefore useful here briefly to consider what ILI theory has to say about treaties that build on existing CSCs and their relationship to the original cognitive structure.

A core assumption upon which ILI theory rests is that international law is a part of international relations in a way that is not true vice-versa. As the result of a process of socio-political cooperation between two or more states, the CSC is therefore in a continuous process of evolution. This means that, during the life of a CSC, new or un-resolved issues may emerge requiring new solutions, which may then be embedded into treaties and/or agreements that build on the original treaty.[144] A treaty that builds on an existing CSC can be understood to embody a sub-CSC, which will be expected to uphold and reinforce the original issue-ideology-solution nexus if the treaty regime is to remain strong. This is what Scott calls the 'stability dynamic', which functions as a mechanism of 'self-correction', whereby a new treaty that does not reinforce the original CSC nexus is rejected in favour of one that does.[145] Scott deems the stability dynamic to be characteristic of robust regimes.[146] A new treaty most directly reinforces the original CSC when it is underpinned by the same foundation ideology upon which the original CSC was founded or by an ideology that reinforces the original CSC. Let us now identify the different elements of the ideational structure embedded within the WTO Agreement paying particular attention to whether they have served to reinforce the original CSC of multilateral trade regulation to which the GATT is integral.

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[143] In attempting to discern the CSC at the heart of the WTO Agreement, this dissertation does not provide a comprehensive account of the entire development of the GATT since its establishment in 1947 nor does it offer an exhaustive list of ideational, political, and economic factors that might have influenced the establishment of the WTO. These developments are, rather, considered to the extent necessary to identify the various CSC elements embedded in the WTO Agreement.

[144] Orli Zahava, *Interpretation of Subsequent Multilateral Disarmament Treaties: An Examination of Legal Integration and Political Harmonisation in the Nuclear Arms Control Regime* (PhD diss., UNSW Sydney, 2018), 77.

[145] Scott, *The Political Interpretation of Multilateral Treaties,* 106, 117 and 169.

[146] See, e.g., Shirley V. Scott, "Comparing the Robustness and Effectiveness of the Antarctic Treaty System and the UNFCCC Regime," *Australian Journal of Maritime & Ocean Affairs* 11, no. 2 (2019): 96–97.

The Issue of Mutual Concern and the Legitimation Goal

Here again we need to begin our analysis by identifying the issue of mutual concern to states that needed to be addressed by means of multilateral cooperation. It will be recalled that the CSC issue arises from unconstrained pursuit of the legitimation goal of states and thus needs to be managed to avoid a situation in which states might enter into conflict or not be able to pursue that goal at all. We will again seek to identify the CSC issue and the legitimation goal in tandem. The establishment of the WTO was the primary achievement of the Uruguay Round of multilateral trade negotiations. Although the need to establish a formal organisation to oversee the regulation of international trade conduct was not overtly expressed by GATT contracting parties at the onset of the Round, understanding just why Contracting Parties decided to launch a new round of multilateral trade negotiations might be a useful indicator of the CSC issue.

As part of the very functioning of the GATT system, impetus for the launch of a new round of multilateral trade negotiations could be couched in terms of greater trade liberalisation or even expanding trade liberalisation into new areas. Indeed, GATT Contracting Parties expressed in the *Ministerial Declaration on the Uruguay Round*[147] their determination, *inter alia,* 'to halt and reverse protectionism and to remove distortions to trade' and their aim to 'bring about further liberalisation and expansion of world trade to the benefit of all countries.'[148] But while this would not be a necessarily inaccurate assessment, it would indicate the issue as seen through the lens of the foundation ideology. That Contracting Parties also expressed at various points in the *Declaration* their concern with the strength and durability of the multilateral trading system, seems to indicate that the CSC issue that prompted states to establish the WTO during the Uruguay Round might have been related to the functioning of the multilateral trade regulation system.

As early as the start of the Tokyo Round in 1973, GATT Contracting Parties had expressed the need for 'improvement of the international framework for the conduct of world trade.'[149] Despite the successful conclusion of the Round in 1979, by the 1980s all countries 'were acutely worried by the drift and deterioration in trade relations, and by the clear risk that the GATT itself – the rule of law in international trade – would be so undermined and bypassed that it would lose all credibility and effectiveness.'[150] During a meeting in June 1981 between the largest trading

[147] GATT, "Ministerial Declaration on the Uruguay Round," 20 September 1986, GATT Doc. MIN.DEC, 1. This declaration is sometimes referred to as the 'Punta del Este Declaration' or the 'Uruguay Round Declaration'. These terms will thus be used here interchangeably.
[148] GATT, "Ministerial Declaration on the Uruguay Round," 2.
[149] GATT, "Declaration of Ministers," 14 September 1973, GATT Doc. MIN(73)1, 1.
[150] John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (The Hague: Kluwer Law International, 1999), 7.

nations of the GATT, officials expressed concern about the 'worldwide slowdown in economic activity and the trade tensions associated with it', concluding that 'trade relations are beset by a number of complex and potentially disruptive problems, reflecting growing protectionist pressures' and thus 'improved international cooperation to solve these problems' was needed.[151] This was confirmed in an official GATT Ministerial Declaration issued in 1982, when Contracting Parties recognised that 'the multilateral trading system, of which the General Agreement is the legal foundation, is seriously endangered' and committed 'to overcome these threats to the system.'[152] It seems therefore that the CSC issue to which the establishment of a new trade organisation was a response can best be defined as one of *ensuring a cohesive, stable, and durable multilateral trade regulation system*.

If that was the issue to which establishing a formal trade organisation was a response, then what may have been the legitimation goal of states that gave rise to the CSC issue? In this case the legitimation goal of states seemed to have been most basically *to adopt trade policies contrary to the rules and overall philosophy of the GATT, while wanting others to remain fully committed to the rules and ethos of the system*. Identification of the legitimation goal can be theoretical, but this definition seems supported when we consider the political context within which the WTO emerged. By the time the Uruguay Round began, the international trading environment had changed substantially since the establishment of the GATT in 1947. Not only had GATT membership expanded from twenty-three contracting parties to over one hundred, thus increasing the complexity of trade negotiations, [153] but practices of protectionism had changed as well, with non-tariff barriers such as trade-distorting subsidies and quantitative restrictions being increasingly used to obstruct the flow of international commerce.[154] The multilateral trade negotiations undertaken under the auspices of the GATT thus came to encompass negotiations on a wider range of issues, including the reduction of non-tariff barriers, issues related to government procurement as well as trade in agricultural products, albeit outcomes in relation to the latter were at best limited.

While the Tokyo Round of negotiations had tackled to some extent the issue of non-tariff barriers and aspects of agriculture, it also led to a fragmentation of the multilateral trading system, for the primary product of the Round was a number of plurilateral agreements, called "Codes", which

[151] Croome, *Reshaping the World Trading System,* 7.
[152] GATT, *Ministerial Declaration*, 29 November 1982, L/5424.
[153] L. Alan Winters, "The Road to Uruguay," *The Economic Journal* 100, no. 403 (1990): 1292.
[154] See, e.g., Ray, "Changing Patterns of Protectionism." 'By the late 1960's it was recognised that the main barriers to international trade were no longer tariffs; nontariff measures taken by states, such as the granting of export subsidies or the levying of countervailing duties to assist domestic producers, the establishment of quota programs, and the use of different methods of valuing goods for customs purposes, represented greater threats to trade liberalisation than tariffs'. McRae and Thomas, "The GATT and Multilateral Treaty Making," 54.

functioned more as side agreements than official interpretations of the GATT and were applicable only to those GATT contracting parties that had accepted and acceded to them.[155] As the Codes were not official interpretations of the GATT, signatories were not required to extend MFN treatment to non-signatories, thus serving to undermine the non-discrimination obligation pursuant to Article I of the GATT, which we identified above as having constituted part of the original CSC solution.[156] Despite a relative progress in terms of trade liberalisation, the aftermath of the Tokyo Round saw heightened sentiments of protectionism and fears of further economic recession among contracting parties, which were largely fuelled by the oil crisis in the early 1970s and the financial crisis throughout the 1980s.[157]

This led several GATT contracting parties, in particular the US, EC, and Japan to adopt protectionist policies, at times in blatant violation of GATT rules.[158] This wave of 'new protectionism' served further to threaten the multilateral trading system. Significantly, the United States, whilst itself adopting trade-restrictive policies in violation of GATT rules, sought unilaterally to retaliate by means of Section 301 of its 1974 Trade Act against the trade policies of other contracting parties, most notably the EC and Japan, that were inconsistent with GATT law or simply deemed to be unfair to US commerce.[159] By pursuing to as great an extent as possible policies contrary to the rules and overall philosophy of the GATT, while wanting others to remain fully committed to the rules and ethos of the system, however, GATT contracting parties put into question the credibility of the entire multilateral trading system and the necessity thus arose to devise an agreed means by which to constrain pursuit of this self-interested goal. Let us now look at the CSC solution.

The CSC Solution

We can now identify the CSC solution, which, as it will be recalled, constitutes most basically the primary means by which states agree to place a constraint on pursuit of their common self-interested goal and thereby address the issue of mutual concern. Having defined the CSC issue to have been one of ensuring a cohesive, stable, and durable multilateral trade regulation system and the legitimation goal to have been to adopt trade policies contrary to the rules and overall

[155] This has been called the GATT *à la carte,* whereby 'contracting parties were at liberty to adhere only to those agreements that served their national interests. Wilkinson, *Crisis and the Governance of Global Trade*, 81. See, also, Desta, *The Law of International Trade in Agricultural Products*, 148; Robert Wolfe, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor," *Journal of International Economic Law* 12, no. 4 (2009): 839.
[156] Winters, "The Road to Uruguay," 1295.
[157] Wilkinson, *Crisis and the Governance of Global Trade,* 82.
[158] Finlayson and Zacher, "The GATT and the Regulation of Trade Barriers," 572.
[159] See, Wilkinson, *Crisis and the Governance of Global Trade,* 73. See, also, John H. Jackson, "The Great Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results," *Columbia Journal of Transnational Law* 36, no. 1-2 (1998): 183.

philosophy of the GATT while at the same time wanting others to remain fully committed to the rules and ethos of the system, we can suggest that the solution was, most basically, the establishment of the WTO itself, as a forum for progressive trade liberalisation via periodical rounds of multilateral negotiations and as inclusive of a system of compulsory dispute settlement to enforce those rules agreed during the negotiations.

The solution is most clearly expressed in Article I of the WTO Agreement,[160] by which states agree most simply to establish the World Trade Organisation. According to leading international trade scholar John Jackson, the two most important institutional structures established by the Uruguay Round package agreed to in 1994 were the establishment of the WTO 'as a formal international organisation' and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to 'specify and control the dispute settlement procedure' within the Organisation.[161] That the creation of a formal organisation itself was the solution is further evident in the fact that the WTO Agreement, or what Jackson calls the "WTO Charter", 'is devoted to the institutional and procedural structure that will facilitate and in some cases be necessary for the effective implementation of the substantive rules that have been negotiated in the Uruguay Round', and as such 'itself does not include substantive rules, but incorporates substantive agreements resulting from the Uruguay Round into its "annexes"'.[162]

Other provisions in the WTO Agreement serve to qualify, make effective and facilitate the solution. By Article II:1, for instance, the WTO 'shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO Agreement]',[163] while Article II:2 provides that all annexes to the WTO Agreement are legally binding on all Member states.[164] This provision is commonly called the 'single-undertaking'

[160] The WTO Agreement was part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, which is comprised of around 60 legal instruments, including *inter alia* understandings, protocols, decisions, and declarations. All instruments embedded in the Final Act are legally binding on all WTO Members, except for the two plurilateral agreements still in force. Of those 60 instruments, about 30 constitute the WTO Agreement. Agreements listed under Appendix 1 to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) are generally considered to be the most important under the WTO Agreement, as they are the only agreements 'that are subject to, and can be invoked before, the WTO dispute settlement mechanism'. See Joost Pawelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003), 41–42.

[161] John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (New York: Cambridge University Press, 2000), 375–376. See, also, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1 January 1995, 1869 UNTS 401. https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[162] Jackson, *The Jurisprudence of GATT and the WTO*, 400.

[163] WTO Agreement, Article II:1.

[164] WTO Agreement, Article II:2. The WTO Agreement and its relevant annexes constitutes over 26,000 pages of text. See, Jackson, *The Jurisprudence of GATT and the WTO*, 399.

requirement, which had been used during the Uruguay Round and stipulates that all WTO obligations concluded during that Round are binding on all WTO Members as one single package and without reservation.[165] Article III in turn determines the functions of the WTO. These are, inter alia, to 'facilitate the implementation, administration and operation, and further the objectives, of [the WTO Agreement] and of the Multilateral Trade Agreements', to 'provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to [the WTO Agreement]', and to administer the DSU, which is annexed to the WTO Agreement.[166] Provisions setting out the structure of the Organisation and outlining decision-making procedures also serve to support the solution. By Article IV, states agree that '[t]here shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years' and by Article IX states agree that the 'WTO shall continue the practice of decision-making by consensus followed under GATT 1947'. Where consensus cannot be reached, Article IX provides that the matter at issue can be decided by voting on a one-country-one-vote basis.[167]

The CSC solution in this case, then, was the establishment of the WTO inclusive of a system of compulsory dispute settlement. The WTO would be the custodian of existing law developed under the auspices of the GATT, including the agreements negotiated during the Uruguay Round, and of the ongoing evolution of the trade regime. On this basis, the Multilateral Trade Agreements were an integral part of managing the issue of ensuring a cohesive, stable, and durable multilateral trading system and were, by virtue of the single-undertaking – that is, the idea that all WTO Members were to accept all trade agreements as a single package, applicable to all states equally. The various multilateral trade agreements can, in fact, be seen as embedding their own sub-CSCs, which could be expected to reinforce the CSC solution in the WTO Agreement. Let us now look at the foundation ideology.

The Foundation Ideology

We are now at the point of identifying the foundation ideology that underpinned agreement on the establishment of the World Trade Organisation. It will be recalled that the foundation ideology is a principle or a set of inter-related principles on the assumed verity of which states are able to reach agreement on a solution to the issue of mutual concern. Scott tells us that the foundation

[165] See, Robert E. Hudec, "GATT and the Developing Countries," *Columbia Business Law Review* 1992, no. 1 (1992): 76. This stood in stark contrast to the fragmented 'code' approach adopted during the Tokyo Round.
[166] WTO Agreement, Article III.
[167] Article IX, WTO Agreement. Note that whereas Contracting Parties to the GATT never sought formally to define the meaning of 'consensus', Article IX clarifies that consensus shall be deemed to have been achieved 'if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'. Consensus had not been defined in the GATT.

ideology is usually alluded to though not overtly stated in the Preamble to a multilateral treaty. By paragraph 1 of the Preamble to the WTO Agreement, Members recognise that:

> [T]heir relations in the field of trade and economic development should be conducted with a view to raising standards of living, ensuring full employment and a large and readily growing volume of real income and effective demand, and expanding production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[168]

On the basis of the passage above, we can suggest that the most basic principle on the assumed verity of which agreement to establish a formal trade organisation was reached was that of free trade: that freeing international trade from barriers that restrict its flow brings rising living standards and growing income and prosperity for all. This would indicate continuity with the original CSC at the heart of the ITO Charter and of which the GATT was an integral part. This is not surprising considering that the WTO itself was a direct outcome of the process of negotiations directed to the liberalisation of barriers to trade and the elimination of discriminatory treatment on a reciprocal and mutually advantageous basis devised as part of the original CSC solution.

A closer reading of the Preamble to the WTO Agreement suggests however that it is not only the principle of free trade that underpins the Agreement, but that freeing trade is to be pursued 'in accordance with the objectives of sustainable development'. The principle of sustainable development can best be understood as a compound concept, referring to an evolved idea of economic development, which takes into account concerns about environmental protection and preservation.[169] According to Karin Mickelson, sustainable development refers to the 'qualified' right to 'environmentally sound and sustainable development'.[170] While environmental concerns in relation to international commerce emerged largely in connection with the Stockholm Declaration adopted as a result of the UN Conference on the Human Environment in 1972,[171] the principle of economic development, or of a 'right to development' – that all states have a fundamental right to economic as well as other forms of development, can be traced back to the

[168] WTO Agreement, Preamble.
[169] See, Bartram S. Brown, "Developing Countries in the International Trade Order," *Northern Illinois University Law Review* 14, no. 2 (1994): 377.
[170] Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse," *Wisconsin International Law Journal* 16, no. 2 (1997): 375.
[171] Brown, "Developing Countries in the International Trade Order," 376.

negotiating history of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948.[172]

During the Havana Conference in 1948, less-developed countries had sought to secure special freedom to deviate from the code of conduct and liberalisation provisions embedded in the ITO Charter and thus to adopt protectionist policies on the basis of their need for economic development.[173] Notably, however, whilst it is true that the United States and United Kingdom were aware of the problems of developing countries, issues of economic development were not at the centre of the ITO project[174] and were fundamentally secondary to the primary CSC issue of trade regulation. The draft ITO Charter produced by the United States contained no provisions on economic development or special treatment for developing or less-developed countries, on the basis of the belief that problems of economic development had no place in a trade charter and should be addressed 'in the Economic Development Sub-commission of the United Nations Economic and Social Council and by institutions such as the World Bank.' [175] A chapter on economic development in the ITO Charter was nonetheless secured at the request of developing countries.[176]

Following the failure of the ITO to come into force and the survival of the GATT instead, which as an application of the CSC solution did not contain any provisions on economic development, the evolution of the trade regulation CSC, as it relates to developing countries, came to be primarily characterised by an attempt by these countries to embed the idea of a right to development into the GATT primarily by means of loosening what has been interpreted here as the original CSC solution.[177] Developed countries, for their part, sought to reaffirm the primacy of the principle of free trade over ideas of development, whilst still making certain concessions to developing countries. During the 1955 Review Session of the GATT, for example, developing contracting parties secured an amendment to Article XVIII of the GATT expanding their right to

[172] Mickelson, "Third World Voices in International Legal Discourse," 375. See, also, Shirley V. Scott and Orli Zahava, "Developing Countries and International Law," in *Oxford Research Encyclopedia of International Studies,* ed. Renee Marlin-Bennett (Online Publication: Oxford University Press, 2017), 13.
[173] Clair Wilcox has labelled this 'the fetish of industrialisation', whereby, according to him, largely under-developed countries understood development to mean industrialisation and thus used it as a justification to advocate for greater freedom to adopt protectionist policies. Wilcox, *A Charter for World Trade,* 30–31. See, also, Hudec, *Developing Countries in the GATT Legal System*, 4.
[174] Brown, "Developing Countries in the International Trade Order," 350.
[175] Hudec, *Developing Countries in the GATT Legal System*, 8.
[176] The first mention of the need to consider the problems of economic development faced by developing countries in as part of the new international trade organisation was made by the ECOSOC in its resolution calling for a conference on trade and employment. See, ECOSOC, "Resolution Regarding the Calling of an International Conference on Trade and Employment," in *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (London, October 1946, E/PC/T/33), 42.
[177] For a comprehensive account of the development of the GATT legal system in relation to developing countries until the mid-1980s, see, Hudec, *Developing Countries in the GATT Legal System*.

adopt protectionist policies for the purposes of economic development and the inclusion of a provision in the new Article XXVIII*bis,* on tariff negotiations, providing that contracting parties should take into account during such negotiations that the special needs of less developed countries at times made it necessary for them to use tariffs for economic development and revenue purposes; in other words, less-developed countries were not expected to reciprocate fully the tariff concessions other countries were making.[178]

While victories as far as a right to deviate from GATT rules for economic development, the temporary nature of the amended Article XVIII and the fact that it was framed 'as an exception to be controlled very carefully – and, quite possibly, even discouraged'[179] as well as the vague and non-legally binding character of the non-reciprocity provision in Article XXVIII*bis*, served to reinforce the primacy of the principle of free trade over the idea of a right to development. This was evident, for example, in the fact that during the Kennedy Round, whilst there was some expectation that developed countries should not expect full reciprocity from developing countries during tariff negotiations, the latter were nonetheless required to make some form of contribution to trade liberalisation; as Hudec has noted, '[d]eveloping countries were allowed to become formal "participants" in the negotiations on the basis of a declared intention to "contribute".'[180]

By the mid-1960s the idea of a right to development gained strength internationally, in large part due to the process of de-colonisation, and gained clearer expression in the GATT with the addition of a fourth part to the Agreement. Part IV, entitled 'Trade and Development', was devised primarily as a response to the challenge to GATT posed by the 1964 UN Conference on Trade and Development (UNCTAD).[181] The creation of UNCTAD, which had been supported by the Soviet Union, had emerged as a potential alternative global trade organisation better suited to the needs of developing countries, who had been increasingly dissatisfied with their performance in the GATT.[182] Part IV provided, *inter alia,* that developed countries should endeavour to reduce trade barriers on products of special interest to developing countries and that developed countries do not expect reciprocity from less developed contracting parties.[183] Although ultimately it contained no firm legal obligations, Part IV was most significant as the first concrete instance in which GATT contracting parties explicitly recognised, though did not define, at an ideational level the relationship between the ideas of free trade and economic development.[184] It was

[178] GATT, Article XXVIII*bis*:3(b).
[179] Hudec, *Developing Countries in the GATT Legal System,* 28.
[180] Hudec, *Developing Countries in the GATT Legal System,* 45–46.
[181] Wilkinson, *Crisis and the Governance of Global Trade,* 64.
[182] Wilkinson, *Crisis and the Governance of Global Trade,* 64. See, also, Brown, "Developing Countries in the International Trade Order," 360; Hudec, *Developing Countries in the GATT Legal System,* 40ff.
[183] GATT, Articles XXXVI and XXXVII.
[184] According to Hudec, the significance of Part IV rested in the fact that it was 'an agreed statement of principle.' Hudec, *Developing Countries in the GATT Legal System,* 58.

expressed in Part IV, for example, not only that more trade was vital to the economic development of less developed countries, but also that one of the basic objectives of the GATT was, in fact, 'the progressive development of the economies of all contracting parties'.[185] That the exceptions to the GATT were only temporary and the commitments of developed countries hortatory at best seems to have reaffirmed the primacy of free trade, but the level of ambiguity with which the relationship between the two principles was expressed should not be understated.

The idea of a right to development gained more firm expression internationally throughout the 1970s and 1980s as it came to be directly linked with the idea of human rights.[186] This led to further changes to the GATT, including the establishment in 1971 of the Generalised System of Preferences (GSP) as a temporary exception to the MFN obligation pursuant to Article I of the GATT and in 1979 at the end of the Tokyo Round with the so-called Enabling Clause, which, as already noted above, gave the GSP a permanent legal basis. By the time the Uruguay Round was launched in 1986, the idea that all individuals and states have an 'inalienable' right to development seemed to have been universally accepted, as expressed in the *Declaration on the Right to Development* by the General Assembly in 1986.[187] The apparent acceptance of the right to development, however, was impacted by emerging concerns throughout the 1970s and 1080s with the natural environment or, as Brown has put it, the 'global environmental commons.'[188] Environmental concerns prompted a redefinition of the idea of economic development so that it would become compatible with environmental protection and preservation.[189] Many developing countries regarded environmental protection and preservation as antithetical to their sovereign right to economic development and simply as another form of attempted intervention by industrialised countries, insofar as many of the 'global commons' that needed protection were located in the Global South.[190]

The principle of 'sustainable development' can therefore be said to have emerged largely from the juxtaposition of the idea of a right to development – that all states and persons have an inalienable right to development, and the principle of environmental protection and preservation

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[185] GATT, Article XXXVI.
[186] See, Peter Uvin, "From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development," *Development in Practice* 17, no. 4-5 (2007): 597–606. See, also, Isabella D. Bunn, "The Right to Development: Implications for International Economic Law," *American University International Law Review* 15, no. 6 (2000): 1425–1467.
[187] UN General Assembly, Resolution 41/128, Declaration on the Right to Development, 4 December 1986, UN Doc. A/RES/41/128. https://undocs.org/en/a/res/41/128. See, also, Upendra D. Acharya, "Is Development a Lost Paradise? Trade, Environment, and Development: A Triadic Dream of International Law," *Alberta Law Review* 45, no. 2 (2007): 401–420.
[188] Brown, "Developing Countries in the International Trade Order," 376.
[189] See, Acharya, "Is Development a Lost Paradise," 410–411.
[190] Brown, "Developing Countries in the International Trade Order," 377. See, also, Acharya, "Is Development a Lost Paradise," 411.

– that the environment must be preserved. As defined in the principle 3 of the 1992 Rio Declaration on Environment and Development, the principle of sustainable development maintains that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'[191] The definition of the principle, however, remains imprecise[192] and its relationship to the principle of free trade is equally so. The Preamble to the WTO Agreement portrays the foundation ideology of free trade as being 'in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.'[193] The precise relationship between trade liberalisation and sustainable development, however, remains ambiguous; while trade liberalisation is expressed as seeking to protect and preserve the environment, it is simply 'consistent' with concerns related to economic development.

Table 4. The CSC of the WTO Agreement, 1995

CSC Issue:	How to ensure a cohesive, stable, and durable multilateral trade regulation system.
Legitimation Goal:	To adopt trade policies contrary to the rules and overall philosophy of the GATT, while at the same time wanting others to remain fully committed to the rules and ethos of the system.
CSC Solution:	The establishment of the World Trade Organisation as a forum for progressive trade liberalisation via multilateral negotiations and as inclusive of a system of compulsory dispute resolution.
Foundation Ideology:	Free trade: Freer world trade raises standards of living for all. Sustainable development is compatible with trade liberalisation.
CSC Myth:	Economic theory and calculations are able objectively to dictate appropriate trade policy and determine compliance with international trade law.

Conclusions Regarding the Logical Nexus of the CSC Embedded within the WTO Agreement

We have now discerned the CSC at the heart of the WTO Agreement and can move on to drawing conclusions about the logical nexus embedded within it. We noted at the start of this section that a treaty that builds on an already-existing CSC is expected to reinforce the original CSC nexus so that the CSC, and hence the treaty regime, remains strong. In the case of the WTO, we can say

[191] UN General Assembly, Resolution 44/228, Rio Declaration on Environment and Development, 22 December 1989, UN Doc. A/RES/44/228. https://undocs.org/en/A/RES/44/228.
[192] See, e.g., Ved P. Nanda, "Sustainable Development, International Trade and the Doha Agenda for Development," *Chapman Law Review* 8, (2005): 53–76.
[193] WTO Agreement, Preamble.

that the CSC at the heart of the WTO Agreement has, as expected, served to reinforce the original CSC to which the GATT was integral most clearly at the level of the solution and, importantly, the foundation ideology.

The foundation ideology of free trade was found to have underpinned the WTO Agreement, but the Preamble to the Agreement also alluded to the principle of sustainable development – that the right to development must be pursued in a manner that meets developmental and environmental needs of present and future generations. On the basis of the analysis above, it seems that the principle of sustainable development had in fact emerged as a competing ideology to that of free trade, for a solution following directly from that principle would serve to undermine the original CSC nexus, for it would likely justify, as a matter of right and necessity, trade restrictions rather than seek to dismantle them.[194] The way the relationship between free trade and sustainable development was articulated, however, meant that the original foundation ideology was fully aligned with that underpinning the WTO Agreement because the original ideology was not modified to take into account sustainable development. Rather, the original ideology that freeing international trade from barriers that keep it small leads to greater economic growth and prosperity for all was simply expressed in the Preamble as being in harmony with the goals of sustainable development, but, notably, not in such a way as to limit trade liberalisation to that compatible with sustainable development objectives. The ideology of free trade has, therefore, remained at the core of the multilateral trading system constituted by the WTO,[195] thus reinforcing the logical nexus of the original CSC structure.

The CSC at the heart of the WTO Agreement also served to reinforce the logical nexus of the original CSC of the GATT by upholding the original CSC solution as a logical application of the principle of free trade to the issue of mutual concern, for it provided that trade liberalisation – or, more precisely, the creation of the rights and obligations of Member states restricting their freedom to pursue protectionist policies, would be undertaken by means of a process of mutually advantageous and reciprocal negotiations. Indeed, according to Narlikar, 'the [WTO] continues to function as a forum for negotiations and provides a code of conduct as the GATT had done'.[196] Periodical "rounds" of negotiations therefore remain at the core of the WTO, as had been the case in GATT, the first of which within the WTO framework has been the Doha Round. By upholding the primarily procedural CSC solution operationalised by the GATT, however, the WTO Agreement also preserved a situation where the operation of the CSC solution may not serve to

[194] Acharya, "Is Development a Lost Paradise," 409.
[195] Hopewell, *Breaking the WTO*, 25.
[196] Amrita Narlikar, *World Trade Organisation: A Very Short Introduction* (Oxford: Oxford University Press, 2005), 30.

reinforce the foundation ideology, for it did not establish any provision that would guarantee that further trade liberalisation would be achieved and, thus, that the CSC nexus would remain tight.

The inclusion of a legalised dispute resolution system to apply and enforce the provisions of the Multilateral Trade Agreements also provided for the ongoing reinforcement of this nexus, insofar as the role of the dispute settlement system was to uphold the legal rights and obligations of states that had been negotiated during the mutually advantageous and reciprocal negotiations envisaged as part of the original CSC solution. As Steinberg has noted, '[i]nsofar as the Appellate Body was delegated agency, it was to apply and help enforce the contract concluded by the Uruguay Round negotiators.'[197] Thus, by Article 3(2) of the WTO Agreement:

> The Members recognise that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[198]

By Article 9(2) of the WTO Agreement, Member states affirm that the Ministerial Conference and the General Council have '*exclusive* authority to adopt interpretations of [the WTO Agreement] and of the Multilateral Trade Agreements',[199] whereas Article 19(2) reinforces the provision that the DSB must uphold existing agreements, not create new law: 'in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements'.[200] A compulsory system of dispute settlement further strengthens the original CSC nexus by tightening its link to the ideology of international law insofar as it serves to reinforce the idea that there is a clear distinction between compliance and non-compliance with international trade rules. This stands in contrast to the GATT years, during which it was often difficult to distinguish between legal and illegal behaviour.[201] According to ILI theory, an ideology is more resistant to change when embedded in international

[197] Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," *American Journal of International Law* 98, no. 2 (2004): 259.
[198] DSU, Article 3(2). The 'covered agreements' are those listed in Appendix 1 to DSU, which are a) the Agreement Establishing the World Trade Organisation; b) the Multilateral Trade Agreements and; c) the Plurilateral Trade Agreements, though the applicability of the DSU to the plurilateral agreements 'shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement'. DSU, Appendix 1.
[199] WTO Agreement, Article 9.2. Emphasis added.
[200] DSU, Article 19(2).
[201] Hudec, *Developing Countries in the GATT Legal System*, 31.

law because the principles contained in the ideology of international law include its having a more or less timeless quality.[202]

2.3 The WTO, power, and the global trade order

We have now identified the cognitive elements embedded in the constitutive treaties of the multilateral trading system, the GATT and the WTO Agreement. This was done by means of tracing the negotiation process from which these documents emerged, from post-war negotiations for the establishment of the International Trade Organisation, to the triumph of the GATT as the primary treaty governing the trade relations of states for over five decades, and finally to the establishment of the World Trade Organisation. The WTO Agreement entered into force on 1 January 1995, thereby establishing a formal trade organisation, of which the GATT would now be an integral part, but also legitimising the original CSC and, hence, the foundation ideology of free trade.

2.3.1 The principle of free trade and (unequal) structures of world power

A central tenet of ILI theory is that a multilateral treaty – and the CSC embedded within it, is an integral part of the power dynamics around the subject matter of the treaty; the CSC both reflects and helps determine a structure of power relations.[203] The process of confirmation of a CSC into a multilateral treaty is thus one of both legitimising the CSC and crystallising the structure of power relations of which the CSC forms the backbone.[204] The unequal character of the structure of power relations is masked by the fact that the CSC solution, justified as it is by the foundation ideology and further legitimised by being embedded into the system of international law, appears to treat all states equally. In reality, however, this is not the case.

Insofar as the WTO Agreement provided for the ongoing reinforcement of the overall nexus of the CSC at the heart of the ITO Charter and to which the GATT was integral, it is useful to consider here the relationship between the original CSC solution and broader structures of power. Based on the CSC analysis above, the CSC solution on the basis of which the GATT was negotiated applied equally to all countries – not only was non-discrimination one of the primary obligations, but all countries, great or small, were under the same obligation to negotiate for the reduction of tariffs and the elimination of preferences on a mutually advantageous and reciprocal basis. Furthermore, the legal right not to give concessions without receiving reciprocal concessions in return and not to reduce tariffs on a particular product was to be applied to all

[202] Shirley V. Scott, "International Law as Ideology: Theorising the Relationship Between International Law and International Politics," *European Journal of International Law* 5, no. 3 (1994): 320.
[203] Scott, *The Political Interpretation of Multilateral Treaties,* 17.
[204] Scott, *The Political Interpretation of Multilateral Treaties*, 116.

states equally, which was expected to 'afford adequate opportunity to take into account the needs of individual countries and individual industries.'[205] Other supporting provisions on commercial policy were also to apply equally to all states.

In practice, however, a system of reciprocal tariff bargaining among states with unequal levels of economic development effectively meant asymmetry.[206] This was stressed by developing countries during the Havana Conference in 1948 where the ITO Charter was finalised on the basis that an obligation to negotiate for the reduction of tariffs and elimination of preferences would be unfavourable to countries in the early stages of development.[207] The obligation nonetheless remained in place. During the early years of the GATT, developing countries came to be largely marginalised from negotiations as those were conducted on a product-by-product and principal supplier basis and developing countries were rarely the principal suppliers of products of interest to other countries.[208] Furthermore, although the CSC solution did not in fact exclude agriculture – a sector of special interest to developing countries, from its purview, exceptions to provisions regulating the use of quantitative restrictions and subsidies in favour of agricultural products meant that tariff concessions related to those products had limited, if any, real effect. Calls for special and differential treatment came to be a central part of developing countries' attempts to improve their place in the multilateral trading system: if they were to benefit from the process of trade liberalisation undertaken under the GATT, they needed to be treated differently. The special treatment of developing countries notwithstanding, the primary beneficiaries of the GATT remained by and large industrial countries.

By upholding the original CSC solution and, hence, the ideology of free trade underpinning it, the WTO Agreement reinforced the asymmetrical outcomes stemming from processes of tariff bargaining undertaken pursuant to the GATT. According to Acharya, 'the WTO offers each of its members the opportunity to participate in market competition, on its face fair and free, but in reality, something quite different because the members are not on equal footing.'[209] Several of the Multilateral Trade Agreements concluded at the end of the Uruguay Round, including importantly the Agreement on Agriculture as will be seen in the next chapter of this dissertation, were negotiated on the basis of a quid-pro-quo between the most powerful members within the regime, namely the US and the EC, and largely neglected the interests of developing countries.[210] This

[205] ITO Charter, Article 17.
[206] See, Wilkinson, *What's Wrong with the WTO and How to Fix It,* 73ff.
[207] Wilcox, *A Charter for World Trade,* 66.
[208] James Scott, "Developing Countries in the ITO and GATT Negotiations," *Journal of International Trade Law* 9, no. 1 (2010): 17.
[209] Acharya, "Is Development a Lost Paradise," 408-409.
[210] Many of the rights and obligations of states pursuant to the Agreement on Agriculture, for example, were agreed to on the basis of the so-called Blair House Accord, which was in essence a quid-pro-quo

has been masked to an extent by the fact that by Article IX of the WTO Agreement, as had already been the case under GATT, decisions are made by consensus. This has been 'both necessary and non-negotiable' for weaker countries for it means that all Members, developed or developing, have effective veto right over the legally-binding rights and obligations agreed to during negotiations.[211]

Furthermore, an automatic system of dispute settlement was largely seen by weaker countries as beneficial, for there would be greater enforcement of trade rules. But, insofar as the rights and obligations enforced through dispute settlement were largely influenced by the most powerful countries within the regime, it seems fair to say that dispute settlement too has generally served the interests of the most powerful. Developed country Members have indeed been the heaviest users of the WTO's dispute settlement system, albeit this has not always been the case and weaker states have been able to use the system to defend and improve their position in the system as will be shown in the next chapter of this dissertation.

A final point here is that while the process of trade liberalisation undertaken under the GATT and the WTO and the trade rules enabling and reinforcing this process have generally served the interests of primarily industrial countries, it did not preclude less-powerful countries from rising within the regime. Another way of expressing this is that while the CSC solution has placed some countries in a better position vis-à-vis pursuit of the legitimation goal, thus sustaining and legitimising an asymmetrical structure of power relations between the members of the regime, it did not "lock" that structure in place.[212] The fact that all decisions in the GATT years were taken by consensus, as is also the case in the WTO meant that, whilst a process of reciprocal and mutually advantageous tariff bargaining benefited primarily those countries with larger markets, and thus with more to offer in negotiations, less powerful countries nonetheless had the opportunity to influence outcomes that they saw as being of little or no benefit to them. It is true that most powerful countries were still dominant in negotiations, for, as William Diebold Jr has commented, '[n]aturally it was the major trading countries whose views were crucial to the kind

between the US and the EC in relation to their long-standing dispute on oil seeds during the late 1980s and early 1990s. See, e.g., Joseph A. McMahon, "The Agreement on Agriculture," in *The World Trade Organisation: Legal Economic and Political Analysis, Volume I,* eds. Patrick F. J. Macrory, Arthur E. Appleton, and Michael G. Plummer (New York: Springer, 2005), 200–202.

[211] Bhupinder Chimni, "The WTO, Democracy and Development: A View from the South," in *Making Global Trade Governance Work for Development,* ed. Carolyn Deere-Birkbeck (Cambridge and New York: Cambridge University Press, 2011), 274.

[212] It is true that a CSC as well as the power dynamics to which the CSC is integral are in constant change, but compare this to the war prevention CSC at the heart of the UN Charter, in which the composition and associated voting rules of the Security Council, justified as they were by the ideology of collective security, combined with amendment provisions in the treaty, served to crystallise in a much more rigid manner the structure of power relations to which the UN Charter was integral.

of "consensus" this process required',[213] but it is an altogether different thing to maintain that they were marginalised altogether; consensus decision-making has remained an important source of power for developing and less-developed countries in the multilateral trading system. While calls for the modification of consensus decision-making procedures have been made since the establishment WTO, including a proposal by Canada during the Seattle Ministerial Meeting in 1999 to establish an executive committee comprised of the major trading countries to direct the Organisation, these have been strongly opposed by developing and least-developed countries as being antithetical to the very foundation ideology underpinning the regime: as one commentator has noted, '[i]f all […] rules and obligations apply to all members equally, then arguments about "efficiency" cannot be used to exclude any country from decision-making processes, whatever its trade or economic weight'.[214]

Consensus decision-making, in combination with the single-undertaking requirement that 'nothing is agreed until everything is agreed' and in light of the rapid economic growth and increasing bargaining clout of some developing countries within the WTO, has, however, significantly complicated agreement on further liberalisation during the most recent round of trade negotiations, the so-called Doha Development Round. Armed with the legal right effectively to veto agreements seen not to be in their interests and able to withstand pressure from more powerful Members, developing countries such as Brazil, China, and India have become increasingly able to set the agenda of negotiations and to block consensus on deals that they believe to be inherently unfair to developing and less-developed countries, in particular in the area of agricultural trade.[215] Some developed-country Members, for their part, have decried the attitude of large developing countries, labelling them 'won't do' countries seeking to block the trade liberalisation process underpinning the WTO.[216] One of the consequences of the shifting distribution of power within the WTO has thus been an undermining of the original CSC nexus, which has in fact always been a possibility since the onset of the multilateral trade regulation CSC; insofar as one of the assumptions of the principle of free trade is that the progressive removal of trade barriers will lead to greater prosperity for all, failure of WTO Members to agree to further trade liberalisation during the Doha Round has undermined the original CSC solution – that is, the process of reciprocal and mutually advantageous negotiations, as a logical

[213] Diebold Jr., "From the ITO to GATT," 159.
[214] Raghanavan, quoted in Wilkinson, *Crisis and the Governance of Global Trade*, 118.
[215] Brendan Vickers, "The Role of the BRICS in the WTO: System-Supporters or Change Agents in Multilateral Trade?," in *The Oxford Handbook on the World Trade Organisation,* eds. Amrita Narlikar, Martin Daunton, and Robert M. Stern (Oxford and New York: Oxford University Press, 2012), 261. See, also, Bernard Zangl et al., "Imperfect Adaptation: How the WTO and the IMF Adjust to Shifting Power Distributions Among their Members," *Review of International Organisations* 11, no. 2 (2016): 180.
[216] Robert B. Zoellick, "America Will Not Wait for the 'Won't-Do' Countries," *Financial Times,* 21 September 2003.

embodiment of an application of the foundation ideology of free trade to the issue of regulating global trade on an ongoing basis.

2.4 Summary of analysis and concluding remarks

This chapter has sought to unpack the WTO Agreement in terms of the CSC embedded within it. It has done so firstly by discerning the CSC at the heart of the ITO Charter and attempting to identify the precise place of the GATT within that CSC. We were then able to discern the CSC at the core of the WTO Agreement paying particular attention to the ways in which that ideational structure has served to reinforce the logical nexus of the original CSC at the heart of the ITO Charter and situating the legal detail within the WTO Agreement in relation to the broader structure of power relations to which the WTO is integral. Three primary conclusions can be drawn from the analysis in this chapter.

The first and perhaps most basic conclusion is that, whereas we started the chapter with the assumption that the GATT had embedded the original CSC of multilateral trade regulation, what has emerged from this analysis is that the GATT was, in fact, part of that CSC insofar as it represented an advanced implementation of the CSC solution. Instead, the CSC of multilateral trade regulation devised by states in the aftermath of the Second World War to avoid the economic instability and insecurity of the inter-war period was in fact embedded within the ITO Charter. The fact that the ITO Charter never came into force, however, meant that the GATT came to be the primary agreement regulating the conduct of international trade for almost fifty years. This means that whereas it is generally accepted in the literature that the multilateral trade regime was established by the GATT/WTO, it would in fact be more accurate to refer to the multilateral trade regime as being that of the ITO/WTO for it was within the ITO Charter that the original multilateral trade regulation CSC was instantiated. This finding has implications for our understanding of the trajectory of the GATT since its establishment in 1947 until the creation of the WTO in 1995, which leads us to our second conclusion.

The second conclusion is that, by virtue of being an advanced implementation of the CSC solution at the heart of the ITO Charter, the GATT was negotiated on the basis of an already-agreed issue-ideology-solution cognitive package, underpinned and logically justified as it was by the idea of free trade – that freeing trade from barriers that keep it small brings economic growth and rising standards of living for all. This leads us to reassess common claims that GATT was more accident than design;[217] while it is true that the GATT had not been conceived to be the primary institution

[217] See, e.g., Finlayson and Zacher, "The GATT and the Regulation of Trade Barriers," 562; Wilkinson, *Crisis and Governance of Global Trade,* 37; George Alvares Maciel, "Brazil's Proposal for the Reform of the GATT System," *The World Economy* 1, no. 2 (1978): 163.

governing international trade and in that sense can be seen as an accident, the normative basis on which it had been negotiated, and the legal detail embedded within the GATT, was part of a broader cognitive structure that had been agreed to by states as the primary means by which to address the issue of how to regulate the conduct of international trade on an ongoing basis. While we also found that the CSC solution operationalised by the GATT did not necessarily appear as the only one possible, it did follow logically from an application of the foundation ideology to the issue of mutual concern and, upon the success of GATT negotiations in Geneva in 1947, that issue-ideology-solution cognitive package came to be cemented. This nexus has been reinforced throughout the life of the General Agreement and has come to be reinforced with the creation of the WTO. The means by which trade was to be liberalised was important because it reinforced the ideology of free trade. Whereas some authors have expressed surprise about the durability and resilience of the GATT regime,[218] as understood from an ILI vantage point it does not seem surprising at all.

The third conclusion is that, while the multilateral trade regime has largely benefitted the stronger, at the same time it did not preclude developing countries form benefitting from the trade liberalisation undertaken in the regime. It is true that the GATT was not designed to be an instrument for facilitating the economic development of non-industrial states and that the multilateral trading system has served the interests of predominantly industrial states – at times to the detriment of others – has been convincingly argued by a number of scholars since the establishment of the GATT.[219] As largely a continuation of GATT rules and practices, the WTO largely reinforced the same ideational structure. However, this is not to say that the rules of the multilateral trading system embedded in the GATT, and subsequently the WTO, served to cement developing and less-developed countries in their post-Second World War position. In other words, while it is possible to say that the rules and practice embedded in the multilateral trading system served to disadvantage non-industrial states in comparison to their industrial counterparts, it is an altogether different thing to say that it gave them no opportunities to improve their position within the regime. That some countries have experienced large economic growth and have become important players in multilateral trade negotiations is indicative of this.

[218] See, e.g., John H. Jackson, "The Puzzle of GATT: Legal Aspects of a Surprising Institution," *Journal of World Trade Law* 1, no. 2 (1967): 131–161.
[219] See, e.g., Hudec, *Developing Countries in the GATT Legal System*; Finlayson and Zacher, "The GATT and the Regulation of Trade Barriers;" Wilkinson, *Crisis and Governance of Global Trade;* Hopewell, *Breaking the WTO*.

3.

Brazil, the *US – Cotton Subsidies* Dispute, and Implications for the WTO Regime

The previous chapter conceptualised the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement) in terms of the Cognitive Structure of Cooperation (CSC) embedded within it. This illuminated the link between the legal detail embedded in the WTO Agreement and its predecessor, the General Agreement on Tariffs and Trade (GATT), and the broader power structure of which the World Trade Organisation (WTO) forms the backbone. This chapter now turns to the United States – Subsidies on Upland Cotton (US – Cotton Subsidies) dispute initiated by Brazil through the WTO's dispute settlement mechanism (DSM) in 2002. Following a brief contextualisation of the political and normative context within which Brazil initiated the dispute, this chapter unpacks the CSC embedded in the Agreement on Agriculture, as the primary legal instrument on which Brazil's case rested. This is followed by an assessment of the US – Cotton Subsidies dispute in relation to the CSC at the heart of the WTO Agreement and to which the Agreement on Agriculture is integral. This chapter will then draw conclusions about the primary implications of the US – Cotton Subsidies dispute for the WTO regime.

3.1 The political context of the *US – Cotton Subsidies* dispute: The Doha Development Round

In September 2002, Brazil submitted to the WTO's Dispute Settlement Body (DSB) a request for consultations with the United States over subsidies on upland cotton.[1] After months of unfruitful negotiations, Brazil requested in February 2003 that a panel be established to investigate the complaint. There were six main subsidy programmes maintained by the US Government in support of agricultural producers that were the target of Brazil's complaint, namely marketing loan payments, direct payments, counter-cyclical payments and other emergency assistance, crop insurance, export credit guarantees, and 'Step 2' payments.[2] At its most basic, Brazil claimed that

[1] With reference to United States legislation, the Panel in *US – Cotton Subsidies* has defined 'upland cotton' to mean 'cotton that is produced from other than pure strain varieties of the Barbadense species, any hybrid thereof, or any other variety of cotton in which one or more of these varieties predominate.' "Report of the Panel," *United States – Subsidies on Upland Cotton,* 8 September 2004, WTO Doc. WT/DS267/R, para. 7.179. Insofar as most US-grown cotton is of the upland cotton variety, the terms 'upland cotton' and 'cotton' will be used here interchangeably. See, Karen Halverson Cross, "King Cotton, Developing Countries and the 'Peace Clause': The WTO's *US Cotton Subsidies* Decision," *Journal of International Economic Law* 9, no. 1 (2006): 153.

[2] This list is based on Cross, "King Cotton, Developing Countries and the 'Peace Clause'," 155–159. Although, as Cross notes herself, the list is not exhaustive.

these measures were, in various ways, inconsistent with the obligations of the United States pursuant primarily to the Agreement on Agriculture,[3] and secondly to the Subsidies and Countervailing Measures Agreement (Subsidies Agreement).[4] Although it is not possible to establish with certainty that Brazil's case was initiated in response to or with the specific aim of influencing Doha Round negotiations,[5] that it nonetheless coincided with the development of those negotiations meant that the outcome of the case had an impact on and served to highlight 'the underlying challenges to advancing the Doha Development Agenda.'[6] Any assessment of the dispute and of potential implications for the international order, therefore, need to be understood in relation to the legal and political context of the Doha Round.

Launched in Doha, Qatar, in 2003, the Doha Round has been highly contentious and remains incomplete.[7] The Round itself has come to be referred to as the Development Round or the Doha Development Agenda (DDA) as, according to the Doha Ministerial Declaration that launched the Round, the interests of developing and less-developed countries were to be placed at the core of negotiations:

> International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.[8]

As one author has noted, the Doha Round was, therefore, seen at least by developing countries as 'perhaps the most important event in the history of multilateral trade relations […] For the first time, the formal trade organisation recognised and acknowledged the firm link between trade and

[3] Agreement on Agriculture, 1 January 1995, 1867 UNTS 410. https://www.wto.org/english/docs_e/legal_e/14-ag.pdf.
[4] Agreement on Subsidies and Countervailing Measures, 1 January 1995, 1869 UNTS 14. https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.
[5] Although, as Black has noted, there is almost no evidence pointing to the contrary. Meredith Taylor Black, *King Cotton in International Trade: The Political Economy of Dispute Resolution at the WTO* (Leiden: Brill Nijhoff, 2016), 114, fn. 339.
[6] Mark S. Langevin, "Foot Dragging or Strategic Withdrawal: The Cotton Dispute and Executive Compliance," *Journal of World Trade* 52, no. 4 (2018): 576.
[7] For an account of the highly contentious beginnings of the Doha Round, see Rorden Wilkinson, *The WTO: Crisis and the Governance of Global Trade* (Oxford and New York: Routledge, 2006), 121ff.
[8] WTO, "Doha Ministerial Declaration," 14 November 2011), WTO Doc. WT/MIN(01)/DEC/1, para. 2.

development'.[9] The Doha Round has, however, 'been caught up in a substantial changing context of power, ideas, and crisis'[10] and the negotiations have not yet reached a conclusion.

As is generally agreed, the Round has deadlocked along North/South lines.[11] On the one hand, primarily developed countries have taken the position that progress in negotiations will only be achieved if other WTO Members, in particular emerging economies such as Brazil, China, and India, are willing to make greater concessions.[12] On the other hand, developing countries, many of which saw their agreeing to launch the Doha Development Round as 'a fundamental error',[13] have generally attributed the lack of conclusion of the Round to the unwillingness of the major powers to make trade concessions, especially in the agricultural sector, whilst at the same time demanding concessions from developing and less-developed countries in sectors such as services and intellectual property rights.[14] Furthermore, although emerging economies like Brazil, India, and China have experienced relatively fast and significant economic growth, in some measure due to trade liberalisation, their joint share of world trade has not yet matched that of the US or of Western countries as a group and, as such, developed country demands for greater and more significant concessions by emerging economies are largely seen by poorer Members as 'unwarranted'.[15]

The Doha Round has, thus, thrown into stark relief tensions between developed and developing countries that have been present in the multilateral trading system since its very inception.[16] The Round has, nonetheless, differed from past negotiations in at least one significant aspect, namely that the increasing power and leadership of developing-country Members in the WTO has effectively made it more difficult for developed Members to dictate the course of negotiations and the trade deals ultimately achieved:

> A decade or two ago, all of this could – and probably would – have been ignored, and Western countries might have forced an accord, as happened during the Uruguay Round.

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[9] Anna Lanoszka, "The Promises of Multilateralism and the Hazards of 'Single Undertaking': The Breakdown of Decision Making within the WTO," *Michigan State Journal of International Law* 16, no. 3 (2008): 671.
[10] Valbona Muzaka and Matthew Louis Bishop, "Doha Stalemate: The End of Trade Multilateralism," *Review of International Studies* 41, no. 2 (2015): 388.
[11] See, e.g., John H. Barton et al., *The Evolution of the Trade Regime: Politics, Law and Economics of the GATT and the WTO* (New Jersey: Princeton University Press, 2006).
[12] Muzaka and Bishop, "Doha Stalemate," 388.
[13] Wilkinson, *Crisis and the Governance of Global Trade*, 124.
[14] Muzaka and Bishop, "Doha Stalemate," 389.
[15] Muzaka and Bishop, "Doha Stalemate," 388.
[16] Wilkinson has, for example, argued that '[t]he political contestation that ensued [in Cancún] resulted directly from the asymmetry of opportunity embedded in the WTO's legal framework and the ways in which this has structured relations among the participating states.' Wilkinson, *Crisis and the Governance of Global Trade,* 126.

> Today, however, structural changes in the prevailing distribution of power within the WTO mean that the more powerful developing countries can resist what they perceive to be a flawed, unfair, or unacceptable deal'.[17]

This was particularly evident during the 2003 Cancún Ministerial Meeting, during which a group of developing countries, led by Brazil and known as the G20,[18] not only explicitly opposed a negotiating text on agriculture proposed jointly by the US and EU on the basis that it did not take into account the interests and necessities of developing countries and was thus fundamentally unfair, but also proposed its own working text.[19] The G20-T text contained, *inter alia,* a formula for tariff reductions that took into account the different capacities of developed and developing countries as well as provisions committing developed countries to do more in terms of special and differential treatment for developing and less-developed country Members.[20] Although other factors might have contributed to the political dynamics at play, the disagreement between the G20-T, on the one hand, and more powerful Members such as the US and the EU, on the other, as evidence of the shifting distribution of power in the WTO, was largely seen as the key catalyst for the collapse of the Cancún Ministerial.[21] Despite more than a decade of negotiations and attempts at securing a conclusion to trade negotiations, it is now generally agreed that the Doha Round is effectively dead.[22]

It was in this context of changing power dynamics and stalemate in the WTO that the *US – Cotton Subsidies* dispute unfolded. That the Panel and the Appellate Body both ruled in favour of Brazil's position constituted 'a dramatic victory' for developing and less-developed countries in the WTO

[17] Muzaka and Bishop, "Doha Stalemate," 390.
[18] Hereinafter G20-T so as not to confuse this grouping with the G-20 grouping in finance. Membership of the group changed throughout time, but the original members were Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Risa, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela. See, Amrita Narlikar and Diana Tussie, "The G20 at the Cancún Ministerial: Developing Countries and Their Evolving Coalitions in the WTO," *World Economy* 27, no. 7 (2004): 952. For an in-depth analysis of the G20-T during the Cancún Ministerial, see, e.g., Marcio Botelho, "The G-20: Aims and Perspectives of a New Trade Alliance" (MA diss.: Berlin University of Applied Sciences, 2005)..
[19] See, e.g., Narlikar and Tussie, "The G20 at the Cancún Ministerial," 951–952.
[20] See, WTO, "Agriculture – Framework Proposal," 2 September 2003, WTO Doc. WT/MIN(03)/W/6. See, also, Narlikar and Tussie, "The G20 at the Cancun Ministerial," 952.
[21] See, e.g., Rorden Wilkinson, *Crisis and the Governance of Global Trade,* 128; Robert E. Baldwin, "Failure of the WTO Ministerial Conference at Cancún: Reasons and Remedies," *World Economy* 29, no. 6 (2006): 683.
[22] The end of the Nairobi Ministerial Meeting is generally understood to have marked the 'death' of the Doha Round. See, e.g., Antoine Martin and Bryan Mercurio, "Doha Dead and Buried in Nairobi: Lessons for the WTO," *Journal of International Trade Law and Policy* 16, no. 1 (2017): 49–66; "The Doha Round Finally Dies a Merciful Death," *Financial Times*, 21 December 2015, https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879.

and a positive outcome in terms of greater trade liberalisation.[23] Moreover, at the same time of the *US – Cotton Subsidies* dispute Brazil was also successful in litigating a case against the European Union, though this time concerning export subsidies in relation to sugar producers,[24] leading some authors to suggest that the political dynamics in the WTO were fundamentally changing in favour of developing and less-developed countries with irreversible consequences for the multilateral trading system.[25] Although it is true that the findings recommendations in *US – Cotton Subsidies* were binding only on the parties to the dispute, namely Brazil and the United States,[26] they were nonetheless expected to have significant implications for the agricultural policies of other WTO Members, such as the EU and Japan[27] and were largely seen as impacting the development of agriculture negotiations during the Doha Round.

Before moving on to analysing in more detail the *US – Cotton Subsidies* dispute, it is necessary to unpack the ideational structure embedded in the Agreement on Agriculture. This is necessary because, insofar as the Agriculture Agreement was the primary legal instrument upon which Brazil's case rested, any assessment of Brazil's position in and the general unfolding of the *US – Cotton Subsidies* dispute, and of implications for the multilateral trade regulation CSC at the heart of the WTO Agreement, need to be undertaken in relation primarily to this agreement.[28] This is done with the aim not only of situating, in ideational terms, the Agriculture Agreement within the broader multilateral trade regulation CSC embedded at the heart of the WTO Agreement, but also of enabling us to determine with some level of precision where, in CSC terms, the various

[23] Cross, "King Cotton, Developing Countries and the 'Peace Clause'," 149. See, also, Kristen Hopewell, "New Protagonists in Global Economic Governance: Brazilian Agribusiness at the WTO," *New Political Economy* 18, no. 4 (2013): 603–623.

[24] See, "Report of the Panel, *European Communities – Export Subsidies on Sugar: Complaint by Brazil*," 15 October 2004, WTO Doc. WT/DS266/R. Australia (WT/DS265) and Thailand (WT/DS283) joined Brazil as co-complainants in the dispute.

[25] See, e.g., Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford: Stanford University Press, 2016).

[26] '[WTO] Report of the Panels are binding only on the parties to the particular proceeding'. John H. Jackson, "The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results," *Columbia Journal of Transnational Law* 36, no. 1-2 (1998): 181.

[27] Stephen J. Powell and Andrew Schmitz, "The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture," *Drake Journal of Agricultural Law* 10, no. 2 (2005): 290. For a detailed analysis on the implications of the *US – Cotton Subsidies* dispute for agricultural policy in the European Union, see Michael Cardwell and Christopher Rodgers, "Reforming the WTO Legal Order for Agricultural Trade: Issues for European Rural Policy in the DOHA Round," *The International Comparative Law Quarterly* 55, no. 4 (2006): 805–838.

[28] In a strictly legal sense, understanding Brazil's case in its entirety would require also understanding the Subsidies Agreement, as many of Brazil's claims were made on the basis of the provisions in this agreement. Due to the fact that, with regards to export subsidies in particular, the Subsidies Agreement explicitly defers to the Agreement on Agriculture and that, pursuant to the Article 13 'Peace Clause' of the Agreement on Agriculture still in effect at the time the dispute was initiated, only in the event that non-compliance with the Agriculture Agreement was ascertained could measures be assessed against the Subsidies Agreement, we will focus in this chapter primarily on the Agreement on Agriculture as the basis on which Brazil's dispute rested. The provisions in the Subsidies Agreement will be considered to the extent necessary for the argument developed, but a complete CSC analysis of this agreement will not be undertaken.

elements of Brazil's case intersect with each CSC and with what implications for the WTO regime.

3.2 Discerning the CSC in the Agreement on Agriculture and situating it in relation to the CSC of the WTO Agreement

The Agreement on Agriculture was concluded in 1994 at the end of the Uruguay Round of Multilateral Trade Negotiations, the last under the auspices of the GATT, and entered into force on 1 January 2005 as an integral part of the WTO Agreement. The Agriculture Agreement is generally perceived to have been one of the most significant outcomes of the Uruguay Round for it brought international trade in agricultural products under strengthened trade rules.[29] Let us now seek to define the elements of the CSC embedded at the core of the Agreement on Agriculture.

The CSC Issue and the Legitimation Goal

The first step in a CSC analysis of a multilateral treaty is to identify the issue of mutual concern to states to which the treaty was a response. In the case of the Agreement on Agriculture, the CSC issue may best be characterised as a sub-issue, for it was secondary to that which prompted negotiations for the establishment of the World Trade Organisation, namely creating a durable, stable, and stronger multilateral trade regulation system. Insofar as the Agreement on Agriculture is commonly praised for having finally brought agricultural trade into the rules of the multilateral trade regime, one may suggest the sub-issue to which the Agreement was a response to have been simply one of regulating trade in agriculture.[30] That agriculture was never, in fact, excluded altogether from GATT regulations[31] suggests, however, that the issue can be more appropriately defined as one of *how to bring international trade in agriculture within strengthened and operationally more effective multilateral rules*.[32] A Ministerial Declaration adopted by GATT

[29] See, e.g., Bartram S. Brown, "Developing Countries in the International Trade Order," *Northern Illinois University Law Review* 14, no. 2 (1994): 347–406; Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From the GATT 1947 to the WTO Agreement on Agriculture* (The Hague: Kluwer Law International, 2002).

[30] Stuart Harbinson, who had been chair of agriculture negotiations at the start of the Doha Round, is reported to have said, for example, that the greatest significance of the Agreement on Agriculture was 'to bring the trade within the scope of GATT/WTO disciplines *for the first time*.' Quoted in Joseph A. McMahon and Melaku Geboye Desta, "The Agreement on Agriculture: Setting the Scene," in *Research Handbook in the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law*, eds. Joseph A. McMahon and Melaku Geboye Desta (Cheltenham: Edward Elgar, 2012), 2. Emphasis added.

[31] According to prominent international trade lawyer John Jackson, arguments that agriculture was excluded from GATT disciplines are erroneous, see John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, Second Edition, 1997). 313–316.

[32] Desta has defined, with regards to market access, the issue to which the Agreement on Agriculture was a response as 'how to bring problems of agricultural market access barriers within a strengthened and operationally more effective multilateral discipline', see Desta, *The Law of International Trade in Agricultural Products*, 63.

Contracting Parties not only stressed that there was 'widespread dissatisfaction with the application of GATT rules and the degree of liberalisation in relation to agricultural trade, even though such trade has continued to expand' but also recognised that there existed 'an urgent need to find lasting solutions to the problems of trade in agricultural products'.[33] This is consistent with the wording of the Punta Del Este Declaration launching the Uruguay Round, which articulated that:

> The CONTRACTING PARTIES agree that there is an urgent need *to bring more discipline and predictability to world agricultural trade* by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.
>
> Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under *strengthened and more operationally effective GATT rules and disciplines* […].[34]

This was articulated in the Agreement on Agriculture in terms of a goal of WTO Members to 'establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration'.

From an ILI theory vantage point, however, this was likely not the only goal states were pursuing by negotiating the Agreement: '[ILI] analysis invites us not only to identify the collective issue to which a multilateral treaty was the response but the realist, self-interested, goal common to the individual states that gave rise to this issue in the first place.'[35] Because the legitimation goal is generally not stated in the treaty text or during negotiations, it can be theoretically deduced. If the issue to which the Agreement on Agriculture was one of bringing international trade in agriculture within strengthened and operationally more effective multilateral rules, then we can say the legitimation goal to have been *seeking access to the agricultural markets of other countries whilst retaining the freedom to protect one's own when and as desired, even if at odds with existing trade regulations or at the risk of undermining the basic ethos of the multilateral trading system*. Agricultural protection, by means primarily of domestic and export subsidisation, had in fact increased throughout the 1980s, not only becoming costly to the subsidising states[36] but also

[33] GATT, "Ministerial Declaration," 29 November 1982, GATT Doc. L/5424, 2 and 8.
[34] GATT, "Ministerial Declaration on the Uruguay Round," 20 September 1986, GATT Doc. MIN.DEC, 6. Emphasis added.
[35] Shirley V. Scott and Roberta C. Andrade, "Sovereignty as Normative Decoy in the R2P Challenge to the Charter of the United Nations," *Global Responsibility to Protect* 11, no. 2 (2019): 219.
[36] See, Carmen Gonzalez, "Institutionalising Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries," *Columbia Journal of Environmental Law* 27, no. 2 (2002): 450.

leading to a loss of credibility by states in the GATT system.[37] By the time the Uruguay Round was underway, agricultural trade reform was, according to Desta, crucial to the 'continued existence or otherwise of the entire multilateral trading system.'[38] Let us now look at the foundation ideology.

The Foundation Ideology and the CSC Myth

It will be recalled that the foundation ideology is a principle or set of inter-related principles on the assumed verity of which a solution can be premised. The foundation ideology is of utmost importance to the CSC for it justifies the constraint placed on pursuit of the legitimation goal by states, thereby lending coherence to the entire cognitive structure. Because the Agreement on Agriculture is an integral part of the WTO legal and ideational package agreed at the end of the Uruguay Round, it is expected that the CSC embedded at its core, and the foundation ideology underpinning it, will serve to reinforce the broader CSC at the heart of the WTO Agreement.[39] Insofar as the Agriculture Agreement was a direct result of the process of reciprocal and mutually advantageous negotiations directed to the liberalisation of international trade that had been undertaken under the auspices of the GATT for almost fifty years, it is possible to suggest – if only as a matter of logic, that the ideology of free trade, underpinned successful agreement on the solution embedded in the Agriculture Agreement and therefore functioned as foundation ideology.

Trade liberalisation in the agricultural sector had been, in fact, such a central element of the Uruguay Round that it was the area upon which the completion of the entire Round was believed to depend: 'agriculture in general, and agricultural export subsidies in particular, held the key […] to the success or failure of [the Uruguay Round]'.[40] The Uruguay Round Ministerial Declaration therefore called for 'greater liberalisation of trade in agriculture'[41] and this was reinforced during the Uruguay Round Mid-Term Review where there was 'a broad measure of consensus [among GATT contracting parties] that agricultural policies should be more responsive to international market signals in order to meet the objective of liberalization of international trade and that

[37] R. C. Hine, K. A. Ingersent, and A. J. Rayner, "Agriculture in the Uruguay Round: From the Punta Del Este Declaration to the Geneva Accord," *Journal of Agricultural Economics* 40, no. 3 (1989): 385.
[38] Desta, *The Law of International Trade in Agricultural Products*, 211.
[39] In this sense the Agreement on Agriculture may be regarded as an agreement that builds on an existing CSC.
[40] Desta, *The Law of International Trade in Agricultural Products*, 211.
[41] GATT, "Ministerial Declaration on the Uruguay Round," 6.

support and protection should be progressively reduced and provided in a less trade-distorting manner.'[42]

The Preamble to the Agreement on Agriculture, therefore, confirms the desire of Member states 'to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration', which is then followed by a recognition, in paragraph 2, of the long-term objectives of Members according to the Uruguay Round Mid-Term Review:

> to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines; […] [and] to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets.[43]

As an integral part of the WTO Agreement, the Preamble to the Agreement on Agriculture also alludes to the principle of sustainable development, although the relationship between this principle and that of free trade remains ambiguous. Paragraph 5, for example, refers to a commitment by developed countries 'to take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members', whereas paragraph 6 notes that 'special and differential treatment for developing countries is an integral element of the negotiations'.[44] Paragraph 6 highlights further that agricultural trade liberalisation 'should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment'.[45]

While the relationship between the principles of free trade and sustainable development remains ambiguous, reference to the CSC myth seems to reinforce the primacy of free trade in the Agreement on Agriculture. The CSC myth, which can be defined as the same underpinning the original multilateral trade regulation CSC to which GATT was integral, albeit in a slightly modified way, as having been that 'economic theory and calculations are able objectively to dictate appropriate trade policy and determine compliance with agricultural trade law'. Insofar as

[42] GATT, "Agreement Recording the Results of the Uruguay Round Mid-Term Review," 21 April 1989, GATT Doc. MTN.TNC/11, 9.
[43] Agreement on Agriculture, Preamble.
[44] Agreement on Agriculture, paras 5 and 6.
[45] Agreement on Agriculture, para. 6.

compliance with the law is dictated by commitments relating to trade liberalisation, and not necessarily sustainable development, then it seems fair to suggest that the Agreement on Agriculture retains free trade as its underpinning philosophy.

The CSC Solution

The solution is the means by which states agree to limit pursuit of their common legitimation goal so as to manage the issue of mutual concern. The Agreement on Agriculture is commonly described as resting upon three pillars, namely market access, domestic support, and export subsidies, which are the primary measures through which states are able to protect their domestic agricultural sector.[46] It is therefore to be expected that the solution to an attempt at strengthening disciplines on agricultural trade would involve placing a constraint on use of these measures. In this case, the solution was most basically an agreement by WTO Members to make legally binding commitments to reduce over a period of time[47] measures affecting import access and export competition for agricultural products and to continue the process of trade liberalisation in the agricultural sector by means of multilateral negotiations. The first of these commitments can be found primarily in Articles 3 and 4 of the Agreement, whilst the second is expressed most clearly in Article 20. Let us look at each in turn.

Article 3 articulates most basically the commitments of WTO Members with respect to domestic support and export subsidies. Pursuant to Article 3.1, WTO Member are bound by the commitments limiting subsidisation agreed to during the Uruguay Round and embedded in Part IV of each Member's Schedule of Concessions.[48] Article 3.2 relating to domestic support then provides that Member states must not grant domestic subsidies beyond the levels specified and bound in their Schedules of Concessions, whereas by Article 3.3 Members agree not to provide export subsidies listed in Article 9.1 in excess of the 'budgetary outlays and quantity commitment levels' specified in their Schedules as well as not to provide such export subsidies listed in Article 9.1 in relation to any agricultural product not specified in their Schedules.[49] The obligation in

[46] See, McMahon and Desta, "The Agreement on Agriculture." See, also, Jennifer Clapp, "WTO Agricultural Negotiations: Implications for the Global South," *Third World Quarterly* 27, no. 4 (2006): 566;

[47] This is called the 'implementation period', which by Article 1(f) 'means the six-year period commencing in 1995' and amounted to the period over which reduction commitments had to be undertaken. Developing and less-developed countries were subject to a longer implementation period of ten years. See, McMahon and Desta, "The Agreement on Agriculture," 2.

[48] Note that the Schedules of Concessions are not annexed to the Agreement on Agriculture itself, but rather to GATT 1994.

[49] Agreement on Agriculture, Article 3.3. In simple terms, budgetary outlays and quantity commitment levels refer to the value and volume levels, respectively, of export subsidies provided in relation to any given agricultural product or group of products. Members are therefore bound by both the value and volume of subsidies provided in support of agricultural products. For a detailed analysis of the dual nature of these commitments, see Desta, *The Law of International Trade in Agricultural Products,* 247ff.

Article 3.3 complemented by Article 8, which articulates that '[e]ach Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule'.[50]

By Article 4, then, Member states commit most basically to convert 'all non-tariff agricultural import barriers into their tariff equivalents and [to bind] the resulting tariffs',[51] which, according to Desta, is 'only a matter of consistency with established GATT practice'.[52] This is stated most clearly in Article 4.1, which simply stipulates that '[m]arket access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein'.[53] Article 4.2, in turn, provides that '[m]embers shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5'. It is interesting to note here that not only is the Agreement on Agriculture silent with regards to the precise means by which tariff rates are to be cut and by how much,[54] but it also does not provide any guidance as to precisely how tariff equivalents are to be measured in the process of tariffication.[55]

Finally, the commitment by states to negotiate for further agricultural trade liberalisation was articulated in Article 20, pursuant to which states recognise that trade in agriculture is an ongoing process and therefore agree that:

> [N]egotiations for continuing the [reform] process will be initiated a year before the end of the implementation period, taking into account: a) the experience to that date from implementing the reduction commitments; b) the effects of the reduction commitments on world trade in agriculture; c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the

[50] It would be possible to suggest that Article 8 is in fact a supporting rule rather than part of the solution proper, however, identifying it as part of the solution is justified insofar as this provision has been called the 'fundamental general provision of the Agreement on Agriculture on export subsidies'. See, Desta, *The Law of International Trade in Agricultural Products*, 231.
[51] Desta, *The Law of International Trade in Agricultural Products*, 62. This process is called 'tariffication' and it 'refers to the process by which non-tariff import barriers are converted into their tariff equivalents'. Desta, *The Law of International Trade in Agricultural Products*, 62 and 67.
[52] Desta, *The Law of International Trade in Agricultural Products*, 62.
[53] Agreement on Agriculture, Article 4. 'Market access concessions' are defined in Article 1(g) as 'all market access commitments undertaken pursuant to [the Agreement on Agriculture]'.
[54] See, Raj Bhala, "World Agricultural Trade in Purgatory: The Uruguay Round Agriculture Agreement and Its Implications for the Doha Round," *North Dakota Law Review* 79, no. 4 (2003): 720ff.
[55] Desta, *The Law of International Trade in Agricultural Products*, 71.

> Preamble to this Agreement; and d) what further commitments are necessary to achieve the above mentioned long-term objectives.[56]

Insofar as one of the basic tenets of the principle of free trade is that expanding international trade through the removal of trade barriers brings prosperity and economic growth, our identification of Article 20 as the solution seems justified for it is, in fact, the only article in the agreement that provides for a continuation of the process of trade liberalisation in agriculture.

Due in large part to the complexity of the rules governing trade in agricultural products, a number of other provisions were included in the Agriculture Agreement so as to make effective the solution. Article 1, for instance, defines terms such as Total Aggregate Measurement of Support (Total AMS)[57], 'export subsidies',[58] and 'market access concessions',[59] which give scope to and help operationalise the specific reduction commitments made as part of the CSC solution, whereas Articles 6 and 7 articulate domestic support measures that are excluded from the reduction commitments[60] and stipulate parameters for the use of such measures, respectively.[61] As regards export subsidies, and perhaps of most importance to our present analysis, Article 9.1 specifies six export subsidy measures that are subject to the reduction commitments referred to in Articles 3.3 and 8. Article 10.1 then articulates an agreement by Members not to apply export subsidies not listed in Article 9.1 'in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments',[62] and thereby to protect the value of those commitments.

In short, the solution embedded in the Agreement on Agriculture as the agreed means by which to address the issue of bringing international agricultural trade within strengthened and more

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[56] Agreement on Agriculture, Article 20.

[57] By Article 1(h), '"Total Aggregate Measurement of Support" and "Total AMS" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and equivalent measurements of support for agricultural products'. Agreement on Agriculture, Article 1(h). This helps operationalise Article 3 for it provides the base level from which the specific commitments on domestic support articulated in Article 3.2 and embedded in each Member's Schedule of Concessions are measured.

[58] By Article 1(e), '"[e]xport subsidies" refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement'. Agreement on Agriculture, Article 1(e). This enables operationalisation of export subsidy commitments.

[59] By Article 1(g), '"[m]arket access concessions" includes all market access commitments undertaken pursuant to this Agreement'. Agreement on Agriculture, Article 1(g).

[60] Exceptions are subsidies defined in Annex 2 to the Agreement on Agriculture (the so-called Green Box measures, which should not have trade-distorting effects), subsidies listed in Article 6.5 (known as Blue Box measures), and subsidies listed in Article 6.4 (named *de minimis* 'Amber Box' measures). See, Bhala, "World Agricultural Trade in Purgatory," 769 at fn. 237. 'Amber Box' measures are deemed to distort trade and so are subject to reduction commitments, save for a minimal amount (*de minimis)* of support of 5 percent for developed countries and 10 percent for developing countries. See, Agreement on Agriculture, Article 6.

[61] Agreement on Agriculture, Articles 6 and 7.

[62] Agreement on Agriculture, Article 10.1.

operationally viable multilateral regulations, was most basically an undertaking not only to reduce over a period of time agricultural protection in the areas of market access, domestic subsidies, and export subsidies, but also, and importantly, to continue the reform process towards freer world agricultural trade. This, then, can be said to have been the CSC solution embedded in the Agreement on Agriculture, which served to define the scope of domestic policies allowable under agricultural trade rules thereby placing a constraint on the freedom of WTO Members to protect their own agricultural markets.

Table 5. The CSC of the Agreement on Agriculture, 1995

CSC Issue:	How best to bring international trade in agriculture within strengthened and operationally more effective multilateral rules.
Legitimation Goal:	Seeking access to the agricultural markets of other countries whilst retaining the freedom to protect one's own when and as desired, even if at odds with existing trade regulations or at the risk of undermining the basic ethos of the multilateral trading system.
CSC Solution:	An undertaking to reduce over a period of time agricultural protection in the areas of market access, domestic subsidies, and export subsidies and to continue the reform process towards freer world agricultural trade.
Foundation Ideology:	Free trade: Freer world trade raises standards of living for all. It allows for (it is compatible with) sustainable development but does not precisely define how.
CSC Myth:	Economic theory and calculations are able objectively to dictate appropriate trade policy and determine compliance with agricultural trade law.

Conclusions Regarding the Logical Nexus of the CSC Embedded in the Agreement on Agriculture

Having unpacked the CSC at the core of the Agreement on Agriculture, we are now able to draw conclusions about the logical nexus between the various elements constituting the CSC. The Agreement on Agriculture was agreed to as part of the final package concluded at the Uruguay Round and the CSC embedded within it came to be an integral part of the multilateral trade regulation regime complex founded on the WTO Agreement. Perhaps the most important observation to be drawn here is that the rules and commitments limiting protection and subsidisation of agricultural products agreed as part of the solution at the heart of the Agriculture Agreement, as the rules of all other WTO Agreements, emerged from the process of reciprocal and mutually advantageous negotiations that constituted the original solution operationalised by means of the GATT. This served to reinforce the original solution as the primary means by which

to address the overall issue with which the multilateral trade regime was established to deal, namely regulating the conduct of international trade on an ongoing basis, thereby reinforcing the original CSC nexus underpinned by the foundation ideology of free trade.

The second observation that can be drawn from the analysis above is that the CSC solution as articulated in the Agriculture Agreement reflects an obligation by states to comply with the fixed reduction commitments that were recorded in their Schedules of Concessions at the time the Agreement was concluded but it does not stipulate the means and amount by which countries are actually required to liberalise agricultural trade. This was, rather, articulated in a separate document entitled *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme,*[63] which in the case of export subsidies, for example, specified that Members were to reduce the value and volume levels of export subsidies by 36 and 21 percent, respectively, and that calculations were to be made on the basis of the years 1986 to 1990.[64]

One of the main implications of this is that, beyond the rules of the Agreement and the commitments specified in each Member's Schedule of Concessions, Members are under no obligation further to liberalise agricultural trade by any given amount or during any period of time beyond the implementation period and beyond the levels specified in the *Modalities* document. Considering that, in CSC terms, the solution is expected to follow from and, thus, reinforce the foundation ideology, and insofar as one of the basic tenets of the ideal of free trade is that the expansion of international trade through the progressive removal of trade barriers brings prosperity and economic growth, then we can appreciate the sheer importance to the overall cohesion of the CSC of the undertaking by Members to continue negotiations on agricultural trade liberalisation pursuant to Article 20. This commitment not only underscores the need for the process of trade liberalisation to continue, thus reinforcing the foundation ideology of free trade, but also emphasises that any further trade liberalisation of the agricultural sector must be undertaken by means of reciprocal and mutually advantageous multilateral negotiations as had been the case under the GATT for almost fifty years.

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[63] GATT, "Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme," 20 December 1993, GATT Doc. MTN.GNG/MA/W/24, paras. 11 and 13. In international trade law terminology, 'modalities' are understood to mean most basically the parameters by which WTO Members are to make cuts to tariffs and subsidies and thereby set the legal limits at which such measures are permitted. At the heart of these 'modalities' lie the specific formulas that will determine the cuts made by Members, but the 'modalities' may also include, *inter alia*, details on special and differential treatment for developing and less-developed countries as well as on the scope of permitted deviations from the agreed tariff and subsidy-cutting formulas. See, WTO, "What are 'Modalities'?,", 2019, https://www.wto.org/english/tratop_e/dda_e/modalities_e.htm. In simpler terms, 'modalities' are most basically the 'broad parameters for the specific type of commitments to be made'. See, Clapp, "WTO Agricultural Negotiations," 566.

[64] For developing countries this amount was 14 and 20, respectively. See, GATT, "Modalities for the Establishment of Specific Binding Commitments," paras. 11 and 13.

Even with the undertaking in Article 20, however, the solution can be said to have been weak at best, since the Agreement on Agriculture not only did not prevent agricultural protection and support, especially in developed countries, to increase, thus altering little in terms of concrete trade liberalisation,[65] but it also did not guarantee that further trade liberalisation would actually be achieved insofar as Article 20 committed Members simply to *negotiate* towards freer agricultural trade. This may very well be due to the fact that agriculture is still perceived by many to occupy a place of 'exceptionalism' under the multilateral trade regime,[66] as reflected in the goal of states according to the Preamble to the Agreement only to '*initiate* a process of reform' in agricultural trade and in arguments by such Members as Japan and some EU states that '[a]griculture […] has specific characteristics which mean[s] it must be treated differently from other sectors.'[67] It seems therefore that the CSC at the heart of 'the Agriculture Agreement still recognises, if perhaps only tacitly, that agriculture is different from other classes of goods.'[68]

The weakness of the Agreement on Agriculture in limiting the freedom of Members, especially the most powerful, to protect and provide trade-distorting support for their agricultural industries stands in stark contrast to, and is further highlighted when seen in light of, the rules embedded in the Subsidies Agreement governing domestic and export subsidies for industrial products. This is particularly evident in the case of export subsidies, which pursuant to Article 3 of the Subsidies Agreement are outright prohibited for industrial products,[69] but are nonetheless explicitly permitted, albeit within limits, when used in support of agricultural products pursuant to Articles 3, 8, and 9 of the Agreement on Agriculture. This effectively makes the agricultural sector the only one to still benefit from export subsidies under WTO rules. [70] The special treatment of agriculture under WTO rules is further highlighted in light of the fact that in relation both to domestic and export subsidies the Subsidies Agreement defers to the Agreement on Agriculture and that by Article 21 of the Agreement on Agriculture '[t]he provisions of GATT 1994 and of

[65] As one author has noted, 'it is pretty difficult to argue that the Uruguay Round [Agreement on Agriculture] dramatically changed the fundamental course of world agricultural trade patterns'. Randy Green, "The Uruguay Round Agreement on Agriculture," *Law and Policy in International Business* 31, no. 3 (2000): 823.
[66] Some authors have referred to the 'uniqueness' of agriculture or to the idea of 'agricultural exceptionalism'. See, e.g., Green, "The Uruguay Round Agreement on Agriculture," 820.
[67] John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (The Hague: Kluwer Law International, 1999), 96.
[68] Desta, *The Law of International Trade in Agricultural Products*, 96.
[69] Paragraph 1 of Article 3 of the Subsidies Agreement provides that '[e]xcept as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1 [of the Subsidies Agreement], shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I [of the Subsidies Agreement]; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.' Subsidies Agreement, Article 3.1. Item (b) of this article refers to what are called 'import substitution subsidies', which are also prohibited under the Subsidies Agreement.
[70] Desta, *The Law of International Trade in Agricultural Products*, 213.

other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement'.

3.2.1 The Agreement on Agriculture: levelling the playing field or furthering asymmetry?

The Agreement on Agriculture was praised not only for having brought agricultural products more firmly and deeply into the rules of the multilateral trading system but also for enabling developing and less-developed countries to participate more fully in the multilateral trade regime[71] and to reap greater benefits from the process of trade liberalisation. This was seen by some as marking 'a systemic shift in the international regulation of agricultural production and trade.'[72] An ILI theorisation would contend that multilateral treaties are virtually always asymmetrical, for the CSC solution generally serves to place some states in a better position vis-à-vis pursuit of the legitimation goal than others whilst at the same time appearing to treat all states equally. Having undertaken a CSC analysis of the Agreement on Agriculture, we can suggest that it is no exception; while appearing to treat all states more or less equally, the solution has served to favour developed countries over their developing and less-developed counterparts in all three pillars of agricultural liberalisation, namely market access, domestic support, and export subsidies. Instead of levelling the playing field between developed and developing countries, the Agreement on Agriculture has, in the words of Jennifer Clapp, 'made it more steeply stacked against developing countries.'[73]

This is perhaps clearest in relation to export subsidies. As noted above, one of the main elements of the solution embedded in the Agreement on Agriculture is the obligation by states to comply with the specific reduction commitments embedded in their respective Schedules of Concessions, though with respect to export subsidies Members were also under an obligation not to introduce new subsidies.[74] Because those commitments were agreed to during the Uruguay Round, only countries that were effectively subsidising agricultural products at the time were able to make commitments and thus to continue subsidisation programmes, albeit within the limits stipulated in their Schedules. According to McMahon and Desta, 'as a result of the approach taken by the [Agreement on Agriculture], only [twenty-five] WTO members (counting EU-15 as one) have

[71] Brown, "Developing Countries in the International Trade Order," 394.
[72] McMahon and Desta, "The Agreement on Agriculture," 1.
[73] Clapp, "WTO Agricultural Negotiations," 565–566.
[74] So as to provide background for the more in-depth analysis of the *US – Cotton Subsidies* dispute below, though cautious not to overcomplicate the present analysis, note that the obligation of states not to introduce new export subsidies relates *only* to those export subsidies listed in Article 9.1 of the Agreement on Agriculture. Members are free to provide export subsidies *not listed* in Article 9.1 in favour of agricultural products so long as in compliance with the anti-circumvention commitment articulated in Article 10.1.

the right to use export subsidies today,'[75] many of which are developed countries.[76] In this case, then, we can argue that the solution embedded in the Agreement, as far as obligations concerning export subsidies go, served to treat developed countries, which generally have greater financial capacity to provide export subsidies, more favourably than developing or less-developed countries, which absent specific reduction commitments are simply not able to subsidise their agricultural industries at all.[77]

The asymmetries of the CSC solution notwithstanding, the Agreement on Agriculture does nonetheless contain provisions ensuring special and differential treatment for developing and least-developed Members.[78] These involve, for instance, a longer implementation period over which developing countries are able to undertake the reduction commitments by Article 15, an exception to Article 9.1 allowing developing countries to use during the implementation period certain export subsidies which would have otherwise been subject to reduction commitments, as well as an undertaking by developed countries in Article 16.1 to 'take such action as is provided for within the framework of the 'Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries'.[79] Even Article 16, which according to Bhala contains a positive commitment by developed countries to undertake certain measures in favour of less-developed countries, when read in conjunction with the provisions of the aforementioned 'Decision', the obligations of developed countries are weak at best.

It seems, then, that even though special and differential treatment in favour of developing countries has been embedded into the rules of the Agriculture Agreement, this did not serve to re-

[75] McMahon and Desta, "The Agreement on Agriculture," 15.
[76] The list of countries can be found in WTO, "Export Subsidies – Background Paper by the Secretariat," 9 April 2002, WTO Doc. TN/AG/S/8.
[77] Note here that whether the Agreement on Agriculture prohibits the introduction of *any* new subsidies or only of subsidies *listed in Article 9* has been subject to some debate, as will be discussed below. This notwithstanding, as one author has noted, 'the rules governing agricultural trade, as embodied in the Agreement on Agriculture, are perceived as allowing the United States and the European Union to continue to subsidise agricultural production and to dump surpluses on world markets at artificially depressed prices while requiring developing countries to open up their markets to ruinous and unfair competition from industrialised country producers.' Carmen Gonzalez, "Institutionalising Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries," *Columbia Journal of Environmental Law* 27, no. 2 (2002): 438.
[78] For an in-depth analysis of the disciplines of the Agreement on Agriculture as they relate to developing and less-developed countries, see Peter Gallagher, *Guide to the WTO and Developing Countries* (The Hague: Kluwer Law International, 2000).
[79] Agreement on Agriculture, Article 16.1. The 'Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries' was adopted as part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. All instruments embedded in the Final Act are legally binding on all Members, although it is worth noting that for the purposes of dispute settlement, this decision does not come under the purview of the Dispute Settlement System.

balance the asymmetries inherent to the CSC solution at the core of the Agreement. While this power asymmetry has been masked to a certain extent by promises of economic prosperity inherent to the foundation ideology of free trade and by the fact that the CSC solution itself was agreed only with the consent of all Members during the Uruguay Round as prescribed in the WTO Agreement, the inequalities between developed and developing countries in agricultural trade have remained writ large.[80] Agriculture has therefore remained one of the most contentious issues in the multilateral trading system and came to be the core focus of Doha Round negotiations, during which developing countries have strongly pushed for the reform of agricultural policies in developed countries.

3.3 The *US – Cotton Subsidies* dispute: what implications for the WTO regime?

We are now ready to undertake the third and final step in our analysis of Brazil's engagement with international law through the example of the *US – Cotton Subsidies* dispute. This step involves analysing the *US – Cotton Subsidies* dispute in relation to the CSC embedded in the Agreement on Agriculture and the broader multilateral trade regulation CSC at the heart of the WTO Agreement (and to which the Agreement on Agriculture is integral). The central premise of ILI theory guiding this analysis is that at the core of every treaty regime lies an idea, understood as an ideology for its role in sustaining a structure of power relations, that will need to be upheld through state discourse in relation to the issue in question if the regime is to remain strong.[81] On this premise, we will seek to assess whether Brazil, by means of this initiative, supports the CSC at the core of the WTO Agreement and to which the Agreement on Agriculture is integral, further strengthen it, or undermine it. It is expected that through this analysis we will be able to draw conclusions about the implications of the initiative for the WTO regime.

Before moving forward, however, a clarification of the scope of this analysis is in order. As argued in Chapter 1 of this dissertation, one of the primary reasons for the selection of the *US – Cotton Subsidies* case as a proxy by which to assess Brazil's engagement with international law was that the dispute has, to date, been one of the longest, most contentious, and politically-charged disputes since the establishment of the WTO and had significant implications for the power dynamics within the Organisation. This same reason, however, makes a comprehensive analysis of the case

[80] See, Gonzalez, "Institutionalising Inequality."
[81] See, Scott, *The Political Interpretation of Multilateral Treaties;* Shirley V. Scott, "International Law as Ideology: Theorising the Relationship Between International Law and International Politics," *European Journal of International Law* 5, no. 3 (1994): 313–325; Shirley V. Scott, "Explaining Compliance with International Law: Broadening the Agenda for Enquiry," *Australian Journal of Political Science* 30, no. 2 (1995): 288–299; Shirley V. Scott, "Beyond 'Compliance': Reconceiving the International Law-Foreign Policy Dynamic," *Australian Year Book of International* Law 19 (1998): 35–48; Shirley V. Scott, "The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality;" *New Zealand Journal of Public and International Law* 5, no. 1 (2007): 103–104.

in its entirety an unviable undertaking in this chapter.[82] We will therefore limit the scope of the present analysis to Brazil's claim only as it related to export subsidies.[83] This seems warranted insofar as these are, by their very nature, the most blatantly trade-distorting of practices – export subsidies are, after all, subsidies designed to boost exports, and represent an area in which wide disparities between developed and developing countries exist in agricultural trade. The starting point for this analysis will be the initial request by Brazil to the WTO's DSB for the establishment of a panel as well as the various written and oral submissions by Brazil and the United States throughout the dispute proceedings. Reference will be made to other documents, including statements by Brazilian Government officials in the WTO where necessary for further clarification.

Finally, considering that this is a case of dispute settlement, it is useful to consider here what we could be expected of litigation as seen from an ILI theory vantage point. Although ILI theory has never been applied to litigation directly, it would be possible to hypothesise a few things about litigation. The first is that, because throughout the life of a treaty regime states must uphold the foundation ideology for the CSC, and hence the regime, to remain strong, it would be expected that parties to a dispute would attempt to couch their position in a way that upholds the foundation ideology and to demonstrate how the policies of other parties is incompatible with that ideology. Furthermore, because legalised third party dispute resolution in itself embodies principles of the ideology of international law, in particular the principle that it is possible to apply international law objectively so as to settle a dispute between states,[84] it could also be hypothesised that throughout the dispute parties will seek to associate their position strongly with the ideology of international law. This analysis therefore will draw primarily on official documents submitted by Brazil and the United States (as well as third parties to the dispute as necessary) to the WTO's DSB. This analysis will also draw on reports issued by the Panel and the Appellate Body.

There are three aspects of the *US – Cotton Subsidies* dispute that, as analysed from an ILI theory vantage point, could be seen as having most impact on the cognitive structure at the core of the WTO regime. The first is that Brazil reinforced the CSC at the heart of the WTO Agreement by communicating in a way that assumes the foundation ideology and the CSC myth to be true and

[82] The dispute lasted almost twelve years, from its initiation in 2002 until its conclusion in 2014 by means of a Memorandum of Understanding signed by Brazil and the United States, and involved six decisions by two different panels, the Appellate Body as well as the WTO Arbitrator, thus resulting not only in a total of six dispute reports but also in thousands of pages of submissions and exhibits by Brazil, the United States, and the third parties to the dispute. The *US – Cotton Subsidies* dispute was, therefore, by any measure huge.

[83] For more comprehensive analyses of the dispute in its entirety, see, Cross, "King Cotton, Developing Countries and the 'Peace Clause';" Powell and Schmitz, "The Cotton and Sugar Subsidies Decisions;" Black, *King Cotton in International Trade.*

[84] See, e.g., Shirley V. Scott, *International Law in World Politics: An Introduction* (Boulder/London: Lynne Rienner, 2017), 118-119.

by seeking to force the US to change its policies so that the ideology will continue to be upheld. The second is that Brazil interpreted provisions on agricultural export subsidies in a way that would strengthen the logical nexus of the CSC at the heart of the Agreement on Agriculture. Finally, Brazil improved its position in the WTO regime vis-à-vis the US and further levelled the playing field in agricultural trade, albeit with potential implications for the overall effectiveness of the regime. Let us look at each in turn.

3.3.1 Brazil reinforced the WTO regime by communicating in a way that assumed the foundation ideology and the CSC myth to be true and by seeking to align US policies with what the ideology of free trade assumes true

The first aspect of the *US – Cotton Subsidies* dispute that is significant to our analysis is that throughout the dispute Brazil strongly upheld the foundation ideology and the CSC myth underpinning the CSC at the heart of the WTO Agreement and to which the Agreement on Agriculture is integral. It did so in two primary ways. First, Brazil built its complaint against the United States and communicated throughout the dispute in a way that assumed the CSC myth, and hence the foundation ideology, to be true. This reinforced the CSC myth that economic theory and calculations are able objectively to dictate appropriate trade policy and to determine compliance with agricultural trade law. This served further to reinforce the CSC myth underpinning the broader CSC at the heart of the WTO Agreement. Second, by demonstrating the extent to which the actions of the United States were harming other countries and were thus incompatible with the ideology of free trade, Brazil sought to force change in US policies so as the foundation ideology would continue to be upheld.

Throughout the dispute Brazil strongly upheld the CSC myth, and hence the foundation ideology of free trade, by communicating on the assumption that economic theory and calculations are able objectively to dictate trade policy and to determine compliance with agricultural trade law. In its 'Further Submission to the Panel' on 9 September 2003, for instance, Brazil stated that:

> This is a case involving basic economic principles of supply and demand. It is a case about too much upland cotton being produced and exported by high-cost US producers. It is about the role played by $12.9 billion in US government payments in increasing and maintaining the world's highest export market share of upland cotton […] Brazil's claims require the Panel to consider the following basic economic supply and demand questions: If there were *no* non-green box domestic support and export subsidies provided by the US Government for its production, export, and use of US upland cotton, how much US

> upland cotton would be produced? How much US upland cotton would be exported? And how much would world and Brazilian prices increase?[85]

Brazil has highlighted that the cost of production of cotton in the United States is some of the highest in the world and that the survival of the cotton industry in the US is directly contingent on the use of subsidies to support producers and shelter them from market impacts. Brazil began its 'First Submission to the Panel', indeed, by quoting the Chairman of the National Cotton Council of America: 'The Delta needs cotton farmers and they can't exist without subsidies.'[86] It further maintained that '[s]ecuring high levels of subsidies was essential to US upland cotton producers, since their production costs are among the highest in the world.'[87] Brazil maintained that due to the increasing discrepancy between the cost of cotton production in the US and world market prices, 'without subsidies many US producers of upland cotton would have been forced to switch to alternative crops or go out of business. Yet, no significant cuts in US production or exports occurred.'[88] Brazil further asked:

> How have US upland cotton producers been able to sustain and increase their production and exports in defiance of basic economic laws? The answer, provided by the US National Cotton Council, the Chief Economist of the United States Department of Agriculture (USDA), and by many other economists is straightforward: massive US subsidies.[89]

As expressed by Brazil, the policies of the United States were, therefore, in direct conflict with the notion of comparative advantage dictated by liberal economic theory, that posits that markets would be more efficient if countries specialised in what they can produce most efficiently compared to other countries. Note here that it is not necessarily that Brazil believes this but that rhetorically it points to a discrepancy between the policies of the United States and policies dictated by the CSC myth.

> With the subsidies, US producers are not only competitive, but have a clear competitive advantage as reflected by the more than doubled US world export market share. This is

[85] "Brazil's Further Submission to the Panel," *United States – Subsidies on Upland Cotton,* 9 September 2003, paras. 1-2. Document on file with author.
[86] Kenneth B. Hood, Chairman of the National Cotton Council of America, quoted in "Brazil's First Submission to the Panel Regarding the 'Peace Clause' and Non-Peace Clause Related Claims," *United States – Subsidies on Upland Cotton (WT/DS267),* 24 June 2003, 1. Document on file with author. Hereinafter, 'Brazil's First Submission to the Panel'.
[87] "Brazil's First Submission to the Panel," para. 6.
[88] "Brazil's First Submission to the Panel," paras. 7 and 8.
[89] "Brazil's First Submission to the Panel," para 14.

particularly ironic given the fact that many US upland cotton farmers could not continue to produce upland cotton without US subsidies.[90]

In order to support its position in the dispute, therefore Brazil can be seen not only to speak on the assumption that economic theory is able to dictate appropriate trade policy but also to demonstrate the extent to which the subsidisation policies of the United States are not. Because the ideology of free trade is premised on states' acceptance of the CSC myth, Brazil's strengthening of the CSC myth also reinforces the foundation ideology.

Furthermore, the fact that Brazil highlights in both its 'First Submission to the Panel' and its 'Further Submission to the Panel' the role of economists in determining the legality (or lack thereof) of US subsidy programmes with WTO rules governing international trade in agricultural products serves further to reinforce the CSC myth.[91] This is similar to the ways in which international lawyers play a central role in determining compliance or non-compliance with international law and, as such, in upholding the assumption characteristic of the ideology of international law that law is able objectively to dictate appropriate foreign policy.[92] Much like international lawyers serve 'as the guardians of the relative autonomy of international law' from politics,[93] economists can be expected to function as the guardians of the autonomy of economics, as a rational and scientific endeavour, from politics and self-interest. As the Panel noted, 'the simulations [used by Brazil to support its case] were prepared by experts, and explained to the Panel by experts'[94] and therefore were to be taken seriously.

In addition, by highlighting the extent of the harm of the US agricultural subsidisation programmes to other countries and thus that such programmes were incompatible with the ideology of free trade, Brazil further strengthened the CSC of the Agreement on Agriculture by forcing change in US policies so as the foundation ideology would continue to be upheld. In support of its claim, therefore, Brazil made clear references to the negative impacts of US agricultural subsidies on other developing and least-developed WTO Members, in particular

[90] "Further Submission by Brazil," para. 285.
[91] See, e.g., "Brazil's First Submission to the Panel," paras. 14, 26, 88, 169, 184, 186, 187, 200, and 201; "Brazil's Further Submission to the Panel," paras. 4, 17, 55, 105, 133, 148, 149, 152, 153, 155, and 157. Brazil drew primarily on econometric models developed by American economist Daniel Sumner, who had previously worked by the USDA and was thus familiar with the subsidy programmes in question as well as the economic formulas used by the US Government. See, Gregory Shaffer, Michelle Ratton Sanchez, and Barbara Rosenberg, "The Trials of Winning at the WTO: What Lies Behind Brazil's Success," *Cornell International Law Journal* 41, no. 2 (2008): 460.
[92] See, Shirley V. Scott, "The Political Life of Public International Lawyers: Granting Imprimatur," *International Relations* 21, no. 4 (2007): 411–426.
[93] Scott, "The Political Life of Public International Lawyers," 418.
[94] "Report of the Panel," para. 7.1207.

West-African cotton producers such as Benin, Mali, and Chad. As Brazil maintained in its closing statement at the resumed first substantive meeting of the panel with the parties,

> it is not equitable for a heavily subsidised WTO Member to more than double its share of competitive world markets for upland cotton in only five years reflecting a significant contribution of subsidies. And it is not equitable for that Member to do so when its costs of production were double of those of the poorest and neediest producers in the world.[95]

Brazil further drew on economic calculations to demonstrate the injustice and sheer implications of US subsidy programmes, in particular export credit guarantees, for poorer countries:

> To put the export effects of this single [export credit guarantee] programme into perspective: the estimated impact of 500,000 bales of exports (representing 109,000 metric tons) – exceeds all of the exports of Cameroon, the Central African Republic, Chad, Cote-D'Ivoire and two-thirds of the exports of Benin, Burkina Faso and Mali in [marketing year] 2001.[96]

This was also clear in Brazil's choice of evidence presented to the Panel. Relevant exhibits included, *inter alia*, a World Bank Working Paper entitled 'Cotton Sector Strategies in West and Central Africa', which stated that 'cotton producers in Africa are competitive on cost factors and could have benefited from its comparative advantage absent US subsidies,'[97] as well as a report by Oxfam entitled 'Cultivating Poverty: The Impact of US Cotton Subsidies on Africa' that highlighted the impact of US subsidies on price suppression in cotton markets and in furthering poverty in African countries, which would otherwise enjoy significant comparative advantage in cotton trade.[98] Brazil further quoted Burkina Faso President, Blaise Compaoré, in a letter to the *New York Times* addressing the US Government:

> America wants us to comprehend the evil posed by violent anti-Western terrorism, and we do, […] But we want you to equally concern yourself with the terror posed here by hunger and poverty, a form of terrorism your subsidies are aiding and abetting. If we cannot sell our cotton we will die […] If cotton doesn't sell at a decent price, it affects

[95] "Executive Summary of the Closing Statement of Brazil at the Resumed First Substantive Meeting of the Panel with the Parties," Annex F-2 to the Report of the Panel, *United States – Subsidies on Upland Cotton,* WTO Doc. WT/DS267/R/Add.1, para. 18.
[96] "Brazil's Further Submission to the Panel," *United States – Subsidies on Upland Cotton,* 9 September 2003, para. 191. Document on file with the author.
[97] Black, *King Cotton in International Trade*, 343.
[98] "Brazil's Further Submission to the Panel," para. 458.

> everything else… That includes Koumbia's little schoolhouse whose third classroom remains unfinished.[99]

Through the use of econometric models and by reinforcing economic theory, therefore, Brazil demonstrated not only that US policies were not dictated by economic theory and judgement and were as such inconsistent with the Agreement on Agriculture (and the Subsidies Agreement), but also that these policies were directly linked to poverty and under-development in developing and least-developed countries and served to undermine the foundation ideology. Brazil indeed stressed in its 'Further Submission to the Panel' that '[g]iven the wide disparity in costs of production and the amount of subsidies provided to US upland cotton producers and their competitors in countries like Argentina, Brazil, Benin and Chad, this case is about equity.'[100] Given the higher efficiency with which developing and least-developed countries primarily in Africa can produce cotton, Brazil maintained that '[i]f the [US] subsidies were removed, the US farmers would be the ones who couldn't compete.'[101] As Black has noted, drawing on reports from organisations such as Oxfam was particularly significant to support Brazil's argument for it provided figures that demonstrated just to what extent subsidies maintained by the US hindered the development and furthered poverty in least-developed African countries[102] and were, hence, not upholding the ideology of free trade.

It is worth noting here that it is not always clear, however, whether Brazil's rhetoric maintains the relationship between the ideologies of free trade and development in a way that leaves free trade at the centre of the CSC of multilateral trade regulation. This was evident in relation to Brazil's claim that US subsidisation programmes had caused significant price suppression in cotton markets and thus serious prejudice to the interests of cotton producers in Brazil as well as other countries. According to Brazil, the extent to which US cotton subsidies did cause significant price suppression, a requirement by Article 6.3(c) of the Subsidies Agreement to determine whether serious prejudice to another WTO Member exists, was to vary depending on the 'vulnerability of a Member and its affected industry'.[103] Brazil further maintained that '[w]hat may be an insignificant level of price suppression for a developed country member producer that is heavily subsidised may be significant for a developing or least-developed country Member with few, if any, subsidies.'[104] Brazil also maintained that a complaint of price suppression should be

[99] "Brazil's Further Submission to the Panel," para. 465.
[100] "Brazil's Further Submission to the Panel," para. 1.
[101] "Brazil's Further Submission to the Panel," para. 465.
[102] These figures include, for example, that US subsidies to cotton producers exceeded the entire gross domestic product of Burkina Faso and such levels of subsidisation exceeded by more than three times the 'entire USAID budget for Africa's 500 million people'. Quoted in Meredith Black, *King Cotton in International Trade*, 342.
[103] "Brazil's Further Submission to the Panel," para. 96.
[104] "Brazil's Further Submission to the Panel," para. 96.

established not only in relation to cotton producers in Brazil, as the complainant, but also to third countries, including West-African cotton producers such as Benin and Chad.[105]

While this was a claim that related to the Subsidies Agreement – and not the Agreement on Agriculture, it is nonetheless useful briefly to consider this point here for the simple reason that mainstreaming the idea of development within the WTO in a way that would supersede the foundation ideology of free trade would be expected to weaken the multilateral trade regulation CSC at the heart of the WTO Agreement and thus to lead to a modification of WTO rules, particularly in relation to developing and least-developed Member states, so that the CSC would remain logically tight. Because a CSC is integral to a structure of power relations, changes to the CSC necessarily result in changes to power dynamics within the regime, and vice versa. The ideational and political implications of such a proposal by Brazil are indeed not too difficult to see.

First, and perhaps most clearly, to the extent that claims of serious prejudice are necessary to determine the amount of retaliation a complainant is allowed to impose on the non-compliant party, were the Panel and the Appellate Body to determine serious prejudice in relation to all other countries mentioned in the dispute by Brazil, then the amount of retaliation Brazil would have been able to impose on the United States would have been significantly larger. Were that to be the case, and because dispute settlement decisions have important precedential value,[106] it would not be surprising if other developing and least-developed countries were to draw on the experience of other countries when making claims of serious prejudice against developed countries so as further to level the playing field in the WTO. Second, to argue that different thresholds should be applied in dispute settlement to developing and least-developed countries in order to establish significant price suppression and serious prejudice would serve to undermine the assumed objectivity of economic theory and calculations insofar as other factors, such as levels of poverty, hunger, and under-development, which go beyond pure economic calculations, would be used to determine compliance with the law.

It is not surprising therefore that both the US[107] – as well as the EC,[108] maintained that the existence of price suppression, and hence serious prejudice, can only be determined in relation to the complaining party and that no different threshold should apply to developing and least-

[105] "Brazil's Further Submission to the Panel," para. 94. Argentina made a similar argument. See, "Report of the Panel," para. 7.1257.
[106] See, Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," *American Journal of International Law* 98, no. 2 (2004): 254; Robert Wolfe, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor," *Journal of International Economic Law* 12, no. 4 (2009): 844.
[107] See, "US Further Written Submission," paras. 86-87.
[108] See, "Report of the Panel," para. 7.12958.

developed countries. The United States argued that 'Brazil's developmental status is irrelevant for the purposes of Article 6.3(c) [of the Subsidies Agreement],' further adding that only Article 27 of the Subsidies Agreement contains provisions on special and differential treatment for developing country Members but that, in any case, these provisions do not modify remedy rules in that Agreement.[109] The EC similarly contended that 'Article 6.3(c) is not a special and differential treatment provision.'[110] The United States, and the EC, were thus more protective, in their interpretation of Article 6.3(c) of the Subsidies Agreement, of the objectivity of economic calculations and thus of the CSC myth in determining compliance with international trade law.

The Panel and Appellate Body ruled against Brazil on this point and reinforced the CSC myth, but with already-undergoing shifts in the distribution of power in the WTO and with an increasing number of developing countries participating as complainants, respondents, and third parties in WTO dispute settlement, it would not be unreasonable to expect that provisions in Multilateral Trade Agreements to be increasingly interpreted in a way that favours developing and least-developed country Members. According to ILI theory, indeed, where changes to the power structure take place, it is expected that changes to the ideational structure integral to power dynamics will change too.[111]

3.3.2 Brazil interpreted the rules governing agricultural export subsidies in a way that tightened the logical nexus in the CSC of the Agreement on Agriculture and reinforced the ideology of free trade

The second significant aspect of the *US – Cotton Subsidies* case is that Brazil adopted an interpretation of export subsidy provisions in the Agreement on Agriculture that resulted in a tighter logical nexus in the CSC embedded within the Agreement and that has been more reinforcing of the foundation ideology of free trade than the interpretation adopted by the United States. This was clearest in relation to the use of export credit guarantees,[112] which, despite having been the subject of multilateral negotiations since at least the onset of the Doha Round,[113] were unambiguously clarified as a result of the dispute to constitute measures subject to the trade

[109] "US Further Submission to the Panel," para. 88.
[110] See, "Report of the Panel," para. 7.1258, summarising the position of taken by the EC.
[111] See, e.g., Shirley V. Scott, "Comparing the Robustness and Effectiveness of the Antarctic Treaty System and the UNFCCC Regime," *Australian Journal of Maritime & Ocean Affairs* 11, no. 2 (2019): 96.
[112] Export credit guarantees are, in simple terms, government-supported guarantees on the repayment of credit provided by exporters to finance the exportation of certain commodities into foreign countries. The primary purpose of these programmes is thus to protect lenders from financial risk and thereby to encourage export of such commodities free of such financing risks. This means that export credit guarantees, when provided on certain terms, can have significant market-distorting effects. See, Dominic Coppens, "WTO Disciplines on Export Credit Support for Agricultural Products in the Wake of the *US – Upland Cotton* Case and the Doha Round Negotiations," *Journal of World Trade* 44, no. 2 (2010): 350.
[113] See, Coppens, "WTO Disciplines on Export Credit Support," 375.

liberalisation rules embedded in the Agreement on Agriculture.[114] The dispute in relation to export credit guarantees can be characterised as one in which each party sought to justify its position in terms of upholding the ideology of free trade, though ultimately Brazil's position made for a tighter logical nexus of the CSC in the Agreement on Agriculture that would more strongly uphold the foundation ideology of free trade.

Recall from the analysis above that the CSC solution at the heart of the Agreement on Agriculture comprised, at its most basic, an undertaking by WTO Members to reduce over a period of time agricultural protection in the areas of market access, domestic subsidies, and export subsidies and to continue the reform process towards freer world agricultural trade by means of multilateral negotiations. As it relates to export subsidies, the primary rule by which states agreed to operationalise the CSC solution was a double commitment by Members pursuant to Article 3.3 not to provide subsidies listed in Article 9.1 in excess of the limits specified in their Schedules of Concessions and not to provide such export subsidies listed in Article 9.1 in relation to any agricultural product not specified in their Schedules.[115] Beyond this commitment, WTO Members are able to continue pursuit of their self-interested legitimation goal by means of subsidising the exportation of agricultural products so long as, with regards to measures listed in Article 9.1, not in excess of their scheduled commitments and, with regards to other forms of export support not listed in Article 9.1, in a way that does not circumvent, or threatens to circumvent, reduction commitments as per Article 10.[116]

Notwithstanding the fact that during the Uruguay Round export credit guarantees were already extensively utilised by the United States as well as other primarily developed countries in relation to agricultural products and that their trade-distorting potential was well-known,[117] these measures

[114] The *US – Cotton Subsidies* dispute in fact marked the first time since the conclusion of the Agreement on Agriculture that the rights and obligations of states in relation to use of export credit guarantees were ever questioned in WTO dispute settlement.

[115] Recall that at the time the Agreement on Agriculture was negotiated, export subsidies listed in Article 9.1 were known directly to have trade-distorting effects. See, Bhala, "World Agricultural Trade in Purgatory," Subsidies listed in Article 9.1 and, hence, subject to the reduction commitments will hereinafter be referred to as 'listed subsidies', whereas subsidies not listed in Article 9.1 and, as such, not subject to reduction commitments will be referred to as 'non-listed subsidies'. Similarly, agricultural products registered in a Member's Schedule of Concessions will be referred to as 'scheduled products', whereas products not registered in a Member's Schedule will be referred to as 'unscheduled products'. This is consistent with existing WTO agricultural trade law practice. See, e.g., Desta, *The Law of International Trade in Agricultural Products*, 231.

[116] That the Agreement on Agriculture contains a distinction between listed and non-listed subsidies is generally agreed in the relevant literature. See, e.g., Desta, *The Law of International Trade in Agricultural Products*; Bhala, "World Agricultural Trade in Purgatory;" Coppens, "WTO Disciplines on Export Credit Support."

[117] See, e.g., Coppens, "WTO Disciplines on Export Credit Support," 353. That the trade-distorting potential of export credits and credit guarantees was known during the Uruguay Round is evident from the fact that rules disciplining the use of export credit support for non-agricultural products were included in the

were not listed in Article 9.1 and thus not subject to the reduction commitments. Instead, export credit guarantees as well as export credits and insurance programmes were made subject to the second paragraph of Article 10, pursuant to which WTO Members

> undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.[118]

The precise meaning of Article 10.2 has been subject to some debate amongst trade scholars, but it is generally agreed that this provision contains two primary obligations: first, members must work towards the development of internationally agreed rules to govern the provision of export credits, export credit guarantees, and insurance programmes; and second, after agreement is reached such measures may only be provided in conformity with those internationally agreed rules.[119] The development of such rules had been subject to multilateral negotiations since at least the beginning of the Doha Round, but by the time the *US – Cotton Subsidies* dispute was initiated, no such internationally agreed rules had been produced.[120] Furthermore, as the Appellate Body noted at the time, Article 10.2 in isolation was ambiguous as to which, if any, rules applied to export credit guarantees in the absence of such internationally agreed disciplines.[121]

This ambiguity notwithstanding, Brazil claimed that US export credit programmes in support of cotton producers were illegal under existing WTO law governing agricultural export subsidies, as provided by the Agreement on Agriculture.[122] More specifically, Brazil claimed that these programmes violated the obligations of the United States pursuant to Article 10.1 for they circumvented, or threatened to circumvent, the reduction commitments made by the US and were,

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Subsidies Agreement. See, Subsidies Agreement, Illustrative List of Export Subsidies (Annex I). See, also, Coppens, "WTO Disciplines on Export Credit Support," 352.

[118] Agreement on Agriculture, Article 10.2.

[119] See, e.g., "Report of the Appellate Body," para. 607; Coppens, "WTO Disciplines on Export Credit Support," 356.

[120] The Appellate Body noted in its Report that '[t]here is no dispute between the parties that, to date, no disciplines have been agreed internationally pursuant to Article 10.2.' See, "Report of the Appellate Body," para. 607.

[121] In contrast, subsidised export credit guarantees are strictly prohibited in the Subsidies Agreement in accordance with the general prohibition on export subsidies in Article 3. Pursuant to item (j) of the Illustrative List of Export Subsidies, export credit guarantee programmes are considered to have a subsidy component, and thus to constitute an export subsidy, if operated 'at premium rates which are inadequate to cover long-term costs and losses of the programmes'. See, Subsidies Agreement, Illustrative List of Export Subsidies (Annex I).

[122] Brazil also argued that US export credit guarantee programmes were inconsistent with the Subsidies Agreement. An in-depth analysis of Brazil's claim as it relates to the Subsidies Agreement is outside the scope of this dissertation and will only be considered to the extent necessary for the argument developed here.

as a result, prohibited export subsidies under the Agriculture Agreement.[123] This prompted a debate as to the precise meaning of Article 10.2. Given the place of Article 10 in the Agreement on Agriculture CSC as a supporting rule designed to ensure the proper functioning of the CSC solution – indeed, this article itself is entitled 'Prevention of Export Subsidy Commitments', whether export credit guarantees were found to be subject at all to the rules of the Agreement on Agriculture or not in the absence of 'internationally agreed disciplines' could have a significant impact on the proper operation of the CSC solution. Because in a CSC the solution follows directly from the foundation ideology, such a determination would be expected either to weaken or to strengthen the logical nexus of the CSC of the Agreement on Agriculture and, hence, the ideology of free trade.

A clarification of Article 10.2 would be particularly significant for the ideational cohesion of the CSC at the heart of the Agreement on Agriculture, furthermore, considering the sheer magnitude of export credit guarantee programmes operated by the US Government to support agricultural producers. At the time Brazil initiated the *US – Cotton Subsidies* dispute, the Credit Commodity Corporation (CCC) of the United States Department of Agriculture (USDA) was required, pursuant to US federal legislation, to make available annually no less than U$ 5.5 billion in export credit guarantees to agricultural products, including upland cotton.[124] Three primary export credit guarantee programmes were operated by the CCC at the time, namely the General Sales Manager 102 (GSM-102), the General Sales Manager 103 (GSM-103), and the Supplier Credit Guarantee Programme (SCGP).[125] Significantly, the primary purpose of these programmes was, *inter alia,* 'to "increase exports of agricultural commodities" [and] "to compete against foreign agricultural exports"'.[126] During the course of the dispute, both Brazil and the United States attempted to legitimise their positions in relation to Article 10.2 by drawing on elements of the CSC at the heart of the Agreement on Agriculture, the CSC of the GATT, and the CSC embedded within the WTO Agreement. While we are mostly concerned here with the position taken by and the rhetoric of Brazil, it is useful to begin by considering the argument presented by the United States insofar as it was the US that raised issues in relation to the precise scope of Article 10.2 to begin with.

The primary response offered by the United States to the claim that its export credit guarantee programmes were illegal was that Article 10.2 explicitly indicated that export credit guarantees were not subject at all to the rules of the Agreement on Agriculture. The US sought to defend its position by reinforcing the logical nexus between the original CSC solution operationalised by

[123] See, "Request for the Establishment of a Panel by Brazil," *United States – Subsidies on Upland Cotton*, 7 February 2003, WTO Doc. WT/DS267/7.
[124] See, "Report of the Panel," para. 7.239. See, also, Cross, "King Cotton, Developing Countries and the 'Peace Clause'," 157.
[125] See, "Report of the Panel," para. 7.236.
[126] See, "Report of the Panel," para. 7.237 (quoting relevant US federal legislation).

the GATT – that is, the process of mutually advantageous and reciprocal negotiations as the primary means by which states agree to constrain their pursuit of economic protection, and the ideology of free trade. In its 'First Written Submission to the Panel', the US maintained that:

> During the Uruguay Round, negotiators did not reach agreement on disciplines on all areas that had been the subject of negotiations, in several cases agreeing to continue negotiating after the close of the Round and the entry into force of the WTO Agreement. The simple fact is that during the Uruguay Round WTO Members did not agree on disciplines to be applicable to export credits, export credit guarantees, and insurance programmes. Unable to reach agreement on such disciplines within the Uruguay Round, Members opted to continue discussions in an appropriate forum, deferring the imposition of substantive disciplines until a consensus was achieved.[127]

According to the United States, therefore, Article 10.2 reflected a categorical 'deferral of disciplines on export credit guarantee programmes contemplated by WTO Members'[128] and, so, any assessment as to whether a violation of the United States' obligations pursuant to the Agreement on Agriculture existed should 'begin and end' with Article 10.2.[129] By highlighting that no consensus was reached during the Uruguay Round of multilateral trade negotiations and, hence, that no rules existed with which the Panel or Appellate Body could determine compliance (or lack thereof) in the first place, the United States effectively upheld the logical interrelatedness between the original CSC solution operationalised the GATT and the solution in the sub-CSC at the heart of the WTO Agreement; that is, that the latter should reinforce the former, not the other way around. As suggested in the previous chapter of this dissertation, this was necessary if the original multilateral trade regulation CSC was to remain strong.

The result of the interpretation of Article 10.2 adopted by the US would, however, be that export credit guarantees would not be regulated at all; instead, states would be free to support and protect their agricultural industries through the use of export credit guarantees with no limit at all and in a manner that would risk undermining the CSC solution in the Agreement on Agriculture given the potentially trade-distorting character of these measures. The Appellate Body indeed

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[127] "Executive Summary of the First Written Submission of the United States," Annex B-2 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WT/DS267/R/Add.1, para. 35. See, also, "First Written Submission of the United States to the Panel," *United States – Subsidies on Upland Cotton,* 11 July 2003. https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute_settlement/ds267/asset_upload_file148_5598.pdf.

[128] "Executive Summary of the First Written Submission of the United States," Annex B-2 to the Report of the Panel, *US – Cotton* Subsidies, WTO Doc. WT/DS267/R/Add.1, para. 38.

[129] "Answers of the United States to the Questions from the Panel to the Parties Following the First Session of the First Substantive Panel Meeting, 11 August 2003," Annex I-2 to the Report of the Panel, *United States – Subsidies on Upland Cotton,* WTO Doc. WT/DS267/R/Add.2, paras 137 and 143.

highlighted that the interpretation of Article 10.2 adopted by the United States, indeed, would leave export credit guarantees (as well as export credits and insurance programmes),

> subject to no disciplines *at all.* In other words, under the United States' interpretation, WTO Members are free to "circumvent" their export subsidy commitments through the use of export credit guarantees, export credits and insurance programmes until internationally agreed disciplines are developed, whenever they may be.[130]

The United States, for its part, maintained that this was in fact the intention of Uruguay Round negotiators, stressing further that, had export credit guarantees been explicitly recognised as trade-distorting export subsidies and had, as such, been listed in Article 9.1,

> then the United States would have been expressly permitted to include such measures in their respective export subsidy reduction commitments. In the absence of a reference in Article 9 [of the Agreement on Agriculture], then the United States was foreclosed from including them. It defies logic, as well as the obvious object and purpose of the agreement, to take the view of the Panel in which such practices would be treated as already disciplined export subsidies yet not permitted to be included within the applicable reduction commitments expressly contemplated by the text. The United States is unfairly whipsawed by this interpretive approach, and Brazil finds itself the beneficiary of an unbargained-for multi-billion dollar windfall.[131]

In support of its position, the United States further maintained that it would 'be hard to imagine parties willing to make such an offer [to apply Article 10.1 to export credit guarantees] in the absence of the United States, among the largest providers of export credit guarantees.'[132] Highlighting the sheer magnitude of export credit guarantee programmes maintained by the USDA, the United States suggested that they could not have been ignored by Uruguay Round negotiators:

> During the relevant base period for determining the levels from which export subsidy reduction commitments were to be calculated (1986-1990), the United States had export activity for scores of commodities under the export credit guarantee program[me]s. It

[130] "Report of the Appellate Body," *United States – Subsidies on Upland Cotton,* 3 March 2005, WTO Doc. WT/DS267/AB/R, para. 617.
[131] "Appellant's Submission of the United States of America," *United States – Subsidies on Upland Cotton,* 28 October 2004, para. 384. https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file938_5598.pdf.
[132] "Executive Summary Closing Statement of the United States at the Second Meeting of the Panel with the Parties," Annex H-4 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/Add.1, para 4.

> provided export credit guarantees in connection with 37 commodities in addition to those thirteen with respect to which it has reduction commitments. Among these, for example, were *yearly averages* of 5.5 *million tons* of corn and *859,000 metric tons* of cotton. Similarly, the quantities of coarse grains would have been double the amount included, triple for vegetable oils, ten-fold for bovine meat and a multiple of *1,700* for "other milk products." Such a magnitude of export credit guarantees during this period simply could not have been overlooked by either the United States or its negotiating partners.[133]

The United States, while seeking to uphold the overall CSC nexus at the heart of the WTO Agreement, including that dispute settlement is designed to uphold the rights and obligations of states emerging from multilateral negotiations, seemed therefore to couch its defence not in terms of the foundation ideology but in terms of the legitimation goal; indeed, the US refers to the object and purpose of the Agreement on Agriculture not in terms of the foundation ideology or the CSC myth, but in terms of pursuit of the legitimation goal of having the ability to protect and support agricultural industries, albeit within the limits stipulated in each Member's reduction commitments.

By couching its defence in terms of the legitimation goal, however, the United States effectively politicised the rules of the Agreement on Agriculture, thus shedding light on the extent to which international law serves in fact as a legitimiser of political goals. However, because, according to Scott, the ideology of international law serves to '[mask] the relativity of a rule to the current political issue […] a rule must be presented in terms not related to the political situation at hand'.[134] In so constructing its argument, therefore, the United States portrayed international law as not politically neutral, thus weakening the assumption underpinning the ideology of international law that law is ultimately distinguishable from, and superior to, politics. Furthermore, by highlighting the sheer magnitude of export credit guarantee programmes, the United States further shed light on the discrepancy between the foundation ideology of free trade and reality; if an assumption of free trade is that freeing international trade from barriers that restrict its flow will lead to greater prosperity for all, then excluding such potentially trade-distorting support measures of such magnitude altogether from the export subsidy would seem fundamentally incompatible with the foundation ideology. While the United States maintained

[133] "US Appellant's Submission," para. 385.
[134] Scott, *The Political Interpretation of Multilateral Treaties,* 23.

that this was part of 'the grand compromise of the Agreement on Agriculture'[135] this too served to highlight the inherently political nature of the Agreement.

Brazil, on the other hand, adopted an interpretation of Article 10.2 that would serve to strengthen the ideational nexus at the heart of the Agreement on Agriculture and thus to reinforce the foundation ideology of free trade. According to Brazil,

> the relevant question is not whether export credit guarantees are "covered" by Article 10.2, but whether they are "exempted" by Article 10.2 from the general export subsidy disciplines of the Agreement on Agriculture. Brazil's position is that Article 10.2 does not exempt export credits like export credit guarantees from the general export subsidy disciplines of the Agreement on Agriculture, including Article 10.1 thereof. If those export credit guarantees constitute export subsidies, then they are subject to those disciplines.[136]

Brazil sought to support its position by associating it with the foundation ideology of free trade and demonstrating that to exclude export credit guarantees from the rules on agricultural export subsidies would weaken the CSC solution of the Agreement on Agriculture and, thus, the ideology. Highlighting that Article 10 of the Agreement on Agriculture was designed to prevent the circumvention of export subsidy commitments, Brazil argued that the position of the United States would undermine the CSC solution and was, thus, simply 'absurd'.[137] In the absence of such internationally agreed disciplines envisaged in Article 10.2, Brazil argued, 'the United States' interpretation of Article 10.2 would leave export credit support completely undisciplined, and open to […] abuse […] In this way, the United States' interpretation of Article 10.2 *facilitates*, rather than *prevents*, circumvention of its export subsidy commitments.'[138] Brazil's interpretation, in contrast, assumed the verity of free trade and of the assumption that economic theory is able objectively to dictate appropriate trade policy: 'Brazil emphasises that the Panel's interpretation does not mean that Members cannot grant export credit guarantees. Instead, it means that

[135] "Executive Summary Closing Statement of the United States at the Second Meeting of the Panel with the Parties," Annex H-4 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/Add.1, para 3.
[136] "Comments of Brazil to Answers to Questions Posed by the Panel Following the First Substantive Meeting of the Panel, 22 August 2003," Annex I-3 to the Report of the Panel, *United States – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R/Add.2, para. 90.
[137] "Comments of Brazil to Answers to Questions Posed by the Panel Following the First Substantive Meeting of the Panel, 22 August 2003," Annex I-3 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R/Add.2, para 118.
[138] "Comments of Brazil to Answers to Questions Posed by the Panel Following the First Substantive Meeting of the Panel, 22 August 2003," Annex I-3 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R/Add.2, para 118. Emphasis in original.

subsidised export credit guarantees are subject to disciplines as trade-distorting measures, and cannot be used to override export subsidy commitments.'[139]

Furthermore, Brazil drew on the ideology of international law, in particular the assumption that it is possible objectively to apply the rules of international law so as to settle any dispute between states, by categorically maintaining that '[i]n WTO dispute settlement, there is only one way to determine what was achieved in past negotiations – to interpret those provisions actually concluded according to the customary rules of interpretation included in the Vienna Convention [on the Law of Treaties (VCLT)]'.[140] Brazil further criticised the United States for not supporting its position with reference to 'the tools of interpretation' of the VCLT and that, as a result, the American interpretation of Article 10.2 'is fundamentally incorrect.'[141]

The Panel and the Appellate Body ultimately upheld Brazil's interpretation of Article 10.2. The Appellate Body suggested that Article 10.2 'must be interpreted in a manner that is consistent with the aim of preventing circumvention of export subsidy commitments'.[142] In ILI terms, this would be suggesting that Article 10.2 is expected to reinforce the CSC solution and, hence, the overall logical nexus of the CSC at the heart of the Agreement on Agriculture. The Appellate Body further stated that '[g]iven that the drafters were aware that subsidised export credit guarantees, export credits and insurance programmes could fall within the export subsidy disciplines in the *Agreement on Agriculture* and the *[Subsidies] Agreement,* it would be expected that an exception would have been clearly provided had this been the drafter's intention.'[143] The Appellate Body further found that it would be 'difficult to believe that the negotiators would not have been aware of and did not seek to address the potential that subsidised export credit guarantees, export credits and insurance programmes could be used to circumvent a WTO Member's export subsidy reduction commitments.'[144]

While one member of the Appellate Body issued a dissenting opinion, the logic (or lack thereof) of their interpretation of Article 10.2 was also couched in terms not of the CSC solution in the Agreement on Agriculture reinforcing the foundation ideology but rather of the solution allowing

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[139] "Report of the Appellate Body," para. 603.
[140] "Comments of Brazil to Answers to Questions Posed by the Panel Following the First Substantive Meeting of the Panel, 11 August 2003," Annex I-1 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R/Add.2, para. 138. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331. https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf.
[141] "Comments of Brazil to Answers to Questions Posed by the Panel Following the First Substantive Meeting of the Panel, 22 August 2003," Annex I-3 to the Report of the Panel, *US – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R/Add.2, para 121.
[142] "Report of the Appellate Body," para. 616.
[143] "Report of the Appellate Body," para. 609.
[144] "Report of the Appellate Body," para. 617.

states to resume pursuit of the legitimation goal. According to the dissenting member, 'it seems anomalous that WTO Members with export credit guarantee programmes would not have sought to preserve some level of flexibility to provide subsidies through such programmes, which flexibility would have been available to them had such programmes been included under Article 9.1 of the *Agreement on Agriculture*.'[145] As the dissenting member of the Appellate Body themselves highlighted, an interpretation of Article 10.2 that deems export credits, export credit guarantees, and insurance programmes altogether exempt from the rules of the Agreement on Agriculture leaves 'a significant gap in the Agreement on Agriculture with respect to export credit guarantees, export credits and insurance programmes that apply to agricultural products.'[146]

Whether it was the intention of the Uruguay Round drafters to exclude altogether export credit guarantees from the rules of the Agreement on Agriculture we may never know, but nor does it matter from an ILI theory vantage point. Instead, ILI theory posits that states within the regime must communicate with each other in a way that assumes the foundation ideology to be true. In this case, it was Brazil that ultimately upheld the ideology of free trade more strongly in its argument and its interpretation of Article 10.2 made for a tighter logical nexus in the CSC of the Agreement on Agriculture that would more strongly uphold the foundation ideology of free trade and the CSC myth during the continuing life of the WTO regime. Because the CSC solution is 'the logical embodiment of an application of the ideology to the issue at hand',[147] interaction within the treaty regime that serves to strengthen the solution would also serve to reinforce the foundation ideology and, hence, to solidify the CSC.

The United States, on the other hand, adopted a position in relation to Article 10.2 that would serve to allow export credit guarantees to be used without any restrictions at all with the potential to undercut export subsidy commitments and, thus, to undermine the CSC solution. It was, therefore, the United States – not Brazil, that seemed to weaken not only the multilateral trade regulation CSC embedded within the WTO Agreement, and to which the Agreement on Agriculture is integral, but also the CSC of international law-international relations itself. To be fair, the sheer magnitude of export credit guarantees maintained by the US and the well-known trade-distorting potential of those measures would, in any case, have made it difficult logically to couch the exclusion of these measures from the Agreement on Agriculture in terms of the ideology of free trade without in fact highlighting the discrepancy between the ideology and reality. However, by couching its defence in terms of power and with explicit references to the legitimation goal, the United States effectively politicised the rules embedded in the Agreement

[145] "Report of the Appellate Body," para. 638.
[146] "Report of the Appellate Body," para. 640. Italics omitted.
[147] Scott, *The Political Interpretation of Multilateral Treaties,* 24.

on Agriculture, thus weakening not only the image of international law as politically neutral and ultimately distinguishable from, and superior to, politics but also its own position in the dispute.

3.3.3 Levelling the playing field in international agricultural trade and ensuring CSC robustness but with potential implications for the effectiveness of the WTO legal regime

The final aspect of the *US – Cotton Subsidies* dispute that is of significance to our analysis is that as a result of the dispute the playing field in international agricultural trade has been further levelled due to the fact that it became easier for other WTO Members, in particular developing and least-developed countries, to compete with agricultural products from the United States. This, however, raised potential issues for the overall effectiveness of the WTO regime, both in ILI theory terms as well as in terms of the more commonly understood notion of effectiveness. This was most clearly evident, again, in relation to export credit guarantees, although there is scope to argue that this was also the case with regards to the interpretation of agricultural trade rules governing other export as well as domestic support measures. In order to understand this, it would be useful briefly to consider the outcome of the dispute in relation to export credit guarantees in legal terms.

As suggested above, both the Panel and the Appellate Body upheld Brazil's interpretation of Article 10.2 and, thus, deemed subsidised export credit guarantees to constitute export subsidies for the purposes of the Agreement on Agriculture and to be subject to the anti-circumvention obligation articulated in Article 10.1. By virtue of this decision, export credit guarantee programmes extended by the US in support of its cotton industry were found to be prohibited under the Agriculture Agreement. This finding was made on the basis that cotton was an unscheduled product and that any subsidisation whatsoever, whether through listed or not-listed export subsidies, of unscheduled products is outright forbidden pursuant to Article 10.1.[148] By deeming these programmes to constitute prohibited export subsidies under the Agreement on Agriculture, the Panel and the Appellate Body were able to determine that these measures were

[148] This drew on a previous finding by the Appellate Body in the *US – FSC* case, initiated by the EC, that '[e]xport subsidies for […] unscheduled agricultural products […] are completely prohibited under the Agreement on Agriculture.' See, "Report of the Appellate Body," *United States – Subsidies on Upland Cotton,* 3 March 2005, WTO Doc. WT/DS267/AB/R, 18 December 2007, para. 652. Italics omitted. This was further upheld by the compliance Panel, which stated that Article 3.3 simply 'prohibits the [WTO Members] from granting any subsidy whatsoever to exports of unscheduled products.' See, "Report of the Panel," *United States – Subsidies on Upland Cotton (Recourse to Article 21.5 of the DSU by Brazil),* WTO Doc. WT/DS267/RW, fn. 782. Note, however, that this determination too was not free from ambiguity, most basically because the Agreement on Agriculture itself, in fact, does not contain any provisions explicitly dealing with the provision of non-listed subsidies to unscheduled products, and has been criticised by some scholars. See, Desta, *The Law of International Trade in Agricultural Products,* 257.

also subject to the export subsidy rules of the Subsidies Agreement[149] and, ultimately, that they were inconsistent with the prohibition on export subsidies articulated in Article 3.1 of that Agreement. By Article 4.7 of the Subsidies Agreement, the United States was therefore required by the Panel to eliminate subsidised export credit guarantee programmes 'without delay',[150] a ruling which was upheld by the Appellate Body.

This was considered to have been a significant victory not only for Brazil but also for other developing and least-developed countries in the WTO regime[151] and to have further levelled the playing field in international agricultural trade in three primary ways. First, absent, *inter alia,* subsidised export credit guarantee programmes provided by the US Government to cotton as well as other agricultural producers, it would be considerably easier for less powerful WTO Members to compete with agricultural exports from the United States. Second, Brazil's win strengthened its position in the Doha Round agricultural negotiations and gave it as well as other developing and least-developed countries more leverage to push for change in the agricultural polices of developed countries.[152] One of the reasons for this was that, although it is true that the findings of *US – Cotton Subsidies* were only applicable to Brazil and the United States as the parties to the dispute, the case would nonetheless have precedential value[153] and could thus be expected to give less powerful countries within the regime the opportunity to negotiate in the 'shadow of the law'. Finally, Brazil's overall victory in the dispute more broadly – and not only in relation to export credit guarantees, demonstrated that developing countries could also be successful in WTO dispute settlement and thus represented, as one author has put it, 'a broader shift within the WTO away from a system dominated by the US and the EC toward a system that increasingly is influenced by emerging market economies'.[154]

The dispute, therefore, served to further the liberalisation of international agricultural trade and to strengthen the logical nexus of the CSC at the heart of the WTO Agreement, thereby reinforcing the foundation ideology and rendering the regime more robust and resilient to change. According

[149] Because of Article 13 of the Agreement on Agriculture, known commonly as the Peace Clause, in order for export subsidies for agricultural products to be considered in relation to the Subsidies Agreement, they need first to be deemed not to conform fully with Part V of the Agreement on Agriculture. Agreement on Agriculture, Article 13. The Peace Clause expired in 2004. See, Richard H. Steinberg and Timothy E. Josling, "When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to Legal Challenge," *Journal of International Economic Law* 6, no. 2 (2003): 369–417.
[150] More specifically, the Panel recommended that these measures be withdrawn 'at the latest within six months of the date of the adoption of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier). "Report of the Panel," para. 8.3. See, also, Cross, "King Cotton, Developing Countries, and the 'Peace Clause'," 168.
[151] See, e.g., Cross, "King Cotton, Developing Countries, and the 'Peace Clause';" Black, *King Cotton in International Trade*; Powell and Schmitz, "The Cotton and Sugar Subsidies Decisions."
[152] Black, *King Cotton in International Trade,* 318.
[153] See, Steinberg, "Judicial Lawmaking at the WTO," 254; Wolfe, "The WTO Single Undertaking," 844.
[154] Cross, "King Cotton, Developing Countries, and the 'Peace Clause'," 155-154. See also, Black, *King Cotton in International Trade*, 62.

to ILI theory, a treaty regime is in a good position so long as CSC participants continue dealing with each other with regards to the issue in question through rhetoric that assumes the verity of the foundation ideology. While ILI theory is mostly concerned with rhetoric, it is not oblivious to state behaviour and posits that for the CSC, and thus the treaty regime, to remain strong the actions of states must be such that do not serve to highlight a discrepancy between the foundation ideology and reality. While Brazil's interpretation of provisions governing agricultural export credit guarantees, as upheld by the Panel and the Appellate Body, served to tighten logical nexus of the CSC of the Agreement on Agriculture, and thus to strengthen the CSC at the heart of the WTO Agreement, the behaviour of WTO Members during agricultural negotiations in the Doha Round had the potential inadvertently to undermine the logical nexus in the CSC at the heart of the WTO Agreement and, hence, the foundation ideology of free trade.

This was the case most basically because until the adoption of the 2008 'Draft Modalities for Agriculture',[155] WTO Members had been negotiating rules on export credit guarantees that were in fact much more lenient than those that the Panel and the Appellate Body had found already to have been embedded in the Agreement on Agriculture, that is, that providing subsidised export credit guarantees to unscheduled agricultural products or above existing reduction commitments was simply prohibited. As Coppens has noted, for example, although WTO Members had agreed to a complete phase out of export subsidies during the Hong Kong Ministerial in 2005, under the Chair's Reference Paper of 13 April 2006 on 'Export Credits, Export Credit Guarantees or Insurance Programmes', it was nonetheless agreed that 'export credit support conforming to the specific disciplines (e.g. being self-financing) would not be considered an "export subsidy" and thus not be prohibited. On the other hand, non-conforming export credit support would […] also not be prohibited as long as it fulfilled specific reduction commitments.'[156] The 2006 'Draft Possible Modalities on Agriculture' again included rules on export credits along the lines proposed in the Chair's Reference Paper, whereby WTO Members would have been able to make new reductions commitments for export credits and export credit guarantees, including in relation to currently unscheduled products, thereby explicitly allowing those measures, albeit within the limits set in each country's new reduction commitments.[157]

Had such rules on export credit guarantees been agreed to by Members, however, they would have stood in stark contrast to the findings in *US – Cotton Subsidies* that the Agreement on

[155] World Trade Organisation, *Revised Draft Modalities for Agriculture,* 6 December 2008, TN/AG/W/4/Rev.4.
[156] Coppens, "WTO Disciplines on Export Credit Support," 377. See also, WTO, "Chair's Reference Paper – Export Credits, Export Credit Guarantees or Insurance Programmes," 13 April 2006. https://www.wto.org/english/tratop_e/agric_e/ref_paper_xcreds_e.pdf.
[157] See, WTO, "Draft Possible Modalities on Agriculture," 12 July 2006, WTO Doc. TN/AG/W/3, 63, Article 3.

Agriculture already contained a prohibition on use of subsidised export credit guarantees when provided to unscheduled products or above existing commitments. Instead, according to the rules envisaged above, '[a]ll WTO Members would thus [have been] allowed to schedule such specific reduction commitments [on use of export credit guarantees] at the end of the Doha Round'[158] and thus to continue providing subsidised export credit guarantees to agricultural products, albeit within the limits imposed by the new reduction commitments and until the phase out date. This, however, 'does not appear to go in line with the logic, purpose and direction of the process of trade liberalisation'[159] and, therefore, would serve to shed light the obvious discrepancy between the foundation ideology of free trade and reality. Insofar as free trade is premised on acceptance of the CSC myth – that economic theory is able objectively to dictate appropriate trade policy, this would also serve to portray the CSC myth a myth in the everyday sense of the word as a statement with no basis on fact.

That WTO Members shifted their approach to export credits and export credit guarantees in the 2008 'Revised Draft Modalities for Agriculture' to align more closely with the findings of the Panel and the Appellate Body in *US – Cotton Subsidies* is, therefore, not surprising from an ILI theory point of view; indeed, ILI theory posits that where new rules or treaties emerge within an existing regime, a stability dynamic will operate so that rules that do not reinforce the foundation ideology will be discarded in favour of ones that do.[160] As a possible new article to replace Article 10.2 of the Agreement on Agriculture, the 2008 modalities document thus provided that 'Members undertake not to provide export credits, export credit guarantees, or insurance programmes otherwise than in conformity with this Article',[161] effectively upholding that these measures are prohibited save for when provided in conformity with agreed disciplines designed to prevent market distortions.

At the same time, the fact that WTO Members had been negotiating rules that were more flexible than what had been interpreted through dispute settlement does pose the question as to whether the Panel and the Appellate Body were in fact serving to uphold the limits placed on pursuit by

[158] Coppens, "WTO Disciplines on Export Credit Support," 377.
[159] Desta, *The Law of International Trade in Agricultural Products,* 259. Note that Desta made this statement in relation to the ruling of the Appellate Body in *US – FSC* that export subsidies provided to unscheduled commodities is simply prohibited. Desta note that, in light of this ruling and of the negotiations required to be undertaken pursuant to Article 10.2, if Members were to agree on rules governing export credit guarantees in negotiations that fell short of an outright prohibition (as least in relation to unscheduled products) this would have implications for the ruling of the Appellate Body in *US – FSC.* Insofar as the Appellate Body drew on this ruling to support its finding in *US – Cotton Subsidies* and to the extent that this seems precisely the situation envisaged by Desta it is reasonable to suggest that the same applies.
[160] See, Scott, *The Political Interpretation of Multilateral Treaties*; Orli Zahava, *Interpretation of Subsequent Multilateral Disarmament Treaties: An Examination of Legal Integration and Political Harmonisation in the Nuclear Arms Control Regime* (PhD diss., UNSW Sydney, 2018).
[161] WTO, "Revised Draft Modalities for Agriculture," 6 December 2008, WTO Doc. TN/AG/W/4/Rev.4, 66.

states of their common legitimation goal by means of reciprocal and mutually advantageous negotiations, and were thus reinforcing the original CSC solution of the GATT, or whether they were going beyond those limits so as effectively to create new ones. On the basis of rhetoric during the dispute, it seems fair to say that the United States has taken the latter view. It indeed highlighted at various points during the dispute proceedings that, by interpreting export credit guarantees as already subject to the export subsidy rules of the Agreement on Agriculture, Brazil was effectively seeking to create rules through litigation that had not been agreed in negotiations. As it maintained in the first meeting of the Panel with the parties,

> The United States has stayed within the disciplines and acted consistently with its WTO obligations negotiated and agreed in the Uruguay Round. We share many of Brazil's objectives with respect to reform of measures that affect agricultural trade, but we obviously do not endorse the means by which Brazil is attempting to obtain changes to WTO-consistent US support measures for upland cotton. Brazil seeks to impose disciplines and achieve results through this litigation that were not agreed in the Uruguay Round through negotiation.[162]

Whether or not a strategic argument crafted simply to win the dispute, the United States expressed concern with what can be understood in ILI terms as the solution in the sub-CSC at the heart of the WTO Agreement not serving to reinforce the original CSC solution operationalised by the GATT as the logical means by which trade rules curtailing the freedom of states to protect and support their domestic industries are to emerge. Insofar as the original CSC solution served to place more powerful countries in a better position vis-à-vis pursuit of the legitimation goal, by seeking to preserve the balance between the original CSC of the ITO Charter and the sub-CSC of the WTO Agreement, the US can also be seen as seeking to preserve its place in the structure of power relations centred on the issue of how to regulate international trade on an ongoing basis.

American rhetoric during the dispute, thus, indicated dissatisfaction with what can be understood as the effectiveness of the WTO regime as seen from an ILI perspective, which would invite us to ask: 'effective for whom'?[163] From an ILI theory perspective 'a regime may be considered effective if accepting the agreed constraints on pursuit of the legitimation goal freed [them] to continue to pursue it with, if anything, renewed vigour'.[164] In this case we can argue that the ruling in *US – Cotton Subsidies* regarding export credit guarantees made the WTO regime less effective

[162] 'Executive Summary of the Opening Statement of the United States at the First Meeting of the Panel with the Parties', Annex C-3 to the Report of the Panel, *US – Subsidies on Upland Cotton,* WT/DS267/R/Add.1, para 1. See, also, "US Further Submission to the Panel," para. 134.
[163] Scott, "Comparing the Robustness and Effectiveness," 96.
[164] Scott, "Comparing the Robustness and Effectiveness," 96.

for the US for it served to place greater a constraint on pursuit of the legitimation goal than the US had seemingly agreed during the Uruguay Round. The position of the United States in the regime was thus weakened in relation to Brazil: as the US maintained in relation to the Panel's ruling on export credit guarantees, '[t]he United States is unfairly whipsawed by this interpretive approach, and Brazil finds itself the beneficiary of an unbargained-for multi-billion dollar windfall.[165]

While a loss of regime effectiveness in ILI terms need not always result in reduced effectiveness as commonly understood in neo-liberal terms, the events that ensued in the aftermath of the *US – Cotton Subsidies* dispute indicate that, in this case, a loss of regime effectiveness for the United States has in fact contributed to a loss of regime effectiveness as commonly understood – that is, the extent to which a regime solves the issue it was designed to solve. There are at least two reasons to suggest this. The first is that, as one author has noted, the *US – Cotton Subsidies* ruling 'had the effect of making the US more defensive in the Doha Round of negotiations.'[166] This has contributed in large part to the lack of agreement amongst WTO Members during the Doha Round, effectively stalling the Round. Indeed, according to Wolfe, 'the knowledge that additions to the WTO *acquis* are subject to unpredictable adjudication ensures that parties are more careful about what they are prepared to accept',[167] though this means that consensus becomes more difficult to achieve.[168] Second, the perception that the findings in *US – Cotton Subsidies* had effectively placed on the United States constraints on pursuit of the legitimation goal beyond what it had agreed during Uruguay Round negotiations – thus placing it in a weakened position vis-à-vis other countries in the regime, has directly contributed to the overall dissatisfaction of the US with the WTO dispute settlement system.

The United States did eventually take measures to bring its subsidy policies in line with the ruling by, *inter alia,* eliminating its GSM-103 and SCGP programmes and changing certain aspects of the GSM-102 so as to remove the subsidy component of the programme.[169] The *US – Cotton Subsidies* dispute, however, can be seen as representing one of many instances in which the findings emerging from WTO dispute settlement were perceived by the United States as effectively adding to its rights and obligations in the WTO and, thus, as constituting 'judicial

[165] "US Appellant's Submission," para. 384.
[166] Black, *King Cotton in International Trade*, 111.
[167] Wolfe, "The WTO Single Undertaking," 844.
[168] Tim Josling et al., "Implications of WTO Litigation for the WTO Agricultural Negotiations," IPC Issue Brief, March 2006, pp. 1 – 22, p. 19.
[169] Although, as Langevin notes, the changes to the GSM-102 programme brought by the enactment of the 2008 Farm Bill nonetheless fell short of full compliance with the rulings by the Panel and Appellate Body. See, Langevin, "The Cotton Dispute and Executive Compliance," 587-588.

overreach'.[170] According to Payosova, Hufbauer, and Schott, US dissatisfaction with WTO dispute settlement on the basis of judicial overreach can be traced back at least to the *US – FSC* dispute initiated by the EC in 1997 and, since then, the US has accused the Appellate Body of 'creating its own rules'.[171] As Steinberg has noted,

> the Appellate Body has engaged in such expansive lawmaking through interpretation, regularly clarifying ambiguities and filling gaps in the GATT and WTO agreements […] This development has fuelled criticisms that expansive judicial lawmaking is shifting the balance of rights and responsibilities established by trade negotiators and embodies in the WTO agreements, thereby undermining democracy, US sovereignty, and political support for the organisation.[172]

Though commonly attributed to the current Trump Administration, hostile and confrontational behaviour by the United States towards the WTO's dispute settlement system was already displayed by the Obama Administration, which had at least since 2011 been vetoing, or at least stymying, the re-appointment of judges to the Appellate Body and, thus, seriously threatening 'judicial independence in the WTO.'[173] Since the election of Donald Trump, this approach to WTO dispute settlement has intensified, if anything, in a more overt way. This has effectively stalled the dispute settlement system of the WTO and thus weakened the effectiveness of the regime; indeed, if the system cannot work, it is fair to say that its effectiveness will be at least limited.

3.4 Summary of analysis and concluding remarks

This chapter has analysed the *US – Cotton Subsidies* dispute successfully litigated by Brazil against the United States in relation to the CSC of the Agreement on Agriculture and the CSC at the heart of the WTO Agreement (and to which the Agreement on Agriculture is integral). By doing so, it has attempted to draw conclusions about whether Brazil, by means of the *US – Cotton Subsidies* dispute, was effectively upholding, further strengthening, or undermining the CSC at the heart of the WTO Agreement. On the basis of this analysis we were also able to draw

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[170] See, Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, "The Dispute Settlement Crisis in the World Trade Organisation: Causes and Cures," *Peterson Institute for International Economics Policy Brief,* (March 2018): 4.
[171] Payosova, Hufbauer, and Schott, "The Dispute Settlement Crisis," 4.
[172] Steinberg, "Judicial Lawmaking at the WTO," 248.
[173] See, Steve Charnovitz, "The Obama Administration's Attack on the Appellate Body Independence Shows the Need for Reforms," *International Economic Law and Policy Blog,* 22 September 2016, https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html. See, also, "US Slammed at DSB for Blocking Korean Appellate Body Reappointment," *World Trade Online,* 23 May 2016. https://insidetrade.com/daily-news/us-slammed-dsb-blocking-korean-appellate-body-reappointment.

conclusions about the implications of the dispute for the WTO regime and for the power structure to which the WTO is integral. Due to the very nature of litigation, we were also able to juxtapose the positions taken by Brazil and the United States, which has allowed for a further comparison of the engagement of a rising power and an established power with the WTO regime. Four primary conclusions can be drawn from this analysis.

The first conclusion is that throughout the dispute Brazil strongly upheld the foundation ideology of free trade and the CSC myth that economic theory and calculations are able to dictate appropriate trade policy and determine compliance with WTO law. It did so by communicating and building its claim against the United States in a way that assumed the CSC myth – that economic theory and calculations are able objectively to dictate appropriate trade policy and determine compliance with international trade law and the foundation ideology of free trade to be true. By demonstrating the discrepancy between the actions of the United States and the foundation ideology, Brazil further forced change in US policies in a way that would ensure the continuing reinforcement of the ideology. Because it is the foundation ideology that lends coherence and justifies the entire CSC structure, Brazil's position throughout the dispute would make it a status-quo power for it reinforced the philosophical underpinning of the regime.

This was also the case with regards to export credit guarantees, in relation to which it was Brazil – and not the United States, that more strongly upheld the foundation ideology of free trade and that further reinforced the CSC at the core of the WTO regime. By adopting an interpretation of rules on agricultural export credit guarantees that would uphold the CSC solution in the Agreement on Agriculture, Brazil reinforced the logical nexus of the CSC within that Agreement and it did so in a way that did not highlight the discrepancy between the foundation ideology and reality. The United States, on the other hand, although it attempted to justify its position in a way that portrayed the original CSC solution operationalised by the GATT as a logical embodiment of an application of the foundation ideology to the original CSC issue, it did so in a way that effectively highlighted the discrepancy between the ideology and reality. The United States therefore politicised international law. That Brazil by and large reinforced the foundation ideology of free trade and the CSC myth throughout the dispute, while an established power such as the United States did not, seems to confirm Kristen Hopewell's contention that, in the WTO, rising powers have largely 'embraced the WTO's discourse of free trade and liberalisation and its tools for opening markets […] [and] have become some of its strongest champions, frequently extolling the virtues of free trade', at times more so than established powers themselves.[174]

[174] Hopewell, *Breaking the WTO*, 16-17.

A second conclusion is that, at the same time that Brazil upheld the foundation ideology and the CSC myth, it was not always clear whether it expressed the foundation ideology of free trade as being more important than that of development. This was clearest in relation to its suggestion regarding the determination of serious prejudice caused by subsidies maintained by the United States in support of its cotton industry. Whereas we have seen that by highlighting the impacts of US subsidy programmes on other developing and least-developed countries Brazil was seeking to reinforce the foundation ideology of free trade, its suggestion that there may exist a different threshold for determining serious prejudice in relation to developed and developing countries would seem to undermine the objectivity of the CSC myth; for, if serious prejudice were to be determined on the basis of less than objective factors, such as levels of poverty and hunger, then the objectivity of economic theory and calculations in determining compliance with trade law would be undermined.

It is true that neither the Panel nor the Appellate Body upheld Brazil's interpretation of serious prejudice, but, were it to have been accepted, it seems that it would have resulted in a modification of the CSC at the heart of the WTO Agreement in a way that would have given greater advantage to developing and least-developed countries in relation to their developed counterparts within the WTO; in this sense, then, Brazil could be considered revisionist in relation to the WTO regime, both in ideational as well as in power terms. Insofar as this is the case, it would seem that, through the *US – Cotton Subsidies* dispute, Brazil was at the same time, albeit in relation to different aspects of the case, reinforcing and weakening the CSC at the heart of the WTO Agreement. This would curiously allow us to characterise Brazil as being simultaneously a revisionist and a status-quo power vis-à-vis the multilateral trade regime at the heart of which lies the WTO.

A third conclusion is that while the dispute resulted in a levelling of the playing field in international agricultural trade and in increased CSC robustness, in particular in relation to export credit guarantees, it did so in a way that nonetheless contributed to the dissatisfaction of the US with WTO dispute settlement. In this case, dissatisfaction of one of the most powerful CSC members with the regime has ultimately had significant implications for the very functioning of the WTO and, therefore, the overall effectiveness of the WTO regime.

Hostile behaviour by the United States towards the dispute settlement system may be attributed to mere power politics. Having analysed the WTO regime through the lens of ILI theory in the previous chapter of this dissertation, however, we were able to determine the importance for the overall ideational coherence of the multilateral trade regime of the WTO dispute settlement system serving to reinforce the process of mutually advantageous and reciprocal multilateral negotiations as the primary means by which trade liberalisation is to be undertaken. We can, therefore, see through this analysis that there also exists a normative foundation to US

dissatisfaction; that, as perceived by the US, the solution in the sub-CSC embedded in the WTO Agreement is not in fact serving to reinforce the original CSC solution operationalised by the GATT as the logical result of an application of the foundation ideology to the issue of mutual concern. So long as the process of creating new trade rules is stalled and as existing rules remain highly ambiguous, the possibility of dispute settlement going ahead of multilateral negotiations remains.

Furthermore, by placing a multilateral treaty in a broader, political perspective, this analysis has shown that judgements of legality, even if serving the uphold the philosophy of a treaty regime, are hardly the end of the story; because a multilateral treaty – and the specific legal detail embedded therein – is integral to a structure of power relations, changes to, or even simple clarifications of, the rules embedded within the treaty that might lead to or be perceived to shift the rights and obligations of states pursuant to that treaty can be expected to have significant implications for the political dynamics within that treaty regime. This suggests that accounts of the *US – Cotton Subsidies* dispute that take the results of the dispute at face value provide an oversimplified reading.

A final concluding remark, albeit not necessarily related to the rising powers debate, would be that, in WTO dispute settlement, there may exist a link between the extent to which parties to a dispute uphold or strengthen the foundation ideology of free trade, and hence the CSC myth, and whether their claims are victorious in dispute settlement. It would certainly be much too simplistic to ascribe Brazil's win solely to ideational factors – indeed, ILI theory does not seek to replace a legal reading of a multilateral treaty[175] nor does it propose a solely 'cognitive approach to international cooperation in order to replace a power and interests account.'[176] It is, however, certainly not surprising from an ILI theory vantage point that in a situation in which two members are in dispute regarding the meaning of a legal provision the member that emerged victorious is that which more strongly upheld the foundation ideology and whose interpretation of a provision would serve further to strengthen the logical nexus of the CSC embedded within the treaty.

[175] Scott, *The Political Interpretation of Multilateral Treaties,* 110.
[176] Scott, *The Political Interpretation of Multilateral Treaties,* 214.

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PART THREE

BRAZIL AND THE 'RESPONSIBILITY WHILE PROTECTING' INITIATIVE

It is a central premise of this dissertation that analysing the nature of a rising power's engagement with international law can be a useful shortcut to understanding its potential impacts on the liberal international order. Part Two of this dissertation was devoted to analysing Brazil's engagement with international law through the example of the *United States – Subsidies on Upland Cotton* (*US – Cotton Subsidies*) dispute successfully litigated against the United States through the dispute settlement system of the World Trade Organisation (WTO).

Part Three of this dissertation will analyse the nature of Brazil's engagement with international law through the example of its 'Responsibility while Protecting' (RwP) initiative. The reasons for this choice are twofold. First, Brazil's RwP initiative, which relates to the Responsibility to Protect (R2P) norm and, more broadly, to the use of force regime as established by the Charter of the United Nations (UN Charter), has been widely seen as one of the Brazil's most notable foreign policy initiatives in the post-Cold War period. Second, it is generally agreed that the UN Charter, more than any other multilateral treaty, has established the foundations of the liberal international order, operating much like a constitution for the international community.

The analysis will be structured in three parts over the next two chapters. Chapter 4 undertakes the first step in the analysis of Brazil's engagement with international law through the example of the RwP initiative, which involves unpacking the legal framework within which the initiative emerged in terms of the Cognitive Structure of Cooperation (CSC) embedded at the heart of the UN Charter. Chapter 5 undertakes the second and third steps of this analysis, namely unpacking the R2P norm in CSC terms and then assessing the potential implications of the RwP initiative for the CSC at the heart of the UN Charter and for the CSC to which the R2P norm is integral.

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4.

The UN Charter, Collective Security, and Global Structures of Power

This is the first of two chapters devoted to assessing the potential implications for the liberal international order of Brazil's 'Responsibility while Protecting' (RwP) proposal. The chapter begins with a brief overview of Brazil's RwP proposal as well as of the Responsibility to Protect (R2P) norm to which RwP related. This is done with a view to contextualising the analysis that is to follow. The chapter then moves on to unpacking the Cognitive Structure of Cooperation (CSC) at the heart of the Charter of the United Nations (UN Charter) since, as will be seen, this was the treaty most likely to be impacted were the RwP initiative to become successful.

4.1 Contextualising the analysis: A brief overview of Brazil's RwP initiative

Since at least the end of the Cold War, Brazil has become increasingly engaged in debates concerning humanitarian intervention and the use of force for humanitarian protection. Its most notable and direct contribution to date has been that of the 'Responsibility while Protecting' concept, proposed in the aftermath of the NATO-led military intervention in Libya in 2011. Former Brazilian President Dilma Rousseff first made reference to the idea of a 'responsibility while protecting' in her opening statement at the General Assembly on 21 September 2011.[1] In addition to making an explicit link between development and security, Rousseff stressed that 'for the international community, the use of force must always be a last resort' and that 'the quest for peace and security in the world cannot be limited to interventions in extreme situations'.[2] Rousseff further stated:

> Much is said about the responsibility to protect; yet we hear little about the responsibility in protecting. These are concepts that we must develop together. For that, the role of the Security Council is vital – and the more legitimate its decisions are, the better it will be able to play its role. And the Council's legitimacy increasingly hangs on its reform.[3]

[1] Dilma Rousseff, "Statement by the President of the Federative Republic of Brazil at the Opening of the 66th Session of the United Nations General Assembly," New York, 21 September 2011. https://gadebate.un.org/sites/default/files/gastatements/66/BR_en_0.pdf.
[2] Rousseff, "Statement at the 66th Session of the UNGA."
[3] Rousseff, "Statement at the 66th Session of the UNGA."

Two months later, then Permanent Representative of Brazil to the UN, Maria Luiza Ribeiro Viotti presented to the Security Council a concept note called *Responsibility while Protecting: Elements for the Development and Promotion of a Concept*,[4] which had been devised as a complement to the emerging R2P norm. Issued as a response to the military intervention in Libya undertaken (arguably) under the auspices of R2P, the RwP Concept Note raised several concerns about the unfolding of the NATO-led campaign and about 'the use of military force in general, and [for] humanitarian purposes specifically'.[5] The issues raised by Brazil related to, inter alia, when it is legally and morally permissible for the use of force to be authorised, the right authority to sanction coercive force, and the development of clear and appropriate criteria guiding authorisations of the use of force by the Security Council, all of which were raised in relation to the issue of using force in a general sense and when used for human protection purposes in the context of the R2P norm.

R2P itself had emerged in response to the failure by the international community of states to prevent humanitarian crises, including those in Rwanda and Kosovo, and from attempts by certain members of the international community to find ways to ensure that assistance would be forthcoming if there were in the future any states that committed atrocities against their own population. Following a challenge issued by Kofi Annan, then Secretary-General of the United Nations, the International Commission on Intervention and State Sovereignty (ICISS) proposed a new concept: R2P.[6] Stemming, therefore, directly from the humanitarian intervention debate following the Kosovo and Rwanda humanitarian crises, R2P was incorporated into the ICISS report, most basically setting out 'the proposition that other states could intervene without a state's consent in the case of an extreme humanitarian emergency if that state failed to protect its own population and the UNSC failed to authorise a response'.[7]

The R2P norm was subsequently embraced by states at the 2005 World Summit and was formally articulated into paragraphs 138 and 139 of the World Summit Outcome Document (WSOD).[8] Paragraphs 138 and 139 recognised not only that states have a primary responsibility to protect

[4] UN General Assembly/UN Security Council. "Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General," New York, 11 November 2011, UN Doc. A/66/551–S/2011/701. https://undocs.org/A/66/551. Hereinafter RwP Concept Note.
[5] Marcos Tourinho, Oliver Stuenkel, and Sarah Brockmeier, "'Responsibility while Protecting: Reforming R2P Implementation," *Global Society* 30, no. 1 (2016): 137–138.
[6] ICISS, *The Responsibility to Protect* (Ottawa: IDRC, 2001).
[7] Charlotte Ku, "The UN Security Council's Role in Developing a Responsibility to Respond to the Climate Change Challenge," in *Climate Change and the UN Security Council*, eds. Shirley V. Scott and Charlotte Ku (Cheltenham: Edward Elgar, 2018), 175.
[8] UN General Assembly, Resolution 60/1, 2005 World Summit Outcome, 16 September 2005, UN Doc. A/RES/60/1. https://undocs.org/en/A/RES/60/1. Hereinafter World Summit Outcome Document or WSOD.

their own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, but also that where a state is manifestly failing to do so and peaceful means are inadequate, the responsibility rests upon the international community to take necessary action to protect threatened populations including through forceful intervention in the state concerned; in this iteration of R2P, however, the use of force would need to be authorised by the Security Council.[9] The formal endorsement by states of the R2P norm in the WSOD was largely heralded as a ground-breaking and 'extraordinary' moment,[10] 'significantly chang[ing] the grammar of political discourse with regard to the prevention of and reaction to massive human rights violations'.[11] This commitment was then explicitly reaffirmed by the Security Council in Resolution 1674 concerning protection of civilians in conflict[12] and again in Resolution 1706 on the situation in Darfur.[13]

So as to enable full operationalisation of the 2005 commitment to R2P, former UN Secretary-General Ban Ki-moon sought in a 2009 report entitled *Implementing the Responsibility to Protect* to divide the norm into three main pillars.[14] As articulated in the report, Pillar I consists of the responsibility of each state to protect its own population from the specific crimes of genocide, crimes against humanity, ethnic cleansing and war crimes, as per paragraph 138 of the WSOD. Pillar II, expressed in both paragraphs 138 and 139, refers to the international community's responsibility to 'encourage and help States to exercise this responsibility [to protect] and support the United Nations in establishing an early warning capability'. Finally, Pillar III places upon the international community the responsibility to act in a timely and decisive manner, through the Security Council and in accordance with the UN Charter, to ensure protection of endangered populations should their states be 'manifestly failing' to do so and peaceful means be inadequate. Pillar III is most clearly expressed in paragraph 139 of the Outcome Document.

Since its adoption at the 2005 World Summit, R2P has come to be increasingly 'invoked by states, non-governmental organisations (NGOs) and the international media, both to justify and to condemn behaviour, and both to advocate and to deter international action in response to crises

[9] WSOD, 30.
[10] See, Gareth Evans, "The Responsibility to Protect: An Idea Whose Time Has Come … and Gone?," *International Relations* 22, no. 3 (2008): 284.
[11] Mehrdad Payandeh, "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking," *The Yale Journal of International Law* 35, no. 2 (2010): 471.
[12] UN Security Council, Resolution 1674, Protection of Civilians in Armed Conflict, 28 April 2006, UN Doc. S/RES/1674. https://undocs.org/S/RES/1674(2006).
[13] UN Security Council, Resolution 1706, Sudan, 31 August 2006, UN Doc. S/RES/1706. https://undocs.org/S/RES/1706(2006).
[14] UN Secretary-General. "Implementing the Responsibility to Protect." New York, 12 January 2009, UN Doc. A/63/677. https://undocs.org/A/63/677.

in various places'.[15] R2P remains, nonetheless, a 'highly contentious normative proposition.'[16] While some see little normative value in the norm[17] or believe it remains a legally obsolete concept,[18] others have expressed concerns that R2P constitutes a simple 'reformulation of the more familiar "humanitarian intervention"',[19] a concern which seemed to have been reinforced in light of accusations that the NATO-led coalition had well exceeded its mandate in its 2011 intervention of Libya.[20] According to Tourinho, Stuenkel, and Brockmeier, this 'forced an intensification of this discussion, and a reconsideration of the extent to which the collective security apparatus, including with the use of military force, is appropriate or sufficient to address these problems'.[21]

It was with the aim of contributing to this debate, more specifically the latter related to R2P operationalisation and the use of force, therefore, that Brazil devised the RwP concept in 2011. The proposal has sparked considerable debate. Some scholars have questioned whether it was revisionist in nature[22] and served to challenge the agreement on R2P reached at the 2005 World Summit,[23] while others have wondered whether the concept contained any innovative elements at all.[24] Other scholars have also considered the cohesion of the concept and the legal basis of some of the elements embedded in the Concept Note.[25] RwP's internal ideational ambiguities

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[15] Luke Glanville, "The Responsibility to Protect Beyond Borders," *Human Rights Law Review* 20, no.1 (2012): 2.
[16] Shirley V. Scott and Roberta C. Andrade, "Sovereignty as Normative Decoy in the R2P Challenge to the Charter of the United Nations," *Global Responsibility to Protect* 11, no. 2 (2019): 200.
[17] See, e.g., Aidan Hehir, "The Responsibility to Protect: 'Sound of Fury Signifying Nothing'?," *International Relations* 24, no. 2 (2010): 218–239.
[18] Colin Seow, "Chasing the Frontier in Humanitarian Intervention Law: The Case for Aequitas ad Bellum," Asian Journal of International Law 6, no. 2 (2016): 294.
[19] Ramesh Thakur and Thomas Weiss, "R2P: From Idea to Norm–And Action," *Global Responsibility to Protect* 1, no. 1 (2009): 24.
[20] Tim Dunne and Sarah Teitt, "Contested Intervention: China, India, and the Responsibility to Protect," *Global Governance* 21, no. 3 (2015): 382.
[21] Tourinho, Stuenkel, and Brockmeier, "Reforming R2P Implementation," 148.
[22] According to Stuenkel '[t]he proposal was based on long-standing elements of humanitarian aid and the use of force, just war theory, and international humanitarian law: the principles of 'do not harm' (*prumum non nocere*) and the articulation of the use of force as a last resort (*ultima ratio*). Put differently, RwP contained no revisionist elements'. See, Oliver Stuenkel, "Brazil and Responsibility to Protect: A Case of Agency and Norm Entrepreneurship in the Global South," *International Relations* 30, no. 3 (2016): 9.
[23] As Alyse Prawde points out: 'One of the earlier concerns about RwP was that it was not clear whether it was an attempt to challenge and detract from the decade of development of R2P as an emerging norm or as a means to foster dialogue about R2P'. Alyse Prawde, "The Contribution of Brazil's 'Responsibility while Protecting' Proposal to the 'Responsibility to Protect' Doctrine," *Maryland Journal of International Law* 29, no. 1 (2014): 202.
[24] Serbin and Serbin Pont, for example, cite Brazilian scholar Eduarda Passarelli suggesting that 'Brazil's RwP was only innovative in its terminology and in its attempt to consolidate a fragmented discussion'. See, Andrés Serbin and Andrei Serbin Pont, "Brazil's Responsibility while Protecting: A Failed Attempt of Global South Norm Innovation?," *Pensamiento Propio* 41 (2015): 177.
[25] Inger Österdahl, for instance, has suggested that in the Concept Note, 'Brazil advertently or inadvertently mixes aspects of the *jus ad bellum* relating to the justifications of military intervention with aspects of the *jus in bello* relating to the way the intervention is carried out […] Whereas the responsibility to react from

notwithstanding, several scholars have praised Brazil's assumed leadership in this debate, arguing that it acted as a 'norm entrepreneur' and highlighting the increasing influence of rising powers over norm development and contestation in international relations.[26]

4.1.1 The analysis ahead

We have now briefly considered the emergence of Brazil's RwP initiative and have situated it within the normative context of the emerging R2P concept. We are now ready to take the first step in our analysis of Brazil's engagement with international law through the example of the country's RwP proposal. This step entails discerning the CSC at the heart of the UN Charter. Insofar as the RwP concept is a collection of ideas expressed in written text concerning the use of military force in the context of R2P, any assessment of the significance of the proposal needs, therefore, to be understood firstly within the context of, and as it relates to, the existing legal framework governing the use of military force as instantiated primarily in the UN Charter. This is also the case with R2P itself, which as Payandeh has argued has to be 'viewed within the context of the existing international legal system of the use of force and collective security as it is defined and shaped primarily by the UN Charter'.[27] Let us now conceptualise the UN Charter in terms of the CSC embedded within it.

4.2 Understanding the UN Charter in terms of the CSC embedded within it

The UN Charter was signed in San Francisco in 1945 and entered into force on 24 October 1945.[28] The UN Charter has been integral to the operation, stability, and distribution of power in the liberal international order and, since its entry into force, has functioned as a constitution for the international community.[29] Let us now move on to discerning the elements constituting the CSC at the heart of the UN Charter.

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the legal point of view is a *jus ad bellum* concept, the "responsibility while protecting" sounds more like a *jus in bello* concept. See, Inger Österdahl, "The Responsibility to Protect and the Responsibility while Protecting: Why Did Brazil Write a Letter to the UN?," *Nordic Journal of International Law* 82, no. 4 (2013): 460 and 464.

[26] Tourinho, Stuenkel and Brockmeier, for example, have argued that RwP 'helped make the political debate about the relative utility of military force for protection purposes more clear and nuanced'. Tourinho, Stuenkel and Brockmeier, "Reforming R2P Implementation," 137–138. See also, Andrew Garwood-Gowers, "R2P Ten Years after the World Summit: Explaining Ongoing Contestation over Pillar III," *Global Responsibility to Protect* 7, no. 3-4 (2015): 301-302; Oliver Stuenkel and Marcos Tourinho, "Regulating Intervention: Brazil and the Responsibility to Protect," *Conflict, Security & Development* 14, no. 4 (2014): 395–396; Derek McDougall, "Responsibility while Protecting: Brazil's Proposal for Modifying the Responsibility to Protect," *Global Responsibility to Protect*'6, no.1 (2014): 64.

[27] Payandeh, "With Great Power Comes Great Responsibility," 471.

[28] Charter of the United Nations, 24 October 1945, 1 UNTS XVI. https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

[29] See, e.g., Bardo Fassbender, "The United Nations Charter as a Constitution of the International Community," *Columbia Journal of Transnational Law* 36, (1998): 529–619.

The CSC Issue

In order to identify the CSC issue, we need to ask '[w]ith what issue was the treaty established to deal'? Scott tells us that the title of the treaty may be a useful indicator of this. In the case of the Charter of the United Nations, one may say that the issue was that of how to ensure cooperation or perhaps unity amongst nation-states after the Second World War, to which creating the United Nations was the solution. Whilst this analysis is not necessarily inaccurate, it only tells us part of the story.[30] International cooperation was, indeed, a key concern of the UN, and of its predecessor, the League of Nations. However, it was not cooperation per se that was the driving force behind the creation of an international organisation. Cooperation amongst states through international organisations had, in fact, existed prior to the establishment of the League of Nations and the UN. Some notable examples are the International Telecommunication Union, founded in 1865, and the Universal Postal Union, established in 1874.[31] Notably, the Permanent Court of Arbitration was also established in 1899 at the International Peace Conference in The Hague.[32] Identifying the central issue addressed in the UN Charter thus requires a deeper understanding of the precise issue around which cooperation between states was necessary at that time.

While the UN Charter in its current form was officially negotiated at the San Francisco Conference in 1945, the idea of developing another international organisation was conceived years earlier, mainly by the United States. This drew on the work of the League of Nations, which is generally recognised as the first attempt by the international community at establishing an international organisation. It is, in fact, difficult to understand the purpose of the UN without some mention of the League of Nations. According to the League's Covenant, the main purpose of the Organisation was 'to promote international co-operation and to achieve international peace and security'.[33] Considering that until Article 10 all articles of the Covenant were primarily procedural and that Article 10 was the first to impose specific obligations on states, those obligations being related to maintaining international peace and security, it is possible to suggest that the main issue addressed in the Covenant was that of how to achieve and maintain international peace and security.[34] This idea is, naturally, not surprising or difficult to understand given the outbreak of World War One a few years earlier. 'Never in world history was peace so

[30] As Scott puts it, this would mean interpreting the CSC issue 'as seen through the lens of the foundation ideology'. Shirley V. Scott, *The Political Interpretation of Multilateral Treaties* (Leiden: Martinus Nijhoff, 2004), 151. The foundation ideology underpinning the UN Charter will be identified below.
[31] Jussi M. Hanhimäki, *The United Nations: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 8.
[32] Hanhimäki, *The United Nations,* 8.
[33] Covenant of the League of Nations, 28 June 1919. http://avalon.law.yale.edu/20th_century/leagcov.asp
[34] Article 10 was indeed at the time considered to be the centrepiece of the Covenant. See, e.g., Scott quoting Woodrow Wilson referring to Article 10 as 'the heart of the Covenant'. Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012), 106.

great a desideratum, so much talked about, looked toward, and planned for, as in the decade after the 1918 Armistice'.[35]

The inter-war period saw the development of a number of treaties designed to deal with the maintenance of peace and security, a significant step towards which was taken by means of the General Treaty for the Renunciation of War signed in 1928, also known as the Kellogg-Briand Pact.[36] Signatories to the Kellogg-Briand Pact agreed to renounce war as an instrument of foreign policy, but as Hurd has noted, war was renounced only amongst parties to the Pact.[37] The Kellogg-Briand Pact therefore did not ban all uses of force. In 1933 a number of Latin American states signed the Saavedra-Lamas Treaty, through which states sought to prohibit any form of intervention, be that of a military or diplomatic nature.[38]

With the outbreak of the Second World War, efforts to maintain peace and security gained new momentum, at the leadership of the United States. While American foreign policy was still to an extent guided by laws of neutrality during war, the US signed in 1941 the Atlantic Charter with the United Kingdom, which was seen by the American government as providing a basis upon which to establish 'a postwar world order'[39] In 1943 the United States begun drafting a proposal for a new international organisation for peace, by which time twenty-six nations had signed the 'Declaration by the United Nations' re-affirming the principles agreed to in the Atlantic Charter.[40] That some authors argue that this Declaration marked the beginning of the United Nations[41] and that such document crystallised an alliance of states with the specific purposed of ending the war seems to perhaps suggest that preventing the outbreak of worldwide war was, from the start, at the core of the UN.

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[35] Ferrell, cited in Scott, *International Law, US Power,* 109.

[36] General Treaty for the Renunciation of War, 27 August 1928, 94 LNTS 57. https://avalon.law.yale.edu/20th_century/kbpact.asp.

[37] Ian Hurd, "The Permissive Power of the Ban on War," *European Journal of International Security* 2, no. 1 (2017): 4 at fn. 9.

[38] Albrecht Randelzhofer, "Article 2(4)," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (New York: Oxford University Press, 2002), 116. See, also, Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States 1940 – 1945,* (Washington, DC: Brookings Institution, 1958), 208 at fn. 5.

[39] Russell, *A History of the United Nations Charter,* 34.

[40] Some authors perceive this declaration to have marked the establishment of the United Nations, arguing that accounts that suggest the UN to have emerged in 1945 at the end of the Second World War are incomplete. See, e.g., Dan Plesch, "How the United Nations Beat Hitler and Prepared the Peace," *Global Society* 22, no. 1 (2008): 137–158. While this is a valid criticism of most accounts of the formal birth of the UN, this dissertation perceives the official establishment of the United Nations to have taken place upon the signing of the Charter of the United Nations and, hence, its insertion into the system of international law.

[41] Hanhimäki, for instance, has suggested that 'the UN started off as an alliance that came into being soon after the American entry to the war'. Hanhimäki, *The United Nations,* 13.

The outbreak of the First World War, the failure of the League of Nations as well as the outbreak of the Second World War seemed, therefore, to have been key motivating factors for the creation of another international organisation. Importantly, while ending the Second World War was a key objective of the United Nations Alliance, their primary concern went beyond just that; what seemed to be at the core of negotiations for the United Nations Organisation was the establishment and maintenance of long-lasting peace. In May 1942, at a pre-dinner discussion with the Commissar to the Soviet Union, Roosevelt expressed his desire to establish another international organisation, arguing that 'what concerned him was the establishment of a peace which would last 25 years, at least the lifetime of the present generation'.[42] In 1944 the United States submitted tentative proposals for the creation of a new international organisation to Britain, China, and the Soviet Union. The US Tentative Proposals for a General International Organisation had aspects of the Covenant of the League of Nations and stated the primary objective of the organisation to be the maintenance of international peace and security.[43] On 22 July 1944, Britain submitted to the US its own tentative proposals, similarly articulating that '[t]he object of the Organisation is stated in Article 4 to be the "maintenance of international peace and security," and this must be regarded as its primary purpose'.[44]

It seems then that the issue of mutual concern that required cooperation between states and gave rise to the need to negotiate the UN Charter and to establish the United Nations organisation was, most fundamentally, that as to how to prevent the breakout of another world war and maintain international peace, where the outbreak of war had resulted from the forceful intervention into one state by another. This appears most clearly in the first sentence of the Preamble to the UN Charter, where Member states express their determination 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind […]'. Article 1(1) further supports this by stating one of the main purposes of the UN to be,

> [t]o maintain international peace and security, and to that end: take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means,

[42] "Memorandum of Conference Held at the White House, by Mr. Samuel H. Cross, Interpreter, 29 May 1942," in *Foreign Relations of the United States: Diplomatic Papers, 1942, Europe, Volume III,* eds. G. Bernard Noble and E. R. Perkins (Washington DC: Government Printing Office, 1961), Document 468, https://history.state.gov/historicaldocuments/frus1942v03/d468.
[43] "United States Tentative Proposals for a General International Organisation, 18 July 1944," in *Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I,* eds. E. Ralph Perkins and S. Everett Gleason, (Washington DC: Government Printing Office, 1966), Document 402, https://history.state.gov/historicaldocuments/frus1944v01/d402.
[44] "Tentative Proposals by the United Kingdom for a General International Organisation, 22 July 1944," in *Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I,* eds. E. Ralph Perkins and S. Everett Gleason, (Washington DC: Government Printing Office, 1966), Document 404, https://history.state.gov/historicaldocuments/frus1944v01/d404.

> and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace[…].[45]

It is important to note that a complete reading of Article 1 suggests that the Organisation was built to deal with a number of issues not limited to the maintenance of peace and preventing war, such as protection of human rights, gender and sovereign equality as well as economic and social development, many of which were included at the San Francisco Conference at the request of Latin American states.[46] While it would be incomplete at best to suggest that the UN was created to deal with peace and security only, an ILI reading of the UN Charter suggests that, whilst the treaty may deal with a number of issues, at the very core of the United Nations is the system of collective security designed to maintain peace and prevent war.[47] Scott, indeed, warns us that '[t]here may at first glance appear to be several issues addressed in a treaty, but a reading of the background to the regime enables one to discern the most fundamental issue that gave rise to the treaty'.[48] Lawrence Ziring, Robert Riggs, and Jack Plano maintain that:

> Safeguarding international peace and security was the primary reason for the establishment of the United Nations in 1945. […] UN functions are not narrowly limited to promoting military security, but even non-military functions are framed in the Charter by their potential contribution to peace. The rationale for international economic and social cooperation, for example, as set forth in Article 55 of the UN Charter, is "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations"'.[49]

Christopher Joyner has captured the centrality of the pursuit of peace and security in the UN Charter by suggesting that '"[j]ustice" – the pursuit of human rights, self-determination, and other goals such as economic development and re correction of past wrongs – was to be sought, but not at the expense of "peace"'.[50] Understanding the United Nations and its Charter as the product of

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[45] Charter of the United Nations, Article 1(1).
[46] See, e.g., Mary Ann Glendon, "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea," *Harvard Human Rights Journal* 16, (2003): 27–39.
[47] Scott and Andrade, "Sovereignty as Normative Decoy," 219. See, also, Petros Mavroidis suggesting that the UN 'was supposed to be the vehicle that would help avoid another world war without, however, taking many decisive steps towards addressing the reasons for conflict', some of which were, in turn, addressed by the Bretton Woods institutions and the GATT. Petros C. Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (New York: Oxford University Press, 2005), 3.
[48] Scott, *The Political Interpretation of Multilateral Treaties*, 112.
[49] Lawrence Ziring, Robert Riggs, and Jack Plano, *The United Nations: International Organisation and World Politics* (Belmont, Calif.: Thomson Wadsworth, 2005), 167.
[50] Christopher C. Joyner, "'The Responsibility to Protect': Humanitarian Concern and Lawfulness of Armed Intervention," *Virginia Journal of International Law* 47, no. 3 (2007): 701. Scott, Billingsley, and

decades of negotiations sparked by the outbreak of two world wars thus allows us to identify that, whilst the UN Charter does deal with multiple issues, the central issue it was created to manage was the maintenance of international peace and security and war prevention.[51] Let us now identify the legitimation goal that gave rise to the CSC issue.

The Legitimation Goal

The legitimation goal is the realist, self-interested, goal of states that, if unrestricted, may lead to conflict and/or a situation in which no state is able to achieve the goal, thus generating the need for a treaty to be negotiated. The legitimation goal is unlikely to be found in the treaty text and so can be hypothesised or theoretically deduced. Understanding the context within which the UN Charter was negotiated is, therefore, necessary in order to identify this goal. Whilst negotiations for the establishment of the UN can be said to have started at the very establishment of the League of Nations, formal negotiations began to take place in the years leading up to the end of the Second World War.[52] If the objective of the United Nations, as related to the CSC issue, was to maintain the peace and avoid the outbreak of a third world war, in order to identify the legitimation goal of states we need to consider precisely what had led states to engage in war in the first place. What goal were states pursuing that led to the outbreak of two world wars? The answer is, most fundamentally, the pursuit of national interests even to the extent of using force.[53] While the exact nature of these interests is, of course, not static and open to interpretation, that WWI and WWII originated in the aggressive pursuit of national interests by certain states is difficult to dispute.

It is important to note that an ILI analysis of a multilateral treaty draws a distinction between the legitimation goal of states and the 'legal' goal articulated in the treaty.[54] While a legal interpretation would only take into account the legal goal of states, this distinction is crucial to a political analysis. In the context of the UN Charter, the legal goal of states is clearly expressed in the preamble, where states make a commitment to 'save succeeding generations from the scourge

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Michaelsen make a similar argument that the international order established by the UN Charter prioritises order over justice. See, Shirley V. Scott, Anthony J. Billingsley, and Christopher D. Michaelsen, *International Law and the Use of Force: A Documentary and Reference Guide* (Santa Barbara, Calif.: Praeger Security International, 2010), 296.

[51] As Oona Hathaway and Scott Shapiro have noted, 'the United Nations Charter was idealistic and pragmatic at once. It was meant not to solve all possible international problems but to solve a particular one–the scourge of interstate war.' Oona A. Hathaway and Scott J. Shapiro, *The Internationalists and their Plan to Outlaw War* (London: Allen Lane, 2017), 213-214.

[52] See, Wilhelm G. Grewe and Daniel-Erasmus Khan, "Drafting History," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (New York: Oxford University Press, 2002), 1–12.

[53] An ILI theorisation recognises that states are heterogeneous, and not unitary, actors that may be pursuing a number of goals at the same time. However, it is a central tenet of this framework that the CSC structure embedded in a multilateral treaty contains one goal common to all states that made it necessary for a treaty to be negotiated. See, Scott, *The Political Interpretation of Multilateral Treaties,* 14.

[54] Scott, *The Political Interpretation of Multilateral Treaties*, 113.

of war', and is reinforced in Article 1(1). The legitimation goal of states, however, is not expressed in the treaty document and is unlikely, in fact, to have been expressed at all during negotiations for the treaty.[55] Importantly, this distinction is not aimed at distorting the meaning of the treaty text and is not based on some obscure and far-fetched interpretation of the purposes of the UN as expressed in its Charter. Rather, it is intended to draw out the idea that a treaty is both a legal and a political document through which states pursue both legal and political objectives. As Scott puts it, '[t]he political interpretation of a multilateral treaty […] is in no way intended to replace a legal interpretation: its objective is not to gauge the legal meaning, but the political significance, of a multilateral treaty'.[56]

Understanding that there is a self-interested, goal that states may have been pursuing through negotiating the UN Charter allows one to assess the political significance of the treaty. In doing so, '[i]t is not that the legal meaning of the treaty components, read at face value, are changed but that a legal reading of the components is being placed in a broader perspective'.[57] As such, the legal detail contained within the UN Charter is a guide to understanding the ways in which it operates as a central element of the broader system of international relations and of broader international structures of power. 'International law is a sub-system of international politics in a way that is not true vice-versa; a multilateral treaty is but one product of, and component of, a process of international cooperation'[58] and in so being may not in fact contain all aspects of the political dynamics characteristic of international negotiation processes.

A CSC reading of the UN Charter would therefore suggest that during negotiations states were attempting to address the issue of how to maintain the peace and prevent another world war whilst at the same time, and through the very act of negotiating the treaty, also pursuing the common, self-interested, goal of being able freely to pursue their national interests. In CSC terms, the solution to the issue of mutual concern is expected to place some agreed limits on states' pursuit of the legitimation goal, allowing states to resume full-throttled pursuit of this common goal albeit with certain limits. Such limits are justified on the basis of the foundation ideology. We can now seek to identify the CSC solution embedded in the UN Charter so as to then move on to identifying the foundation ideology.

[55] Scott, *The Political Interpretation of Multilateral Treaties*, 113.
[56] Scott, *The Political Interpretation of Multilateral Treaties*, 110.
[57] Scott, *The Political Interpretation of Multilateral Treaties*, 111.
[58] Scott, *The Political Interpretation of Multilateral Treaties*, 108.

The CSC Solution

Within the CSC structure the solution is most basically the means through which states agree to address the issue of mutual concern that gave rise to the need to negotiate a treaty. According to Scott, '[t]he solution may take the form of a rule proscribing or prescribing particular action, which will appear to treat all states equally but in practice is unlikely to do so'.[59] The solution constitutes the 'crux' of the treaty, which if removed would render the treaty virtually empty of substance. What legal rule, then, did negotiating states agree to as the best means through which to manage the issue of how to maintain the peace and to avoid a third world war? The primary answer is, most basically, a categorical prohibition on the use of force except for when necessary for self-defence or when authorised by the Security Council so as to operationalise a collective mechanism to enforce and respond to breaches of this prohibition.

The prohibition on the use of force can be found in Article 2(4) of the UN Charter, which expressly outlaws the threat or use of force, stating that

> [a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[60]

That the prohibition attempts to prevent war and to maintain the peace has been central to the United Nations has been widely recognised. Ian Hurd has, for example, noted that Article 2(4) is often considered to be 'the primary contribution of the UN system to international order',[61] while Nico Schrijver maintains that '[f]ew treaty provisions, if any, are as significant in international affairs as Article 2(4) of the UN Charter'.[62] Louis Henkin has similarly suggested Article 2(4) to be 'the heart of the UN Charter.'[63] The prohibition on the first use of force embedded in Article 2(4), therefore, 'remains the starting point in any contemporary legal discussion regarding use of force'.[64] This prohibition is reinforced by a call for the peaceful settlement of disputes in Article 2(3). According to Randelzhofer, Article 2(3) and Article 2(4) are closely connected and 'constitute the most important principles with regard to the aim described in Art. 1(1) in the first

[59] Scott, *The Political Interpretation of Multilateral Treaties*, 114.
[60] UN Charter, Article 2(4).
[61] Ian Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World," *Ethics & International Affairs* 25, no. 3 (2011): 295.
[62] Schrijver goes even further so as to suggest that acceptance of the prohibition on the use of force and its centrality to international relations indicates that Article 2(4) could be considered *jus cogens*. See Nico Schrijver, "The Ban on the Use of Force in the UN Charter," in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), 465.
[63] Louis Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated," *American Journal of International Law* 65, no. 3 (1971): 544.
[64] Scott, Billingsley, and Michaelsen, *International Law and the Use of Force*, 57.

place, that is, to maintain international peace and security'.[65] In the present analysis, however, Article 2(3) is understood as serving to reinforce Article 2(4) and can, in fact, be seen as implied in the very idea of a prohibition on the use of force: if states are not to use force then, naturally, they are expected to resolve disputes in a peaceful manner.[66] Article 2(4) was therefore at the core of the solution, and was reinforced by various other provisions or supporting rules.

If Article 2(4) places a general prohibition on the first use of force, Articles 24, 39 and 42 give the legal right to use force to the Security Council.[67] By conferring on it 'primary responsibility for the maintenance of international peace and security', states agree 'that in carrying out its duties under this responsibility the Security Council acts on their behalf'.[68] Article 39 then establishes that should the Council determine the existence of 'a threat to the peace, breach of the peace or act of aggression' it may take measures in accordance with Articles 41 and 42 to restore international peace and security. Whilst Article 41 provides the Council with enforcement options short of military force, under Article 42 the Council is able to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'.

The second exception to the prohibition on the use of force embedded in Article 2(4) can be found in Article 51 of the UN Charter, which recognises the 'inherent right' of states to use force should it be necessary for self-defence. Pursuant to Article 51 states are allowed to use force for individual as well as collective self-defence, and any such action:

> [S]hall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It would be possible to argue that Article 51 is not necessarily a logical solution to the issue of how to maintain the peace and prevent the outbreak of another world war, for the right to individual or collective self-defence is, in actual fact, perceived to be so fundamental 'as to be logically prior to the development of law'. [69] This is evident in the fact that Article 51 does not "give" states a right to self-defence but rather recognises the existence of the "inherent" right of

[65] Albrecht Randelzhofer, "Article 2," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (New York: Oxford University Press, 2002), 65.
[66] The manner with which Articles 2(3) and 2(4) correlate has, in fact, led some scholars to suggest that the order of these two articles should be reversed, with the prohibition on the use of force appearing before the call for the peaceful settlement of disputes. See, Randelzhofer, "Article 2," 66.
[67] Ian Hurd, "Is Humanitarian Intervention Legal," 295.
[68] Charter of the United Nations, Article 24.
[69] Scott, Billingsley, and Michaelsen, *International Law and the Use of Force*, 57–58.

a state to use military force to defend itself.[70] The right to self-defence, as it appears in the UN Charter, is nevertheless considered here to have constituted part of the CSC solution at the heart of the UN Charter for it is directly related to attempts to prevent war.[71] Article 51 further provides that states have the right to use force in response to an armed attack and, while states may take measures for self-defence, these must be carried out only 'until the Security Council has taken measures necessary to maintain international peace and security' and all acts of 'self-defence shall be immediately reported to the Security Council'.[72]

The solution embedded in the UN Charter can be said to consist, most basically, of a categorical prohibition on the use of coercive force articulated in Article 2(4), except for when necessary for self-defence as per Article 51 or when authorised by the Security Council so as to enforce the peace, which is articulated most basically in Article 39. Pursuant to Article 39 the Security Council may determine the existence of 'a threat to the peace, breach of the peace or act of aggression' and may take measures in accordance with Articles 41 and 42 to restore international peace and security. These provisions, as they were conceived by the drafters of the UN Charter, were seen as the logical solution to the issue of preventing war and safeguarding the peace. While the sheer importance of the Article 2(4) prohibition on the threat or use of force to attempts at preventing war and maintaining the peace cannot be downplayed, it is necessary to stress that the CSC solution is also comprised of a collective mechanism to enforce this prohibition. Highlighting the often-ignored centrality of international law in attempts to prevent war, Randelzhofer seems to confirm this:

> Today it is already possible to refer to a system of war prevention in international law comprising: 1. The prohibition of the use of force, 2. Collective measures to secure that prohibition, 3. The obligation to resort to peaceful means for the settlement of disputes […] It would be too narrow a view, therefore, to equate the prohibition of the use of force with the prevention of war by means of public international law as a whole. But undoubtedly the prohibition of the use of force draws its significance from being the most direct effort to prevent war.[73]

Other provisions in the UN Charter then serve to facilitate and reinforce the solution. Pursuant to Article 25 'states agree to accept and carry out the decisions of the Security Council', while by

[70] Scott, Billingsley, and Michaelsen, *International Law and the Use of Force*, 57–58.
[71] Randelzhofer also lists '4. regulations on arms limitation and reduction, and 5. rules, though so far barely developed, concerning "peaceful change"' as components of the system of international law for war prevention. Randelzhofer, "Article 2(4)," 114.
[72] UN Charter, Article 51.
[73] Randelzhofer also lists '4. regulations on arms limitation and reduction, and 5. rules, though so far barely developed, concerning "peaceful change"' as components of the system of international law for war prevention. Randelzhofer, "Article 2(4)," 114.

Article 43 Member States agree to make available to the Council 'armed forces, assistance, and facilities […] necessary for the purpose of maintaining international peace and security'. Article 103 further reinforces the solution, by which states agree that their obligations under the UN Charter shall prevail over obligations under any other international agreement.[74] Even Article 2(7), generally understood to make reference to the principles of sovereignty and non-intervention and to be at odds with the idea of military intervention, serves to reinforce the solution by stating that these principles 'shall not prejudice the application of enforcement measures under Chapter VII'. Rules on voting and membership too would serve to reinforce and ensure the continuing operationalisation of the CSC solution so as to ensure continuing reinforcement of the foundation ideology. Article 23, for example, outlines the composition of the Security Council, whereas Article 27 articulates voting procedures, including that each permanent member is granted virtual veto power over 'all other [non-procedural] matters'.[75]

In a CSC, the solution places a limitation on states' pursuit of the legitimation goal, that is, the pursuit of national interest even to the extent of waging war against another country. By negotiating the UN Charter states thus agreed that the use of force was no longer to be used as a means through which to pursue power or to change the status quo, but was to be used only in the common interests of the international community for the maintenance of international peace and security or where necessary for self-defence. However, once in place, a prohibition on the first use of force combined with a collective enforcement mechanism allowed states to resume pursuit of their own national interests, albeit within agreed limits. In a tight CSC, the solution is expected to follow logically from an application of the foundation ideology to the issue of mutual concern and, hence, plays a central role in the CSC structure for it serves to support the foundation ideology and thus the power structure of which the treaty is an integral part. Let us now identify the foundation ideology. We will then be in a better position to assess the UN Charter in relation to the international structure of power of which it forms the backbone.

The Foundation Ideology and the CSC Myth

It will be recalled from previous chapters that not all elements of the CSC are of equal weight and it is the foundation ideology that has the most importance within the structure for it provides the justification for a limitation to be placed on states' pursuit of the legitimation goal. Within the CSC, the ideology makes the solution appear as the only one possible, giving coherence to the entire ideational structure. We now need to identify the principle or set of inter-related principles

[74] Scott and Andrade, "Sovereignty as Normative Decoy."
[75] UN Charter, Article 27.

on the basis of the assumed verity of which states mediated their positions vis-à-vis pursuit of the legitimation goal so as to manage the CSC issue.

While from a legal perspective the preamble to a treaty is read more or less at face value, from an ILI vantage point the preamble is of utmost importance for it usually contains reference to the foundation ideology.[76] Here we are looking for 'an accepted statement of fact that [underpinned] the solution, justifying why that is the best response to the issue at hand'.[77] At first glance this task may seem rather daunting most simply because the Preamble to the UN Charter explicitly recognises several principles that guide the Organisation. Nevertheless, as all CSC components are expected to follow logically from each other, our having already identified the issue of mutual concern, legitimation goal, and solution points us to one particular principle that seems to have underpinned successful negotiation of the Charter: collective security.

The principle of collective security is alluded to, though not overtly stated, at various points in the UN Charter. This is most evident in the Preamble, where member states commit 'to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest'. Read together, these commitments can be understood as a practical expression of the idea of collective security.[78] The principle is reaffirmed in Article 1(1), where, in order to achieve the main purpose of the United Nations of maintaining international peace and security, states commit '[t]o take effective *collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace* […]'.[79] Article 2(5) further emphasises the principle by stating that '[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present UN Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'. Pursuant to Article 2(5), thus, states must not only refrain from assisting any aggressor but also provide assistance to the United Nations where necessary to take enforcement action against the aggressor state(s).

Identifying the CSC embedded in a treaty, however, is an interpretive exercise and is not disprovable. Given that a number of principles are recognised in the UN Charter, confirming with

[76] Scott, *The Political Interpretation of Multilateral Treaties*, 3.
[77] Shirley V. Scott, "Intergovernmental Organisations as Disseminators, Legitimators, and Disguisers of Hegemonic Policy Preferences: The United States, the International Whaling Commission, and the Introduction of a Moratorium on Commercial Whaling," *Leiden Journal of International Law* 21, no. 3 (2008): 586.
[78] That these two particular commitments reflect the principle of collective security is confirmed by Rüdiger Wolfrum, "Preamble," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (New York: Oxford University Press, 2002), 37.
[79] Charter of the United Nations, Article 1(1). Emphasis added.

conviction that collective security served as the foundation ideology that underpinned successful negotiation regarding the issue of how to maintain the peace and prevent another world war requires investigating the political background and negotiating history of the UN Charter. Let us first look at the basic definition of collective security as well as its development throughout time so as not only to grasp the precise nature of this principle but also to confirm it as the foundation ideology underpinning the UN Charter.

The principle of collective security 'is notoriously difficult to define'[80] but is often contrasted with the idea of balance of power.[81] According to Thakur and Weiss,

> Traditional warfare is the use of force by rival armies of enemy states fighting over a clash of interests: us against them. Collective security rests on the use of force by the international community of states to defeat or punish an aggressor: all against one.[82]

Kupchan and Kupchan have expanded on this idea, defining collective security as a system whereby 'states agree to abide by certain norms and rules to maintain stability and, when necessary, band together to stop aggression',[83] whilst according to Kelsen '[w]e speak of collective security when the protection of the rights of the states, the reaction against the violation of the law, assumes the character of a collective enforcement action'.[84] Ziring, Riggs, and Plano, in turn, have suggested that, while the concept of collective security has been previously used to describe 'indiscriminately […] any arrangement among two or more countries that involves the possibility of joint military action', a more accurate definition of the concept is that of 'an arrangement among states by which all are committed to aid any country threatened with armed attack by any other country'.[85] Expressed as a statement of fact, the principle of collective security thus means most basically that 'international peace and security can be maintained if all states agree to join in a collective response to defeat an aggressor',[86] whereas the more popular idea of

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[80] Peter G. Danchin, 'Things Fall Apart: The Concept of Collective Security in International Law', in *United Nations Reform and the New Collective Security*, eds. Peter G. Danchin and Horst Fischer (Cambridge: Cambridge University Press, 2010), 40.
[81] See, Ziring, Riggs, and Plano, *The United Nations,* 168.
[82] Thakur and Weiss, "R2P: From Idea to Norm," 24.
[83] Charles A. Kupchan and Clifford A. Kupchan, "The Promise of Collective Security," *International Security* 20, no. 1 (1995): 52–53.
[84] Hans Kelsen, "Collective Security and Collective Self-Defence Under the Charter of the United Nations," *American Journal of International Law* 42, no. 4 (1948): 783.
[85] Ziring, Riggs, and Plano, *The United Nations,* 171. Lynn Miller has similarly defined the principle of collective security as the idea that 'the peace of the international community can be maintained through a binding, predetermined agreement to take collective action to preserve it.' Lynn H. Miller, "The Idea and the Reality of Collective Security," *Global Governance* 5, no. 3 (1999): 303.
[86] Scott and Andrade, "Sovereignty as Normative Decoy," 221.

'all against one' can be defined as the CSC myth, which can best be conceived of as 'a story told in support of an ideology'[87]and thus serves to reinforce the principle of collective security.

The idea of collective security appeared long before the establishment of the UN, though it is important to note that the content of the principle *as it appears* in the UN Charter was the product of a development over time. Writing in 1942, Spykman suggested that the idea of collective security had been advocated in earlier centuries but was only 'given institutional form' at the establishment of the League of Nations in 1919.[88] Scott has accordingly suggested that '[t]he Covenant was infused with US and British influence regarding collective security – the idea that all states would commit ahead of time to resist an aggressor'.[89] The principle was perhaps most evidently expressed in Article 10 of the Covenant, according to which Member States agreed 'to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League'.[90] Article 11 further stipulated that,

> [a]ny war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole league, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.[91]

It is worth noting that, while Members of the League were committed to band together against an aggressor, according to the Covenant not all wars were outlawed. While the Preamble to the Covenant clearly expressed the desire of Member States to achieve peace and security 'by the acceptance of obligations not to resort to war', pursuant to Article 12 war was nonetheless a legal option so long as waged after a three-month 'cooling off' period.[92] This led some authors to suggest that the League system was not a pure system of collective security,[93] since some wars as well as neutrality during war were still legally permissible foreign policy tools at the disposal of states.

The peace movement gained momentum in the inter-war period and during the 1930s ideas that war should be prohibited as an instrument of national policy were materialised and reflected in the signing of the Kellogg-Briand Pact as well as other documents including the Saavedra-Lamas

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[87] Scott, *The Political Interpretation of Multilateral Treaties*, 16.
[88] Nicholas J. Spykman, "Frontiers, Security, and International Organisation," *Geographical Review* 32, no. 3 (1942): 437.
[89] Scott, *International Law, US Power*, 106.
[90] Scott, *International Law, US Power*, 106.
[91] Covenant of the League of Nations, Article 11.
[92] Peter Malanckzuk, *Akehurst's Modern Introduction to International Law*, Seventh Revised Edition (London: Routledge, 1997), 24.
[93] See, e.g., Scott, *International Law, US Power,* 115.

Treaty. These developments had a significant impact on laws of neutrality as '[o]nce it was illegal to initiate war, a policy of strict neutrality would effectively be favouring the aggressor'.[94] Writing in 1936, McNair alluded to the changing attitude of the international community towards war and the use of force, suggesting the Covenant of the League of Nations and the Kellogg-Briand Pact to be legal expressions of such an ideational shift:

> [The Covenant of the League of Nations and the Kellogg-Briand Pact] may be summed up in two propositions: resort to armed force for the settlement of an international dispute is an illegal act, and, I submit, that illegal act is the commission of an international wrong (breach of treaty) *against every state in the world* (with unimportant exceptions such as Thibet) *and not merely upon the victim of the use of force*. That is the big new factor added by the Kellogg-Briand Pact.[95]

The breakout and destructiveness of the Second World War led to further changes to ideas concerning war and collective security. In August 1941, the United States and the United Kingdom signed the Atlantic Charter, expressing, inter alia, the belief that all states should abandon the use of force in order to maintain the peace.[96] The wording of the agreement stood in slight contrast to the Kellogg-Briand Pact, which outlawed war only, and not the use of force altogether, as an instrument of foreign policy. When work towards the establishment of a new international organisation began during the Second World War two things were, therefore, clear: firstly, that in order to maintain the peace any act of aggression should be met with overwhelming force, a lesson learnt from the League of Nations,[97] and secondly that states were to band together to respond to threats to the peace or acts of aggression.

Neutrality thus came to be seen as incompatible with the idea of collective security. To express it differently, the idea of neutrality was defeated by the idea that all states must commit ahead of time to band together to ensure each other's security. Hersch Lauterpatcht commented in 1936 that 'collective security and neutrality are mutually exclusive. The more there is of one the less there is of the other'.[98] Ravenal went further to suggest that '[t]he animating idea of collective security is that each outbreak of aggression will be suppressed, not by a partial alliance directed specifically against certain parties, but by a universal compact, binding all to defend any.

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[94] Bowett, cited in Scott, *International Law, US Power,* 116.
[95] Arnold McNair, "Collective Security," *British Year Book of International Law* 17, (1936): 158. Emphasis added.
[96] Atlantic Charter, 19 August 1941. http://avalon.law.yale.edu/wwii/atlantic.asp.
[97] Russell, cited in Scott, *International Law, US Power*, 119.
[98] Lauterpatcht, quoted Quincy Wright, "The Present Status of Neutrality," *American Journal of International Law* 34, no. 3 (1940): 391, fn. 4.

Neutrality is explicitly – usually formally – abjured'.[99] A corollary of this idea was the belief that all states needed to make a commitment to safeguard the security of each other. In his inaugural speech to the Senate on 16 April 1945, former American president Harry Truman stated that '[t]he breaking of the peace anywhere is the concern of peace-loving nations everywhere'.[100]

If at the core of collective security rests the idea that each state 'accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace',[101] it seems reasonable to suggest that the principle of collective security effectively functioned as the logical assumption based on which states negotiated a solution to the issue of how to avoid war and maintain the peace and, thus, justified placing a limit on the pursuit of states' national interests. Authors have accordingly suggested that collective security is inextricably related to efforts to prevent war. Mearsheimer, for example, has claimed that '[c]ollective security directly confronts the issue of how to prevent war'.[102] Kelsen, writing only a few years after the establishment of the UN, has gone further to suggest that '[c]ollective security is the main purpose of the United Nations, just as it was the main purpose of its predecessor, the League of Nations' and that in the UN Charter 'the principle of collective security is placed ahead of all its provisions'.[103] The principle of collective security, then, functioned as the foundation ideology of the CSC embedded in the UN Charter.

The Community of Interest and the CSC Hegemon

There are two more elements which we will seek to identify so as to complete our CSC analysis of the UN Charter, namely the community of interest and the CSC hegemon. According to Scott, the community of interest constitutes most basically all those states that express a desire to participate in negotiations for a solution to the issue of mutual concern. In the case of the UN Charter, the community of interest may perhaps best be defined as all states that participated at

[99] Earl C. Ravenal, "An Autopsy of Collective Security," *Political Science Quarterly* 90, no. 4 (1975-1976): 702.
[100] Harry Truman, quoted in Kenneth W. Thompson, "Collective Security Re-Examined," *The American Political Science Review* 47, no. 3 (September 1953): 756.
[101] Adam Roberts and Dominik Zaum, *Selective Security: War and the United Nations Security Council since 1945* (Abingdon, Oxon: Routledge, 2008), 11.
[102] John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19, no. 3 (1994-1995): 14.
[103] Kelsen, "Collective Security and Collective Self-Defence," 783 and 785. Note, however, that Kelsen's statement suggests collective security to be a purpose of the UN, which may in fact imply that the CSC issue addressed in the UN Charter would amount to how to establish a successful system of collective security. This would suggest that collective security is the issue, confirming Scott's argument that the issue and the ideology are often conflated. However, even though this may seem a minor point, the distinction between them is crucial in political terms.

the San Francisco Conference in 1945. In other words, the community of interest was made up of the entire international community of states at the time.

The community of interest, however, does not equate to the CSC participants; because a CSC can be seen to emerge when two or more states begin negotiations regarding pursuit of the legitimation goal on the basis of the same foundation ideology, CSC participants can only be identified on the basis of their negotiating limits on pursuit of the legitimation goal, and thus a solution to the CSC issue, on the basis of the same foundation ideology.[104] The community of interest is thus broader than the CSC participants and may encompass various CSCs. In the case of the UN Charter, the CSC participants can be defined as having been most basically the Great Powers at the time, namely the United States, the United Kingdom, China, and Russia (and France). Negotiations for the establishment of the United Nations had, until the San Francisco Conference, indeed taken place mostly between and among these four states and the San Francisco conference was sponsored by them. These, then, were the countries that had most influence over the definition of the CSC elements and, by the time of the San Francisco conference, other states in the community of interest were 'presented with a largely finalised Charter text.'[105] As we will see below, this served to establish a power relationship between the CSC members and those members of the community of interest.

A power relationship may also exist, however, as between the members of the CSC itself.[106] In a CSC, where one state has most influence over the definition of the CSC elements, this state may be dubbed the CSC hegemon.[107] Because in a tight CSC the solution is to follow logically from an application of the foundation ideology to the issue of mutual concern, the hegemon could be expected to have most influence over definition of the issue, for it serves to 'legitimis[e] the dissemination and implementation of its preferred policy choices.'[108] This means that the precise definition of the issue addressed in a multilateral treaty matters and is a political exercise. In this case the CSC hegemon can be identified most basically as having been the United States. According to Scott, '[m]uch of the original drafting of the Charter had taken place in the United Stated Department of State'[109] and it was 'the United States that led the world in the organised peace movement'.[110] Let us now move on to drawing conclusions about the ideational nexus

[104] Scott, *The Political Interpretation of Multilateral Treaties,* 15.
[105] Shirley V. Scott, "The Question of UN Charter Amendment, 1945-1965: Appeasing 'The Peoples'," *Journal of the History of International Law* 9, no. 1 (2007): 85.
[106] Scott, *The Political Interpretation of Multilateral Treaties,* 19.
[107] Scott, *The Political Interpretation of Multilateral Treaties,* 195.
[108] Scott, "IGO's as Disseminators," 585.
[109] Scott, "The Question of UN Charter Amendment," 84.
[110] Scott, *International Law, US Power*, 109.

embedded in the UN Charter so as to situate it in relation to the structure of power relations of which it is an integral part.

Table 6. The CSC of the UN Charter, 1945

CSC Issue:	How to prevent another world war and maintain international peace, where war had in the past resulted from the forceful intervention into one state by another.
Legitimation Goal:	The pursuit of national interests even to the extent of using force
CSC Solution:	A general prohibition on the use of force other than in self-defence or when authorised by the Security Council to restore the peace.
Foundation Ideology:	Collective security: International peace and security can be maintained if all states agree to join in a collective response to defeat an aggressor.
CSC Myth:	All against one.

Conclusions Regarding the Logical Nexus of the CSC at the Heart of the UN Charter

We have now discerned the different elements of the CSC at the heart of the UN Charter, and we must assess the logical nexus of the different elements of the CSC. What does it mean, however, to suggest that? And, how can one determine how tight the logical nexus of the CSC embedded in a multilateral treaty? According to Scott, '[a] cohesive CSC is one in which the agreed solution appears as the only one possible given the application of the foundation ideology to the issue of mutual concern'.[111] Expressed differently, because an ideology dictates a particular course of action,[112] once applied to the issue of mutual concern, in a tight CSC, the foundation ideology will determine the appropriate solution by which to address the issue in question.

In the case of the UN Charter, the issue of mutual concern identified above was that of how to maintain the peace and avoid another world war. The solution to that issue, in turn, was identified most basically to have constituted a categorical prohibition on the use of force, as per Article 2(4), except when in self-defence and as a collective response mechanism whereby states would join, under the authority of the Security Council, to respond to threats of the peace, breaches of the peace, or acts of aggression. Having identified the foundation ideology underpinning the UN Charter to have been the principle of collective security, we must then consider whether the solution embedded in the UN Charter is a logical result of an application of that principle to the

[111] Shirley V. Scott, "The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality;" *New Zealand Journal of Public and International Law* 5, no. 1 (2007): 113.
[112] Scott, *The Political Interpretation of Multilateral Treaties*, 115.

issue of mutual concern. According to Wolfrum, this does seem to be the case: 'the main legal prerequisite of collective security is the general prohibition of the use of force, except when authorised by the competent central organ of the respective organisation (an idea reflected in Art. 24) or in cases of self-defence'.[113] This suggests that the CSC solution to the issue of how to maintain the peace is a requirement for the fulfilment of the idea of collective security and, thus, appears to be the only solution possible. Former American President Harry S. Truman stressed this in a speech to Senate in 1945, stating that "[t]his Charter points down the only road to enduring peace. There is no other"'.[114]

By appearing as the only one possible, and in addressing the issue of how to maintain the peace, the solution embedded in the UN Charter effectively placed a limitation on states' unfettered pursuit of their national interests. Such constraints on states' pursuit of the legitimation goal were only justified, in turn, on the basis of a shared belief on the verity of the collective security principle.[115] Once in place, the solution allowed states to resume vigorous pursuit of the legitimation goal, albeit with the proviso that force was no longer an acceptable means by which to change the status quo unless if necessary for self-defence or to restore the peace.[116] The UN Charter, as Ian Hurd has indeed pointed out, 'removes from states the right to decide as they wish how to use their militaries and installs in its place a collective system with the UN Security Council at the centre.'[117]

Importantly, while appearing to treat all states equally, the solution embedded in the UN Charter, justified by the foundation ideology, favoured some states over others in their pursuit of the legitimation goal, thereby creating and legitimising an asymmetric structure of power relations.

4.3 The UN Charter, power, and the liberal international order

We have now discerned the elements of the CSC at the heart of the UN Charter and are thus at a turning point in the development of our analysis of Brazil's RwP initiative. The UN Charter entered into force on 24 October 1945, in this way confirming and legitimising the cognitive structure, and hence the foundation ideology, embedded within it. Scott tells us, however, that '[e]ntry into force of a multilateral treaty is not the end of the story, in either legal or political

[113] Rüdiger Wolfrum, "Article 1," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (New York: Oxford University Press, 2002), 42.
[114] Thompson, "Collective Security Re-Examined," 756 at fn. 5.
[115] This is not to suggest that states reached an agreement in San Francisco solely due to a logically tight ideational nexus in the proposed Charter text and that power politics did not play a role in garnering agreement. Rather, it is to highlight the inextricable link between ideas and power and to assert that the ideational nexus embedded in the Charter was necessary, though not sufficient, to determine the fate of the treaty at the San Francisco Conference in 1945.
[116] Scott and Andrade, "Sovereignty as Normative Decoy," 222.
[117] Hurd, "The Permissive Power of the Ban on War." 3.

terms. Nor is identification of the CSC an end in itself'.[118] Because a CSC sustains and legitimises a structure of power, it is expected that it will evolve 'in order to keep abreast of the changing context in which it operates and to respond to challenges to its CSC nexus'.[119] Let us now seek to shed light on the structure of power of which the UN Charter is an integral part.

4.3.1 The ideology of collective security and (unequal) structures of world power

The UN Charter, perhaps more than any other multilateral treaty, has laid the foundations for the liberal international order[120] and is indeed largely perceived to function as a constitution for the international community.[121] The implications for (the) international order of the Article 2(4) prohibition on the first use of force, combined with the legitimisation of the collective use of force as authorised by the Security Council so as to deter an aggressor and restore international peace and security, were far from theoretical. As expected by ILI theory, the instantiation of the use of force CSC into the UN Charter served to uphold and legitimise a particular power structure that became integral to the operation of the liberal international order. Such a structure of power relations, the unequal character of which is masked by the foundation ideology of collective security, is most evident in the configuration and associated voting rules of the Security Council.

The Security Council was a crucial piece of the 'puzzle of peace'[122] and conferring on it the monopoly over the legitimate use of force other than in self-defence was not an oversight. As the above analysis suggests, this was in fact a logical result of an application of the principle of collective security to the issue of how to maintain the peace and prevent another world war.[123] With the outbreak of the Second World War, collective security was more than ever seen as a necessity. The Great Powers, having the military capacity to maintain and restore peace and security, saw themselves largely as having 'the predominant responsibility […] in matters relating to peace and security'[124] and, hence, to make the system of collective security a reality. Because the CSC solution is a direct result of an application of the foundation ideology to the CSC issue,

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[118] Scott, *The Political Interpretation of Multilateral Treaties*, 116.
[119] Scott, *The Political Interpretation of Multilateral Treaties*, 117.
[120] Thakur and Weiss, "R2P: From Idea to Norm," 42.
[121] See, e.g., Fassbender, "The United Nations Charter as a Constitution."
[122] The term 'puzzle of peace' is borrowed from a book by Gary Goertz, Paul Diehl, and Alexandru Balas entitled *The Puzzle of Peace: The Evolution of Peace in the International System.* See, Gary Goertz, Paul Diehl, and Alexandru Balas, *The Puzzle of Peace: The Evolution of Peace in the International System* (New York: Oxford University Press, 2016).
[123] According to Scott, Billingsley, and Michaelsen, '[t]he UN Charter is not so idealistic as to anticipate a world in which force is never used. Rather, it gives the Security Council a virtual monopoly on the legitimate use of force. The UN Charter system is a system of collective security, by which a central body essentially takes primary responsibility for maintaining international peace and security'. Scott, Billingsley, and Michaelsen, *International Law and the Use of Force*, 58.
[124] Hans Kelsen, "Organisation and Procedure of the Security Council of the United Nations," *Harvard Law Review* 59, no. 7 (1946): 1115 at fn. 40.

the ongoing operationalisation of the solution is crucial so that the ideology continues to be upheld throughout the life of the CSC and, hence, of the treaty regime.

That a system of collective security could only come to fruition if conducted by the Great Powers of the time was frequently used as a justification for the structure of the Security Council during the drafting and negotiation process of the UN Charter. In a letter to the Chargé d'Affairs in Brazil on 18 December 1944, for instance, the US Secretary of State explained that the United States would not support the Brazilian Government's request for a permanent seat in the Security Council on the grounds that Brazil, which had previously been unofficially considered by the US for permanent membership,[125] lacked the capacity to enforce and maintain peace and security:

> A major consideration, among others, in the selection of the five permanent members is the estimated contribution which such members could, should the necessity arise, make to the enforced maintenance of peace in any part of the world, including the Far East, as measured by their prospective naval, air, and military strength, as well as the possession of adequate transportation facilities, in the period following the end of hostilities.[126]

Leo Pasvolsky, then Special Assistant to the Secretary of State for International Organisation, is reported to have provided a similar justification for the special position of Great Powers in the Council during an informal meeting with diplomatic representatives of some American republics in January 1945:

> The Council must be efficient and effective, and it must be representative. He stated that the provision for permanent seats on the Council was related to the responsibilities in the performance of its principal functions, and was conditioned upon the ability and willingness of the powers who did have permanent seats to carry out the heavy responsibilities that would rest upon them. He said that the provision for the five countries specified as permanent members was related to the fact that those countries now represented the preponderance of military and industrial power in the world.[127]

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[125] See, Justin Morris, "From 'Peace by Dictation' to International Organisation: Great Power Responsibility and the Creation of the United Nations," *International History Review* 35, no. 3 (2013): 520.
[126] "Telegram: The Secretary of State to the Chargé in Brazil (Donnelly), 18 December 1944," in *Foreign Relations of the United States: Diplomatic Papers, 1944, General, Volume I,* eds. E. Ralph Perkins and S. Everett Gleason, (Washington DC: Government Printing Office, 1966), Document 523, https://history.state.gov/historicaldocuments/frus1944v01/d523.
[127] "Record of Informal Meeting with Diplomatic Representatives of Certain American Republics, January 31 1945," in *Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations, Volume I,* eds. Velma H. Cassidy, Ralph R. Goodwin, and George H. Dengler (Washington DC: Government Printing Office, 1967), Document 10, https://history.state.gov/historicaldocuments/frus1945v01/d10.

A Soviet delegate at the San Francisco Conference was similarly reported as having 'admitted that the right of "veto" would put the permanent members of the Council in a special position but it was pointed out that this corresponded to the responsibilities and duties that would be imposed on them'.[128] Importantly, this was also recognised by smaller states at the San Francisco Conference. Kelsen notes that the delegate from Cuba, for example, expressed recognition of the idea that 'the responsibility of the great powers surpassed that of the other powers'.[129] The 'primary responsibilities' of the Great Powers to maintain and restore the peace served, therefore, as a key justification, to borrow Kelsen's words, for '[t]he privileged position which the Charter grants the five great powers in conferring upon each of them a permanent seat in the Security Council and the veto right.[130]

In a *strictly legal* sense, however, the solution does not appear to give the Great Powers any additional or exceptional legal responsibilities or privileges. Article 24 confers on the Security Council and not on its individual members 'primary responsibility for the maintenance of international peace and security',[131] while Article 2(4) prohibits the first use of force by all members of the UN, including the five permanent members. A legal reading of the solution, therefore, would suggest that all states are treated equally – sovereign equality is, indeed, not only a basic principle recognised in the UN Charter[132] but a fundamental element of the idea of international law itself.[133] However, in a *political* sense, the CSC solution placed the permanent members of the Security Council at a significant structural advantage in relation to other member states. This was the case primarily by virtue of key supporting rules on voting and decision-making designed to make effective the CSC solution, and pursuant to which the Great Powers were to be endowed with veto power and, hence, virtual impossibility of enforcement action being taken against them.[134] Speaking with particular reference to the US but in a way equally applicable to all other permanent members, Scott, Billingsley, and Michaelsen have suggested that:

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[128] Quoted in Kelsen, "Organisation and Procedure," 1117.
[129] Quoted in Kelsen, "Organisation and procedure," 1117.
[130] Kelsen, "Organisation and Procedure," 1117.
[131] Kelsen, "Organisation and Procedure," 1118.
[132] 'It is "sovereign equality" not "equal sovereignty" the Charter speaks of'. Fassbender, "The United Nations Charter as a Constitution," 582.
[133] See, Shirley V. Scott, "Beyond 'Compliance': Reconceiving the International Law-Foreign Policy Dynamic," *Australian Year Book of International* Law 19 (1998): 44.
[134] Note, again, that this analysis is not meant to distort the meaning of the provisions in the Charter nor is it disputing that in a strictly legal sense these duties and obligations apply equally to all Member States. This analysis, however, aims to show that in a political sense the precise legal detail embedded in the Charter gave the P5 a more favourable position in the UN collective security system. An ILI reading of a multilateral treaty would, indeed, suggest that this is precisely the function of the foundation ideology, namely to portray the solution as treating all states equally in legal terms but in reality to benefit some states over others. See, e.g., Scott, *The Political Interpretation of Multilateral Treaties,* 17ff. While legally the Great Powers did not have any additional responsibilities or privileges, they were believed to '[form] a

> Whereas less powerful states not aligned with the United States can expect the Security Council to enforce Article 2(4) of the UN Charter against them, it is much less likely that the United Nations could enforce the prohibition on the use of force against the United States. One of the reasons for this is that the global order, of which Article 2(4) is integral, prioritises order over justice. This means that there is a politics to Articles 2(4) and 51 of the UN Charter and to their interpretation, for they generally serve the interests of the status quo powers and, at times, place a disadvantage any State with a genuine grievance.[135]

The practical result of the CSC solution combined with supporting rules on voting and amendment at the heart of the UN Charter was therefore an international order based on 'the institutionalized exemption of the essential powers from the operation of the enforcement system'.[136] Indeed, central to the idea of collective security is, to borrow Miller's words, 'a binding obligation to defend a particular status quo against forceful change.'[137] Through the establishment of a categorical prohibition on the first use of force, therefore, any challenge to the political status quo via the use of force came to be regarded as illegal and served to place the Great Powers, against which enforcement was virtually impossible, at a more favourable position in the newly established international order.[138] As Hurd has pointed out, the goal of the drafters of the UN Charter was indeed 'to centralise the enforcement of international order in the hands of the great powers at the time, and to pacify the relations among other states by depriving them of independent legal channels to war'.[139] This is further reinforced by the fact that, pursuant to Article 25,[140] decisions emanating from the Security Council are legally binding on all UN members and that, pursuant to Article 108, amendments to the Charter require a vote of two thirds of the members of the General Assembly and ratification by two thirds of all UN members including all five permanent members of the Council.[141]

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necessary nucleus of power' to maintain international peace and security, which served to justify their position in the Charter. See, Summary Report of the Seventh Meeting of Committee III/I, quoted in Kelsen, "Organisation and Procedure," 1118 at fn. 47. This is, also, in no way to suggest that the powers of the Security Council are unlimited or not subjected to scrutiny, but rather to suggest that in a very real way the perceived necessity for peace through collective security served to justify the privileged position of the Great Powers in the international order and thus to support the political status quo.

[135] Scott, Billingsley, and Michaelsen, *International Law and the Use of Force*, 296.

[136] Ravenal, "An Autopsy of Collective Security," 707.

[137] Miller, "The Idea and the Reality of Collective Security," 303.

[138] Notably, great power privilege in the Security Council goes beyond the simple right to veto. Tourinho, Stuenkel, and Brockmeier, for example, suggest that '[i]nevitably, elected members do not share the knowledge of past agreements that mark negotiations between permanent members. They are effectively excluded from informal negotiations where, in practice, many of the important decisions are taken'. Tourinho, Stuenkel and Brockmeier, "Reforming R2P Implementation," 147.

[139] Hurd, "Is Humanitarian Intervention Legal," 295.

[140] UN Charter, Article 25.

[141] UN Charter, Article 108.

While the UN Charter solution, and associated composition and voting rules of the Security Council, created an unequal structure of power and was not received lightly by other CSC participants and members of the community of interest, belief in the verity of collective security made those unequal constraints acceptable to all. The UN Charter was accepted by smaller states on the basis of an implicit quid-pro-quo.[142] The UN Charter solution was comprised of mutually reinforcing provisions that served both to crystallise and sustain the post-war political status quo and to safeguard smaller powers against military intervention by the Great Powers. On the one hand, Article 2(4) prohibited the use of force, though this would still be allowed if necessary for self-defence, as per Article 51. Articles 24, 39 and 42, underpinned the assumption underpinning the principle of collective that peace may be guaranteed through force if necessary, then placed in the hands of the Security Council monopoly over the mechanisms necessary to enforce the peace should a breach of Article 2(4) occur. On the other hand, the threshold embedded in Article 39, served as a sort of guarantee to smaller powers that the Great Powers would not use force against them arbitrarily and beyond what was necessary for maintaining or restoring international peace and security;[143] if force would be used as a mechanism by which to restore the peace, it was to be undertaken collectively and, thus, was to work in the common interests of all members of the United Nations. In a statement to the House of Commons in February 1945 Churchill captured this accurately:

> It is […] on the Great Powers that the chief burden of maintaining peace and security will fall. The new world organisation must take into account this special responsibility of the Great Powers, and must be so framed as not to compromise their unity or their capacity for effective action if it is called for at short notice. At the same time, the world organisation cannot be based upon a dictatorship of the Great Powers. It is their duty to serve the world and not to rule it.[144]

To paraphrase Justin Morris, while the extent to which these responsibilities have been fulfilled is at the very least debatable, the above-described dynamics that characterised UN Charter negotiations in 1945 have truly and decisively shaped the liberal international order within which

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[142] Shirley V. Scott, "The Problem of Unequal Treaties in Contemporary International Law: How the Powerful have Reneged on the Political Compacts within which Five Cornerstone Treaties of Global Governance are Situated," *Journal of International Law and International Relations* 4, no. 2 (2008): 101–126.

[143] 'While the letter of the law would arguably have been met if the Security Council authorised use of force in the interests of the P5 so long as the Council had passed a resolution identifying a threat to the peace, breach of the peace or act of aggression, this was far from the understanding on which the less powerful gave their consent to the vastly inequitable terms of the Charter'. Scott, "The Problem of Unequal Treaties," 107.

[144] Address by Winston Churchill to the House of Commons on 27 February 1945, quoted in Morris, "From Peace by Dictation to International Organisation," 529.

we find ourselves today.[145] Importantly, the CSC at the core of the UN Charter has served to justify, and at the same time crystallise, a structure of power relations centred on the issue of how to avoid war and maintain the peace, legitimised by the foundation ideology of collective security.

4.3.2 The evolution of the CSC after entry into force of the UN Charter

International law is a part of international politics in a way that is not true vice-versa. This means that, as an integral part of an ever-evolving international political system, an international treaty regime, and hence the CSC embedded at its core, is expected to continue to evolve. An ILI theorisation deems a stable treaty regime one whose original CSC is able to endure challenges to its ideational nexus and is able to evolve whilst maintaining a tight CSC nexus:

> Though resistant to change, an ideology may need to undergo modification if the power structure is to survive. […] A strong ideology may be able to defeat outright a rival ideology or the CSC may change at the level of solution so as to meet the challenge of a rival ideology. The foundation ideology will thus need to evolve in relation to other current ideologies as well as to the evolution of the other CSC components as an aspect of the life of a treaty regime.[146]

As a constitution for the international community,[147] the UN Charter is, indeed, largely understood to be a living instrument[148] and despite the emergence of new issues and new ideologies throughout the more than seventy years since the establishment of the United Nations, the original CSC nexus embedded in the UN Charter, and thus the power structure of which it forms the backbone, has largely been retained.

Perhaps the clearest evolution in the CSC at the heart of the UN Charter has taken place in relation to the expansion of the concept of 'threat to international peace and security' that, by Article 39 of the UN Charter, functions as the threshold for authorisation of the use of military force by the Security Council.[149] Significantly, this has taken place without formal amendment to the treaty

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[145] Morris, "From Peace by Dictation to International Organisation," 529.
[146] Scott, *The Political Interpretation of Multilateral Treaties,* 24.
[147] See, e.g., Fassbender, "The United Nations Charter as a Constitution;" Bardo Fassbender, "Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order," in *Ruling the World? Constitutionalism, International Law and Global Governance,* eds. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge/New York: Cambridge University Press, 2009).
[148] Fassbender, "The United Nations Charter as a Constitution," 594.
[149] As noted above, Article 39 articulates that the Security Council may find a 'threat to the peace, breach of the peace, or act of aggression', but it is generally agreed that the Council has generally invoked its Chapter VII powers on the basis of the existence of a 'threat to the peace' more so than a breach of the peace or act of aggression. See, Christopher K. Penny, "Greening the Security Council: Climate Change as an Emerging 'Threat to International Peace and Security," *International Environmental Agreements: Politics, Law, and Economics* 7, no. 1 (2007): 48 at fn. 77.

text.[150] By the original ideational structure as conceived by its drafters, the UN Charter collective security system was the means through which to avoid a third war of global proportions, which in 1945 was mostly understood as interstate war; the 'all against one' idea indeed referred to all states against one aggressor state. Since the end of the Cold War, the notion that '[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security' gained traction amongst the international community of states.[151] The notion of what constitutes a threat to international peace and security thus was expanded to encompass intra-state war as well as other issues with the potential indirectly to threaten international peace and security, such as human rights violations, terrorism, the proliferation of nuclear weapons, and, arguably, even climate change.[152]

Expanding the concept of a threat to the peace has largely served to uphold and maintain the original issue, that is, how to maintain the peace and prevent war, as the primary issue addressed in the treaty. All other issues are perceived to be secondary to the original issue and, arguably, relevant to the extent that they can be considered a 'threat to international peace and security' in the broader meaning of the term. Even with concepts such as human security and environmental security, the main focus of the UN Charter is still primarily the maintenance of the peace and consideration of these issues in the context of Chapter VII action by the Security Council is only legitimate insofar as these issues are 'linked to the hierarchically superior purpose of the maintenance of international peace and security'.[153] This reinforces the foundation ideology of collective security as the logical philosophical underpinning of discussions regarding the issue of how to maintain international peace and security.

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[150] As noted above, the UN Charter has been amended in 1965 to increase non-permanent membership of the Security Council and to expand the Economic and Social Council (ECOSOC). It was amended again in 1976 to expand ECOSOC membership. Carolyn L. Wilson, "Changing the Charter: The United Nations Prepares for the Twenty-first Century," *American Journal of International Law* 90, no. 1 (1996): 117.

[151] UN Security Council, "Note by the President of the Security Council," New York, 31 January 1992, S/23500. http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PKO%20S%2023500.pdf.

[152] The High-Level Panel on Threats, Challenges, and Change defined a threat to international peace and security as '[a]ny event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security'. In doing so, they identified six categories of issues that can now be seen to threaten international peace and security: Economic and social threats, including poverty, infectious disease and environmental degradation; inter-State conflict; internal conflict, including civil war, genocide and other large-scale atrocities; nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime. High-Level Panel on Threats, Challenges and Change*, A More Secure World: Our Shared Responsibility* (New York: United Nations 2004), 12. See, also, Shirley V. Scott and Roberta C. Andrade, "The Global Response to Climate Change: Can the Security Council Assume a Lead Role," *Brown Journal of International Affairs* 18, no. 2 (2012): 215–226; Penny, "Greening the Security Council."

[153] See, George Andreopoulos, "Collective security and the Responsibility to Protect," in *United Nations Reform and the New Collective Security*, eds. Peter G. Danchin and Horst Fischer (Cambridge: Cambridge University Press, 2010), 157.

As would be expected by ILI theory, an expansion of the CSC issue necessarily brought with it a modification of the CSC solution, by means of a widening of the Security Council's agenda and of the array of tools available to the Council to fulfil its role of maintaining international peace and security, which served to reinforce the CSC nexus. Andreopoulos has dubbed this a 'normative overstretch', whereby the Security Council has since the end of the Cold War come to deal in a more systematic way with situations of intra-state conflict and humanitarian atrocities.[154] In normative terms, the conceptual evolution of the threat to international peace and security concept was possible largely due to the decision-making flexibility the drafters of the UN Charter endowed the Security Council.

A turning point in the evolution of the CSC at the heart of the UN Charter was perhaps the 2003 invasion of Iraq by the US, UK, and Australia for it threw into stark relief the sheer inequality of the CSC solution embedded in the UN Charter. Because collective security only 'works on the assumption that no state would use force against any member of the collective security system, as any aggression would be met by overwhelming international force and therefore would be fruitless',[155] the fact that the illegal use of force by the US against Iraq was met with no enforcement measures served to undermine the foundation ideology, weaken the CSC, and effectively open room for further challenges to the original CSC nexus. According to Scott:

> Viewing opposition to the invasion from the perspective of the US having reneged on the implicit compact that accompanied the consent of the less powerful to an ostensibly inequitable treaty offers a context within which to understand the depth of reaction to that act of illegality. It was, for example, not difficult to see the 2003 invasion of Iraq as a war motivated by self-interest for which the Charter was to be a pretext, a war that has so far given rise to less, rather than more, international order.[156]

From this perspective, the 2003 invasion of Iraq was so deeply criticised by the international community as much because of the weak (or non-existent) legal basis upon which the operation was premised as because it threw into stark relief the extent to which some states are placed at a better position vis-à-vis pursuit of the legitimation goal and thus highlighted the gap between the foundation ideology of collective security and reality. In the words of Andreopoulos, 'the unilateral use of force has strained collective understandings of the relevant provisions of the UN Charter and has reinforced communal concerns about growing power asymmetries.'[157]

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[154] Andreopoulos, "Collective Security and the Responsibility to Protect," 156.
[155] John Allphin Moore and Jerry Pubantz, *Encyclopedia of the United Nations* (New York: Facts on File, 2008), 56.
[156] Scott, "The Problem of Unequal Treaties," 109.
[157] Andreopoulos, "Collective Security and the Responsibility to Protect," 155.

4.4 Summary of analysis and concluding remarks

This chapter has conceptualised the UN Charter in terms of the CSC embedded within it. This has illuminated the clear link between the CSC at the core of the UN Charter, underpinned as it is by the foundation ideology of collective security and the structure of power relations of which the UN Charter forms the backbone. There are three primary conclusions that we can draw from the analysis above and that will be central to understanding the potential implications of Brazil's RwP initiative for the UN Charter regime.

The first conclusion that we can draw from the analysis above is that the UN Charter actually has at its core a very tight CSC nexus – that is, the CSC solution appears as a clear and logical embodiment of an application of the foundation ideology of collective security to the issue of how to maintain the peace and avoid another world war. One of the implications of this is that the place of the Security Council, its composition and voting arrangements, have all been defined and logically justified on the basis of assumed belief in the verity of the foundation ideology of collective security. The tight issue-ideology-solution cognitive package at the heart of the UN Charter, underpinned as it was by the principle of collective security, thus served to mask the unequal character of the structure of power relations of which the UN Charter forms the backbone and at the centre of which lies the Security Council. In this case, however, it seems that the unequal character of the power structure was defined not by the CSC solution proper, but by supporting rules pertaining to the composition and voting arrangements of the Security Council as well as by amendment provisions.

The second conclusion, which follows from the first, is that the UN Charter regime is a particularly robust one; according to Scott, '[i]n a robust regime the CSC solution will follow logically – indeed appear as the only solution possible, from an application of the foundation ideology to the CSC issue.'[158] The UN Charter has therefore been able to withstand normative as well as power changes in a way that has by and large preserved the original CSC nexus and reinforced the foundation ideology of collective security. Because a CSC, and hence the foundation ideology, is integral to a structure of power relations, the reinforcement of the logical nexus of the UN Charter CSC has also served to reinforce the structure of power relations of which the UN Charter forms the backbone and at the centre of which lies the Security Council. The evolution of the CSC at the heart of the UN Charter can be seen perhaps most clearly in the expansion of the term 'threat to international peace and security', itself a broader term than 'threat to the peace, breach of the peace or act of aggression' that was embedded in Article 39 of the UN

[158] Recall that in ILI terms a robust regime is one at the core of which lies a tight issue-ideology-solution cognitive package. Shirley V. Scott, "Comparing the Robustness and Effectiveness of the Antarctic Treaty System and the UNFCCC Regime," *Australian Journal of Maritime & Ocean Affairs* 11, no. 2 (2019): 96.

Charter. It has come to mean human security and even, arguably, environmental security. This expansion, however, has taken place without a formal amendment of the text of the UN Charter.

The third and final conclusion is that this analysis has highlighted that the prohibition on the use of force articulated in Article 2(4) of the UN Charter was a central element of the CSC solution by which states agreed to address the issue of how to maintain the peace and avoid a third war of worldwide proportions. This reinforces the importance scholars have attributed to Article 2(4), which has generally been considered to be 'one of the twentieth century's greatest achievements', to borrow the words of Michael Byers.[159] While it is true that the Article 2(4) prohibition on the use of force was integral to the New World Order established by the UN Charter,[160] it nonetheless allowed states to resume pursuit of their self-interests albeit within the agreed limits that force was not to be used, save for when necessary for self-defence or to restore the peace as authorised by the Security Council. According to ILI theory, this is indeed the function of the CSC solution in a multilateral treaty – whereas treaties are commonly seen as designed to solve global issues, ILI theory sees them as management devices at the core of which lies an agreed means by which states seek to place a constraint on their pursuit of the legitimation goal but in a way that allows them to resume pursuit of that goal with, if anything, renewed vigour and free from the threat of the issue impeding that pursuit.[161] This is a similar assessment to that provided by Ian Hurd, who has highlighted the 'permissive effect of the law on war',[162] but it allows us to go one step further so as to conclude that the CSC solution at the heart of the UN Charter has been both constraining and permissive.

[159] Quoted in Hurd, "The Permissive Power of the Ban on War," 1.
[160] Hathaway and Shapiro, *The Internationalists,* 212-213.
[161] Scott, *The Political Interpretation of Multilateral Treaties,* 7
[162] Hurd, "The Permissive Power of the Ban on War," 1.

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Brazil, the RwP Initiative, and Implications for the UN Charter Regime

The previous chapter conceptualised the Charter of the United Nations (UN Charter) in terms of the Cognitive Structure of Cooperation (CSC) embedded within it. This illuminated the link between the legal detail embedded within the UN Charter and the broader structure of power relations to which the United Nations (UN) is integral. This chapter turns to the 'Responsibility while Protecting' (RwP) initiative proposed by Brazil to the UN Security Council in 2011. Following a brief contextualisation of the RwP concept in relation to the political and normative context within which it emerged, in particular the Responsibility to Protect (R2P) concept, this chapter unpacks R2P in terms of the CSC embedded within it and situates this cognitive structure in relation to the CSC embedded in the UN Charter. This is followed by an analysis of the RwP initiative in relation to the CSC of which R2P is a part and to that at the heart of the UN Charter. This chapter will then draw conclusions about the potential implications of Brazil's RwP proposal for the UN Charter regime were the initiative to become successful.

5.1 The political context within which RwP emerged: R2P and the military intervention in Libya

On 17 March 2011, the Security Council adopted Resolution 1973 establishing a no-fly zone and authorising states to 'take all necessary measures […] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya'.[1] This marked the first time that Chapter VII was invoked by the Security Council in the context of R2P.[2] As recounted by Ramesh Thakur, the unfolding of the military operation, led by NATO, from the moment authorisation to the death of Libya's then leader Muammar Gaddafi was a rather quick endeavour:

> NATO took almost a full decade to intervene with air power in Kosovo in 1999; in Libya, it took just one month to mobilize a broad coalition, secure a UN mandate to protect civilians, establish and enforce no-kill zones, stop Gaddafi's advancing army, and prevent

[1] UN Security Council, Resolution 1973, Libya, 17 March 2011, UN Doc. S/RES/1973. https://undocs.org/S/RES/1973(2011).
[2] Ramesh Thakur, "R2P after Libya and Syria: Engaging Emerging Powers," *The Washington Quarterly* 36, no. 2 (2013): 69.

> a massacre of the innocents in Benghazi. By year's end, Gaddafi had been ousted and killed.[3]

The speed with which the campaign took place and the outcome achieved led many to call it a 'model intervention',[4] an indication that R2P had 'come of age'[5], or even a 'triumph for R2P […] show[ing] it is possible for the international community […] to deploy international forces to neutralise the military might of a thug and intervene between him and his victims.'[6] For many others, however, the outcome of the campaign highlighted not the triumph but more a warning of the dangers of R2P implementation.[7] In particular, the intervention was criticised on the basis that the NATO-led coalition had exceeded its mandate by going beyond enforcing a no-fly zone to overthrowing Gaddafi and forcing regime change,[8] a criticism which was highlighted most forcefully by the BRICS states, all of which except for South Africa had abstained in the vote for Resolution 1973.[9] NATO's over-interpretation of the authorisation by the Security Council complicated the response (or lack thereof) to the humanitarian atrocities committed by the Assad regime in Syria.[10] While concern over the political situation in Syria was reported to the Council as early as April 2011, persistent vetoes by Russia and China reflected the absence of consensus within the international community as to how best to respond to the situation.[11]

Brazil was particularly critical of the way R2P was implemented in Libya, stating that 'the use of force has made a political solution more difficult to achieve' and that the responsibility to protect 'must not be used as a pretext for regime change or meddling in domestic politics.'[12] By the time the RwP Concept Note was proposed to the Security Council, Brazil had further articulated concerns relating to R2P implementation, including when it is legally and morally permissible for

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[3] Thakur, "R2P after Libya and Syria," 69.
[4] Ivo Daalder, United States Ambassador to NATO, quoted in Oliver Stuenkel, "The BRICS and the Future of R2P: Was Syria or Libya the Exception?," *Global Responsibility to Protect* 6, no. 3-4 (2014): 18.
[5] Ban Ki-moon. "United Nations Secretary General's Address to the Stanley Foundation Conference on the Responsibility to Protect (R2P)," *Press Release.* New York, 18 January 2012, http://www.un.org/press/en/2012/sgsm14068.doc.htm.
[6] Thakur, "R2P after Libya and Syria," 69.
[7] Justin Morris, "Libya and Syria: R2P and the Spectre of the Swinging Pendulum," *International Affairs* 89, no. 5 (2013): 1280.
[8] Tim Dunne and Sarah Teitt, "Contested Intervention: China, India, and the Responsibility to Protect," *Global Governance* 21, no. 3 (2015): 382.
[9] See, Thorsten Benner, "Brazil as a Norm Entrepreneur: The 'Responsibility While Protecting' Initiative," (working paper, Global Public Policy Institute Berlin, March 2013), 3 – 4, https://www.gppi.net/media/Benner_2013_Working-Paper_Brazil-RWP.pdf.
[10] Thakur, "R2P after Libya and Syria," 70.
[11] See, e.g., Thakur, "R2P After Libya and Syria,"; Dunne and Teitt, "China, India, and the Responsibility to Protect."
[12] Maria Luiza R. Viotti, "Statement by the Permanent Representative of Brazil to the United Nations at the General Assembly Informal Dialogue on the Responsibility to Protect: Secretary General's Report on 'The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect'," New York, 12 July 2011. http://responsibilitytoprotect.org/Brazil%20Stmt.pdf.

the use of force to be authorised, the right authority to sanction coercive force, and the development of clear and appropriate criteria guiding authorisations of the use of force by the Security Council. Although the precise nature of the Brazilian attitude towards R2P has been subject to some debate, [13] scholars have generally deemed RwP to have been 'an innovative and constructive proposal to bridge the gap between an overly trigger-happy NATO and excessively resistant China and Russia,'[14] leading one author to go so far as suggesting the proposal to have been 'the most significant recent development in the evolution of the R2P doctrine'.[15] While it would be possible to assess the implications of Brazil's RwP directly as they relate to the CSC at the heart of the UN Charter as identified in the previous chapter of this dissertation, that the RwP proposal emerged within the normative and political context of debates about R2P implementation means that it is inextricably related to the ideational structure of which R2P is a part. Any assessment of the ideas intrinsic to the RwP proposal and of potential implications for the UN Charter regime therefore need to be understood in relation not only to the UN Charter CSC but also to the cognitive structure of R2P, and in light of the intersection between the two CSCs.[16]

5.2 Conceptualising R2P in ILI terms and identifying the point of intersection between R2P and the CSC of the UN Charter[17]

Chapter 4 analysed the CSC at the heart of the UN Charter. This section analyses R2P in CSC terms. This is done so as to identify where R2P intersects with the CSC at the heart of the UN Charter and to enable us to identify with precision at what point the RwP proposal intersects with both and with what potential implications. Because R2P has, to date, not been instantiated into a multilateral treaty, we will undertake the CSC analysis on the basis of paragraphs 138 and 139 of the World Summit Outcome Document (WSOD), for they articulate what has thus far been the

[13] As Stuenkel and Tourinho have noted: 'Dominant literature has often described Brazil's position [in relation to R2P] as "hostile" and "dissenting"'. See, Oliver Stuenkel and Marcos Tourinho, "Regulating Intervention: Brazil and the Responsibility to Protect," *Conflict, Security & Development* 14, no. 4 (2014): 387.

[14] Oliver Stuenkel, "Brazil and Responsibility to Protect: A Case of Agency and Norm Entrepreneurship in the Global South," *International Relations* 30, no. 3 (2016): 10. Interestingly, though, while the argument that RwP was a bridge-builder is often mentioned, few, if any, authors have sought to explain precisely how this "bridge-building" unfolded.

[15] Derek McDougall, "Responsibility while Protecting: Brazil's Proposal for Modifying the Responsibility to Protect," *Global Responsibility to Protect*'6, no.1 (2014): 64.

[16] Stuenkel and Tourinho make a similar argument, suggesting that understanding Brazil's position in the RwP Concept Note requires a precise understanding the of the terms under which R2P is used. See, Stuenkel and Tourinho, "Regulating Intervention," 389.

[17] This section draws on Shirley V. Scott and Roberta C. Andrade, "Sovereignty as Normative Decoy in the R2P Challenge to the Charter of the United Nations," *Global Responsibility to Protect* 11, no. 2 (2019): 189–225.

closest to an agreed statement of R2P.[18] It will also be necessary at times to trace the cognitive evolution of the concept so as to support our analysis. Let us now seek to discern the various elements constituting the CSC of R2P.

The CSC Issue

We need to begin our CSC analysis by identifying the issue that prompted states to mediate their positions in relation to what has come to be known as R2P. Although we are not working with a treaty, a useful point to start our analysis might be the title of paragraphs 138 and 139 of the WSOD: 'Responsibility to protect genocide, war crimes, ethnic cleansing, and crimes against humanity'. Insofar as this title provides any indication of the CSC issue, we can suggest the issue to have amounted, or at least been related, to protecting populations from the four specific crimes listed. There are at least two reasons, however, to question this interpretation of the CSC issue: firstly, that R2P had been devised some years before the WSOD was produced and, secondly, that, as is commonly the case in relation to multilateral treaties, the title above is likely to reflect the issue as seen through the lens of the foundation ideology. It is therefore necessary briefly to consider the political background within which R2P was first proposed so as to determine with precision the issue that needed to be addressed.

R2P was proposed by the International Commission on Intervention and State Sovereignty (ICISS) in the context of a highly contentious debate about the idea of military interventions on humanitarian grounds, the so-called humanitarian interventions, that had been sparked by several humanitarian crises in the 1990s. In 1994, the United Nations had failed to intervene during the Rwandan crisis, despite knowledge of the extent of atrocities committed by the Rwandan Government, leading to a 'humanitarian catastrophe'.[19] Only five years later, the bombing of Yugoslavia by NATO, although justified on humanitarian grounds to protect Kosovar Albanians from mass atrocities from the Yugoslav Government, was highly criticised for having 'generated more carnage than it averted'.[20] The unfolding of these and other humanitarian crises, and questions as to the appropriateness and legitimacy of international responses (or lack thereof) to

[18] This seems to be supported by the fact that it is generally understood by scholars and state representatives that most references to R2P relate to its formulation in paragraphs 138 and 139 of the WSOD. See, e.g., Schaper, Herman, "Statement by the Permanent Representative of the Kingdom of the Netherlands to the United Nations at the Informal Debate on the Brazilian Concept Note on 'Responsibility while Protecting'," New York, 21 February 2012, http://www.responsibilitytoprotect.org/Netherlands%2021%20Feb%20RwP.pdf. See, also, Stuenkel and Tourinho, "Regulating Intervention," 388, quoting former Secretary-General's Special Adviser on R2P Edward Luck stating that 'for the UN and its Member States the principle of a responsibility to protect is what is contained in paragraphs 138 and 139 of the Outcome Document, nothing more and nothing less.' References to the ICISS formulation of R2P will, nonetheless, be made where relevant.
[19] ICISS, *The Responsibility to Protect* (Ottawa: IDRC, 2001), 1.
[20] ICISS, *The Responsibility to Protect*, vii.

address them, 'prompted debate regarding the merits of codifying the law of humanitarian intervention and what criteria for its legality might be.'[21] This led former UN Secretary-General Kofi Annan to issue 2000 his famous challenge:

> I recognize both the force and the importance of these arguments [for and against the concept of humanitarian intervention]. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity? We confront a real dilemma.[22]

It was in response to the dilemma identified by Annan, therefore, that the ICISS was formed and R2P formulated. The ICISS Report begins with a statement that '[t]his report is about the so-called "right of humanitarian intervention": the question of when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk in that other state.'[23] Insofar as R2P was devised as a 'new normative framework that would ensure that there were no more Rwandas and no more Kosovos'[24] and to the extent that there was a shared understanding of an issue it can be said to have been that as to what the international community could collectively do to respond to further mass atrocities and gross human rights violations.[25]

While it is true that the ICISS Report also considered issues related to prevention of mass atrocity crimes and to the need to rebuild states devastated by conflict and human rights violations, that the ICISS itself maintained that R2P is 'above all else' about 'react[ion] to situations of compelling need for human protection' seems to support our interpretation of the CSC issue as constituting one of response or reaction.[26] Once R2P was embedded into the 2005 WSOD, the issue can be said to have been narrowed to involve how to respond to the four specific crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as reflected in the title of paragraphs 138 and 139. Let us now seek to identify the CSC solution.

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[21] Shirley V. Scott, *International Law in World Politics: An Introduction* (Boulder/London: Lynne Rienner, 2017), 107.
[22] Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations, 2000), 48. https://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf.
[23] ICISS, *The Responsibility to Protect,* vii.
[24] Nicholas Wheeler, "A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit," *Journal of International Law & International Relations* 2, no. 1 (2005): 96.
[25] Scott and Andrade, "Sovereignty as Normative Decoy," 214.
[26] ICISS, *The Responsibility to Protect,* 29. See, also, Aidan Hehir, "The Responsibility to Protect: 'Sound of Fury Signifying Nothing'?," *International Relations* 24, no. 2 (2010): 220.

The CSC Solution

The CSC solution is the agreed means by which states will constrain pursuit of their common legitimation goal and thereby to address the CSC issue. If the CSC issue was one as to how could the international community respond collectively to gross human rights violations, what then was the solution devised to address this issue? In this case, it seems that the solution was in fact R2P itself. Gareth Evans, one of the drafters and main proponents of R2P, has indeed referred to the concept as the "solution" to the challenge posed by the former UN Secretary-General.[27] The CSC solution, in its most institutionalised formulation, was articulated in paragraphs 138 and 139 of the WSOD. Paragraph 138 highlights the need for the international community to help states to exercise their responsibility to protect their own populations from the crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity. In the following paragraph, states explicitly accept the responsibility to use diplomatic and peaceful means to help protect populations in the event these crimes do take place and, in this context, agree to be:

> [P]repared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[28]

The CSC solution as articulated in the WSOD thus consisted most basically of a political agreement by the international community of states to contribute collectively to the prevention of genocide, war crimes, ethnic cleansing, and crimes against humanity and to help protect populations by peaceful and diplomatic means. Should peaceful means be inadequate and domestic authorities be manifestly failing to protect their populations, states may also deploy military force through the Security Council pursuant to Article VII of the UN Charter.

It is noteworthy here that even though coercive force is explicitly recognised in paragraph 139 as a measure at the disposal of the international community in exercising its responsibility to protect, its use is nonetheless unambiguously limited to Chapter VII of the UN Charter. This reflects a significant departure from R2P as initially formulated by the ICISS in 2001, which did recognise the Security Council to be the primary authority to sanction the legitimate use of force but nonetheless did not discount the possibility that authorisation by the Council may be bypassed

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[27] Gareth J. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution, 2008). The second chapter of Evans' book is called 'The Solution: From "The Right to Intervene" to "The Responsibility to Protect"'.
[28] WSOD, para. 139.

should it fail to act.[29] The ICISS formulation of R2P was seen as radical 'insofar as it appeared to pave the way for authority to come from bodies other than the UN Security Council should the international community find the Council in deadlock' and was therefore heavily criticised.[30] By the time states came closest to a formal agreement on the CSC solution, the highly contentious nature of the ICISS formulation of R2P had been removed and any use of military force in the context of R2P was unambiguously restricted to the terms of Chapter VII of the Charter.

The Legitimation Goal

The legitimation goal is the self-interested goal of states, the unconstrained pursuit of which gave rise to the CSC issue and created the need to negotiate a solution. We have identified the CSC issue as that as to what the international community could collectively do to ensure against future Rwandas and Kosovos and the R2P concept as the most basic solution to this issue. What, then, was the self-interested goal common to states that needed to be constrained? If the Secretary-General's challenge above provides an indication of the CSC issue, then the legitimation goal seems to have been simply to have the freedom not to respond to humanitarian atrocities unless such action is perceived to be in one's national interests and, where action to halt such atrocities is imperative, to have the ability to intervene even if unmandated and with a weak basis on international law:

> Indeed, states were usually not doing anything much in response to gross humanitarian atrocities in other countries, as in Rwanda, save where it may have coincided with perceived national interests to do so, but where forcible intervention was sought to end atrocities it did not always have a sound basis in international law, as in the case of Kosovo.[31]

While the legitimation goal is rarely, if ever, expressed during negotiations and may, as such, be theoretically deduced, our interpretation seems to be supported if we consider that, according to ILI theory, unfettered pursuit of this goal might lead to conflict between states or to a situation in which no state is able to pursue that goal at all. In the case of R2P, unconstrained pursuit of the legitimation goal did not lead to conflict between states, at least not in any formal sense, but at the same time it can be said to have undermined to such a large extent the foundations of the post-World War Two international order embodied primarily in the UN system that it needed to be constrained. As then Secretary-General Kofi Annan stated in 1999: 'If the collective conscience of humanity – a conscience which abhors cruelty, renounces injustice and seeks peace for all

[29] See, ICISS, *The Responsibility to Protect,* 53.
[30] Scott and Andrade, "Sovereignty as Normative Decoy," 212.
[31] Scott and Andrade, "Sovereignty as Normative Decoy," 214.

peoples – cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice.'[32] Let us now identify the foundation ideology.

The Foundation Ideology and the CSC Myth

The foundation ideology consists of a principle or set of inter-related principles on the basis of which states agreed to mediate their positions vis-à-vis pursuit of the legitimation goal so as to arrive at a mutually acceptable solution. Because of the role of the CSC solution as constraining pursuit by states of their self-interested goal, it is expected that the solution will follow directly from an application of the foundation ideology to the CSC issue. Having identified the CSC issue, the CSC solution as well as the legitimation goal, it is possible to suggest that the principle that underpinned and served to justify the creation of the R2P concept was that of collective responsibility.

The principle of collective responsibility means, most basically, that the protection of individuals against egregious human rights violations is a responsibility of the international community of states, even when such crimes occur beyond one's own borders. The idea that the international community has a role to play in ensuring the protection of populations from mass atrocity crimes was alluded to by former Secretary General Kofi Annan as early as 1999, when he stated that:

> From Sierra Leone to the Sudan to Angola to the Balkans to Cambodia and to Afghanistan, there are a great number of peoples who need more than just words of sympathy from the international community. They need a real and sustained commitment to help end their cycles of violence, and launch them on a safe passage to prosperity.[33]

As the logical foundation of R2P, the principle of collective responsibility was alluded to at various points in the ICISS Report. The Report noted that where states are unwilling or unable to protect their own populations from gross human rights violations, 'that responsibility must be borne by the broader community of states',[34] albeit it is necessary to note that the principle was never explicitly defined. Although the ICISS noted that the precise dimensions and nature of such a responsibility remain to be defined, it nonetheless proposed R2P on the basis of the belief that such responsibility existed and was un-contested. The ideal was then expressed in more concrete

[32] United Nations, "Secretary General Presents his Annual Report to the General Assembly," *Press Release.* New York, 20 September 1999. https://www.un.org/press/en/1999/19990920.sgsm7136.html.
[33] United Nations, "Secretary General Presents his Annual Report to the General Assembly," *Press Release.* New York, 20 September 1999. https://www.un.org/press/en/1999/19990920.sgsm7136.html.
[34] ICISS, *The Responsibility to Protect*, viii.

terms by the High-Level Panel on Threats, Challenges and Change in its 2004 report entitled *A More Secure World: Our Shared Responsibility*:

> There is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community – with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.[35]

With explicit reference to the High-Level Panel Report, then UN Secretary General Kofi Annan further reinforced this in a 2005 report, where he emphasised the idea of 'our common humanity'[36] and stressed 'that the security of states and that of humanity are indivisible and that threats facing humanity can be solved only through collective action.'[37] Reinforcing the idea of collective responsibility is thus the principle that the security of humanity is indivisible and can only be secured by the international community acting in concert. By the time of its incorporation into the 2005 WSOD, the collective responsibility principles appeared to have been widely embraced by the international community of states[38] as expressed most clearly in paragraph 139.

Closely associated with the foundation ideology is the CSC myth, which is best understood as a 'story told in support of an ideology.'[39] In the case of R2P the CSC myth may best be identified as the statement 'Never Again!'. Originally used in the context of the 1948 Genocide Convention and in reference to attempts to ensure that atrocities such as those during the Holocaust would never happen again, the 'Never Again!' plea has, since the emergence of R2P, been commonly

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[35] High-Level Panel on Threats, Challenges and Change*, A More Secure World: Our Shared Responsibility* (New York: United Nations 2004), 65–66.
[36] UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All,* 21 March 2005, UN Doc. A/59/2005, para. 18.
[37] Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm," *American Journal of International Law* 101, no. 1 (2007): 100.
[38] See, e.g., Paul Martin, "Statement by the Prime Minister of Canada at the High-Level Meeting of the Sixtieth Session of the United Nations General Assembly," New York, 16 September 2005, http://www.un.org/webcast/summit2005/statements16/can050916eng.pdf; John R. Bolton, "Letter from United States Ambassador John R. Bolton to UN Member States," 30 August 2005. http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05[1].pdf; Rosemary Banks, "Statement by the Permanent Representative of New Zealand to the United Nations at the High Level Plenary Meeting of the General Assembly," New York, 16 September 2005, https://www.un.org/webcast/summit2005/statements16/newz050916eng.pdf. This is not to suggest, however, that acceptance of the principle was unanimous.
[39] Scott, *The Political Interpretation of Multilateral Treaties*, 16.

used in relation to the concept.[40] As one of the lead architects of R2P noted in an essay entitled 'The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All':

> Let us get to the point that when another man-made humanitarian catastrophe like Cambodia, or Rwanda, or Bosnia, or Darfur looms on the horizon, as it surely will, we will never again have to look back after another disastrous failure, asking ourselves, with a mixture of anger, incomprehension and shame, how we could possibly have let it happen again.[41]

The CSC myth served to support the principle of collective security by highlighting that the R2P concept, embodying the culmination of an acceptance by states that they have a positive responsibility to protect populations from egregious human rights violations, would finally allow the international community of states '[t]o be confident that we'll never again have to say "never again"'.[42]

Conclusions Regarding the Logical Nexus of the CSC of R2P

Having discerned the various elements of the CSC of R2P, we are now able to draw conclusions about the logical nexus between the CSC elements. As suggested above, the issue of mutual concern to states was most basically how the international community could act collectively to ensure against the occurrence of further humanitarian atrocities, to which the solution was most basically the R2P concept itself. One of the most obvious observations to be made here is that the solution that was accepted by states during the 2005 World Summit and embedded in paragraphs 138 and 139 of the WSOD was narrower than that which had been originally devised by the ICISS in 2001, the latter having never been accepted in full.[43] In a CSC, the solution is expected to place limits on the pursuit by states of their self-interested goal, which was identified above as having been most simply not acting in response to prospects of humanitarian atrocities unless such action is perceived to be in one's national interests but, where action to halt such atrocities is imperative, having the ability to intervene even if in the absence of basis in international law for doing so. The limits placed on pursuit of the legitimation goal is then logically justified by the foundation ideology, which constitutes the philosophical underpinning of the entire cognitive structure. In the case of R2P, the foundation ideology was the principle of collective responsibility, namely

[40] Alex Stark, "Introduction," in *The Responsibility to Protect: Challenges and Opportunities in Light of the Libyan Intervention*, ed. Alex Stark (E-Book: E-International Relations, November 2011), https://www.files.ethz.ch/isn/181082/R2P.pdf.
[41] Gareth Evans, "The Responsibility to Protect: Ending Mass Atrocities Once and For All," *Irish Studies in International Affairs* 20, (2009): 7. See, also, Evans, *The Responsibility to Protect: Ending Mass Atrocities*.
[42] Evans, "The Responsibility to Protect," 10.
[43] The significance of this will be addressed below.

that the international community of states has a positive responsibility to protect individuals against egregious human rights violations even where such atrocities occur beyond sovereign borders, which was in turn reinforced by the CSC myth: 'Never Again!'.

Table 7. The CSC of R2P as per the WSOD, 2005

CSC Issue:	How should the international community respond collectively to mass atrocity crimes and gross human rights violations.
Legitimation Goal:	Non-action unless in perceived national interests, but where action necessary, ability to intervene with force even if unmandated.
CSC Solution:	Various responses, including the use of collective force where authorised by the Security Council in accordance with Chapter VII of the UN Charter.
Foundation Ideology:	Collective responsibility: The protection of populations against egregious human rights violations is a collective responsibility of the international community of states.
CSC Myth:	Never again!

Once a tight nexus between the various elements composing the CSC has been achieved and agreed to by states, a CSC is typically embedded into a treaty and thus confirmed into the system of international law, thereby slowing – though not halting – the rate of change to the ideational structure.[44] Despite claims that R2P has gained nearly universal acceptance,[45] R2P has to date not been embedded into a treaty and remains rather a simple 'political commitment'.[46] This may be indicative that a logically tight R2P nexus is yet to be achieved. Indeed, the extent to which states accept the principle of collective responsibility as a given and R2P as a logical and legitimate constraint on pursuit of their common legitimation goal might be at the very least questionable; consider, for example, the comment by former United States President, Barack Obama, that 'America cannot use our military wherever repression occurs. And given the costs and risks of intervention, we must always measure our interests against the need for action'.[47] It is true that the United States did join the military campaign in Libya, but at the same time this statement seems to fall well short of providing any certainty that the United States will do so again in the future as prescribed by the R2P commitment. It seems then that, as Garwood-Gowers noted in 2015, R2P remains a 'complex and indeterminate normative structure', thus giving the concept a

[44] Scott and Andrade, "Sovereignty as Normative Decoy," 209.
[45] Alyse Prawde, "The Contribution of Brazil's 'Responsibility while Protecting' Proposal to the 'Responsibility to Protect' Doctrine," *Maryland Journal of International Law* 29, no. 1 (2014): 185.
[46] Alex J. Bellamy and Ruben Reike, "The Responsibility to Protect and International Law," *Global Responsibility to Protect* 2, no. 3 (2010): 269.
[47] "Obama's Remarks on Libya," *The New York Times*, 28 March 2011

high level of 'internal dynamism' and opening up significant room for states to interpret its various ideational components differently.[48] Let us now move onto identifying the point of intersection between the R2P CSC and the CSC at the heart of the UN Charter.

5.2.1 Comparing the CSC of R2P with the CSC at the heart of the UN Charter

It was argued in the previous chapter that in order to understand both Brazil's RwP proposal and the R2P concept, it would first be necessary to unpack the ideational structure embedded in the Charter of the United Nations. This was justified on the basis that, insofar as the ideas embedded in both R2P and RwP relate primarily to the initiation of armed conflict, it is the UN Charter and the ideational structure embedded within it that has established the normative status quo within which both initiatives emerged. We will now seek to draw a comparison between the CSC at the core of the UN Charter and that of which R2P is a part. We will then be able to situate the Brazilian RwP initiative in relation to both CSCs and to draw conclusions about potential impacts on the international order.

From a comparison of the structure of ideas at the core of the UN Charter with that of which R2P is a part, and taking into account the development of the R2P CSC, the most basic conclusion that can be drawn here is that the R2P concept as initially formulated by the ICISS in 2001 had the potential fundamentally to undermine the UN Charter CSC.[49] Insofar as the very issue to which the Charter was a response was the prevention of another world war where, importantly, war was seen to be initiated by forceful intervention by one state against another, the contention by the ICISS that military intervention into another country, where there was no authorisation by the Security Council, could be used unilaterally as a legitimate means by which to protect populations from humanitarian atrocities and gross human rights violations seems to be fundamentally inconsistent with the very reason the UN Charter was negotiated in the first place: that is, preventing war by halting the ability of states to use force against one another. While it is true that the UN Charter did leave room open for coercive force to be used, this was limited in two very important aspects: the legitimate use of force could only be used collectively under the sponsorship of the Security Council as a safeguard against Article 2(4) breaches and in cases of self-defence. While the ICISS did emphasise that the Security Council was the right authority to sanction the use of force, it nonetheless left open a proposition that, were the international community of states to fully embrace it, would effectively expand the CSC solution at the heart

[48] Andrew Garwood-Gowers, "R2P Ten Years after the World Summit: Explaining Ongoing Contestation over Pillar III," *Global Responsibility to Protect* 7, no. 3-4 (2015): 303.
[49] Scott and Andrade, "Sovereignty as Normative Decoy," 222.

of the UN Charter so as to allow force legitimately to be used beyond the two limitations currently in place.[50]

On the basis of this analysis, it is not surprising that the R2P solution embedded in the WSOD, as reflecting the closest states have come to collectively agreeing to the a CSC of R2P, explicitly limits coercive force in the fulfilment of the international community's responsibility to protect to the terms of Chapter VII of the UN Charter.[51] While not explicitly stated in paragraphs 138 and 139 of the WSOD, the specific reference to Chapter VII seems to suggest that where the use of force is contemplated as a response to a situation of genocide, war crimes, ethnic cleansing, or crimes against humanity, such a situation would first have to be identified as constituting a threat to international peace and security, and only then may the Security Council authorise force. That states chose in the WSOD to endorse a version of R2P that could be placed 'firmly under the collective security framework of the United Nations',[52] seems to confirm the ILI theory insight that where a norm or concept emerges as competing with an existing CSC a 'stability dynamic' operates whereby the emerging norm is modified or altogether rejected so that the normative status quo, as underpinned by the original foundation ideology, is reinforced.[53] Nonetheless, even as embedded in the WSOD, insofar as the R2P concept remains indeterminate and open to vastly different interpretations, the fear remains of a slippery slope towards 'a fundamental reinterpretation of the UN Charter', as prominent international lawyer José Alvarez has put it.[54]

5.3 The RwP initiative: what potential implications for the UN Charter regime?

We are now at the point at which we can undertake the third and final step in our analysis of Brazil's RwP initiative. This step consists of assessing the initiative in relation to the CSC of R2P and to the CSC at the heart of the UN Charter. The central premise of ILI theory guiding this analysis is that at the core of every treaty regime lies an idea, understood as an ideology for its role in sustaining a structure of power relations, that will need to be upheld through state discourse in relation to the issue in question if the regime is to remain strong.[55] On this basis, we will seek

[50] Scott and Andrade, "Sovereignty as Normative Decoy," 224.
[51] The formulation of R2P as it appears in paragraphs 138 and 139 of the WSOD is commonly referred to in the R2P literature as 'R2P-lite'. See, Chris Brown, "The Antipolitical Theory of Responsibility to Protect," *Global Responsibility to Protect* 5, no. 4 (2013): 434.
[52] Stuenkel and Tourinho, "Brazil and the Responsibility to Protect," 387–388.
[53] See, Scott, *The Political Interpretation of Multilateral Treaties*, 169.
[54] José E. Alvarez, "The Schizophrenias of R2P," in *Human Rights, Intervention, and the Use of Force,* eds. Philip Alston and Euan Macdonald (Oxford: Oxford University Press, 2008): 280. Alvarez has suggested that, despite attempts by defenders of R2P to downplay expansive interpretations of the norm, even as it appears in the WSOD, the simple fact is that 'these expansive citations of R2P are built into its very soul.' See, Alvarez, "The Schizophrenias of R2P," 278.
[55] See, Scott, *The Political Interpretation of Multilateral Treaties;* Shirley V. Scott, "International Law as Ideology: Theorising the Relationship Between International Law and International Politics," *European*

to answer the following question: does Brazil, through the RwP initiative, uphold the CSC at the core of the UN Charter, further strengthen it, or undermine it? Upholding the logical nexus in a CSC, and hence the foundation ideology, is done most clearly where states communicate within the treaty regime on the assumption that the foundation ideology underpinning and lending coherence to that entire cognitive structure is true. But, given that the other elements of the CSC are expected to be in a logical relationship with the ideology, discourse that accepts that the solution within the CSC structure follows logically from an application of the foundation ideology to the issue of mutual concern also strengthens the CSC. A secondary question that we will seek to answer of the RwP initiative is: what conclusions can we draw about the potential implications of the initiative for the UN Charter regime?

The starting point for this analysis will be the RwP Concept Note. The Concept Note was presented as a collection of several principles that Brazil suggested should be considered by the international community of states in the exercise of their responsibility to protect populations from genocide, ethnic cleansing, war crimes, and crimes against humanity. It should be noted, however, that on the basis of the Concept Note, it is not always clear how the different aspects of RwP relate to the elements in each CSC nor it is clear whether Brazil is, in fact, proposing a clear alternative CSC to that embedded in the 2005 WSOD or to that embedded in the UN Charter. Furthermore, many of the ideas proposed in the Concept Note were not fully articulated or expanded by Brazil in the Note itself. This means that we will at times need to look elsewhere, primarily at official statements by Brazilian Government official on R2P and RwP, for further clarification of Brazil's normative position in relation to the RwP initiative.

Because the RwP initiative has so far not been, in any official way, fully embraced by the international community, we will have to undertake this analysis on the basis of possible impacts of the initiative should it become accepted. There are three aspects of the Brazilian proposal that as interpreted from an ILI theory lens were of most direct relevance to the CSC of R2P and the CSC at the heart of the UN Charter and that, if accepted, could be expected to have most impact on the UN Charter regime. These were Brazil's criticism of the logical nexus of the CSC of R2P embedded in the 2005 WSOD, the proposal for stricter criteria to guide the authorisation of military intervention that would modify slightly the CSC solution at the heart of the UN Charter, and a proposal relating to the right authority to sanction the legitimate use of military force that

Journal of International Law 5, no. 3 (1994): 313–325; Shirley V. Scott, "Explaining Compliance with International Law: Broadening the Agenda for Enquiry," *Australian Journal of Political Science* 30, no. 2 (1995): 288–299; Shirley V. Scott, "Beyond 'Compliance': Reconceiving the International Law-Foreign Policy Dynamic," *Australian Year Book of International* Law 19 (1998): 35–48; Shirley V. Scott, "The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality;" *New Zealand Journal of Public and International Law* 5, no. 1 (2007): 103–104.

would flatten the power structure of which the UN Charter forms the backbone but with potential implications for the effectiveness of the UN Charter regime. Let us look at each in turn.

5.3.1 Critiquing the logical nexus of the CSC of R2P embedded in the 2005 WSOD

The first aspect of the RwP initiative that is significant to our analysis is that, in its Concept Note, Brazil appears to critique the logical nexus of the CSC of R2P. In the analysis above we defined the issue to which R2P was a response as one of what the international community could collectively do to respond to gross human rights violations, to which R2P itself, underpinned by the foundation ideology of collective responsibility, was a response. As embedded in the 2005 WSOD, the R2P solution included the use of coercive force, through the Security Council, as one of the tools through which the international community could seek to address the CSC issue. In the RwP Concept Note, however, Brazil maintains that a CSC solution that involves coercive force could not logically follow from an application of the foundation ideology of collective responsibility to the issue of responding collectively to gross human rights violations that led to the creation of R2P.

This is expressed most clearly in paragraph 6 of the Concept Note, where Brazil maintains that the international community must observe a 'strict line of political subordination and chronological sequencing' of the three pillars of R2P and that

> it is essential to distinguish between collective responsibility, which can be *fully* exercised through non-coercive measures, and collective security. Going beyond the exercise of collective responsibility and resorting to mechanisms in the domain of collective security implies that a specific situation of violence or threat of violence against civilians should be characterized as a threat to international peace and security.[56]

Brazilian Government officials had already expressed doubt as to the merits of an R2P solution that included the possibility of using force at the 2005 World Summit, during which former Brazilian Foreign Minister Celso Amorim expressed that 'international cooperation in the human rights and humanitarian assistance field must be guided by the principle of collective responsibility' but, he added, 'it is an illusion to believe that we can combat the dysfunctional politics at the roots of grave human rights violations through military means alone, or even economic sanctions, to the detriment of diplomacy and persuasion.'[57] Amorim seemed to express acceptance for the foundation ideology of collective responsibility, namely that the protection of

[56] RwP Concept Note, para. 6. Emphasis added
[57] Celso Amorim, "Statement by the Minister of External Relations of the Federative Republic of Brazil at the Opening of the 60th Session of the United Nations General Assembly," New York, 17 September 2005. http://www.un.org/webcast/ga/60/statements/bra050917eng.pdf.

individuals from human rights violations is a common responsibility of the international community of states, but questions the merits of force to the detriment of diplomacy in responding to the CSC issue, albeit at that point Amorim did not make it clear whether a solution involving force could follow logically from the principle of collective responsibility.

After the NATO-led intervention in Libya, however, Brazilian rhetoric on the issue became more forceful and was largely characterised by attempts to sever the connection between the accepted R2P solution involving coercive force and the foundation ideology of collective responsibility. Former Ambassador to the UN Maria Luiza Ribeiro Viotti, for example, expressed that

> With regard to [Security Council] resolution 1973, Brazil had serious doubts on whether the use of force, to the extent provided for by the Resolution, would lead to the realisation of our common objectives, that is, the immediate end of violence and the protection of civilians. It is regrettable that the manner in which the resolution has been implemented has not dispelled our doubts. Furthermore, the use of force has made a political solution more difficult to achieve.[58]

Brazil does not expand on this in the remainder of the Concept Note, but former Brazilian Foreign Minister Antonio de Aguiar Patriota stressed again in 2015 that 'it is essential to distinguish between collective responsibility – which can be fully exercised through non-coercive measures – and collective security – which involves a case-by-case political assessment by the Security Council.'[59]

While for some the intervention in Libya was an indication that R2P had come of age,[60] for Brazil it simply demonstrated that there existed a discrepancy between a solution to the issue of responding to grave human rights atrocities that involved coercive force and the idea that protection of individuals from egregious human rights violations was a collective responsibility of the international community of states; for Brazil, not only had the NATO-led intervention not addressed the issue it was authorised to address, but it in fact led to more instability and less protection. As articulated in paragraph 9 of the RwP Concept Note, 'the world today suffers the

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[58] Viotti, Maria Luiza R. "Statement by the Permanent Representative of Brazil to the United Nations at the General Assembly Informal Dialogue on the Responsibility to Protect: Secretary General's Report on 'The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect'," New York, 12 July 2011. http://responsibilitytoprotect.org/Brazil%20Stmt.pdf.

[59] Antonio de Aguiar Patriota, "Statement by Minister Antonio de Aguiar Patriota in a Debate on 'Responsibility While Protecting' at the United Nations," New York, 21 February 2012. http://www.itamaraty.gov.br/en/press-releases/8654-statement-by-minister-antonio-de-aguiar-patriota-in-a-debate-on-responsibility-while-protecting-at-the-united-nations-new-york-february-21-2012.

[60] Ban Ki-moon. "United Nations Secretary General's Address to the Stanley Foundation Conference on the Responsibility to Protect (R2P)," *Press Release.* New York, 18 January 2012, http://www.un.org/press/en/2012/sgsm14068.doc.htm.

painful consequences of interventions that have aggravated existing conflicts, allowed terrorism to penetrate into places where it previously did not exist, given rise to new cycles of violence and increased the vulnerability of civilian populations.'[61] This was further highlighted by one Brazilian representative who stated that '[c]learly in many cases, a military-centred solution to peace and stability, with the aim of protection of civilians, has not achieved satisfactory goals from either a security or moral perspective'[62] and again by former Foreign Minister Antonio Patriota, when he recalled the 'daunting reminders of the destabilisation which may result from military action', which according to him included the expansion of 'the so-called "Islamic State" into Libyan territory and the dramatic refugee crisis we are facing today'.[63]

It seems therefore that, while Brazil has expressed acceptance in its RwP Concept Note and associated foreign policy discourse for the foundation ideology of collective responsibility, namely that there exists a positive collective responsibility on behalf of the international community to protect populations from gross human rights violations, it denies that a solution underpinned by this principle could ever include the use of coercive force. Rather, it seems to express an interpretation of the issue-ideology-solution cognitive package embedded in the 2005 WSOD that, if accepted, would in fact serve to lead to a slight, albeit significant, modification of the CSC of R2P so as to exclude the use of coercive measures, including military force, altogether from the CSC solution. As Patriota reiterated again in 2015 at the General Assembly Interactive Dialogue on R2P, '[o]ur collective responsibility *does not* need to translate into collective security in order to be effective. It can be *fully* exercised through non-coercive measures'.[64] According to Brazil, this would follow more logically from the foundation ideology and thus be fully effective in addressing the issue of protecting populations from egregious human rights violations.

[61] RwP Concept Note, para. 9.
[62] Permanent Mission of Brazil to the United Nations. "Statement by the Brazilian Representative at the Open Debate of the United Nations Security Council on the Protection of Civilians," New York, 12 February 2014. http://responsibilitytoprotect.org/Brazil.pdf.
[63] Antonio de Aguiar Patriota, "Statement by the Permanent Representative of Brazil to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on a Vital and Enduring Commitment: Implementing the Responsibility to Protect," New York, 8 September 2015. http://www.responsibilitytoprotect.org/brazil(1).pdf.
[64] Antonio de Aguiar Patriota, "Statement by the Permanent Representative of Brazil to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on a Vital and Enduring Commitment: Implementing the Responsibility to Protect," New York, 8 September 2015. http://www.responsibilitytoprotect.org/brazil(1).pdf. Emphasis added.

At first sight, however, it would not seem that such a modification interpreted by Brazil would in fact tighten the logical nexus of the CSC of R2P; insofar as the issue to which R2P was a response was one of reaction by the international community to gross human rights violations, as articulated in the Secretary General's challenge, and it would be difficult to see what the international community could do to halt mass atrocities through peaceful and non-coercive means only. If R2P was, as Gareth Evans has put it, created to ensure that the international community of states would 'be confident that we'll never again have to say "never again"',[65] then a solution that would arguably do little to halt gross human rights abuses would render the CSC myth a simple myth in the conventional sense of the word, that is 'a belief having no foundation in fact.'[66]

Table 8. Modified CSC of R2P as proposed in the RwP Concept Note, 2011

CSC Issue:	How should the international community respond collectively to mass atrocity crimes and gross human rights violations.
Legitimation Goal:	Non-action unless in perceived national interests, but where action necessary, ability to intervene with force even if unmandated.
CSC Solution:	Collective response through peaceful and non-coercive measures only.
Foundation Ideology:	Collective responsibility: Protection against gross human rights violations is a collective responsibility.
CSC Myth:	Never again!

To the extent that the issue to which R2P was a response was one of preventing further humanitarian atrocities and gross human rights violations, however, it would be possible to suggest that the solution proposed by Brazil might in fact tighten the logical nexus of the R2P CSC. That the CSC issue might have been one of preventing human rights atrocities, as opposed to one of responding collectively to such situations, has indeed been suggested by some scholars and proponents of R2P.[67] The ICISS itself had already stated in its 2001 Report that prevention was the 'single most important dimension' of R2P,[68] albeit in contrast to a later assertion that the

[65] Gareth Evans, "The Responsibility to Protect: Ending Mass Atrocities Once and For All," *Irish Studies in International Affairs* 20, (2009): 7. See, also, Evans, *The Responsibility to Protect: Ending Mass Atrocities*.
[66] Scott, *The Political Interpretation of Multilateral Treaties,* 16.
[67] See discussion in Aidan Hehir, "The Responsibility to Protect: 'Sound of Fury Signifying Nothing'?," *International Relations* 24, no. 2 (2010): 226ff.
[68] ICISS, *The Responsibility to Protect,* xi.

concept was 'above all else' about 'react[ion] to situations of compelling need for human protection'.[69] In the aftermath of the 2005 World Summit, R2P proponents such as Gareth Evans and Alex Bellamy have similarly maintained that R2P was primarily about prevention.[70] These interpretations notwithstanding, there is, as already noted in the CSC analysis above, strong indication that the issue to which R2P was a response was one of reaction to situations of gross human rights violations; not only were the pages of the ICISS Report devoted mostly to what it called 'the responsibility to react',[71] but the Secretary General's challenge, to which R2P was a response (as the ICISS itself highlighted), was primarily one concerning reaction to humanitarian crises, not prevention.

While Brazil has also highlighted in the RwP Concept Note and at various forums that 'prevention is always the best policy',[72] to the extent that the CSC issue was first and foremost one of response, a CSC solution underpinned by the principle of collective responsibility that excludes the possibility of force being used would seem more, rather than less, likely to undermine the CSC myth in the CSC of R2P and hence the foundation ideology of collective responsibility. In other words, the modifications proposed by Brazil's RwP initiative would render the CSC of R2P less, not more, coherent. Furthermore, the CSC solution proposed by Brazil would not seem to be an effective one neither from an ILI theory vantage point nor from a neo-liberal perspective – not only would it outright preclude pursuit of the legitimation goal common to states, which did involve having the freedom to intervene with force where deemed necessary, but it would also be unlikely to solve the problem of protecting populations from gross violations of human rights in the first place.

The first implication of this is that it shows that Brazil's RwP Concept Note would, in fact, serve to modify R2P insofar as it would modify the CSC solution and that was identified to have been R2P itself. This finding has value for our analysis for it allows us to identify with some level of precision the intersection between Brazil's initiative and the CSC of R2P and also that RwP would in fact lead to a modification of the issue-ideology-solution cognitive package of R2P embedded within the 2005 WSOD. A second implication of Brazil's position in relation to the logical nexus of the CSC of R2P is that, by critiquing the logical nexus of the CSC of R2P and further adding that any use of force is related to the principle of collective security and must follow from an

[69] ICISS, *The Responsibility to Protect,* 29.
[70] See, Evans, *The Responsibility to Protect,* 56; Bellamy, *The Responsibility to Protect,* 3.
[71] Hehir has, for example, highlighted that only nine out of eighty-five pages in the ICISS Report were devoted to prevention. Hehir, "The Responsibility to Protect," 226.
[72] RwP Concept Note, para. 11(a).

identification of a situation as a threat to international peace and security, Brazil effectively reinforces the logical nexus of the CSC at the heart of the UN Charter.

In the RwP Concept Note, therefore, Brazil does not seem altogether to rule out the use of coercive force in relation to humanitarian crises; rather, Brazil appears to present the rather more nuanced argument that military force is a solution that does not (and cannot) follow from an application of the ideology of *collective responsibility* to the issue of responding to large-scale humanitarian atrocities. Instead, as expressed by Brazil, the collective use of force is a solution that follows exclusively from an application of the foundation ideology of *collective security* to the issue of how to maintain the peace and avoid world war three. This reinforces the issue-ideology-solution logical nexus in the UN Charter. This is significant because, as suggested above, so long as R2P remains open to vastly different interpretations, it will always seem to pose a threat to the CSC at the heart of the UN Charter.[73] By proposing a slightly modified CSC of R2P that does not include the use of coercive force, therefore, Brazil reinforces the CSC at the heart of the UN Charter by rejecting a new normative proposition that would have the potential to undermine that CSC. In other words, Brazil not only to clarifies the contours of R2P, but it also does so in a way that would ensure R2P would no longer be a threat, even if only in the realm of possibility, to the UN Charter CSC.

5.3.2 Brazil's RwP proposal would serve slightly to modify the CSC solution at the heart of the UN Charter

The second aspect of the RwP initiative that is of interest to our analysis is that it would, if accepted, lead to a modification of the CSC solution at the heart of the UN Charter, which, although slight would nonetheless have the potential to undermine the foundation ideology of collective security and thus weaken the UN Charter regime. This was the case most clearly in relation to Brazil's proposal in the RwP Concept Note for stricter criteria and rules that should guide deliberations by the Security Council about the appropriateness of using military force to respond to threats to international peace and security.

As was suggested in the previous chapter of this dissertation, the agreed solution through which states were to address the issue of how to maintain the peace and avoid a third world war was a categorical prohibition on the first use of force and a collective enforcement mechanism whereby the Security Council would respond with coercive force if necessary to threats to the peace, breaches of the peace, or acts of aggression. Insofar as Brazil's proposal for stricter criteria relates

[73] See, Scott and Andrade, "Sovereignty as Normative Decoy," 225Alvarez, "The Schizophrenias of R2P," 278.

to Security Council decision-making regarding the use of force, its primary impact would be on the CSC solution. In paragraph 7 of the RwP Concept Note, Brazil claims that:

> Even when warranted on the grounds of justice, legality and legitimacy, military action results in high human and material costs. That is why it is imperative to always *value, pursue and exhaust all diplomatic solutions* to *any given* conflict. As a measure of last resort by the international community in its exercise of its responsibility to protect, the use of force must then be preceded by a comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis.[74]

This is reiterated in Paragraph 11(b), where Brazil maintains that '[t]he international community must be rigorous in its efforts *to exhaust all peaceful means* available in the protection of civilians under threat of violence, *in line with the principles and purposes of the Charter* and *as embodied in the 2005 World Summit Outcome*'.[75] Two sets of criteria to guide the use of force by the Security Council are thus proposed: the need to exhaust all peaceful means and, should force be contemplated, a comprehensive and judicious analysis of possible consequences on a case-by-case basis.[76]

At a first glance, one could easily argue, as Brazil in fact does, that this is already prescribed by the letter of the UN Charter and thus that a modification of the CSC solution, or even of any supporting rule for that matter, would not be necessary were the RwP Concept Note to be fully embraced by the international community. Another way to look at this would be to suggest that, even if a modification of the CSC solution were required on the basis of Brazil's proposal, this modification would make the logical nexus of the UN Charter CSC, if anything, tighter; insofar as the very CSC issue to which creation of the United Nations was a response was one of how to maintain the peace and avoid war, it would seem reasonable to maintain that modifying the CSC solution to make it harder for coercive force to be employed would in fact more closely align the elements of the war prevention CSC at the heart of the UN Charter. A categorical prohibition on the first use of force binding on all Members of the United Nations was, after all, the primary solution by which to avoid war and maintain the peace.

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[74] RwP Concept Note, para. 7. Emphasis added.
[75] RwP Concept Note. Emphasis added.
[76] Note here that proposals for criteria and guidelines guiding authorisations of coercive measures by the UN to maintain or restore the peace are as old as the Organisation itself, so Brazil's proposal is not necessarily new. Roberts, Adam and Dominik Zaum, "The Inherent Selectivity of the Council's Roles," *Adelphi Papers* 47, no. 395 (2007): 15. See, also, discussion in Edward Luck, "A Council for All Seasons: The Creation of the Security Council and its Relevance Today," in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945,* eds. Vaughan Lowe et al. (New York: Oxford University Press, 2010), 70–73.

Upon further inspection, however, a formal requirement for criteria is not only not prescribed in the UN Charter but were it to be embedded in the Charter, particularly one which prescribes that all peaceful means must be exhausted, it would counterintuitively serve to weaken the logical nexus of the UN Charter CSC. As suggested in the previous chapter of this dissertation, the war prevention CSC at the heart of the UN Charter contains a tight logical nexus: the ban on the first use of force pursuant to Article 2(4) and the collective enforcement mechanism to restore the peace and maintain order were the most logical result of an application of the principle of collective security to the issue of how to maintain the peace and avoid another world war. Importantly, a primary assumption of collective security is that peace and security can be maintained if states commit to an immediate and fulsome collective response to stop an aggressor. In order for the CSC to retain a tight issue-ideology-solution nexus, the drafters of the UN Charter therefore intentionally gave the Security Council decision-making flexibility as regards the need for coercive force to be used so as to allow for rapid and efficient response to restore order.[77]

Table 9. Modified UN Charter CSC as proposed in the RwP Concept Note, 2011

CSC Issue:	How to maintain the peace and avoid world war three.
Legitimation Goal:	Pursuit of national interests even to the extent of waging war against another country.
CSC Solution:	UN Charter rules on use of force should be retained but if force is used it must be preceded by a rigorous attempt to pursue and exhaust all diplomatic and peaceful solutions and a comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis.
Foundation Ideology:	Collective security. There is a common responsibility to minimise harm if force is used.

Pursuant to Article 39 of the Charter the Security Council must identify 'the existence of any threat to the peace, breach of the peace, or act of aggression' in order to decide on the appropriate means, in accordance with Articles 41 and 42, through which to maintain or restore peaceful conditions.[78] While Article 41 lists coercive measures short of military force, pursuant to Article

[77] Edward Luck quotes Leo Pasvolsky suggesting that the aim of the Great Powers at Dumbarton Oaks was to create a 'flexible machinery' that would be able to deal with the varied issues the Council may encounter. Luck further highlights that, indeed, '[o]ne of the more consistent themes invoked in San Francisco was the need for prompt and decisive action by the Security Council' and so the need for flexibility in UN mechanisms to maintain the peace was also supported by smaller powers, who 'were looking for security assurances, if not guarantees' that the Council would act if necessary. Luck, "The Creation of the Security Council," 69–73.

[78] UN Charter, Article 39.

42 should the Security Council deem that 'measures provided for in Article 41 would be inadequate or have proved to be inadequate' it may authorise military measures to restore the peace.[79] Beyond these provisions, the Charter does not contain any obligation that peaceful measures be resorted to first nor does it require that the Council actually *try* measures in Article 41 before resorting to the use of force. The decision as to whether non-military means *would be* inadequate and on the appropriate way to deal with a given situation threatening peace and security is thus largely left at the discretion of the Council.[80]

Thus, it is not only the case that the UN Charter does not prescribe that all peaceful measures be *exhausted* before the use of force can be authorised by the Security Council to address a threat to the peace, breach of the peace, or act of aggression, but that it *could not* contain too detailed and strict requirements on the Security Council if the foundation ideology of collective security was to continue to be upheld and the overall CSC nexus to remain strong throughout the life of the UN Charter regime. Placing a legal requirement that the Security Council exhausts all peaceful measures before force can be contemplated would, then, serve to weaken the logical nexus in the UN Charter CSC because collective security assumes an immediate and fulsome response to an aggressor and necessitates the Security Council having the scope to do that in order to be effective. While Brazil's proposal that any authorisation of coercive force must be preceded by a comprehensive and judicious analysis of possible consequences on a case-by-case basis is arguably already followed by the Security Council in considering whether force would be necessary to restore order, a legal institutionalisation of such a requirement would likely serve to slow a potential response by the Security Council and weaken the logical nexus of the CSC at the heart of the Charter.

It is true that a CSC is not static and that it continues to evolve so as to keep abreast of political and ideational changes. This is certainly the case with the CSC embedded in the UN Charter, which, as pointed out in the previous chapter of this dissertation, has evolved, *inter alia,* by means of an expansion of the notion of what constitutes a 'threat to international peace and security'. In light of this, one could very well suggest that stricter criteria to guide when and how the Security Council might respond to threats to international peace and security in a broader sense might be prudent.[81] Even then, however, it is possible to argue that it was precisely the flexibility of

[79] UN Charter, Articles 41 and 42.
[80] Roberts and Zaum, "The Inherent Selectivity of the Council's Roles," 15. See, also, discussion Luck, "The Creation of the Security Council," 70–73. Luck points out on page 72 that the wording of Article 42 was in fact refined at the San Francisco Conference in 1945 at the suggestion of Canada to reflect that the Council is free to resort to force without reaching any check points.
[81] Österdahl, for instance, notes that some scholars have suggested that where a threat to international peace and security involves human rights violations, stricter criteria should apply. See, Österdahl, "Why Brazil Wrote a Letter to the UN," 469.

Security Council decision-making, among other things, that provided for an evolution of the war prevention CSC at the core of the UN Charter in a way that has by and large retained the tight logical nexus between its elements and retained the foundation ideology of collective security as its philosophical underpinning. As Luck has pointed out, 'not constricting the Council's freedom of action through lists of rules and guidelines […] has allowed it to be a remarkably adaptable institution, evolving its tools and working methods as conditions have changed in unpredictable ways.'[82] The UN Charter, Luck adds, 'is a living document, as well, because it gave the Security Council room to adapt to changing circumstances.'[83] Placing a requirement on the Security Council for the exhaustion of all peaceful measures before any coercive force is authorised, as proposed by Brazil, would, therefore, likely imbue a level of rigidity to the CSC solution that would not only result in a weakening of the overall logical nexus of the CSC and of the foundation ideology underpinning the cognitive structure but could potentially make it more difficult for the CSC to evolve in a way that retains the original issue-ideology-solution ideational package at its core.

5.3.3 Flattening the power structure to which the UN Charter is integral albeit with potential implications for the effectiveness of the UN Charter regime

The final aspect of the RwP proposal that is relevant to our analysis is that in relation to Brazil's interpretation of the right authority to sanction the use of force to respond to a threat to international peace and security, in particular its suggestion that the General Assembly might have the legal right to do so under existing international law. Were the interpretation proposed by Brazil to be accepted, it would potentially serve to modify the CSC solution at the heart of the UN Charter in a way that would perhaps flow, if anything, more logically from an application of the foundation ideology to the CSC issue, albeit this would likely be more difficult to implement. Brazil's RwP proposal relating to the right authority to sanction coercive force in the context of gross human rights violations and in general to restore peace and security is ambiguous and has gone through a largely unexplored shift since the creation of R2P and so, in order to grasp the significance of it, it is necessary to unpack it in more detail.

Brazil first touches upon the issue of right authority in Paragraph 11(c) of the RwP Concept Note, where it maintains that '[t]he use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its resolution 377 (V)'.[84] This is reinforced in Paragraph 11(d), according to which '[t]he authorization for the use of force

[82] Luck, "The Creation of the Security Council," 83.
[83] Luck, "The Creation of the Security Council," 85.
[84] RwP Concept Note.

must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly'.[85] Brazil therefore alludes to the idea that General Assembly Resolution 377 (V),[86] entitled the Uniting for Peace Resolution, confers on the General Assembly the legal right to authorise military force to address threats to the international peace and security. The starting point for understanding whether this is indeed the case and, if not, what would be the implications for the CSC at the heart of the UN Charter if Brazil's proposal were to be accepted is the Uniting for Peace resolution itself.

The Uniting for Peace resolution was passed by the General Assembly in 1950 to ensure that, should the Security Council be in deadlock, collective assistance would be forthcoming should it be necessary. By the time the resolution had been passed, the Soviet Union had already vetoed, as Zaum notes, forty-five draft resolutions since the establishment of the United Nations, effectively deadlocking the Council despite the existence of acts of aggression and breaches of the peace, as by North Korea against South Korea, had been taking place.[87] This was serving increasingly to cast doubt on the ability of the Security Council to exercise its primary responsibility for the maintenance of international peace and security and thus undermining the logical nexus of the CSC that had been embedded in the UN Charter a few years earlier.

The answer proposed by the United States, which had been trying to address the situation in Korea, was to propose a resolution to be adopted by the General Assembly that would enable the Assembly to respond 'to aggression and threats to international peace and security should the Council be paralysed because of a veto.[88] The Uniting for Peace resolution thus provided that,

> if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to the Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

[85] RwP Concept Note.
[86] UN General Assembly, Resolution 377 (V), Uniting for Peace, 3 November 1950, UN Doc. A/RES/377(V). https://undocs.org/en/A/RES/377(V).
[87] Dominik Zaum, "The Security Council, the General Assembly, and War: The Uniting for Peace Resolution," in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945,* eds. Vaughan Lowe et al. (New York: Oxford University Press, 2010), 157.
[88] Zaum, "The Security Council, the General Assembly, and War," 157.

The Uniting for Peace resolution reinforced the tight logical nexus in the CSC of the UN Charter by ensuring that collective force would be used to respond and halt situations that threaten international peace and security, thus upholding the foundation ideology of collective security

The resolution, however, does not go as far as conferring on the General Assembly the legal right to authorise coercive force[89] and simply bestows upon the Assembly the right to make recommendations to members regarding collective measures to be employed, which in any case are not legally binding on member states.[90] This is in line with Article 10 of the Charter, by which the Assembly is empowered to 'discuss any questions or any matters within the scope of the present Charter […] and […] may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.'[91] The resolution as such serves to reinforce the original CSC solution, according to which the legitimate use of force, other than in self-defence, can only be sanctioned by the Security Council, as logically following from an application of the principle of collective security to the issue of mutual concern. Because a CSC is integral to a structure of power relations, by reinforcing the original CSC nexus at the heart of the UN Charter, the power structure to which the UN Charter is integral too was reinforced.

This means that, unlike suggested by Brazil, the General Assembly cannot legally authorise or confer a mandate for the use of force under the Uniting for Peace resolution. Brazil therefore seems to adopt a broader interpretation of the resolution and so to deem the General Assembly to have broader powers vis-à-vis the authorisation of coercive force than seems to be the case in existing international law.[92] One might simply dismiss Brazil's proposal as 'sensational'.[93] Yet, that it was formally presented to the Security Council – and, as such, supposedly reflected Brazil's official position on the matter, and that interest in a possible role for the General Assembly vis-à-vis sanctioning the use of force has arguably increased since the emergence of the R2P

[89] See, Österdahl, "Why Brazil Wrote a Letter to the UN," 475-476.
[90] Payandeh, "R2P and International Lawmaking," 503.
[91] UN Charter, Article 10. This is reinforced in Article 11, but note that under both Articles 10 and 11, such recommendations by the General Assembly may be made 'except as provided in Article 12', which in turn stipulates that 'while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. UN Charter, Article 12. See, also, Michael Cowling, "The Relationship Between the Security Council and the General Assembly with Particular Reference to the ICJ Advisory Opinion in the 'Israeli Wall' Case," *South African Year Book of International Law* 30, (2005): 56.
[92] It is noteworthy here that even if the General Assembly were to recommend the collective use of force, it may only do so where a situation amounts to a breach of the peace or an act of aggression, whereas, apart from war crimes – which imply the existence of war, acts of genocide, ethnic cleansing, and crimes against humanity are likely to be regarded as threats to international peace and security in the broader, post-Cold War sense. See, Österdahl, "Why Brazil Wrote a Letter to the UN," 476-477
[93] Österdahl, "Why Brazil Wrote a Letter to the UN," 477.

concept,[94] would seem to suggest that this proposal by Brazil should at least be taken seriously. It would thus be useful to consider whether this would in fact serve to weaken or strengthen the logical nexus in the CSC at the heart of the UN Charter with what potential implications for the power structure to which the UN Charter is integral.

At first glance, it would seem that conferring on the General Assembly the right to sanction the use of coercive force so as to restore international peace and security would, in fact, serve to tighten the logical nexus of the CSC, as the General Assembly represents the closest to the collective will of all members of the United Nations; if responses under collective security are to be collective – all against one! – then a decision by the General Assembly would indeed seem to uphold the CSC myth even more strongly than one authorised by the Security Council. Insofar as the selective permanent membership of the Security Council and associated voting rules has been integral to the distribution of power within the UN Charter regime, it would also seem that conferring on the Assembly the right to sanction force would democratise and flatten the power structure to which the war prevention CSC forms the backbone. Yet, it would seem not unreasonable to suggest that a speedy and effective response to suppress threats to the peace, breaches of the peace, and acts of aggression might not be as easily reached through the General Assembly as through the Security Council, which would potentially make the CSC solution even more difficult to implement. Because in a CSC the ongoing interaction of states on the basis of the solution itself serves to reinforce the CSC and, hence, the foundation ideology,[95] a potentially non-operational solution would likely lead the eventual weakening of the overall UN Charter regime.[96]

Curiously, in the remainder of the Concept Note, Brazil makes no further mention of the General Assembly, even where the use of force is concerned. In Paragraph 11(f), for instance, Brazil claims that '[i]n the event that the use of force is contemplated, action must be judicious,

[94] The ICISS already proposed in 2001 that the General Assembly might have an important role in relation to the use of force to address gross human rights violations, albeit it did emphasise the limitations of the Assembly's role to recommend non-legally binding collective measures only. The ICISS, nonetheless, did maintain that a recommendation by the Assembly would be significant to the extent that it could 'provide a high degree of legitimacy for an intervention'[94] without authorisation by the Security Council. See, ICISS, *The Responsibility to Protect*, para. 6.30. A few years later, Thomas Weiss suggested that a recommendation by the General Assembly for the use of collective force to respond to egregious humanitarian violations 'might have a moral and political weight sufficient to categorise the use of force as "legal" even without the Security Council's endorsement.' Weiss, "The Illusion of Security Council Reform," 155.

[95] See, Scott, *The Political Interpretation of Multilateral Treaties,* 24.

[96] This is naturally not to suggest that the operation of the CSC solution by means of authorisations (or lack thereof) of force by the Security Council to restore the peace has by any means been without problems and has always served to uphold the CSC nexus at the heart of the UN Charter, and hence the foundation ideology of collective security. Rather, it is simply to highlight that conferring on the General Assembly the right legally to authorise the use of force might, in fact, simply make the CSC solution even more difficult to implement.

proportionate and limited to the objectives established by the Security Council', while making no reference to a role for the Assembly.[97] Further Brazilian statements at UN forums have, likewise, not made explicit references to the possibility of military force being authorised by the General Assembly, albeit such statements have varied in their ambiguity with relation to precisely which UN body can, and should, in Brazil's view, authorise the use of armed force. Former President Dilma Rousseff, for instance, unambiguously stated in September 2012, less than one year after RwP was presented at the Security Council, that '[t]he use of force without authorization by the Council is illegal, yet it is beginning to be regarded in some quarters as an acceptable option. This is by no means the case'.[98] Contrastingly, Ambassador Patriota suggested rather vaguely in September 2015 that 'an authorisation [to use coercive measures] by the UN remains essential', albeit he did later highlight the role of the Security Council in legitimising the use of force.[99]

In subsequent statements, therefore Brazil seems to have largely reinforced the existing logical nexus of the CSC at the heart of the UN Charter, albeit it is also true that this has almost always been expressed alongside calls for Security Council reform and democratisation. According to Brazil, a democratisation of the membership of the Security Council, both permanent and non-permanent and with Brazil as well as other developing countries becoming new members, would serve to enhance not only the legitimacy of the Security Council's decisions but also the effectiveness of the UN regime. As former Brazilian President Dilma Rousseff noted during the same speech in which RwP was first proposed:

> With each passing year, it becomes more urgent to solve the Council's lack of representativeness, *which undermines its credibility and effectiveness.* [...] We can delay no longer [the debate of Security Council reform] […] The world needs a Security Council that reflects contemporary realities; a Council that brings new permanent and non-permanent members, especially developing countries.[100]

Former Minister of External Relations, Celso Amorim, similarly expressed in 2005 that '[i]t is not reasonable to expect that the Council can continue to expand its agenda and responsibilities

[97] RwP Concept Note, para. 11(f).
[98] Dilma Rousseff, "Statement by the President of the Federative Republic of Brazil at the Opening of the 67th Session of the United Nations General Assembly," New York, 25 September 2012. http://www.itamaraty.gov.br/speeches-articles-and-interviews/president-of-the-federative-republic-of-brazil-speeches/4690-statement-by-h-e-dilma-rousseff-president-of-the-federative-republic-of-brazil-at-the-opening-of-the-general-debate-of-the-67th-session-of-the-united-nations-general-assembly?lang=en.
[99] Antonio de Aguiar Patriota, "Statement by the Permanent Representative of Brazil to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on a Vital and Enduring Commitment: Implementing the Responsibility to Protect," New York, 8 September 2015. http://www.responsibilitytoprotect.org/brazil(1).pdf.
[100] Dilma Rousseff, "Statement by the President of the Federative Republic of Brazil at the Opening of the 66th Session of the United Nations General Assembly," New York, 21 September 2011. https://gadebate.un.org/sites/default/files/gastatements/66/BR_en_0.pdf.

without addressing its democracy deficit'.[101] In 2012 Rousseff further stressed the need for inclusiveness in the Security Council by making a clear link between Security Council reform, the legitimacy of its decisions, and the effectiveness of the United Nations as a whole and stating that any use of force in international relations is 'necessarily [a] collective effort, which presupposes the quest for consensus'.[102] Brazil therefore calls for Security Council reform by drawing on the foundation ideology of collective security and suggesting that a democratisation of the Council would – given current changes in the global distribution of power, follow more logically from the foundation ideology of collective security to the issue of preventing war and therefore serve to tighten the logical nexus of the CSC at the heart of the UN Charter.

5.4 Summary of analysis and concluding remarks

This chapter has sought to situate the 'Responsibility while Protecting' proposal by Brazil in relation both to the CSC of R2P and that at the heart of the UN Charter. By doing so, it has attempted to assess the potential implications of the ideas proposed by Brazil for the UN Charter regime and, as such, concludes Part Three of this dissertation. Three primary conclusions have emerged from this analysis.

The first is that, through the RwP initiative, Brazil does not seem to question the foundation ideology of collective responsibility. However, Brazil does seem to challenge the issue-ideology-solution nexus in the CSC of R2P by directly questioning whether a CSC solution underpinned by the principle of collective responsibility could ever logically include the use of coercive force. As seen from an ILI theory vantage point, therefore, it seems that Brazil's RwP initiative did contain ideational elements that, if accepted, would serve to challenge and replace the solution in the CSC of R2P – that is, the R2P norm itself, and would hence modify the overall cognitive framework embedded in the 2005 WSOD.[103] In this sense, then, Brazil could be considered a revisionist country in relation to R2P.

This is particularly interesting when considered in light of the existing literature on RwP, which has by and large maintained that Brazil has upheld and not sought to challenge R2P. Stuenkel

[101] Celso Amorim, "Statement by the Minister of External Relations of the Federative Republic of Brazil at the Opening of the 60th Session of the United Nations General Assembly," New York, 17 September 2005. http://www.un.org/webcast/ga/60/statements/bra050917eng.pdf.
[102] Dilma Rousseff, "Statement by the President of the Federative Republic of Brazil at the Opening of the 67th Session of the United Nations General Assembly," New York, 25 September 2012. http://www.itamaraty.gov.br/speeches-articles-and-interviews/president-of-the-federative-republic-of-brazil-speeches/4690-statement-by-h-e-dilma-rousseff-president-of-the-federative-republic-of-brazil-at-the-opening-of-the-general-debate-of-the-67th-session-of-the-united-nations-general-assembly?lang=en.
[103] A notable exception as far as analyses of RwP go, is the assessment by Andrew Garwood-Gowers that RwP was in fact an attempt to 're-frame R2P's third pillar in more constrained terms.' Garwood-Gowers, "R2P Ten Years after the World Summit," 301–302.

has, for example, suggested that while Brazil's RwP Concept Note was seen by some as 'obstructionist', it served rather to sustain R2P as a global norm.[104] '[A]ll emerging powers', including Brazil, Stuenkel has noted, 'supported the concept of R2P at the UN World Summit in 2005 and most times since then – in fact, emerging powers have supported R2P far more than not in the UNSC.'[105] Prawde has similarly maintained that RwP was not an attempt by Brazil to challenge the R2P framework already in place, but rather merely an attempt 'to clarify it' and 'sharpen the debate' on R2P.[106] Tourinho, Stuenkel, and Brockmeier have contended that RwP served to 'facilitate a discussion on the most controversial aspects of R2P.'[107] Kenkel has further noted that RwP was proposed as a 'complement, rather than a substitute, for R2P itself.'[108]

A possible reason for this discrepancy might be that what the scholars mentioned above are in fact suggesting is that Brazil was not challenging the philosophical underpinning of R2P – that is, the foundation ideology of collective responsibility that the international community of states does have a positive responsibility to protect populations from egregious human rights violations. Were that to be the case, then, their assessment would seem to be in line with our analysis above. This nonetheless highlights a shortcoming of the existing R2P and RwP literature namely that there is often little, if any, differentiation between the various ideational elements that are associated with an emerging normative proposition; indeed, scholars have referred to R2P, for example, as a principle,[109] norm,[110] or a doctrine,[111] while often failing to discern between these various ideational elements and their functions in processes of socio-political cooperation.

A tangible, real-world, effect of this has been that, as an international lawyer has put it, 'it is far from clear what exactly a state means when it endorses "the" responsibility to protect.'[112] From an ILI theory vantage point, however, not only can we see that Brazil was in fact challenging the issue-ideology-solution cognitive package of R2P, by proposing that the use of force could not follow logically from an application of the principle of collective responsibility to the issue of responding to gross violations of human rights, but we are also able to locate with a certain degree of precision that this challenge was directed primarily at the CSC solution, that is the R2P norm

[104] Stuenkel, "Brazil and Responsibility to Protect," 375–390.
[105] Stuenkel, "Brazil and Responsibility to Protect," 380.
[106] Prawde, "Brazil's Responsibility while Protecting," 202–203.
[107] Tourinho, Stuenkel, and Brockmeier, "Reforming R2P Implementation," 140.
[108] Kai Kenkel, "Brazil and the Responsibility to Protect," *AP R2P Brief* 5, no. 1 (2015): 5.
[109] See, e.g., Edward C. Luck, "Sovereignty, Choice, and the Responsibility to Protect," *Global Responsibility to Protect* 1 (2009): 10–21.
[110] See, e.g., Jutta Brunnée and Stephen Toope, "Norms, Institutions and UN Reform: The Responsibility to Protect," *Journal of International Law and International Relations* 2, no. 1 (2005-2006): 121–139.
[111] See, e.g., Rebecca J. Hamilton, "The Responsibility to Protect: From Document to Doctrine – But What of Implementation?," *Harvard Human Rights Journal* 19, (2006): 289–297; Fiammetta Borgia, "The Responsibility to Protect Doctrine: Between Criticisms and Inconsistencies," *Journal on the Use of Force and International Law* 2, no. 2 (2015): 223–237.
[112] Payandeh, "R2P and International Lawmaking," 481.

itself. This determination also has value in an assessment of the potential impact of Brazil's initiative for the CSC of R2P for Brazil is not outright rejecting the foundation ideology of collective responsibility, which would pose a much greater challenge to the CSC of R2P than a challenge to the solution.

The second conclusion that can be drawn from this analysis above is that while in some important respects the ideas proposed by Brazil were more protective of the CSC at the heart of the UN Charter than the R2P concept as formulated both in the 2005 WSOD, such as proposing a distinction between collective security and collective responsibility, at the same time some elements of the RwP proposal would serve slightly to modify the CSC at the heart of the UN Charter. Because the UN Charter 'more than any other document, encapsulates and articulates the agreed consensus on the prevailing norms that give structure and meaning to the foundations of world order',[113] were the ideas embedded in the RwP Concept Note to be accepted by the international community of states or, even, to form the basis for further discussions on R2P, it could have been expected to lead to corresponding changes in the political dynamics relating to the use of force:

This is a different assessment than that found in common accounts of RwP and of Brazil's engagement with debates on R2P and the use of force, which hold that the proposal 'contained no revisionist elements'.[114] This begs the question as to why such a disparity exists. One explanation might be that, much like the scholarship on emerging powers in general, current accounts of RwP have not considered the proposal as it relates to the already-existing normative and legal framework within which the proposal emerged, which we have identified to have been that established by the UN Charter. Even where RwP has been considered in relation to the UN Charter, the debate has, like in the case of R2P, generally been framed as one of sovereignty, which on the basis of the CSC analysis undertaken in the previous chapter of this dissertation did not even figure in the CSC embedded in the UN Charter. This means that common accounts of RwP have therefore generally either downplayed the extent to which the specific legal provisions in the UN Charter have been integral to the liberal international order or have misrepresented the precise point of intersection between the RwP proposal and the legal framework established by the UN Charter, meaning that conclusions drawn about the nature and potential impacts of RwP have been at best incomplete.

A third conclusion is that, while Brazil is choosing to work within the United Nations, as predicted by liberal and neoliberal institutionalist scholars, certain aspects of the RwP initiative nonetheless

[113] Thakur and Weiss, "R2P: From Idea to Norm," 42.
[114] Stuenkel, "Brazil and Responsibility to Protect," 9.

would, if accepted, serve to modify, even if slightly, the CSC at the core of the UN Charter. This suggests that the choice of a rising power to work within existing international institutions is not of itself an indication of a status quo disposition by that state nor is it indicative that the liberal international order will emerge unscathed. In the case of the UN Charter, however, a modification to the structure of power relations of which the treaty is an integral part is virtually, though not formally, precluded by the amendment provisions of Article 108, which afford the permanent members of the Security Council veto power over any amendment to the treaty. It seems, then, that the precise legal detail embedded within the system of international law does matter in the course of the rise of new powers and international power transitions.

PART IV

CONCLUSIONS

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6.

Conclusions

For, whether the cognitive structure is used as a means of changing political relationships or whether the cognitive structure changes as a reflection of changes initiated via other forms of power, it is ideas that function as the mechanism of change within the treaty regime.[885]

6.1 Reviewing the goals of the thesis

This dissertation was based on the premise that the nature of a rising power's engagement with international law could serve as a useful indicator of the potential impacts of their rise for the existing liberal international order. The system of international law has been central to the very operating logic of the liberal international order. This significant point holds more than simple theoretical value; because the existing 'political order is dependent on the law […] the changes that take place in international law will constitute the basis of this new world order.'[886] From this perspective, studies on rising powers have, however, paid inadequate attention to the nature of their engagement with international law, certainly in a manner that pays attention to the specific detail of the law.

The primary goal of this dissertation was therefore to begin to fill this gap by using the case of Brazil. The dissertation has drawn on the Theory of International Law as Ideology (ILI theory) as developed by Shirley Scott. Chapter 1 established the suitability of ILI theory for it allows for an analysis of international law that is able to account for the centrality of international law to the existing system of international politics, that reconciles international law to power, and that is political in nature whilst at the same time being attentive to specific legal detail.

Two foreign policy initiatives were chosen for analysis, namely the *United States – Subsidies on Upland Cotton* (*US – Cotton Subsidies*) case successfully litigated by Brazil against the United States in the WTO and the 'Responsibility while Protecting' (RwP) initiative presented to the UN Security Council in the aftermath of the military intervention in Libya. The justification for the selection of foreign policy initiatives rested on one primary factor: if the primary task undertaken

[885] Shirley V. Scott, *The Political Interpretation of Multilateral Treaties* (Leiden: Martinus Nijhoff, 2004), 221.
[886] Muthucumaraswamy Sornarajah, "The Role of the BRICS in International Law in a Multipolar World," in *The Rise of the BRICS in Global Political Economy*, eds. Vai Io Lo & Mary E. Hiscock (Cheltenham: Edward Elgar, 2014), 291.

in this dissertation was to draw potential conclusions regarding the likely impact of Brazil as a rising power on the liberal international order through an analysis of the country's engagement with international law, it would be necessary to select for analysis foreign policy initiatives that are related to treaty regimes of central importance to the existing international order and that had the potential to impact those regimes. This is a requirement that both the *US – Cotton Subsidies* dispute and the RwP initiative meet precisely.

Both of the initiatives emerged within multilateral treaty regimes that are key pillars underpinning the existing international order.[887] The Charter of the United Nations (UN Charter), within which the RwP initiative emerged, is generally understood to have, perhaps more than any other multilateral treaty, laid the foundations for the liberal international order[888] and it is indeed commonly perceived to function as a constitution for the international community.[889] Similarly, the World Trade Organisation (WTO) is the primary body governing the conduct of international trade and its founding treaty, the Marrakesh Agreement Establishing the WTO (WTO Agreement), is perceived to operate as a trade constitution for the international community.[890]

Furthermore, these initiatives were among the most significant in the history of Brazil's foreign relations and have served as vehicles by which Brazil asserted itself as a leader of the Third World in existing institutions of global governance. The RwP initiative was heralded not only as one of Brazil's most notable foreign policy initiatives,[891] representing the 'culmination' of Brazil's contribution to debates regarding intervention and human protection,[892] but also as the most significant recent contribution to the development of the Responsibility to Protect (R2P).[893] Similarly, the *US – Cotton Subsidies* dispute, successfully litigated by Brazil, has been one of the longest, most contentious, and politically-charged to date in WTO dispute settlement and was central to Brazil's establishment as a more assertive power in the WTO.[894]

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[887] See, e.g., Scott, "The Problem of Unequal Treaties."
[888] Ramesh Thakur and Thomas Weiss, "R2P: From Idea to Norm–And Action," *Global Responsibility to Protect* 1, no. 1 (2009): 42.
[889] See, e.g., Bardo Fassbender, "The United Nations Charter as a Constitution of the International Community," *Columbia Journal of Transnational Law* 36, (1998): 529–619.
[890] Renato Ruggiero, former WTO Director-General, cited in Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford: Stanford University Press, 2016), 15.
[891] See, e.g., Oliver Stuenkel, "Brazil and Responsibility to Protect: A Case of Agency and Norm Entrepreneurship in the Global South," *International Relations* 30, no. 3 (2016): 384.
[892] Kai M. Kenkel and Cristina G. Stefan, "Brazil and the Responsibility while Protecting Initiative: Norms and the Timing of Diplomatic Support," *Global Governance* 22, no. 1 (2016): 42.
[893] Derek McDougall, "Responsibility while Protecting: Brazil's Proposal for Modifying the Responsibility to Protect," *Global Responsibility to Protect* 6, no.1 (2014): 64.
[894] Karen Halverson Cross, "King Cotton, Developing Countries and the 'Peace Clause': The WTO's *US Cotton Subsidies* Decision," *Journal of International Economic Law* 9, no. 1 (2006): 154.

Three steps were undertaken to analyse each foreign policy initiative. The first step consisted of conceptualising the WTO regime and the UN regime in terms of the Cognitive Structure of Cooperation (CSC) embedded at the heart of their constitutive treaties – the WTO Agreement in the case of the former and the UN Charter in the case of the latter. This was done so as to discern the various ideational elements embedded within each treaty and, in turn, to situate those elements, and hence the treaty itself, in relation to the broader structure of power relations of which each treaty regime forms the backbone. The task of discerning the CSC at the heart of the multilateral treaty was conducted on the basis of the treaty interpretation guidelines devised by Scott in *The Political Interpretation of Multilateral Treaties*, in particular, the section of the volume called 'Guidelines for Identifying the CSC Embedded in a Multilateral Treaty'.[895] This step relied on both primary and secondary sources, the point of departure having been the treaty that established each regime.

The second, intermediary, step of the *US – Cotton Subsidies* analysis involved conceptualising the Agreement on Agriculture in terms of the CSC embedded within it, and R2P in terms of the CSC to which it relates, in the case of the RwP initiative. These were then analysed in relation to the CSCs identified in the previous step. This second step was necessary so as to gain a proper understanding of each initiative in relation to the relevant treaty regimes, albeit for slightly different reasons in each case. As regards the *US – Cotton Subsidies* dispute, analysing the Agreement on Agriculture was necessary insofar as it was the primary legal document upon which Brazil's case rested and, therefore, Brazil's impact on the WTO regime by means of this initiative would have taken place primarily via the Agreement on Agriculture, and so needs to be understood in relation to that Agreement. In the case of the RwP proposal, we undertook an analysis of the CSC to which R2P is integral because Brazil's RwP Concept Note was a direct response to the Libyan intervention undertaken arguably under the auspices of R2P; as a consequence, the impact of Brazil on the UN Charter regime by means of its RwP initiative would need to be assessed primarily in relation to R2P.

The third and final step in this analysis consisted of situating each Brazilian initiative in relation to the existing CSC structures identified in the first and second steps above in order to assess whether the initiatives served to uphold the CSC at the core of the multilateral treaty regimes in question, further strengthen it, or undermine it. The central premise of ILI theory guiding this analysis was that at the core of every treaty regime there is a principle or small set of inter-related principles, referred to as an ideology to denote its role in sustaining a structure of power relations, that needs to be upheld through state discourse in relation to the issue in question if the regime is to remain strong. The principles are upheld through discourse assuming them to be true, so long

[895] Scott, *The Political Interpretation of Multilateral Treaties*, 111–117.

as the discrepancy between the principle and reality is not highlighted through actions of the state. Analysis of the potential implications of each initiative for the multilateral treaty regime within which it emerged was facilitated by the fact that both initiatives chosen were presented by Brazil as collections of ideas expressed primarily, though not solely, in written text and were thus able to be neatly situated in relation to each multilateral treaty in question.

In seeking to answer our primary question, we worked on the basis that, as postulated by ILI theory, not all CSC elements are of equal significance within the CSC structure and, as such, of most impact was likely to be rhetoric that related directly to the foundation ideology as the philosophical premise underpinning the CSC, justifying and lending coherence to the entire treaty regime. Given that the other CSC elements are expected to follow from and thus be in a logical relationship with the foundation ideology, discourse that had bearing on those elements, particularly the solution, was also expected to have an indirect impact on the ideology underpinning the CSC. Discourse relating to the behaviour of states in relation to international law *per se*, was analysed in terms of its relationship to the ideology of international law. This was relevant mostly in relation to the *US – Cotton Subsidies* dispute insofar as not only was the dispute premised on the ideology of international law, but Brazil's primary claims related to an apparent discrepancy between the behaviour of the United States and international law. Legalised third party dispute resolution in itself embodies principles of the foundation ideology, in particular the principle that it is possible to apply international law objectively so as to settle a dispute between states.

A note on the scope of the findings of this dissertation is in order here. It was noted above that our primary goal was to use the case of Brazil to assess what the engagement of a rising power with international law can tell us about the potential implications of its rise for the international order. The fact that we chose two Brazilian foreign policy initiatives as examples through which to analyse the country's engagement with international law has meant that the scope of the findings presented below is necessarily limited to that of the specific initiatives analysed and in relation to the regimes within which these initiatives emerged. In the case of the *US – Cotton Subsidies* dispute, we were only able to draw conclusions about the dispute in relation to the WTO regime, whereas in the case of the RwP initiative we were only able to draw conclusions about potential impacts on the UN Charter regime. Nonetheless, those initiatives analysed were chosen on the basis of their having emerged within multilateral treaty regimes of such a centrality to the liberal international order that impact on those regimes would likely lead to impact on the international order.

6.2 Findings regarding Brazil's engagement with international law

The analysis undertaken in this dissertation has allowed us to draw several conclusions about Brazil as a rising power. Most basically, Brazil has demonstrated diplomatic initiative by bringing the *US – Cotton Subsidies* dispute in 2002 through the dispute settlement mechanism (DSM) of the WTO as well as proposing the RwP Concept Note in 2011. This seems to confirm the position taken by norms scholars that as new powers rise their tendency will be to become norm shapers and not simply accept the imposition of norms by developed countries.[896] The second observation is that, although both initiatives were the result of a high level of proactivity by Brazil, the *US – Cotton Subsidies* dispute was of much greater moment than the RwP proposal. Reasons for this may include the fact that R2P itself has, arguably, not become very significant in international relations[897] – and certainly not in international law,[898] and, insofar as RwP was proposed in direct relation to R2P, its value would inevitably have been tied to that of R2P. A second factor might be that it is not always readily apparent on the basis of the RwP Concept Note alone how the ideational elements of the RwP initiative related to the CSC of the R2P and the CSC at the heart of the UN Charter. Although we were able to identify the points of intersection through further analysis of Brazil's rhetoric in relation to R2P and RwP, this was likely a point that weakened the initiative; indeed, ILI theory hypothesises that a new normative proposition will have most impact where it is related to a discernible issue-ideology-solution ideational package.[899] Where this is not the case or where it is not clear whether this is the case, then it would be possible to suggest that the impact of a new normative proposal is likely not to be significant or at least limited.

This suggests in turn that being a 'norm shaper'[900] and demonstrating initiative does not in and of itself guarantee that a norm will be impactful, but rather that the precise contents of the normative proposition and their precise relationship with existing normative frameworks is an important factor affecting the success (or lack thereof) of a new normative proposition. This insight on the lack of success of RwP differs from most conventional accounts of the initiative, which by and

[896] See, e.g., Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta, and Bruce Jones, "A Hesitant Rule Shaper?," in *Shaping the Emerging World: India and the Multilateral Order,* eds. Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta, and Bruce Jones (Washington, DC: Brookings Institution, 2013), 3–21; Kai M. Kenkel and Marcelle T. Martins, "Emerging Powers and the Notion of International Responsibility: Moral Duty or Shifting Goalpost?," *Brazilian Political Science Review* 10, no. 1 (20160: 1–27; Mathilde Chatin, "Brazil: Analysis of a Rising Soft Power," *Journal of Political Power* 9, no. 3 (2016): 369–393; Marco Vieira, "Rising States and Distributive Justice: Reforming the International Order in the Twenty-First Century," *Global Society* 26, no. 3 (2012): 311–329; Stuenkel, "Brazil and Responsibility to Protect," 375–390.
[897] Aidan Hehir, "The Responsibility to Protect: 'Sound of Fury Signifying Nothing'?," *International Relations* 24, no. 2 (2010): 218–239.
[898] Shirley V. Scott and Roberta C. Andrade, "Sovereignty as Normative Decoy in the R2P Challenge to the Charter of the United Nations," *Global Responsibility to Protect* 11, no. 2 (2019): 198–225.
[899] Scott and Andrade, "Sovereignty as Normative Decoy," 208.
[900] Cristina G. Stefan, "On Non-Western Norm Shapers: Brazil and the Responsibility while Protecting," *European Journal of International Security* 2, no. 1 (2016): 88–110.

large attribute the lack of success of the initiative to the fact that the Brazilian Government itself withdrew support for RwP.[901] It is true that in order to be successful a new normative proposition likely needs institutional backing. Yet, unless such backing were to lead to greater ideational coherence between the elements articulated in the RwP initiative itself, and to greater clarity as to how these elements relate to the existing cognitive structure at the heart of the UN Charter, RwP would still be likely to have only limited real-world impact.

Whether rising powers will choose to work within existing institutions has generally been assumed in some of the literature as indicative of acceptance by these countries of the existing international order and not of a desire to change or supplant it.[902] Undertaking an analysis of Brazil's initiatives through the lens of an ILI theorisation has, however, enabled us to go beyond what has so far been taken at face value. Participation in an organisation in and of itself tells us little about whether the actions of a rising state will serve to uphold or undermine the existing normative and power structures that characterise and give structure to the international order. What this analysis has shown is that more important seems to be the engagement of these states with certain specific legal provisions that underpin the founding treaties of these organisations, for it is the specific legal detail of a treaty that serves to uphold and legitimise the power dynamics integral to that organisation.

It is noteworthy that, in relation to both initiatives, Brazil can be considered to have been simultaneously a status quo and a revisionist power and in the *US – Cotton Subsidies* case, where it was possible to draw a direct link between the way Brazil couched its position and the fact that it was successful, we can see that the preferences and intentions of a rising power are not in and of themselves enough to determine whether the initiative will succeed. It is not that the elements of each Brazilian initiative were changed, but rather that they are interpreted in relation to already existing cognitive structures embedded in cornerstone multilateral treaty regimes and that those

[901] See, e.g., Kai Michael Kenkel and Cristina G. Stefan, "Brazil and the Responsibility While Protecting Initiative: Norms and the Timing of Diplomatic Support," *Global Governance* 22, no. 1 (2016): 41–58; Thorsten Benner, "Brazil as a Norm Entrepreneur: The 'Responsibility While Protecting' Initiative," (working paper, Global Public Policy Institute Berlin, March 2013): 1–11; Derek McDougall, "Responsibility while Protecting: Brazil's Proposal for Modifying the Responsibility to Protect," *Global Responsibility to Protect* 6, no.1 (2014): 64–87.

[902] See, e.g., See, Susanne Gratius, "The International Arena and Emerging Powers: Stabilising or Destabilising Forces?" (working paper, Peace and Security Programme, FRIDE, 2008), https://www.researchgate.net/profile/Susanne_Gratius/publication/228386802_The_international_arena_and_emerging_powers_stabilising_or_destabilising_forces/links/0046352e109be610dd000000/The-international-arena-and-emerging-powers-stabilising-or-destabilising-forces.pdf; G. John Ikenberry, "The Future of the Liberal World Order," *Foreign Affairs* 90, no. 3 (2011): 56–62; Miles Kahler, "Rising Powers and Global Governance: Negotiating Change in a Resilient Status Quo," *International Affairs* 89, no. 3 (2013): 711–729.

regimes themselves were interpreted in a broader perspective – that is, in relation to the structure of power relations to which they are integral.

6.2.1 Findings regarding Brazil's engagement with international law through the *US – Cotton Subsidies* dispute

The analysis undertaken in this dissertation represented the first time that the *US – Cotton Subsidies* dispute was analysed in any systematic way in the context of the rising powers debate. Much of the existing literature on rising powers in the WTO assumes that Brazil is generally seeking to supplant trade liberalisation rules as are other rising powers.[903] Perhaps the primary finding of this analysis, then, is that, contrary to what has been so far assumed to be the case, Brazil throughout the dispute strongly upheld the ideology of free trade. It did so most clearly by communicating and building its complaint against the United States in a way that assumed the foundation ideology and the CSC myth to be true. By demonstrating the discrepancy between the actions of the United States and the foundation ideology, Brazil further forced change in US policies in a way that would ensure the continuing reinforcement of the ideology. Because it is the foundation ideology that lends coherence and justifies the entire CSC structure, Brazil's position throughout the dispute would thus make it a status-quo power for it reinforced the philosophical underpinning of the regime.

This was also the case with regard to export credit guarantees. Brazil upheld the foundation ideology of free trade more strongly than the US. By adopting an interpretation of rules on agricultural export credit guarantees that would uphold the CSC solution in the Agreement on Agriculture, Brazil reinforced the logical nexus of the CSC within that Agreement and it did so in a way that did not highlight the discrepancy between the foundation ideology and reality. The United States, on the other hand, can be understood in ILI terms as having attempted to justify its position in a way that portrayed the original CSC solution operationalised by the GATT as a logical embodiment of an application of the foundation ideology to the original CSC issue, but did so in a way that effectively highlighted the discrepancy between the ideology and reality. That Brazil by and large reinforced the foundation ideology of free trade and the CSC myth throughout the dispute, while an established power such as the United States did not, seems to confirm Kristen Hopewell's contention that, in the WTO, rising powers have largely 'embraced the WTO's discourse of free trade and liberalisation and its tools for opening markets […] [and] have become

[903] This has been a primary criticism made by Kristen Hopewell about the literature on rising powers in the WTO. See, Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford: Stanford University Press, 2016), 12ff.

some of its strongest champions, frequently extolling the virtues of free trade', at times more so than established powers themselves.[904]

A second conclusion is that it was not always clear throughout the dispute whether Brazil expressed the foundation ideology of free trade as being more important than that of development. This was clearest in relation to its interpretation of serious prejudice and significant price suppression provisions in the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) – that is, that there may exist a different threshold for determining serious prejudice in relation to developed and developing countries. It is true that neither the Panel nor the Appellate Body upheld Brazil's interpretation of serious prejudice, but, were it to have been accepted, it seems that such an interpretation would have resulted in a modification of the CSC at the heart of the WTO Agreement in a way that would have given greater advantage to developing and least-developed countries in relation to their developed counterparts within the WTO. In this sense, then, Brazil could be considered revisionist in relation to the WTO regime, both in ideational as well as in power terms. Insofar as this is the case, it would seem that, through the *US – Cotton Subsidies* dispute, Brazil was at the same time, albeit in relation to different aspects of the case, reinforcing and weakening the CSC at the heart of the WTO Agreement. This would curiously allow us to characterise Brazil as being simultaneously a revisionist and a status-quo power vis-à-vis the multilateral trade regime at the heart of which lies the WTO.

A third conclusion is that whereas the literature on the *US – Cotton Subsidies* dispute has generally taken the Panel and Appellate Body rulings as a victory for Brazil and other developing and least-developed countries as well as for the WTO system in terms of greater trade liberalisation, analysing the dispute through the lens of ILI theory has given us a different insight into the implications of the dispute. By placing a multilateral treaty in a broader, political perspective, this analysis has shown that judgements of legality, even if serving to uphold the philosophy of a treaty regime, are hardly the end of the story; because a multilateral treaty – and the specific legal detail embedded therein – is integral to a structure of power relations, changes to, or even simple clarifications of, the rules embedded within the treaty that might lead to or be perceived to shift the rights and obligations of states pursuant to that treaty can be expected to have significant implications for the political dynamics within that treaty regime.

In this case, a clarification of certain provisions in the Agreement on Agriculture by the Panel and the Appellate Body, even though in a way that served to tighten the logical nexus of the CSC at the heart of the Agriculture Agreement and thus to strengthen the foundation ideology, ultimately contributed to the dissatisfaction of the US with WTO dispute settlement. That the United States

[904] Hopewell, *Breaking the WTO*, 16-17.

is one of the most powerful CSC members has had significant implications for the very functioning of the WTO and, therefore, the overall effectiveness of the regime. Having analysed the WTO regime through the lens of ILI theory, we were able to determine the importance for the overall ideational coherence of the multilateral trade regime of the WTO dispute settlement system serving to reinforce the process of mutually advantageous and reciprocal multilateral negotiations as the primary means by which trade liberalisation is to be undertaken. This, in turn, allowed us to identify the normative foundation to US dissatisfaction; that, as perceived by the US, the solution in the sub-CSC embedded in the WTO Agreement is not in fact serving to reinforce the original CSC solution operationalised by the GATT as the logical result of an application of the foundation ideology to the issue of mutual concern. So long as the process of creating new trade rules is stalled and as existing rules remain highly ambiguous, the possibility remains of dispute settlement moving ahead of what states are prepared to accept in multilateral negotiations.

6.2.2 Findings regarding Brazil's engagement with international law through the RwP initiative

Existing literature on RwP assumes that the initiative would not serve to undermine or supplant R2P but rather to reinforce it.[905] The analysis undertaken in terms of ILI theory has found that, on the contrary, if accepted, Brazil's RwP proposal would in fact serve to modify the R2P concept. Insofar as that is the case, Brazil would be considered a revisionist rising power in relation to R2P. The existing literature on RwP would seem inadequate insofar as it does not distinguish clearly between the different ideational elements to which a new normative proposition may relate – indeed, R2P has been referred to variously as a principle,[906] norm,[907] or a doctrine.[908]

Understanding that Brazil is in fact challenging the CSC of R2P at the level of the solution – that is, whether it follows logically from an application of the foundation ideology to the issue of mutual concern, but not the foundation ideology itself, allows us to conclude that Brazil is

[905] See, e.g., Stuenkel, "Brazil and Responsibility to Protect," 375–390; Alyse Prawde, "The Contribution of Brazil's Responsibility while Protecting Proposal to the Responsibility to Protect Doctrine," *Maryland Journal of International Law* 29 (2014): 184–209; Marcos Tourinho, Oliver Stuenkel, and Sarah Brockmeier "'Responsibility while Protecting: Reforming R2P Implementation," *Global Society* 30, no. 1 (2016): 134–150; Kai M. Kenkel "Brazil and the Responsibility to Protect," *AP R2P Brief* 5, no. 1 (2015): 1–11.

[906] See, e.g., Edward C. Luck, "Sovereignty, Choice, and the Responsibility to Protect," *Global Responsibility to Protect* 1 (2009): 10–21.

[907] See, e.g., Jutta Brunnée and Stephen Toope, "Norms, Institutions and UN Reform: The Responsibility to Protect," *Journal of International Law and International Relations* 2, no. 1 (2005-2006): 121–139.

[908] See, e.g., Rebecca J. Hamilton, "The Responsibility to Protect: From Document to Doctrine – But What of Implementation?," *Harvard Human Rights Journal* 19, (2006): 289–297; Fiammetta Borgia, "The Responsibility to Protect Doctrine: Between Criticisms and Inconsistencies," *Journal on the Use of Force and International Law* 2, no. 2 (2015): 223–237.

revisionist insofar as it is seeking to slightly revise the R2P issue-ideology-solution package embedded in the 2005 World Summit Outcome Document (WSOD). At the same time, it is not a strongly revisionist rising power insofar as it is not altogether rejecting the philosophical premise that it is a collective responsibility of the international community to respond to egregious human rights violations. It is, however, questionable whether what was in ILI terms interpreted as a proposed new solution in the CSC of R2P would in fact serve to reinforce the foundation ideology of collective responsibility throughout the life of this CSC.

We were also able to see that, by arguing that a solution in the CSC of R2P that includes coercive force could not logically follow from an application of the foundation ideology of collective responsibility to the CSC issue, Brazil reinforced and protected the CSC at the heart of the UN Charter. This was found to be the case because, insofar as R2P remains without a clear legal definition, the threat remains of it leading to a slippery slope towards the replacement of the CSC at the heart of the UN Charter with the CSC of R2P – and, thus, of a third exception to the use of force being explicitly legalised. We were able to interpret, therefore, that the RwP Concept Note proposes a clearer definition of the issue-ideology-solution package of R2P that is of greater compatibility with the UN Charter. In doing so, Brazil also upholds the logical nexus between the elements of the CSC at the heart of the UN Charter for it highlights that any use of force can only be authorised by the Security Council where a threat to international peace and security is identified, thus strengthening the collective use of force as a logical response to the issue of how to maintain the peace and avoid a third world war.

Assessing the RwP initiative through the lens of ILI theory has also enabled us to conclude that the proposal, were it to be accepted, would also lead to a modification, albeit slight, to the CSC at the heart of the UN Charter. In the case of Brazil's broad interpretation of the role of the UN General Assembly in sanctioning the use of coercive force pursuant to the Uniting for Peace Resolution, it would likely lead to a flattening of the structure of power relations to which the UN Charter is integral. While we found that this proposal would follow, if anything, more logically from an application of the ideology of collective security to the issue of how to maintain the peace and avoid a third world war, thus reinforcing the ideology, we were also able to establish that this would likely be difficult to be operationalised in practice, with potential implications for the UN Charter regime. It is true that Brazil later changed its position and strictly upheld force authorised by the Security Council as the logical result of an application of the foundation ideology to the CSC issue. In doing so, however, Brazil also called for Security Council reform in a way that portrayed a democratisation of the Council as strengthening the logical nexus of the CSC. Furthermore, we were also able to determine that Brazil's proposal for stricter criteria would serve slightly to modify the CSC solution at the heart of the UN Charter but in a way that would

potentially undermine the foundation ideology – for collective security assumes an immediate response to stop an aggressor, and that might again lead to a loss of regime effectiveness.

Our analysis, therefore, indicates that Brazil is once again functioning simultaneously as both a revisionist and a status quo rising power. This is a different assessment than that found in existing accounts of RwP and of Brazil's engagement with debates on R2P and the use of force, which hold that the RwP proposal 'contained no revisionist elements',[909] and in Brazil's own perspective of its position in the international order as a strict supporter of the principles of the UN Charter. This begs the question as to why such a difference exists. One likely explanation may be that, much like the scholarship on emerging powers in general, current accounts of RwP have not systematically considered the proposal as it relates to the already-existing normative and legal framework. Even where RwP has been considered in relation to the UN Charter, the debate has, as in the case of R2P, generally been framed as one of sovereignty, which on the basis of the CSC analysis undertaken in Chapter 4 of this dissertation did not figure in the CSC at the heart of the UN Charter.

This suggests that existing accounts of RwP have generally underplayed the extent to which, or at least misrepresented how, the specific legal provisions in the UN Charter have been integral to the international order and invites us to be more precise about what exactly it is that rising powers are seeking to uphold and revise and about the precise place of these different ideational elements within existing structures of global governance and within the international order. It further suggests that the terms 'status quo' and 'revisionist' may not be of very much analytical value in explaining and distinguishing amongst the approaches adopted by rising powers.

6.3 Findings in relation to the WTO regime

While the primary focus of the dissertation was Brazil, an application of ILI theory has provided insights in relation to the WTO regime itself. A CSC interpretation of the GATT and the WTO Agreements has yielded a more nuanced, and perhaps slightly different, understanding of the emergence of the multilateral trading system than the existing literature on the issue. In ILI terms the analysis has clarified that the CSC underpinning and defining the multilateral trade regime was that embedded in the 1948 Havana Charter Establishing an International Trade Organisation (ITO Charter). This suggests that the GATT can best be understood as having been part of that CSC, as opposed to having embedded the CSC proper, insofar as its purpose was primarily to embody an advanced instalment of the solution agreed to as part of the broader multilateral trade regulation CSC. This means that, whereas scholars and trade practitioners often refer to a

[909] Stuenkel, "Brazil and Responsibility to Protect," 9.

GATT/WTO regime, the regime may be more accurately characterised as the ITO/WTO regime, a finding that has come about through undertaking the ILI analysis of the multilateral trade regime. This is a nuanced, but important, departure from existing accounts of the multilateral trade regime, which have generally maintained the GATT in and of itself to have established the trade regime. A central implication of this is that situating the GATT in the CSC structure as an advanced application of what in ILI terms can be understood as the CSC solution in the ITO Charter has shed light on just why the GATT trade regime survived for as long as it did. If GATT is viewed as an integral part of an agreed issue-ideology-solution cognitive package, the durability of the multilateral trade regime no longer seems 'surprising'.[910]

A second finding from the application of ILI theory to the multilateral trade regime has been that whereas the solution in the original CSC embedded within the ITO Charter did follow logically from an application of the foundation ideology to the issue of mutual concern, it did not necessarily appear as the only one possible. This of itself is a significant finding and has allowed for a greater understanding of the evolution of the GATT during its almost fifty years of existence, but it also invites us to consider on a theoretical level what it means precisely for the CSC solution to follow logically from an application of the foundation ideology to the issue of mutual concern. ILI theory maintains that '[a]n ideology dictates a particular course of action. Once applied to the issue in question the foundation ideology will thus dictate what the solution should be. Or, to express it differently, the solution will follow logically from an application of the CSC myth to the CSC issue'.[911] However, as developed thus far primarily by Scott, but also by other scholars, ILI theory does not necessarily delve further into precisely what that means and could be refined through further applications of the theory to other multilateral treaty regimes.

6.4 Implications of the analysis for future research

Using ILI theory has also proved useful for gaining a better and more nuanced understanding of litigation; this was in fact the first time that ILI theory was applied to litigation. What this analysis demonstrated is that there may exist a causal link between the extent to which a litigant's claim serves to strengthen the logical nexus of the CSC at the heart of a multilateral treaty and the success of the claim. While it is not analytically sound to draw general conclusions on the basis of an analysis of the *US – Cotton Subsidies* dispute alone, it did seem that at least in relation to this dispute, the party that emerged victorious was the one whose claims ultimately served to uphold more strongly the CSC myth and the foundation ideology underpinning the multilateral trade regime and to strengthen the logical nexus of the Agreement on Agriculture. In order to

[910] See, e.g., John H. Jackson, "The Puzzle of GATT: Legal Aspects of a Surprising Institution," *Journal of World Trade Law* 1, no. 2 (1967): 131–161.
[911] Scott, *The Political Interpretation of Multilateral Treaties*, 115-116.

develop any sort of generalisations, a broader and more systematic analysis would be necessary. Possible questions to guide this analysis would include: Is there any scope to suggest that a claim couched in terms of the foundation ideology or the CSC myth is more likely to succeed in litigation than one couched in terms of the legitimation goal? This could have value for policymakers in terms of developing litigation strategy.

The study presented in this dissertation suggests at least two lines of likely fruitful enquiry in relation to rising powers. First, it may be valuable to undertake analyses along similar lines in relation to other rising powers and to undertake comparative studies. It could be valuable to compare the experience of, say, China as a rising power with permanent member status at the UNSC, with that of Brazil which developed the RwP initiative as a non-permanent member of the Council. And second, having ascertained, on the basis of the analysis of both initiatives by Brazil, that the term 'revisionism' might usefully be redefined, it may be in fact that the term is of little analytical value and that it would be preferable to develop more nuanced terminology.

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