

by developed or more powerful countries. Now the question is: How effective the WTO dispute system can be at facing the so-called twenty-first century issues?¹³

The influence that the WTO and emerging economies have had on the impact and construction of international economic law is clear. Now we will learn how far multilateralism can go in order to achieve better results vis à vis regional and plurilateral approaches taken by several countries in the negotiation of regional agreements that are replacing the multilateral trading system.

THE BRICS' CONTRIBUTIONS TO THE ARCHITECTURE AND NORMS OF INTERNATIONAL ECONOMIC LAW

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The BRICS brings together Brazil, Russia, India, China, and South Africa: five fast-growing emerging countries representing the major regions of the globe. By just about any macroeconomic metrics, the BRICS are powerhouses collectively, as well as individually in the case of China, India, and Brazil. If gross domestic product (GDP) is measured using purchasing power parity, the emerging world already surpassed the developed world in 2008, reaching 54% of the world GDP by 2010. The BRICS' share of world trade, GDP, investment, and foreign currency reserve is widely expected to continue to grow and quickly to outpace the Organization for Economic Co-operation and Development (OECD) countries. But what does this mean for the legal architecture of international economic law and its normative principles?

The BRICS have made a number of substantive and institutional contributions to international economic law. My remarks will first outline some of the BRICS' contributions to trade law, investment law, and to the reshaping of foreign aid. I will then focus on recent shifts in the institutions of international economic governance denoting the growing political importance of the BRICS. However, the BRICS' influence remains limited in large part due to the still embryonic nature of the group as a political entity (second section). Perhaps even more fundamentally, it is unclear whether the BRICS aspire to propose an alternative normative and institutional foundation for international economic law, or whether their challenge to the current consensus is strategic and self-interested on a shorter time-horizon (concluding section).

THE BRICS' CONTRIBUTIONS TO INTERNATIONAL ECONOMIC LAW

The BRICS have come to view themselves as an alternative voice to the traditional Washington Consensus and to the still dominant western voices in international economic law and multilateral institutions such as the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO). In the recent past, this challenge has taken the form of increasingly vocal negotiating positions, but now the BRICS are attempting to reshape the institutional balance of the Bretton Woods institutions, or, even more radically, to sidestep them altogether. Areas in which the BRICS have contributed to the architecture

¹³ Twenty-first century issues include the financial sector, environmental problems, and e-commerce, among others. See Interview with Professor John Jackson on the WTO's Dispute Settlement System, http://www.wto.org/english/forums_e/debates_e/debate41_e.htm.

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of economic law include their enhanced capacity at the WTO, increased participation in investment treaties, and decreased dependence on foreign aid.

Substantive Contributions to the Law

The BRICS have used their enhanced capacity to successfully negotiate and litigate in the WTO. David Trubek has argued that the rise of the BRICS may contribute to a hybrid system and a redefinition of the WTO's values.¹ The BRICS nations have dramatically increased their trade law capacity, promoted exports, coordinated participation in legal disputes with domestic policy, and increased their capacity to use WTO law to open foreign markets and protect domestic policies. For instance, India and Brazil have succeeded in preserving some policy space within the Trade-Related Aspects of Intellectual Property Rights (TRIPS) regime that allowed them to negotiate better prices for antiviral drugs and to maintain a domestic generics industry against the pressure of an ever-growing IP agenda in the United States and the EU. More recently, Indian generic drugs producers won a landmark appeal defeating Novartis' claims and using some flexibilities within TRIPS. China, Brazil, and other emerging countries have developed a sophisticated and intensive recourse to the dispute settlement mechanism, denoting improved domestic processes for managing these efforts.² China's active participation in the dispute settlement process includes seeking rule changes, challenging protectionism, and successfully defending its industrial policy against claims of WTO violations.

The BRICS are now outward investors and actively claim an interest in protecting their own investors, in addition to attracting foreign investment. Generally, BRICS nations are demanding more flexible terms in investment and trade agreements or have even refused outright to sign rigid agreements with the United States (as in the case of Brazil). All BRICS have employed a strategic industrial policy and conditioned their foreign investment on the transfer of technology and export performance. Now that Brazil, India, and China are investing in the United States and European Union, these jurisdictions may have to reconsider the effect of the agreements on their own regulatory autonomy and rethink their policy towards bilateral investment treaties (BITs) with the BRICS nations.

Both in the areas of intellectual property and foreign investment, the BRICS may find themselves in an ambivalent position. On the one hand, they have strongly signaled that they wish to resist the current legal frameworks; on the other hand, they may now find themselves in a position to benefit from such frameworks in certain sectors of the economy. For example, pro-investor provisions in traditional BITs may be very favorable to Chinese investors in the United States. Intellectual property tools such as patents and copyrights that are typically

¹ David M. Trubek, *Reversal of Fortune? International Economic Governance, Alternative Development Strategies, and the Rise of the BRICS* (June 2012) (unpublished manuscript, presented at the European University Institute), http://www.law.wisc.edu/facstaff/trubek/eui_paper_final_june_2012.pdf. There is a growing literature on the BRICS' influence on international economic law. *See, e.g.*, PAULO BORBA CASSELLA & DANIEL FLORIMOND, *BRIC, BRÉSIL, RUSSIE, INDE, CHINE ET AFRIQUE DU SUD: À L'HEURE D'UN NOUVEL ORDRE JURIDIQUE INTERNATIONAL* (2011); JULIEN VERCUEIL, *LES PAYS ÉMERGENTS: BRÉSIL, RUSSIE, INDE, CHINE . . . : MUTATIONS ÉCONOMIQUES ET NOUVEAUX DÉFIS* (2012).

² *DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* (Gregory C. Shaffer & Ricardo Melendez-Ortiz eds., 2010); Gregory C. Shaffer & Charles S. Sutton, *The Rise of Middle-Income Countries in the International Trading System*, in *LAW AND DEVELOPMENT IN MIDDLE INCOME COUNTRIES* (Randall Peerenboom & Thomas Ginsburg eds., forthcoming), Minnesota Legal Studies Research Paper No. 12-51, available at <http://ssrn.com/abstract=2153911>; Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 VA. J. INT'L L. 551 (2012).

understood to protect innovation may be cast in a new light when China's enormous biomedical and genetic research bears fruits. At the same time, this innovation will be seriously hampered by current strategies promoted in the Western hemisphere such as evergreening of patents and restrictions on the use of patented materials and processes for research and educational purposes.

As with foreign investment, the traditional flows of foreign aid are reversing in the case of Brazil and China, which are now net givers of aid. Gu, Humphrey, and Messner note that Chinese aid does not include the neo-liberal conditionalities common in standard Washington Consensus prescriptions with regard to economic liberalization.³ These countries would therefore appear as more attractive donors for a number of developing countries that do not wish or are not ready to submit to extensive liberalization, fiscal discipline, etc. Some BRICS, particularly China, tend to provide non-cash financing for projects without policy conditionality. They view this strategy both as part of the principle of noninterference of internal affairs and also as a means of circumventing corruption. In addition, the BRICS tend to focus on micro-sustainability of individual projects while traditional donors pay greater attention to long-run macroeconomic impacts.

Ultimately, policy orientations by the BRICS regarding trade and investment will likely be defined by the emerging tension in these countries between the interests of some areas of the private sector and the broader public policy objectives including domestic development and preferences regarding allocation of socioeconomic welfare and public goods. It may well be that the BRICS will make choices in these areas that are different from those underpinning the current dominant consensus. That in turn will condition their positions regarding trade and investment disciplines on the international stage.

Reshaping Institutional Structures

Beyond their challenge to neo-liberalism in the rules of international economic law, the BRICS are also reshaping institutional structures of international economic governance. For instance, they have pushed for increased voting power in the World Bank and IMF. They are also developing their own institutions.

The BRICS have successfully increased their shares and votes in the World Bank and the IMF. The April 2010 World Bank reform package included an "increase in shares and votes of Part II (borrower) countries."⁴ The Part II designation includes all of the BRICS countries except Russia. The 3% increase in share that was negotiated benefited mainly Brazil, China, and Turkey. Middle-income countries now have about one-third of the votes. In November 2010, the IMF board agreed on a 6% increase in share for emerging economies. These changes will make China the third largest shareholder after the United States and Japan, and bring India, Russia, and Brazil into the top ten.

The BRICS have also challenged the legitimacy of the G8 and increased their influence by participating in the G20. Ambassador Roberto Carvalho Azevêdo, a Brazilian trade diplomat, will in all likelihood succeed Pascal Lamy in September 2013 as the next Director-General of the WTO.⁵ The nine original candidates represented a diverse set of countries,

³ Ling Gu, John Humphrey & Dirk Messner, *Global Governance and Developing Countries: The Implications of the Rise of China*, 36 *WORLD DEV.* 274, 285 (2007).

⁴ Robert Wade, *Emerging World Order: From Multipolarity to Multilateralism in the G20, the World Bank, and the IMF*, 39 *POL. & SOC'Y* 347, 359 (2011).

⁵ WTO 2013 News Items, "Troika Recommends Carvalho de Azevêdo to Be the Next WTO Director-General," http://www.wto.org/english/news_e/news13_e/gc_rpt_08may13_e.htm.

but the EU, United States, Canada, and Japan did not put forward candidates of their own. Ultimately, the choice was winnowed down to the Brazilian candidate or the Mexican candidate. Ambassador Azevêdo was the only candidate from a BRICS country.

Most recently, the BRICS announced that they would be launching their own development bank and common currency reserve funds. This announcement is very much in direct challenge to the World Bank and the IMF respectively. The BRICS leaders agreed to establish a bank to serve their own enormous infrastructure needs, but also to cooperate with other emerging and developing countries in the future.⁶ The development bank would be the first institution of the informal BRICS forum. The leaders also agreed to establish a USD 100 billion pool of foreign reserves to “contribute to strengthening the global financial safety net and complement the existing international arrangements as an additional line of defense.”⁷ In addition, the group agreed to set up:

- a BRICS business council, to provide business-to-business links within the group;
- a BRICS consortium of think tanks, to generate innovative thinking; and
- a BRICS academic forum, to promote specialist dialogue.⁸

CAN THE BRICS BUILD A HOUSE?

While the BRICS certainly are contributing to the law and institutions of international economic governance, their influence is currently limited by a number of internal challenges. The low level of institutionalization of the group means that it is only as strong as its weakest political link; and as domestic policies and current events reveal, there is no shortage of tensions within the group.

As recently summarized by a commentator in the press:

Brazil and India define themselves as non-aligned developing economies. Russia does not. China sometimes does, and sometimes thinks of itself as *sui generis*. China and Russia have more open economies, with exports accounting for around a third of GDP. India and Brazil are more closed, with exports less than a fifth of GDP. Perhaps most important, China and Russia are both running huge current-account surpluses.⁹

India and Brazil have complained about China’s currency undervaluation, and India’s industry is seriously challenged by competing Chinese imports.

The BRICS countries are each other’s main trade partners but also each other’s competitors. This is very apparent in the number of trade disputes that pit BRICS countries against each other. About 70% of China’s WTO disputes are with emerging powers. Brazil and other BRICS countries have introduced duties on Chinese products, and by the end of 2012, India had no fewer than 149 antidumping cases against Chinese products. Brazil has lodged a complaint at the WTO against South Africa.¹⁰ India has complaints against Brazil and South

⁶ Andrew England, *BRICS Agree to Create Development Bank*, FIN. TIMES (Mar. 27, 2013), http://www.ft.com/intl/cms/s/0/2bcbd6e0-96e5-11e2-a77c-00144feabdc0.html?ftcamp=published_links%2Ffrss%2Fhome_middleeast%2Ffeed%2F%2Fproduct.

⁷ *Id.*

⁸ *PM Hails BRICS’ Decision to Launch Development Bank*, ECON. TIMES (Mar. 28, 2013), http://articles.economic-times.indiatimes.com/2013-03-28/news/38099680_1_brics-development-bank-brics-business-council-contingency-reserve-arrangement. See also Didi Kirsten Tatlow, *BRIC, BRICS, or BRICSI? The Growing Challenge*, INT’L HERALD TRIB. (Mar. 28, 2013), available at <http://rendezvous.blogs.nytimes.com/author/didi-kirsten-tatlow/>.

⁹ *The BRICs: The Trillion Dollar Club*, ECONOMIST (Apr. 15, 2010), available at <http://www.economist.com/node/15912964>.

¹⁰ William Gumede, *Complicated Relationship Holds BRICS Back*, MAIL & GUARDIAN (Mar. 22, 2013), <http://mg.co.za/article/2013-03-22-00-complicated-relationship-holds-brics-back>.

Africa.¹¹ Brazil and China have both been aggressively investing in Africa.¹² China and India are both trying to gain regional preeminence in Asia.

Beneath broad common positions, such as the desire to keep trade and climate change negotiations separate, and generally to place the main onus of cutting emissions on the EU and the United States, BRICS members have serious disagreements. Russia is an industrialized country under the Kyoto accords, with obligations the other BRICS do not have. Brazil is the world's biggest deforester, albeit one committed to slowing the pace, while China is now planting several million hectares of forest per year.

Geopolitical differences can also be an issue. When Syria's President Bashar al-Assad asked the BRICS to give its embattled regime humanitarian support, the BRICS responded with a noncommittal statement that reflected the divergent positions of China and Russia on the one hand and the other members on the other.¹³

All this leads a number of commentators to decry the lack of coherence among the BRICS. The point may have been overemphasized. After all, the United States and Europe have been at odds on numerous political and economic issues over the past 60 years. In fact, the first five decades of GATT and WTO disputes consisted mostly of transatlantic battles, some enduring to date. These conflicts have not prevented the United States and Europe from largely setting the rules and the agenda for international economic law and institutions.

Perhaps more importantly and more originally, the BRICS have been able to leverage their economic power and political influence in a defensive fashion by challenging the neo-liberal consensus, but so far, the BRICS have had limited success in transforming this resistance into an affirmative power to reform. The announced BRICS development bank and currency reserve are prime examples. The idea for this project formed in 2010, yet there is still no agreement regarding the amount of contributions expected from each participating country. It may also be anticipated that the institutionalization of this theoretically equal partnership will be difficult.

CONCLUDING THOUGHTS: THE BRICS ARE IN A UNIQUE POSITION TO INFLUENCE INTERNATIONAL ECONOMIC LAW

The BRICS as a group have a distinguishing feature that few other emerging countries can boast: they have the capacity to act both multilaterally and regionally. Most developing countries lack that ability. The United States and the EU have found a great source of leverage in past decades from shifting between bilateral, regional, and multilateral fora for negotiations. BRICS countries are able to do the same and have increasingly done so over the past five years or so. The impact of this development can be felt in all corners of the international economic law system, from the WTO and the proliferation of regional trade agreements, to the management of foreign aid and investment flows.

At the WTO, the BRICS are vibrant participants and have increasingly coordinated their positions to resist demands for the deepening of trade liberalization in areas that they did not wish to liberalize or link to the multilateral regime. In addition, the BRICS countries have negotiated their participation in an increasing number of regional trade agreements

¹¹ *Id.*

¹² JULIEN BOKILO, *LA CHINE EN AFRIQUE: LA CHINE EN CONCURRENCE AVEC LES ANCIENS PARTENAIRES DE L'AFRIQUE ET LES PAYS BRICS* (2011).

¹³ Ryan Villarreal, *Will BRICS Pressure Syria on Humanitarian Aid?*, *INT'L BUS. TIMES* (Apr. 2, 2013), www.ibtimes.com/will-brics-pressure-syria-humanitarian-aid-1164255#.UVrxbihY6hM.mailto.

where these same issues are addressed.¹⁴ Overall, trade among the BRICS countries has increased by 1,000% over the past decade, and trade between the BRICS and the United States, EU and Japan has also increased by nearly 300%.¹⁵

The proposed BRICS development bank and currency reserve fund, combined with the push to increase these members' participation in the Bretton Woods institutions, is another illustration of this two-pronged strategy of multilateral and regional intervention.

Jim O'Neill, the chief economist for Goldman Sachs, coined the BRICS acronym in 2001,¹⁶ but the group leaders did not officially meet as a group until 2009. Today the group is still in the early stages of transforming the catchphrase into a political, legal, and economic reality. Whether the BRICS will develop a cohesive vision for international economic law and institutions in the long run, or whether it will prove to be more of a short- or medium-term strategic positioning, remains to be seen. The exact geography of the emerging leadership for international economic governance might retain blurry boundaries, where, for instance, Russia might be a major player with respect to energy issues, while the "new" trade and investment players might include some BRICS countries (Brazil, China, and India) alongside Mexico, Turkey, and Argentina.

More fundamentally, it is not at all clear that the BRICS aspire to impose a new consensus for international economic relations. It may be that they simply wish to sidestep the neo-liberal orthodoxy, and are less concerned about proposing an alternative model. History would certainly suggest the value of such an approach. Indeed, no univocal model for international economic law has proved to serve equally well countries with diverse socioeconomic, political, and resource makeup as the BRICS, much less the rest of the emerging economies and industrial countries.¹⁷ At a time when the Millennium Development Goals calendar is coming to a close with no end of poverty in sight, the search for "universal" economic development and governance models has yet again been a failure, and the BRICS may have learned that lesson.

What is certain is that the United States and Europe can no longer assume that they have the political and economic power to set the rules of the game. There has been much talk in recent years about how a U.S.-EU Regional Trade Agreement could be a radical game changer. The Trans-Pacific Partnership negotiations, which currently do not involve any BRICS countries, are also attracting much attention and are thought by some to be a gateway to revitalizing the WTO negotiations. Will this strategy by the United States repeat the successful shift between regional and multilateral negotiations on intellectual property that resulted in the TRIPS and other enhanced trade commitments? I would argue that we are past that point. We operate in a world of global supply chains: the BRICS are the biggest sellers and on their way to becoming the major buyers. However, it is equally unlikely that they will substitute themselves for the current industrial powers at the reins of the international

¹⁴ Brazil has RTAs with 47 countries, Russia with 12 countries, India with 53 countries, China with 20 countries, and South Africa with 16 countries. WTO, *Participation in RTAs*, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

¹⁵ Dan Keeler, *Special Report: BRICS*, GLOBAL FIN. (Feb. 2012).

¹⁶ Jim O'Neill, *Building Better Global Economic BRICS*, GOLDMAN SACHS (Nov. 30, 2001), <http://www.goldman-sachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf>.

¹⁷ Current theoretical literature is also reflecting this reality and seeking alternatives to the universalist paradigm. See, e.g., FRANK J. GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW—THREE TAKES* (2013).

law economic institutions. Path dependency and institutional inertia, for starters, militate against it. Nor do I believe that they will succeed in creating entirely new fora that will supplant the Bretton Woods institutions. The limited impact of UNCTAD under the impetus of the Non-Aligned Movement certainly provides a cautionary tale in that respect. But together with the United States, Europe, and other emerging powers, they must reimagine our global international economic governance.