G20 AND BEYOND—THE INFLUENCE OF EMERGING COUNTRIES ON THE ARCHITECTURE OF INTERNATIONAL ECONOMIC LAW

This panel was convened at 9:00 am, Friday, April 5, by its moderator, Clay Lowery of Rock Creek Global Advisors, who introduced the panelists: William Burke-White of the University of Pennsylvania Law School; Gisela Bolívar of Jiménez Romero y Asociados; and Sonia E. Rolland of Northeastern University School of Law.[*]

The Influence of Emerging Economies on the Architecture of International Economic Law: A Perspective from Mexico and the WTO

By Gisela Bolívar[†]

It is a privilege to speak at this panel in light of the importance of the role that emerging economies have played in the architecture of international economic law. I would like to thank the American Society of International Law for the opportunity to share some thoughts regarding the perspective of emerging economies and the World Trade Organization (WTO) on the subject. My remarks and comments are entirely my own and do not reflect the views of an official instance, although the data used are part of several official international sources.

Emerging Economies' Figures

According to data published by the International Monetary Fund and the World Bank, in recent years emerging economies have had a more dynamic development compared with other economies, particularly in comparison to economies of developed countries. One of the biggest differences in growth occurred in the period 2007–2008. According to IMF estimates, an average growth of 1.9% for the economies of developed countries and of 6.2% for emerging economies, would be maintained between 2011 and 2015. By 2013, it is expected that the growth of emerging economies will be greater than that of developed economies.[1]

These figures largely reflect the increase in the growth rate especially in the BRIC's economies.

International Economic Law

How then can we say that emerging economies have had an influence on the architecture of international economic law?

As some authors have pointed out,[2] we should first define what international economic law stands for. Clearly free trade, investment, international agreements relating to intellectual

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[1] *See* Luis Orgaz & Luis Molina y Carmen Carrasco, *El Creciente Peso de las Economías Emergentes en la Economía y Gobernanza Mundiales.* Los Países BRIC Documentos Ocasionales No. 1101, Banco de España, Eurosistema 13–17 (2011). According to the last forecast published in 2012, there will be some changes in the countries' economic behavior due to the economic crisis and its effects. International Monetary Fund, *World Economic Outlook Database October 2012*, at http://www.imf.org/external/pubs/ft/weo/2012/02/pdf/text.pdf.

[2] *See* Andreas F. Lowenfeld, International Economic Law (2d ed. 2008).

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property, and those who establish dispute settlement mechanisms to resolve trade disputes that arise between countries should be considered as a first source of international economic law. Precedents arising from the resolution of trade disputes are also a source of such legislation. Moreover, there are some other agreements and international regulations, for example, tax agreements or provisions governing loans from international organizations such as the World Bank and the IMF, that are also an important source of international economic law.

For now, we will only refer to the first group of agreements and precedents in trade.

From my perspective, the influence of emerging economies in international economic law, has been mainly developed by the following:

(1) signing of bilateral and multilateral agreements in both trade and investment;
(2) modification of rules and internal trade legislation for trade facilitation;
(3) growing participation of these countries in various multilateral forums and especially in dispute settlement mechanisms established by the WTO and other international agreements;
(4) introducing concepts such as less-developed economies, emerging economies, and least-developed countries, among others.

Mexico

As an example of an emerging economy, I will develop the following three points for the case of Mexico.

The decisionmaking process has been a difficult process in a multilateral system, particularly since the last negotiating round of the WTO has not achieved reliable responses to trade negotiations by countries at a multilateral level. Regional trade agreements have been an efficient instrument to deliver better responses regarding trade issues and trade negotiations in a regional system.

Since the early 1990's, Mexico has been one of the most active countries in the signing of bilateral trade agreements. From the opening up of trade in its economy, Mexico has been an active actor on the regional scene. Currently Mexico is a party to twelve free trade agreements with forty-four countries, twenty-eight bilateral investment treaties, and nine economic complementation agreements.[3] Mexico is also part of regional agreements such as the agreement with Central America, the Initiative of the Latin American Pacific Alliance (Alianza del Pacífico Latinoamericano), the Trade Agreement with the European Union, as well as the Asia Pacific Economic Cooperation (APEC), which has had a very interesting development through the Trans Pacific Strategic Economic Partnership (TPP).

The opening up of trade with Mexico has made the country an innovator in the integration of Mexican exporter companies in world chain production. In other words, Mexican exporter companies produce final goods with raw materials and inputs originated in numerous countries.

Regarding the influence on internal legal changes, first it is important to note that following the signing of various international agreements and because the Mexican legal system is self-executing with respect to international treaties, the country has modified, since entering the GATT in 1986, various provisions of its internal trade regulations to comply with its international obligations.

[3] *See* Secretaría de Economía, Tratados y Acuerdos firmados por México, at http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/tlc-acuerdos.

Second, as productivity is connected to a system of efficient services as part of a regime in which trade barriers are eliminated, Mexico initiated in 2008 a trade facilitation program that, among other things:[4]

(1) eliminated reference prices to import goods in more than 332 tariff numbers;
(2) eliminated requirement of registration of some imports of products that do not represent any threat for health and safety;
(3) eliminated unnecessary regulations and simplified customs procedures.

The effects of these measures, along with the economic policy that the Mexican government has undertaken for several decades, have resulted in the following:

(1) more competitive global business development;
(2) growth of foreign direct investment;
(3) integration of the North American market in certain sectors;
(4) a better rating by international agencies, which benefits the country's image abroad.

Along with this, there are some areas that affect competitiveness in Mexico, such as deficient services, telecommunications, fiscal regulations, and the existence of monopolies or oligopolies in electricity and energy along with safety issues. Lack of infrastructure has limited Mexico's progress, in addition to problems with law enforcement, justice, educational and social differences—problems that all together generate inequality in progress and backwardness in the country's development.

Mexican participation and negotiation of all the bilateral and regional free trade agreements has become the best way to promote the integration of the country with international markets.

With regard to our third point of analysis, the participation of emerging economies in the mechanisms of dispute settlement under the WTO agreements and other regional agreements, Mexico, along with other emerging countries such as Brazil, Russia, India, China, and South Africa, stand as some of the most active members of this system.

So why is it important whether these countries have been active or not in dispute settlement mechanisms? Because this greatly influences participation in determining the criteria of the WTO to resolve different cases, and in the definition of international criteria derived from other mechanisms. All these precedents confirm another source of the modification of international economic law.

The Influence of the WTO in the Architecture of International Economic Law

There are some clear examples of the definition of these international criteria, among others:

(1) The analysis in light of the WTO agreements made on safeguard measures on imports of polypropylene bags and tubular fabric established by the Dominican Republic. The main issue in this case was the applicability of GATT Article XIX and the Safeguards Agreement. The Panel concluded that ''the provisional and definitive duties are safeguards, since they have suspended the Dominican Republic's obligations under GATT referred to the most-favoured nation principle, and since they have imposed a tariff surcharge, different from an ordinary customs duty, (which

[4] *See Decreto de Facilidades Administrativas en Materia Aduanera de Comercio Exterior,* Official Mexican Gazette, Mar. 31, 2008.

was not set forth in the Dominican Republic's GATT Schedule).''[5] The panel then addressed the substantive claims raised by the complainants. This was a decision that reinforced the multilateral system through endorsing the systemic application of GATT Article XIX and the Safeguard Agreement.

(2) The recent analysis conducted by the WTO on the issue of subsidies claimed by major aircraft producers in the European Union and the United States. In this case, among other findings, the Appellate Body found that some subsidies and tax rate reduction ''caused, through their effects on Boeing's prices, serious prejudice in the form of significant lost sales within the meaning of the SCM Agreement'' with respect to a particular market of seats;[6]

(3) The position for several years held by the WTO about trade restrictions that Mexican producers had to face with respect to the tuna compliance standard label ''dolphin safe.'' In this case, among other resolutions, the Appellate Body reasoned that ''by excluding most Mexican tuna products from access to the 'dolphin-safe' label while granting access to most US tuna products and tuna products from other countries, the measure modifies the conditions of competition in the US market to the detriment of Mexican tuna products.''[7]

Those are examples of a long list of cases that have been changing the landscape of international trade in light of the new international economic law.

How Can Those Cases Have an Influence on International Economic Law?

In the first case, the main resolution issued by the panel endorsed the application of Article XIX of GATT and the Safeguard Agreement, establishing a precedent for all countries, particularly for less-developed countries and developing countries to avoid non-compliance with general WTO principles under the argument of protecting their national industries from possible injury effects.

In the second case, the Appellate Body issued a resolution that will have direct effects on the global market of aircraft through the definition of subsidies and the way the United States manages some financial aid, even by the justification of scientific research.

In the third case, the WTO defined market conditions through competition rules that would be considered in the future as trade barriers.

Other legal effects that WTO decisions have in the construction of international economic law are related to the outcome that such decisions have on international trade through participant countries in dispute mechanisms.

Among the participation of less-developed countries in WTO dispute settlement mechanisms, it is important to analyze if retaliation is a significant determinant of success and participation in WTO settlement proceedings. Different authors have considered that many countries decide to participate in WTO proceedings due to retaliation measures that a final decision in the WTO may bring about.[8] Other authors have argued that a key consideration

[5] *See* Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (Summary of Key Findings), Disputes DS415, DS416, DS417, DS418, *available at* http://wto.org/english/tratop_e/dispu_e/cases_e/ds415_e.htm; http://wto.org/english/tratop_e/dispu_e/cases_e/ds416_e.htm; http://wto.org/english/tratop_e/dispu_e/cases_e/ds417_e.htm; http://wto.org/english/tratop_e/dispu_e/cases_e/ds418_e.htm.

[6] *See* United States—Measures Affecting Trade in Large Civil Aircraft, Second Complaint, (Summary of Key Findings), Dispute DS353, *available at* http://wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm.

[7] United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Summary of Key Findings), Dispute DS381, *available at* http://wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

[8] Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 World Bank Econ. Rev. 287, 310 (2005).

regarding countries' participation in dispute settlements is precisely to settle early in order to avoid the likelihood of an adverse ruling.[9]

So what is an adverse ruling? A typical adverse ruling or a favorable outcome on trade remedies is implemented by a modification of the original measure rather than a complete withdrawal, for example, in dumping or subsidies cases, margins may be reduced. On the other hand, in safeguards, a favorable outcome will be translated as the withdrawal of a contested measure, and consequently the liberalization of the related product.

Nonetheless, normally decisions issued by the DSB establish a general ruling stating that a country must bring its measures into conformity with the WTO agreements. This practice has caused a delay in compliance by affected countries.

Another aspect to be considered is the impact of retaliation and settlement of cases on countries. If we analyze different scenarios, we can conclude that it is not the same effect if participants in a controversy are developed countries; developed countries versus developing/less-developed countries; or developing versus developing/less-developed countries.

Returning to our three examples of WTO decisions, we can conclude that the results are based on the type of countries that participate in a dispute:

(1) In the case of safeguard measures between least-developed countries, the Dominican Republic informed the DSB that it has complied with their recommendations since April 21, 2012, by lifting the safeguard measure and establishing the MFN tariff at the level that was in place before the application of the safeguard.[10]
(2) In the case of *Airbus v. Boeing*, between developed countries, the DSB expects to release its compliance report by the first half of 2014.[11]
(3) Finally, in the tuna case, between a least-developed country and a developed country, the reasonable period of time for the United States to implement the DSB recommendations expires on July 13, 2013.[12]

Considering these three examples, generally when countries involved are in equal economic conditions, results in applying retaliation measures are more effective.

Conclusion

Taking all this into account, some of the main positive results from the WTO proceedings are not only maintaining a constant activity among dispute settlement procedures (i.e., keeping the Organization alive despite the Doha negotiations) and conforming to new international economic rules, but also recognizing those processes as negotiating tools among the participants involved (participants include not only complainants and respondents but also third parties—whose pressure sometimes results in an early settlement).

The dispute settlement mechanism created by the WTO has been probably the most successful system in solving international trade controversies. The rate of compliance of the WTO dispute settlement system is around 90%, which may not have been proven successful in terms of avoiding regional agreement negotiations, but which has definitely been proven successful in constituting negotiating tools for participants and preventing unilateral actions

[9] Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 Fordham Int'l L.J. 158, 164–65 (2001).

[10] *See* Dominican Republic—Safeguard Measures, Implementation of Adopted Reports, n.5.

[11] *See* United States—Measures Affecting Trade in Large Civil Aircraft, Compliance Proceedings, n.6.

[12] *See* United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Reasonable Period of Time Dispute, n.7.

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

By Sonia E. Rolland[*]

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 Settleement System, http://www.wto.org/english/forums_e/debates_e/debate41_e.htm.

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