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Introduction

This book offers an account of emerging economies' positioning in trade and investment law. We explore the tension between development policies and the demands of the liberal trade and investment ordering, and consider whether a robust alternative vision has or could emerge in the Global South. While our research reveals a constellation of legal innovations from the Global South that depart from the mainstream liberal model, it also concludes that such contributions to law and policy are driven by pragmatism and strategic self-interest rather than more traditional political economy ideological orientations. This in turn has implications for the future of global economic governance. Unlike the socialist-inspired political economy models, or Non-Alignment endeavors, these legal moves do not aspire to coalesce into an alternative ordering for global governance. Emerging countries are not displaying a clear intention to dismantle the current ordering.

We face a watershed moment in international economic law, resulting from the confluence of a number of long-term trends.

First, the field is rife with clashes of values and interests. States in the Global North, encouraged by multinational corporations, push to further open global markets, reduce the role of the state in the economy, and provide special protection for foreign investors. States in the Global South resist some of these pressures in the name of development, maintain a commitment to state-led growth, and demand more control over their domestic markets and opportunities abroad for their exporters. These tensions translate into stalemates over the scope of existing rules, struggles to create new ones, and even fears that the multilateral rule-based system itself will collapse.

Second, the respective weights of developing and developed economies in the world economy are shifting, as the former are overtaking the latter in share of world gross domestic product. Over all this looms China. In recent years, China has become more assertive on the world stage. It has doubled down on its commitment to state-led growth and announced policies that conflict with existing and proposed rules. As its economy grows in both absolute terms and relative to that of the United States and European Union (EU), and it strengthens relations with other developing countries, China's capacity to influence trade and investment policy grows apace.

Third, we are in a time of institutional and governance softening. On one hand, multilateral economic institutions continue to face a legitimacy deficit, and now suffer from relative disengagements from their traditional supporters, the United States and the EU. On the other hand, the large developing countries, sometimes dubbed "middle income" countries by economists, have failed to rise to this governance challenge either individually or collectively.

Could we be witnessing the end of the post-war liberal order and the emergence of a China-led order more supportive of Global South values? It is clear that China will have more and more to say about the multilateral ordering, but it is neither ready nor willing to remake the current system from which it has benefited significantly. Indeed, a closer look at the struggles of China and the rest of the Global South with the liberal trade and investment regime reveals a much more complex picture. Far from trying to overturn the liberal trade order, China and other emerging economies have sought to use it to promote their interests while resisting efforts to extend the regime in ways that challenge their core values and interests. Similarly, while emerging economies have also resisted aspects of the global investment protection system, most have accepted many of its tenets, and some continue to sign Bilateral Investment Treaties (BITs), albeit in modified form.

Despite tensions between the current system of international economic law (IEL) and the policy preferences of many emerging economies, countries of the Global South have managed to achieve some kind of balance between the neoliberal thrust of the system and their desire to pursue strategies that – from a neoliberal viewpoint – are heterodox. The result is a system they can use to further their own ends, and one that intrudes on their policy space only to a tolerable degree.

We might think of this confluence as a "truce" between a radical liberalization/marketization campaign and strong resistance in the name of state-led growth and sovereignty. The truce is acceptable to the countries of the South because the system benefits them to some extent; they lack a clear alternative ordering; and even if they had identified a substitute model, they lack the political structure and discipline to mount a concerted action to implement it. Likewise, the truce is acceptable to the North because it has given those economies sufficient access to lucrative markets in the South, and cheap imports, while ostensibly allowing social protection at home for those dislocated by trade liberalization. That is not to say that this status quo represents a normative, political, social or economic optimum. It is at best a working compromise, an uneasy one fraught with costs that are born unequally by all parties involved.

This truce may be characterized as "embedded neoliberalism" echoing John Ruggie's famous description of an "embedded liberalism" regime that emerged from World War II. Ruggie coined the term to describe the compromise between allowing goods and capital to flow freely around the world as they had in the heyday of the gold standard, and allowing national governments to control such flows and develop social protection systems to protect against destabilizing shocks. Updating the idea of a compromise between discordant policies, we might call today's regime embedded neoliberalism, where free market globalization is governed by a multilateral rule system designed for capitalist market economies but tempered by a series of policies and strategies that allow some deviation from capitalist market organization, and allow some protectionism, along with social protection to cushion import shocks.

While we outline the case that a form of embedded neoliberalism emerged, we argue that it may not endure. It was understood that China and other countries that were committed to state-led growth deviated from the free market capitalist model that the rule system presupposed, but it was assumed they would eventually join the mainstream. What happens when that faith fades? Will the North no longer tolerate the favorable rules, exceptions, avoidance and evasion upon which the truce rested?

There is evidence on both sides that the truce is unraveling. Some of the premises underlying the settlement have come unstuck. China has made it clear that it has no intention of abandoning its state-led model. Systems of social protection in the North are proving inadequate to protect the losers from the shocks of market opening, thus undermining the legitimacy of adherence to the multilateral system as it is currently designed, and creating domestic backlash against the system. The United States now questions many of the trade rules and processes of the post-WWII regime, as does the EU in the field of investment. The World

Trade Organization (WTO) (and the GATT before that), long the lynchpin of the regime, has largely stalled as a negotiation forum, and its preeminence is being challenged by unilateral moves by the United States, as well as the emergence of competing mega-regional free trade agreements such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). If the truce flounders, can a new equilibrium be found, and what would be its defining features? Alternatively, what would the failure to cooperate between the major trading powers, old and new, mean for the world order and for smaller emerging economies?

I Making the System Work for the South: Embedded Neoliberalism

Behind the theory of embedded neoliberalism lies the claim that developing economies have been able to make use of the liberal trade and investment regime to support their development strategies without having to adopt the full gamut of neoliberal prescriptions. The evidence supports that thesis. A growing number of emerging countries are successfully utilizing the existing trade law system in support of their development policies. Particularly noteworthy are victories in dispute settlement, the use of flexibilities such as trade remedies, and the successful resistance against the expansion of free trade disciplines. On the investment side, the design of traditional BITs involved host countries agreeing to provide extensive protections to foreign investors (post-establishment protections), but host countries typically retain control over access of investors to their markets (limited pre-establishment constraints). In practice, they made extensive use of sectoral exclusions and other policy tools to limit foreign investors in certain parts of their economy, typically in sectors touching on security, energy and what they viewed as government services (health, education). Additionally, countries like South Africa and India have pushed back, while Brazil pursued a different approach altogether, without significantly affecting the flow of foreign direct investment (FDI) to its economy.

A Developing Countries Use the WTO to Gain Access to Markets in the North and South

At the WTO, emerging countries have prevailed in a number of disputes against developed members whose policies restricted their access to markets. The EU lost challenges brought by China, Brazil, Thailand, India, Argentina, Indonesia and Peru. The United States lost against China, Brazil, Thailand, India, Argentina, Indonesia, Venezuela, Chile, Antigua and Barbuda, Ecuador, Mexico and Pakistan. Brazil prevailed over Canada. Indonesia won against South Korea.

However, challenges of implementation in their favor somewhat dampen these apparent victories. Indeed, developing members make up a disproportionate number of complainants in retaliation proceedings and other findings of noncompliance, compared to their proportion in disputes. A number of additional cases were withdrawn or settled without a decision by a panel or arbitrator.

Developing members also successfully challenge each other's trade restrictions. China, Brazil, India, Indonesia, Argentina, Costa Rica, Honduras, Guatemala, El Salvador, the Dominican Republic, Mexico, Guatemala, Panama, Colombia, Turkey, Egypt, the Philippines and Thailand have all been involved in disputes against each other where one party was found in breach of its obligations.

B Developing Countries Use Trade Remedies and Other Flexibilities to Protect Domestic Industries

A number of avenues exist to modulate general IEL obligations. Some are available to and used by a wide range of states albeit for different objectives. For instance, many developing countries try to maintain industrial policies in the face of neoliberal restrictions thanks to the widespread use of trade remedies such as safeguards, antidumping duties and countervailing duties.

In some cases these measures have been challenged at the WTO and countries have been required to end them. In many more cases, the use of these measures is adjudicated and policed domestically, with international trade law operating as a somewhat remote framework. In the face of massive use of these trade remedies domestically, the international system lacks the capacity to effectively deter strategic abuses.

Trade remedies are not the only escape from restrictions: developing countries avail themselves of additional flexibilities within the WTO trade regime available more specifically to them, including exceptions to most-favored nation obligations for the Generalized System of Preferences, preference programs among developing countries, and ad hoc waivers to other provisions in particular circumstances.

C In Practice, the Dispute Process Enables Developing Countries to Temporarily Adopt Policies That Contravene the Rules

Even when an exception or waiver is not available, the design of the dispute settlement system results in practice in members breaching their obligations with relatively little economic cost before another member is able to retaliate. The increasingly lengthy WTO disputes settlement process, combined with the fact that a losing party need not offer remedies for past damages, means that several years may pass before a member is forced to withdraw or compensate for a breach.

Developed and developing members make use of this de facto flexibility mechanism. The notorious bananas dispute between various African, Caribbean and Pacific Group (ACP) members and the United States against the EU has been ongoing since the inception of the WTO. More recently, India's solar energy development program continues to offer WTO-incompatible subsidies to domestic producers more than eight years after the inception of the measures challenged by the United States. As India and the United States continue to debate whether and what type of retaliation the latter may be able to impose on India, the program moves steadily toward its forecasted completion date of 2022. In other words, it is possible that India will have designed and implemented a twelve-year-long domestic industrial support program in breach of WTO obligations without providing compensation to affected foreign parties.

China appears to follow a different tactic for creating policy space for its industrial policy. Rather than capitalizing on dispute settlement delays, China makes it difficult for challenges to be brought in the first place. It does so by taking vast ranges of measures that individually, might not be challengeable, and collectively, are difficult to circumscribe. Moreover, measures are often in place for shorter periods of time (although they are in the service of longer-term objectives). Foreign businesses are left to navigate this labyrinthine legal system, identify potential WTO breaches and persuade their governments to bring a complex dispute against a regulatory environment that is constantly shifting.

D Developing Countries Have Successfully Blocked Extension of the Rules

Lastly, and perhaps most importantly, developing countries have successfully resisted the expansion of the trade liberalization agenda at the

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WTO. In the 1990s, they prevailed in largely excluding the "Singapore issues" (investment, competition, government procurement and trade facilitation) from trade negotiations and eventually stalled the launch of a new round of negotiations altogether at the Seattle Ministerial Meeting. In the Doha Work Programme, emerging countries have asserted their voices to limit the scope of negotiations on items they disfavored, and to include topics of interest to them. In the first few years of the round, they gained some concessions on access to medicine and subsidies reduction on cotton from the United States. While the topic of trade facilitation had been one that India and other "refuseniks" of the Singapore Ministerial Meeting had rejected, the disciplines that emerged two decades later likely took a fundamentally different shape thanks to coordinated leadership from several developing countries. The Trade Facilitation Agreement inaugurated a new type of progressive, capacity-based obligation tied to offers for financial support for implementation from richer countries.

Similarly, while emerging economies have resisted aspects of the global investment protection system, most have accepted many of its values, and some continue to sign investment agreements with more restricted investment protections. States opposing the system, most notably Brazil, were able to refrain from entering into BITs while continuing to access global capital markets for investment. Even countries such as India, South Africa, Indonesia and Ecuador, which more recently retrenched from their participation in BITs, do not appear to have suffered significant capital outflow in response.

While we argue that these compromises and strategies resulted in something of an equilibrium, we do not suggest that the international trade and investment law system serves the interests of developing countries adequately or equitably. Moreover, hard-won concessions in favor of emerging countries often revealed themselves to be pyrrhic victories. The status quo was, in many ways, an agreement to disagree, made of a combination of effective resistance to new rules, de jure and de facto derogations, and strategic noncompliance. The post-2008 period, however, called this truce into question.

II Is the Truce About to Be Broken?

From every quarter of the globe, unpredictable political economy choices and normative heterogeneity suggest that we are in a period of legal and institutional instability. We view changes in Chinese and U.S. trade policies and development strategies as particularly salient.

A Trade Policy Changes in the Face of Resurgent Chinese State Capitalism

Far from promising to further move toward market-oriented policies and liberalization, China has made clear that it is committed to maintaining its unique form of state-dominated economic strategy. In an effort to catch up with and surpass the more established economies, China has announced the "Made in China 2025" action plan, which outlines a ten-year strategy to build intelligent manufacturing capabilities, enhance innovation, and upgrade ten key sectors. Many believe this vast new industrial policy contains numerous violations of WTO law. China is expanding its influence all over the world, creating new alliances and institutions and making massive investments. Its rapid upgrading of industrial and technological skills has allowed it to emerge as a major competitor to the older industrial powers. Chinese producers and investors' dramatic expansion into Asian, African and Latin American markets is settling into an enduring trend that offers destination countries new alternatives to their traditional partners.

Strategies in response to this new reality are eroding the embedded neoliberalism truce. Across the political spectrum in old industrial powers, progressive and conservative voices, liberal and protectionist interests concur to cast China as a political, economic and military threat, a manipulator of the rules. The March 2018 consolidation of power by China's Xi Jinping further heightened concerns. Taking the lead is the United States. The first U.S. effort was the Trans-Pacific Partnership (TPP), which sought to create a more market-oriented space in the Asian Pacific region. Some saw this as an indirect way to pressure China to liberalize. After withdrawing from the TPP, the Trump administration announced a zero-tolerance policy to China's heterodox strategies, in a decisive break from the embedded neoliberal compromise.

Elsewhere, critics differ sharply as to the appropriate response to China. Some opt to push back on the perceived threats with protectionist policies, trade litigation, investment restrictions, rapprochement with like-minded countries and a general hardening of the political discourse. Others prefer to join China as a new locus of power, influence and economic opportunity, as demonstrated by the support of the Asian Infrastructure Investment Bank (AIIB), the Regional Comprehensive

Economic Partnership (RCEP), and Belt and Road Initiative (BRI, formerly known as One Belt One Road). For instance, the collapse of Transatlantic Trade and Investment Partnership (TTIP) negotiations and rise of the AIIB are causing some European countries to shift their negotiation efforts from West to East, while Latin America seeks to maneuver between China, the United States, and Pacific region trade and investment deals.

B Investment Law Is Unsettled

As investment increasingly originates from the Global South and is directed toward old industrialized countries and developing countries alike, the traditional foreign investment legal model is also under attack.

A broad range of legal experimentation is afoot to reframe legal disciplines, the balance of rights of investors and host countries, and the nature and reach of dispute settlement. Countries as diverse as Indonesia, Brazil, South Africa and some Bolivarian-oriented countries (Bolivia, Colombia, Ecuador, Panama, Peru and Venezuela) wish to reassert the preeminence of the state as an arbiter of investment policy and protection. China, which is also a proponent of such policies with regard to inbound investment flows, finds itself more in line with the pro-investor protections enshrined in traditional BITs when it comes to its outward investment.

Investor–state dispute settlement is becoming a highly sensitive pressure point for states. Brazil holds steadfast to its refusal to sign bilateral investment treaties with investor–state dispute resolution clauses. Indonesia, South Africa and others are withdrawing or letting lapse their BITs. The legitimacy of ICSID and other investor–state investment dispute resolution entities is called into question by developed and developing countries alike.

To various degrees, developing countries are manifesting their dissatisfaction with the embedded neoliberalism truce by challenging many traditional features of investment law. These moves may help to reshape investment law. However, the contours of investment law are also shifting, as China, in particular, blurs the lines between public development aid and outward investment. Similarly, rules of origin in trade treaties and some modalities for trade in services are really legal frameworks that condition and affect how and where to locate production, which is a core issue for foreign investment flows.

C Restricted by IEL, the Social Safety Net Fails to Offset Shocks

International economic regulation implemented in the 1990s, including the proliferation of BITs and trade agreements generally aligned with the WTO, was fundamentally designed to achieve convergence in economic and social policies toward a capitalist, liberal democracy model. Special and differential treatment at the WTO assumes temporary deviations pending full commitment to a mainstream free trade agenda; Washington Consensus policies require privatization and a general curtailing of state intervention in the economy.

The theory was that states would manage and offset the costs of liberalization domestically, as dictated by their particular social contracts. Studies have shown that some states are unable or unwilling to uphold these social contracts. While theories abound as to the reason for such failings, IEL arguably plays a role because it increasingly constrains domestic policy instruments in the name of market opening. For instance, BITs are used to attempt to restrict states' ability to enact regulatory measures in public health, the environment, taxation and other fields. The WTO agreements ostensibly leave it to states to determine the level of regulatory protection they wish to maintain in these areas, but in practice, interpretative standards such as the requirement for the "least trade-restrictive alternative," the expiration of exceptions for certain subsidies, and the tightening of government procurement disciplines, all constrain states' policy options. While robust social safety nets, as cornerstones of the domestic political bargain, tend to be thought of as a Western European feature, they are also mainstays in many middle-income emerging countries. The liberalization of agricultural markets is a major source of concern in India, where food security and government-provided basic food supply are key to social peace and the livelihood of millions of the nation's poorest. The divestment of energy and water supply management to foreign investors in many Latin American and African countries similarly has had a mixed track record in its impact on social stability.

Further, the failure of the social safety net in much of the North fully to cushion trade shocks is one cause of the populist backlash against the trade regime, and provides support for those who want to forego the embedded neoliberal bargain by cracking down on deviations from market principles. At the same time, it poignantly reveals to China and other emerging countries the flaws in liberal capitalism, reducing their incentive to join the system. It was once thought that IEL would manage