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## Introduction to the Embedded Liberalism Compromise

*Gillian Moon and Lisa Toohey*

This volume focuses on the socio-economic compromise struck by the drafters of the 1947 General Agreement on Tariffs and Trade (GATT) and subsequently given the name ‘embedded liberalism’ by John Ruggie. Ruggie, an international relations scholar and proponent of constructivist theories of international relations, sought to explain the role of norms and shared values in sustaining international regimes, arguing that it was necessary to first ‘look at how power and legitimate social purpose become fused to project political authority into the international system’ in order to then understand the nature of the international order.<sup>1</sup> In this 1982 piece, Ruggie set out to explain the nature of the international economic order, using it as a case study of regime change. In establishing his argument, he characterised the post-war system as one of ‘embedded liberalism’, a term that was subsequently adopted by another generation of scholars to describe the post-war approach to trade regulation.

According to the principle of Embedded Liberalism, it was intended that an open and non-discriminatory trade system would operate but, by way of compromise, that the ability of states to pursue other policies and to minimise disruption to domestic social interests would be preserved. Liberal trade policy and laws were understood to be embedded within a larger commitment to interventionist domestic policies, particularly policies directed at labour stability and employment.

Recent world events, including the election of US President Donald Trump and the British referendum decision to leave the European Union (known colloquially as Brexit), have had a profound impact on the momentum of the trade system. The Trans-Pacific Partnership Agreement (the TPP) has acquired a new future as the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP). The CPTPP was signed in March 2018, and incorporates by reference most provisions of the TPP, although for the moment the United States is not a party.

<sup>1</sup> J. G. Ruggie, “International regimes, transactions and change: Embedded liberalism in the postwar economic order,” *International Organization* 36, no. 2 (Spring 1982): 382.

These political events may be understood, in large part, as an expression of opposition by domestic labour to changes in industrial and employment patterns, changes that occurred in response to the intensification of trade liberalisation twenty years ago when WTO law and its accompanying dispute settlement regime were introduced. Expressions of opposition have erupted primarily in highly developed economies, particularly in the United States and parts of Europe, and have been directed at trade-related policies facilitating labour and business mobility. Concerns about trade are certainly not new and are also interrelated with other citizen concerns about regulation of global commerce, as evidenced by the Occupy Movement that sprang from the Global Financial Crisis in 2009. However, it has been only in recent years that the balance of political power has shifted and resulted in changes to government policies on international economic integration.

With these dynamics in mind, this volume was curated by the editors to explore the multiple dimensions of the Embedded Liberalism Compromise, so as to understand its contemporary influence both on the scope and application of international economic law and on the content and character of parallel domestic socio-economic policy space. The book focuses on the fundamental, relational question of existing 'legal room for policy space' domestically and ties together historical and future-oriented perspectives on the topic. Its chapters present a unique balance of geographical and disciplinary perspectives from Australia, the United Kingdom, the United States, Canada, South Africa, China, Taiwan and France.

The volume is organised in three parts, working its way sequentially through the creation of the Embedded Liberalism Compromise (Part I), exploration of the dynamic of the Compromise and its diffusion from WTO law into international economic law more broadly (Part II), and the normative potential of the Compromise to find a way forward for international integration in the present political climate, in a manner that serves the interests of ordinary citizens (Part III).

The Embedded Liberalism Compromise cannot bring back the conditions of yesteryear or dramatically change the destinies of factory workers whose jobs have disappeared. It can, however, remind policymakers of the imperative to strike a balance between domestic concerns on the one hand and international integration on the other, and it gives policymakers and legislatures the liberty to do so without falling foul of the WTO's purposes.

Meredith Kolsky Lewis sets the stage in Chapter 2 by providing an historical analysis of how the Embedded Liberalism Compromise was struck by the negotiators of the GATT and the way in which the GATT coupled stability mechanisms with the reduction of trade barriers. Lewis identifies the structural and textual features of the GATT agreements that represented a commitment to the notion of compromise, including procedural and substantive provisions in the text of the GATT. Lewis then turns to consider whether it is appropriate to continue using the term 'Embedded Liberalism Compromise' despite the fact that the elements of the Compromise came under change and strain from the 1970s onwards.

She concludes that there is some risk of confusion in applying the term to the contemporary environment, as even though the interest in balancing trade and non-trade objectives remains constant, there has been significant change in approach throughout subsequent trade rounds. For example, the Tokyo Round referred to shielding the world economy from shocks and imbalances and the need for ‘orderly conditions’. On the other hand, in the Uruguay Round, substantive provisions reduced domestic policy space through agreements such as the TRIPS Agreement and the Agreement on Sanitary and Phytosanitary Measures. Finally, Lewis notes, the contemporary trade law environment, which is characterised by a proliferation of preferential trade agreements, further undermines a notion of compromise. Notwithstanding these concerns, Lewis concludes that a form of the Compromise remains and can be seen in the Nairobi Package adopted at the WTO’s Tenth Ministerial Conference in 2015 and even in carveouts in preferential agreements such as the Trans-Pacific Partnership Agreement. Her conclusion is that a form of the Embedded Liberalism Compromise continues as part of the landscape, although it is different from Ruggie’s original conception.

In Chapter 3, Lisa Toohey takes a sociolegal perspective to explore how and why the fundamental elements of the Embedded Liberalism Compromise have shifted over time. She begins by noting that the term ‘liberalism’ has undergone a dramatic shift in content, reflecting changing political expectations about the role of a market economy. This shift in expectations about the market contributed in turn to a disengagement from the market as a tool for societal stability. She identifies that, while the free-standing structure of the WTO is useful for enhancing trade openness, the creation of a trade-centric organisation has also facilitated a less embedded role for trade and changed the narrative of social concerns from being axiomatic to being issues of ‘trade and’. Thirdly, there has been a change in the nature and politics of a ‘compromise’, which has resulted at least in part from a greatly diversified cast of actors in the international system. While individual actors still seek domestic regulatory space, they are not seeking the same types of domestic regulatory space but, rather, a diverse range of claims that respond to the situation of each state. Toohey concludes that, in the face of these challenges, the Embedded Liberalism Compromise remains a vital concept, one that is capable of being a touchstone or departure point for discussions about the future of globalisation in an era where its relevance is being increasingly questioned.

In ‘Universal Human Rights in the Embedded Liberalism Compromise’, (Chapter 4), Gillian Moon sets out in three parts a suggested approach for understanding the influence and, arguably, presence of universal human rights in the Embedded Liberalism Compromise and offers some reflections on what that interpretation might mean for the way the trade regime is understood today. Moon suggests that employment was seen in the post-war period by the industrialised states as the decisive variable in maintaining social (and political) stability and that it was from this viewpoint that they sought to retain powers to intervene in their domestic economies, consciously curbing their GATT commitments. Moon describes the

presence generally of human-rights-related ideas in the decision-making of the time, as well as the presence specifically of labour-related human rights in the discussions leading to the development of the Compromise. She concludes that ‘human rights’ in a general or attitudinal sense were a part of the Embedded Liberalism Compromise. In the final part, some questions consequent upon these findings are posed and some reflections are offered on the insights they provide into the relationship between human rights and the trade regime in the present day.

The final chapter of Part I is a contribution by Chios Carmody, who in Chapter 5 explores ‘legitimate expectations’ as an underlying norm of international economic law in both the trade and investment contexts. The treatment of expectations in WTO law has principally been to read them out as a matter of pleading in WTO dispute settlement, while in international investment law they are prominent – and controversial – in the assessment of expropriation and standards of treatment. The chapter examines the consequences of a doctrine of expectations for a reinvigoration of Embedded Liberalism, suggesting that any effort to do so will have to grapple with expectations as a pervasive feature of normativity under conditions of stasis and change. The effort to ‘embed’ market forces into a framework where they might be regulated by national governments runs up against the objectively-determined expectations of individual economic operators. In this dilemma, individual and communal expectations will have to be reconciled. There are indications that the reconciliation is already happening in ways reminiscent of domestic administrative law.

Each of the four chapters contained in Part II of the volume takes a specific case study to show how the dynamics of the Embedded Liberalism Compromise play out in practice.

Fiona Smith’s chapter, ‘From Agriculture to Food Security: Embedded Liberalism and Stories of Regulatory Failure’ (Chapter 6), draws on John Ruggie’s work on Embedded Liberalism, in which he reimagines the nature of the GATT regime as a set of rules that pursue a multilateral solution to the problems of international trade whilst leaving policy space for GATT ‘members’ to implement domestic social policy agendas. Smith points out that Ruggie’s work has predictive value as a theory explaining rule change in the international system. In other words, Ruggie’s vision of the GATT was not static but predicted how conflicts between the multilateral objective and domestic autonomy embedded in the GATT rules would strain the rules’ efficacy to the point where regulatory change would become inevitable. It presents a story of how, and under what circumstances, international trade rules fail and how new rules emerge. Smith explores these dynamics in the context of changing agricultural policies, showing how global negotiations on agricultural rules need also to be understood as being embedded, multiple, complex and changing narratives about the roles of agriculture, farmers and food in society.

Chapter 7, by Hsu-Hua Chou and Weihuan Zhou, illustrates how broad domestic debates about the expression of cultural identity end up manifesting in specific

disputes for adjudication under WTO law. Those specific disputes, in turn, illustrate the practical parameters of the Embedded Liberalism Compromise in a broader range of contexts. They chronicle efforts to preserve the use of a traditional Taiwanese cooking wine, *mijiu*, at an affordable price and the attendant WTO dispute, thereby showing how disputes about the Embedded Liberalism Compromise can and could be adjudicated. Chou and Zhou's work shows the potential for cultural expression to form part of the domestic policy space preserved from the disciplines of international trade law. Their fundamental argument, however, is that the incursion of trade law into the pricing of a cultural essential in Taiwan is caused not by trade liberalisation itself or even by WTO law but by an expansive interpretation of a non-discrimination provision (National Treatment, or NT) in WTO law. They demonstrate thereby the vulnerability of the Embedded Liberalism Compromise to interpretive erosion.

Modern trade agreements typically include investment chapters. Similar debates about the relationship between liberalisation under international law and socio-economic regulation under domestic law are occurring in the realm of investment. Negotiations for the Trans-Pacific Partnership (TPP) Agreement involved precisely this debate, and the balance ultimately struck (now within the CPTPP) has been one of the principal reasons for opposition to the TPP by the Trump administration in the United States. The issue is directly addressed in two particularly probing chapters by Catharine Titi and Andrew Mitchell.

The contribution of Catharine Titi in Chapter 8 shows the utility of the concept of the Embedded Liberalism Compromise beyond merely the WTO or trade arena. Titi explores the transformation of Embedded Liberalism and the state's right to regulate, from being 'emergent' concepts in international investment law to becoming the quintessence of new international investment agreements. The Embedded Liberalism of WTO law is often held in contrast with the laissez-faire liberalism of 'old generation' international investment agreements (IIAs). While WTO law, including the original treaty GATT, broadly attempts to reconcile trade liberalisation with domestic regulatory flexibility, old generation investment agreements have been liberal instruments, overly protective of investor interests at the expense of the state's right to regulate in the public interest. However, the unharnessed liberalism of these international investment treaties is progressively giving way to new, more balanced instruments, and a paradigm shift may be witnessed towards a model that is closer to the Embedded Liberalism of WTO law. The chapter explores this shift in international investment law towards new treaty models, such as the TPP (CPTPP) and the TTIP, that radically change the landscape of the discipline through the widespread use of exceptions for public policy measures and other provisions aiming to safeguard the state's right to regulate.

A second relevant dimension of these new treaty models is their emphasis on regulatory coherence, described by Andrew Mitchell and Elizabeth Sheargold in Chapter 9. Their chapter considers whether the inclusion of regulatory coherence

in agreements impacts on the regulatory autonomy of signatories and also how regulatory coherence provisions might impact domestic development of regulation. It examines whether the adoption of ‘good regulatory practices’ in accordance with the TPP (CPTPP) will help to ensure that measures enacted by states to protect non-economic interests (such as public health or the environment) are consistent with other key obligations of international trade and investment law. Although many elements of good regulatory practice mirror the criteria used to distinguish legitimate regulatory measures from disguised protectionism, there is no guarantee that a tribunal will come to the same conclusions as those reached during a domestic impact assessment. Regulatory coherence provisions are thus an interesting case study of the balance inherently required by an Embedded Liberalism Compromise, as they go to the heart of states’ legislative prerogatives.

Part III of the book, ‘Engineering the Embedded Liberalism Compromise: Addressing the Future in Times of Turmoil’, pushes into new territory. Building on the premise identified in Part II, that the international community has somewhat lost its way in maintaining the Embedded Liberalism Compromise, it shows the potential for this concept to be an important touchstone for rekindling the international economic system in a time of social and political turmoil.

This is a theme taken up by Rachel Harris in Chapter 10, seeking to test whether human rights are included within an evolved concept of ‘Embedded Liberalism’. Harris argues that trade liberalisation today is balanced not only against member-states’ need to ensure domestic economic and social stability but also against other legitimate public purposes that intersect with trade, including human rights. The specific question Harris poses is whether, and to what extent, human rights could be said to fit within the contemporary Embedded Liberalism Compromise. In contrast to the view that Embedded Liberalism is a dialectic between competing national and international forces, Harris postulates how Embedded Liberalism relates to the fragmentation of international law more broadly. She interprets Embedded Liberalism as a framework of description, critique and advocacy. Like Ruggie, Harris advocates for, and seeks to apply, a constructivist approach. In order to gauge the extent to which the trade liberalisation agenda is embedded within other legitimate societal purposes today, such as human rights, Harris argues we need to understand the ‘inter-subjective framework of meaning’ that constitutes the international trade law regime. She illustrates this by examining WTO jurisprudence over the past twenty years, focusing on the GATT. Harris shows that the protection and promotion of legally enforceable human rights under international law is not expressly embedded with or balanced against trade law disciplines in a legal sense. However, she argues there is still substantial scope for governments to effectively implement human rights obligations even where that restricts trade within the evolving inter-subjective framework in which the GATT is given meaning. This is chiefly achieved through an expansive interpretation of the closed list in GATT XX and through a more deferential application of its tests.

In Chapter 11, Gillian Moon and Justine Nolan reflect on a reduction since the post-war period in the power of governments of nation states to control factors affecting 'domestic stability'. Under the Compromise, trade liberalisation was to increase prosperity but without triggering any socially destabilising effects, most particularly for labour markets. This chapter explores two changes effected by corporations which have reduced states' ability to nurture domestic stability through the means of such 'merely national social bargains'. The first change is the evolution of global supply chains, and the second is the automation revolution. The two changes can be seen as springing directly from the gradual expansion of economic liberalism, particularly in relation to investment and capital. Each change involves a dramatic alteration to traditional methods of production, with deep and extensive consequences across the world for the availability of employment and for the terms upon which employment is offered. The significance of the changes for present purposes is that they have been commercially driven, cost-reducing alterations imposed by non-state actors (corporations), developments over which domestic governments have little regulatory reach. Yet their impacts may be seen in populist-led political developments – even instability – in the United States and in Europe and Britain, the very nation states which brokered the Embedded Liberalism Compromise seventy years ago. The authors argue that the changes pose a considerable challenge to the role of nation states and to the safeguarding of domestic stability. Ultimately, what happens, and how fast it happens, is a matter largely for corporate decision and will be determined by commercial considerations; what is clear is that these aspects of domestic stability are now substantially in the hands of non-state actors and that nation states are no longer in a controlling position.

Chapter 12, by Franziska Sucker, returns to role of the Embedded Liberalism Compromise for the protection of cultural identity. She argues for a 'collective will' to protect and promote cultural diversity and demonstrates that the means of achieving this objective has undergone a re-conceptualisation: from the controversial, so-called 'cultural exception' pursued within the scope of the WTO discourse, to the concept of 'cultural diversity' proclaimed within the realm of the UNESCO. Sucker then demonstrates to what extent cultural policy measures are compatible with the basic WTO obligations. She argues that cultural aspects of goods and services production and sale, such as provenance, language or method of production, can impact on the determination of whether goods and services are 'like' and can also influence the demarcation of the relevant market segment. Sucker shows to what extent general and special exceptions in WTO law can be invoked in the context of cultural policy to justify potential violations of basic WTO law obligations. She concludes by emphasising the flexibilities provided for WTO members by the positive and negative list approach in GATS, arguing that the admittedly limited domestic policy and regulatory space for cultural policy measures – reflecting the Embedded Liberalism Compromise – is underutilised and suggesting reasons for this.

Emily Reid's chapter, 'The WTO's Purpose, Regulatory Autonomy and the Future of the Embedded Liberalism Compromise', is concerned with the potential contribution of the Compromise to strengthening the capacity of the WTO to respond to the diversity of interests and objectives pursued in a changing international legal context. The starting premise is that it is possible for the WTO to do so, drawing on a conceptual framework based upon sustainable development. The question asked is whether there is any added value through referencing the Embedded Liberalism Compromise in this process. Reid highlights that, while the Compromise is frequently discussed in terms of its significance for national regulatory autonomy, it has a second element: non-discrimination in trade. It is argued that the future contribution, and relevance, of the Compromise is dependent upon two developments. First, its conceptual scope must be broadened from the original focus upon social stability and full employment to encompass states' regulatory autonomy with regard to contemporary interests and values, such as environmental protection. Secondly, the non-discrimination paradigm of the GATT and WTO must be reinforced. The chapter, therefore, first examines the means by which the compact could be broadened and, subsequently, assesses the extent to which the traditional non-discrimination paradigm of the GATT and WTO is secure. This second part recognises and examines the impact of the competing market-access paradigm, which gained traction under the neo-liberal orthodoxy of the latter decades of the twentieth century and which is arguably manifested in particular provisions of various WTO agreements.

While there are differing views in this volume as to the precise contemporary status of the Embedded Liberalism Compromise, there is broad agreement that the Compromise agreement negotiated between the original states after the war was fundamentally altered by the Uruguay Round negotiations and that a modern version of the Compromise would involve a different and diverse set of domestic policy concerns. There is also broad agreement that a capacity for a new balance remains. There is sufficient room in existing WTO law to accommodate diverse domestic policy priorities. Global trade under WTO law remains a means to social, political and economic ends, rather than an end in itself. Revisiting the Compromise, as this volume does, reminds trade policymakers that maintaining balance between domestic social goals and international trade goals continues to be of great importance, as recent political events are demonstrating in much of the industrialised world. The labour-related social instability which the Compromise states feared is in evidence today, as many blame their unemployment, underemployment and low or stagnant wages on an excess of economic liberalisation.

The chapters in this volume also remind trade policymakers that it would be a mistake to see contemporary options as bounded by only one account of the Compromise – to assume that they are not authorised to move outside the bounds of those historical domestic policy concerns in order to strike a balance involving new, contemporary social policy challenges. This will involve addressing the broad

social policy frameworks of modern states with relatively open trade and investment regimes, including such challenges as environmental degradation, labour market changes (including automation and globalised production), cultural preservation or food security. Our goal in preparing this volume has essentially been to shift thinking about the Compromise away from it as an abstract concept to something which can be mobilised in discussing, negotiating and drafting better trade law. Indeed, it is evident that international investment law is changing and tending towards the protection of states' right to regulate, rather than against it.

The volume is also a reminder that, unlike the immediate post-war period, most modern trading states are signatories to multiple human rights treaties. These treaties elevate numerous social policy goals to the status of legally binding state obligations; in doing so, they necessarily expand states' social policy goals beyond those of 1947, as well as altering the status of those goals. While some of the rights are vague and create seemingly inchoate duties and while the legal relationship between WTO rules and human rights is as yet undeveloped, it is nevertheless the case that most aspects of domestic stability today cannot be dismissed as merely the social policy goals of one individualistic or eccentric state.

There is a general consensus that a modern perception of the Embedded Liberalism Compromise has a potentially significant role to play in achieving or restoring balance, and that the original Compromise must be reconceptualised to include a more contemporary and diverse range of domestic concerns, situated in the context of burgeoning international law. Such a reconceived Compromise offers a practical touchstone to secure the durability and relevance of the international economic order.