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Voss-Bascom Professor of Law and Dean of International Studies Emeritus, University of Wisconsin-Madison. (dmtrubek@wisc.edu). This essay, designed to launch a longer-term project, is meant as much to raise issues as to resolve the complex questions involved. Alvaro Santos’ work on Brazil in the WTO inspired the project. I received helpful comments and advice from Santos, Andrew Lang, Mihaela Papa, Leila Choukrone, and Sonia Rolland. Kyle Engelke provided invaluable research assistance. Errors all mine.
Many believe that International economic law and policy (IELP) is “tilted” in favor of neo-liberal approaches to development strategy. It is alleged that the WTO, BITs, IMF, and World Bank adhere to free market principles and place strict limits on the ability of states to carry out development policies that have worked on the past. (Wade, 2003) The result, according to this view, is that taken as a whole, trade law, investment law, international financial regulation, and development assistance policy favor the interests of multinational companies and the developed nations where they are based over those of the countries and people of the Global South.

Julio Faundez, a leading critic of IELP, asserts that the neo-liberal Washington Consensus “…became the overriding constitutional framework” of international economic law and “…the ‘basic law’ of the world economy.” (Faundez 2011). He sees international economic law as a recent construction, an institution created in the last quarter-century by developed countries. He thinks it operates to the disadvantage of nations in the developing world. From a development point of view, he argues, there are five flaws in this “basic law” and the related institutions of global governance:

• the rules are created without any input from developing counties
• the international economic institutions have excessive control over economic policy in developing countries
• ostensibly reciprocal agreements like bilateral investment treaties are really asymmetric and only protect developed country interests
• adjudicative bodies set up to enforce international economic law are dominated by private sector advocates and trade specialists who do not understand the development issues involved in disputes and favor private interests over national concerns
• overall international economic policy is determined in bodies like the G-8 in which developing countries have little or no say.

While many agree with Faundez’ critique, and lament the restrictions placed on developing countries’ regulatory autonomy or “policy space”, others question this analysis. There is a counter narrative that suggests that IELP may not be as restrictive as the critics suggest. In this account, while IEL does contain principles, rules and policies that appear to limit national options and restrict policy space, the rules are more flexible than the critics allege and it is still possible for nations in the Global South to embrace heterodox strategies. (Santos 2012; Amsden 2005) Further, observers note that while the World Bank and the International Monetary Fund may have adhered to strict neo-liberalism in the past, this is changing and their policies today are more permissive. Faundez himself recognizes that the edifice he criticizes is less entrenched than some believe. Characterizing the regime as “fragile,” he suggests that if an alternative idea of development emerged to replace the neo-liberal vision, it would be possible to construct a more development-friendly international economic regime. (Faundez, 2011)

This paper explores this counter narrative by suggesting that the rise of the emerging economies can change international economic governance. In this preliminary study, I focus on the role of the BRICS nations because they have formed an official organization and pledged to work together to create a more equitable international economic order. But much of the analysis applies to larger emerging
economies in general. The argument is that as these nations become more important in the world economy, their power to affect international economic law and policy will grow. Moreover, I contend that this is already happening: there has been some relaxation of the constraints on regulatory autonomy and more acceptance of alternative development strategies. (Santos, 2012)

These issues are explored in the following sections. Section one describes the various elements of the international economic regime and sketches the case that they enforce strict neo-liberal policies. Section two looks at the nature of international economic law showing the indeterminacy of the rules, the contested nature of the policies it allegedly enshrines, and the limits of its enforcement capacities. Section three describes the rise of the BRICS. It chronicles their growing importance in the world economy, their endorsement of heterodox development policies, and their increasing capacity to operate effectively both singly and jointly in global institutions. Section four describes some efforts by the BRICS to change specific rules and policies showing that they have already have made an impact. Section five qualifies the argument by identifying some issues that may limit the extent to which emerging economies can and will change the rules of the game.

1) The Critique of International Law and Policy

Critics assert that the rules of international trade and investment law enshrine and enforce neo-liberal ideas about development. Observers of the WTO note that the Uruguay Round outlawed many industrial policy practices that were used effectively by Asian developmental states: these include export subsidies, infant industry protection, performance requirements for foreign investors, and various devices to acquire foreign technology. The subsidies code, TRIPS, TRIMS and other provisions of the WTO, it is argued, place strict limits on use of such tools. DiCaprio and Gallagher conclude:

“...WTO Covered Agreements have constricted some important policy space for Member developing countries...Many policies that were common in the NICs are inconsistent with their current international commitments...our central finding is that the WTO contracted the available policy set...” (2006, p. 800)

At the same time, the proliferation of bilateral investment treaties (BITS) also restricts development strategies and hampers governmental ability by requiring national treatment for foreign investors and restricting regulatory capacities. Van Harten argues that BITS deter the use of industrial policy by making it harder to impose rules designed to build up domestic industries; impose performance requirements on foreign investors; revise investment contracts to account for changing market conditions; and establish service standards for privatized utilities owned by foreign investors. (Van Harten, 2011)

Similar issues are raised about the operation of the international financial institutions. Critics contend that they have embraced neo-liberalism as the development strategy and embraced one-size-fits-all policies that demand a reduced role for the state, rule out most kinds of industrial policy, and favor foreign investors.

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2 I recognize that the five countries in the formally establish BRICS group do not constitute a fully formed bloc, have disagreements among themselves, and when they agree may not speak for all developing countries.
2) International Economic Law: Indeterminate rules and contested economics

Like any body of law, international economic law contains many terms and provisions that are subject to multiple interpretations. Let’s look at trade law. Terms like “trade barrier” and “subsidy” have no inherent meaning and must be defined. In his magisterial study of the neo-liberal turn in trade law, Andrew Lang notes that:

“...tremendous ambiguity remained even after the creation of the WTO – particularly as regards the new disciplines on domestic regulation...In virtually every area of domestic regulation, negotiators have chosen to proceed largely by way of generally worded principles. Such principles are highly indeterminate in their meaning, and their impact on regulatory choices at the national level is governed to a very large extent by the way they are interpreted...” (Lang, 164)

Lang shows us how technical expertise, based on neo-liberal economics, was deployed by the trade law community as a key interpretive tool. Because this body of thought assumes that markets are almost always preferable to state action, and free flows of goods and services across borders almost always contribute to net global welfare, the use of neo-liberal economics made it easy to construe WTO terms in ways that protected markets against state action, limited national policy space, and hindered use of industrial policy.

While Lang does not focus on development issues, his analysis helps us understand how the WTO emerged as a restraint on industrial policy. But it also helps us see that there is nothing immutable about these results. Trade law was more supportive of industrial policy in the past. Initially, it was part of the post-WW II regime of “embedded liberalism” that allowed great leeway in domestic policies. From the founding of the GATT to the Uruguay Round, trade law was much more accepting of industrial policy than it has been recently.

Can trade law and other aspects of international economic law escape from neo-liberalism and accommodate alternative developmental strategies? We know that the rules are intrinsically malleable and that alternative and more accommodating interpretations are possible. Indeed, Lang, Santos and others have shown that different interpretative practices have emerged in recent years suggesting that change may be occurring. The question is: what are the key forces that shape these interpretative practices and what does it take to change them?

That is admittedly a big question. International economic law emerges from bargaining among nations who are themselves influenced by domestic considerations. So national bargaining power and the domestic interests of the most powerful nations must play a role. Bargaining power is influenced by the size of domestic markets as it is access to these markets that offer incentives for agreement. As markets change and national power waxes and wanes, possibilities for changes in international economic law should emerge.
The shift in market power may be a game changer in global governance. But economic changes do not translate directly into power and influence. Much turns on the capacity of rising powers: effective power depends on the capacity to use it and this means having the skills and institutions needed to operate effectively in international arenas. Further, results are subject to the mediating effects of international organizations and transnational networks and the influence of dominant ideas. Of special importance are the networks of trade experts and investment arbitrators who play a central role in interpreting general terms and concepts. They develop and sustain bodies of ideas that are used to flesh out general terms.

3) The Rise of the BRICs and the Global Power Shift

Will the rise of the BRICS lead to changes in international economic law? These nations have, to one degree or another, relied on industrial policy to achieve more rapid growth and have resisted some of the pressures of international economic law. Their markets are increasingly important to the world economy, they are increasing their influence in international organizations, they have built up their capacity to deal with international economic law, and they have contributed to the emergence of new approaches to development that challenge the hegemony of neo-liberalism.

a) State activism and successful use of industrial policy

All the BRICS to one degree or another have employed industrial policy. In the search for promising growth paths and technological upgrading, they have selected specific industries and products for special support and offered tax breaks, direct subsidies, low cost credit, and protection from foreign competitors. They have conditioned foreign investment on transfer of technology and export performance. These forms of state activism have contributed to above average rates of growth in countries like China, India, and Brazil.³

b) Growing market power

In what it called a “power shift,” The Economist magazine noted that the emerging world, led by the BRICS and other major emerging economies, will soon constitute over 50 percent of world GDP. Using market exchange rates, The Economist estimated that the emerging world’s share of global GDP grew from about 20% in 1990 to 38 percent in 2010 and is projected to reach 50 percent by 2017. More dramatically, if GDP is measured using purchasing power parity, the emerging world had surpassed the developed world by 2008 and had reach 54 percent of world GDP by 2010. (Economist, 2011). Reflecting on these changes, Robert Wade says “…we can thank of the new multipolarity in economic and financial affairs as involving three poles—the United States, the EU, and BRICs. (Wade 2011).

³ The literature is voluminous. For recent discussions of state activism in Brazil see Cypher 2012; Arbix and Martin 2011.
c) Increased voice in international organizations and global summits

The BRICS have pushed for increased voting power in the World Bank and International Monetary Fund. They have secured an increase their quotas and representation in governance. They have also challenged continued hegemony of the G 7/8 and been brought to the top table of global governance through the creation of the G-20 which may be emerging as the primary forum for global economic and political coordination.

d) Enhanced International economic law capacity

Brazil, India and China have become sophisticated players in the international economic law game. They have invested heavily in trade law capacity and used it to promote exports and shield heterodox policies. Santos (2012) and Papa (2012) remind us that “trade law capacity” involves a lot more than the acquisition of legal knowledge and skills. It also includes the ability to coordinate participation in legal disputes with domestic policy. In addition to creating a cadre of trained lawyers in the public and/or private sectors, countries must structure relations among government agencies and between government and industry in ways that ensure optimal use of the legal tools available. For example, as Brazil began to learn more about how to operate in the trade regime, it not only invested in a massive program to train lawyers; it also reorganized the way government and the private sector work together to identify issues the issues that should be pursued in the WTO. (Santos 2012; Badim forthcoming). Mihaela Papa observes:

“Since the late 1990s, Brazil’s participation in the WTO dispute settlement has undergone a dramatic transformation, as Brazil moved from an ad hoc approach to dispute settlement to a sophisticated and well-designed domestic coordination strategy based on the cooperation within the government (between the foreign ministry, other ministries and Geneva mission) and between the government and the formally engaged private sector. Brazil’s aspirations for successful WTO participation led to the mobilization of interest in the WTO expertise, new institutes, courses and research groups, private sector engagement with the WTO and civil society engagement.” (Papa, 2012 p.9 )

Similar things have happened in China. Hsieh notes that “…China has consistently made WTO legal capacity building a priority and endeavored to fortify public-private partnerships to enhance this capacity” (Hsieh 2010, p. 1028). China has reformed the governmental structure that deals with WTO issues, created WTO think tanks to serve as bridges between enterprise and government, encouraged the development of domestic sector private legal capacity, and pressed for inclusion of Chinese experts in the WTO DSU and Secretariat. (Hisieh, 2010). Similar developments can be found in India.

In addition to increasing their capacity to use WTO law to open foreign markets and protect domestic policies against challenges by other WTO members, China, India and Brazil are expanding the use of anti-dumping law, enhancing their capacity to provide protection for some domestic industries, thus possibly helping implement industrial policy. (Wu, 2012). Similar efforts are going on to build capacity in the BITS regime. While Brazil has so far eschewed BITs, China and India have increased their interest in these
agreements and have been developing more sophisticated approaches to both the design of treaties and defense against claims.

e) Support for heterodox economics and alternative development strategies

Academics and policy makers are developing new theories of development that may challenge the hegemony of neo-liberalism. In Latin America, this body of thought is called “new developmentalism” or “neo-structuralism”. (Trubek, 2010) Charles Gore speaks of an emerging “Southern Consensus” that fuses neo-structuralism with East Asian developmentalism. (Gore, 2000.)

New developmentalism accepts the primacy of the market but envisions a major role for the state. It stresses that markets in developing countries are often fragile, and that even relatively robust markets are unable to take advantage of opportunities for innovation. It accepts the need to engage with the global economy but stresses this should be a strategic engagement in which opening is sequenced in ways that promote domestic goals. That means maintaining some controls on capital flows and finding ways to protect and support export industries through various forms of performance-conditioned intervention.

The “Southern Consensus” includes “productive development policy” that not only strengthens sectors in which a country currently has a comparative advantage but also builds capacity in areas where it might compete effectively in the future. It favors both a strong state and a strong private sector. Gore notes that the Consensus promotes “…close government-business cooperation within the framework of a pragmatic developmental State.” (Gore, 2000). Because it assumes that an activist state and industrial policy are necessary for development, this approach reverses the neo-liberal distrust of state intervention. Speaking of Brazil’s adherence to this approach, James Cypher describes it as one revives the classic developmentalist faith in the role of the state but departs from their prescriptions in several ways:

New Developmentalism stresses a “growth with equity” approach along with an emphasis on industrial policy, highlighting public, growth-supporting, infrastructure spending, and a “neoschumpeterian” emphasis on building a national innovation system through deep public-private cooperative programs that will drive investment expenditures toward productivity-enhancing science and technology applications throughout the national industrial base of the economy. (Cypher p.3, n4)

To the extent that new developmentalism emerges as a full-blown alternative to neo-liberalism, it might serve as the basis for new approaches to international economic law.4

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4 However, there is an ongoing debate concerning the extent to which this body of thought, and practices derived from it, represent the emergence of a new paradigm or an adaptation of the old one. New developmentalism comes in various versions depending on the degree to which development policy deviates from the tenets of the Washington Consensus. For a useful study of continuity and change between the Washington Consensus and
4) **The BRICS strike back: Protecting alternative development strategies through international economic law**

The BRICS have begun to use their enhanced capacities to influence international economic law. These interventions have softened the impact of the IEL disciplines and allowed more leeway for alternative development strategies. This includes successful negotiation and litigation in the WTO as well as efforts to expand policy space in new model BITS.

**a) WTO**

Emerging economies have been able to defend heterodox policies through use of WTO litigation. Leila Choukroune notes that many of these emerging trade champions are to a very large (China) or much smaller extent (Brazil) state capitalists:

“As ambiguous market economies or economies in transition [China and Brazil] play with different rules than those ideally imagined for a free trade world, and skillfully select legal tools available in the WTO Agreement that could better protect their syncretic economic model.”

She suggests that the rise of the BRICs may contribute to a hybrid system and a possible redefinition of the WTO’s values lifting the “veil of hypocrisy” that “reigns over an idealized model of international trade that is not always respected by its main proponents” who preach liberalization but practice protection of domestic interests. (Choukroune 2012)

(i) **Brazil: Subsidies and TRIPS**

When it initially joined the WTO, Brazil accepted the whole package of WTO agreements and did not adjust its domestic institutions to ensure that it could protect key policies. But as neo-liberal enthusiasm waned, successive administrations have protected domestic policy space by challenging restrictive interpretations of global trade rules. This growing willingness to challenge WTO-based restrictions is a result of changes in in the way trade policy is formulated in Brazil and shifts in Brazil’s development strategies.

After flirting with neo-liberalism in the 1990s, by 2004 Brazil had resumed its commitment to industrial policy. (Trubek, Schapiro, and Coutinho, 2012) As the state began to play a more robust role in the promotion of economic growth and social protection, trade policy-making was more closely integrated with overall development policy and Brazil invested in the legal and related skills needed for success in trade disputes. At the same time the arena for discussion of trade policy has been expanded as more government agencies began to participate and the private sector and a flourishing civil society

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Note that some aspects of new developmentalism can be justified without departing from neo-classical premises while other features may require an alternative theoretical approach. And the question of whether new developmentalism really is a break with neoliberalism is a contested issue. Thus Babb (forthcoming) argues that the BRICS are simply pursuing a variation of the Washington Consensus paradigm rather than being guided by an alternative theory.

This section draws on Santos (2012) and Sanchez Badin (forthcoming)
movement entered the debate. The result has been that Brazil has been able to use trade law as a shield for policy innovation.

In the case of intellectual property, Brazil was able to carve out space within the TRIPS regime that allowed it to negotiate better prices for anti-viral drugs. Although initially it looked like TRIPS would preclude this kind of action, a number of changes in law, politics and government organization at the domestic level as well as action in the international arena helped strengthen the government’s capacity to shape domestic health policy in the face of international constraints. The judiciary entered the arena to enforce a constitutional right to health, administrative changes were made that opened trade policy discussions to a wider range of interests, and the legislature was mobilized.

Specific legal changes at the domestic level included: (i) reforms of the legal system in order to eliminate TRIPS-plus provisions; (ii) authorization for use of such flexibilities as compulsory licenses; (iii) the approval of new mechanisms implicitly authorized by the international system that favor access to technology (such as the Bolar exception); and (iv) the creation of new government institutions that could serve as countervailing powers to industry interests in the patent approval process. At the same time, Brazil and other developing countries carried on a campaign at the international level that led WTO and WIPO to take a more supportive stance towards the use of policy space in this field. (Sanchez Badin forthcoming.)

The trade finance case also shows how Brazil has been able to legally protect domestic policy space from restrictions from the WTO. As part of its new industrial policy, Brazil sought to build Embraer into a national champion and facilitate its efforts to develop market share in the global regional jet market. One thing it did was provide subsidized government financing for sales of Embraer planes. Such financing is an essential part of the deal for all aircraft manufacturers and Embraer was hampered by the high cost of finance available to Brazilian companies. To deal with this, the government provided a subsidy to the institutions that provided finance for Embraer sales. This practice was challenged by Canada’s Bombardier as a violation of the WTO subsidies code. After a long and drawn out litigation, Brazil was forced to make changes in its subsidies. But through a partially successful campaign that drew on the growing capacity of government and industry working together in the trade law field, Brazil was able to preserve part of the subsidy program and shift the whole issue of aircraft financing terms into the OECD where it felt it had a better chance of achieving its goals. By moving the issue to the OECD, Brazil got a voice in the main forum affecting global rules for aircraft finance. This meant it has a say in the terms affecting its competitors and thus more bargaining leverage in the continuing dispute with Bombardier. (Sanchez Badin, forthcoming; Santos, 2012)

(ii) *India and TRIPS Flexibilities*

Although perhaps not as active as Brazil, India has become an increasingly prominent player in the WTO dispute settlement system and has learned how to use the system to protect alternative strategies. Amy Kapczynski details how India exploited TRIPS’ formal flexibilities to preserve policy space. TRIPS gives developing countries room for maneuver by allowing them to place limits on patentable subject matter, create procedural opportunities to challenge patents, and place restrictions on injunctive
remedies. Using a number of strategies, India took advantage of these flexibilities to protect its domestic pharmaceutical industry. (Kapczynski 2009)

(iii) China and the legitimation of state activism

In the early years after accession, China was not very active in the WTO. But in recent years it has become one of the most active participants in the dispute settlement process. It has sought rule changes and both challenged protectionism by other countries and defended various aspects of its industrial policy against claims of WTO violations. In doing this it has contended for interpretations of WTO law that would allow more policy space for countries following heterodox paths. To be sure, China has had limited success in this effort. One reason is that some of the cases deal with tensions between China’s state activism and aspects of its WTO Accession Agreement which impose WTO plus and minus obligations that may be even more at odds with the Chinese model of development than normal WTO rules. It may be that once the Accession Agreement rules are no longer in force, and Chinese trade law capacity increases, it will have more success defending its heterodox practices. (Rolland, n.d)

b) BRICS and the new model BITS

This is a complex area. Given the number of BITs in effect, changing attitudes of developed and developing nations towards key issues, and the lack of a central decision maker, it is harder to be sure of trends in this area than in the trade field. While Brazil, India and China have resisted many limitations of their FDI regimes in the past, that is changing. Now that they are outward investors, they have an interest in protecting their own investors as well as attracting foreign investment. Brazil has so far eschewed BITs but China and India have signed numerous treaties.

In recent years China at least has agreed to more protection for investors. But China’s recent BITs still leave significant policy space suggesting that China is unwilling to allow the BITs regime to hamper its use of industrial policy. Thus recent China BITs allow control of speculative capital and place no restrictions on the use of performance standards. (Gallagher, 2010). In a comparison between the recent China-Germany BIT and the US Model BIT, Sarah Anderson concludes that “The Chinese government has maintained much more policy flexibility to ensure that foreign investment supports national economic strategies.” (Anderson, 2009, p.2)

India also has engaged in the regime but sought to retain control over claims and retain freedom to carry out industrial policies. Papa (2012) reports that India was able to resist pressures to include investor-state arbitration in agreements and its latest model BIT has narrowed the protections allowed foreign investors and limited restrictions on government regulatory autonomy. She states “Current investment treaty negotiations demonstrate India’s greater assertiveness in protecting its policy space...” (17)

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6 One area of intense debate is China’s support for “green industry”. An important part of China’s industrial policy, this support has been challenged by the US and others. The resulting debate has raised important questions about the SCM agreement and environmental goals which is still on-going. (Wilke, 2011)
If the BRICS are demanding more flexible terms in agreements, their new-found importance as investors may also be influencing developed country attitudes towards policy space limitations. Now that countries like Brazil, India and China are investing in the US and EU, these jurisdictions must consider the effect of the agreements on their own regulatory autonomy. This has led them to rethink their policy towards BITs. Jose Alvarez notes that the United States, “now faces the serious threat of suit from foreign investors within its borders”. He shows that the recent US model BITs have removed the strict limits on policy space common in earlier versions. (Alvarez 2011). This shift is probably caused, at least in part, by the increasing flows of FDI from the BRICS to the US and the EU and the realization that BITs can affect developed as well as developing country policy space.

c) BRICS and Development Assistance

Another area where the BRICS may be changing global governance is in the area of policies regarding development aid. Brazil and China, at least, are now primarily aid givers, not aid recipients. This has given them more of a say in IFI policy. This may be reflected in the softening of IFI resistance to further, the growing economic strength of the BRICS have meant that they are less dependent on the IFIs and thus less affected by their policy preferences. Finally, BRICS’ aid to less developed countries comes with little or no conditionality thus allowing more policy space than has been the norm in development aid in the past. Speaking of China’s challenge to Western development policy, Gu, Humphrey, and Messner note that Chinese aid does not include the neo-liberal conditionalities common in Western agreements. They note that China:

“...presents a challenge to the development project of Western countries, offering an alternative view of what development is and how to achieve it. China has not followed the standard Washington Consensus prescriptions with regard to economic liberalization.” (Gu, Humphrey and Messner, 2007 p. 285)

d) Assessing these developments

All these developments suggest that Faundez’s assessment of international economic law and policy may be overly pessimistic. The emerging economies are no longer so much under the sway of the IFIs and are beginning to have some say on the rules of the game. The BRICS are finding ways to shape WTO law to fit alternative strategies. BITs have become more reciprocal and more tolerant of industrial policy. Trade bureaucrats and investment arbitrators may still come disproportionately from developed countries and/or accept neo-liberal ideas. But this may be changing. And as the role of the G-20 expands the BRICS should have more of a chance to influence global policy.

5) Limiting factors

We should not, however, assume that the tables have been fully turned or that international economic law is now a “level playing field”. While there is evidence that the BRICS are already making a difference, there are factors and forces that may limit their effectiveness. Any final assessment of the prospects for change in international economic law and policy must take these into consideration.
a) The continuing strength of neo-liberal policy, academic, and legal networks

Policy makers, academics, arbitrators, and lawyers from emerging economies participate in transnational networks that diffuse expertise and ideas about “best practices”. Babb describes the Washington Consensus as a transnational policy paradigm diffused through such networks and reinforced by IFI conditionality. While acknowledging that the paradigm may no longer be hegemonic, she notes that it still affects policy-making and no clear alternative has emerged. She notes:

The Washington Consensus was soon weakened by its own internal vulnerabilities and the changing intellectual and political circumstances. However, it has not yet been overthrown by a competing paradigm, either at the national or transnational level. (Babb, p.22)

To the extent that transnational networks and international bureaucrats retain a commitment to neoliberal ideas, it may be hard to dislodge interpretations derived from them. Thus Kapczynski speaks of a “transnationalized legal culture” in patent law that affected Indian administrators by transmitting concepts that supported broader patent protection for foreign firms. And it has been suggested that arbitrators in investment disputes drawn largely from the private sector in developed countries favor expansive limits on state power.

b) Limited success in reforming global institutions

While BRICS have pushed for more power in international financial institutions, these efforts have not fully succeeded. The push for increased voting power in the World Bank and IMF did lead to some change but less than the proponents wanted. (Wade 2011) And the BRICS have not always acted effectively as a bloc: the recent selection process for the head of the World Bank shows the limits of their capacity to work together. While the creation of the G-20 certainly has helped the emerging economies, the BRICS influence there is still limited and the G-7 still remain very powerful. (Wade, 2011).

c) Disagreements and conflicts among the BRICS

The BRICS share some general approaches to development and have common interests in making some changes in international economic law. But they may not always be in agreement: for example, Papa notes that China and India have taken different stances towards the scope of BITS and appropriate processes for dispute settlement. And there may be real conflicts between these countries: thus many in Brazil have been very critical of China’s trade and currency policy. The Economist reports:

“Many Brazilian industrialists distinguish between Chinese and other competitors. “We don’t believe in protection against efficiency,” insists Roberto Giannetti of São Paulo’s Federation of Industries (FIESP). But he adds that “today we can’t accept China as a fair trader”. FIESP says it did not want the tax increase on imported cars. But it complains that China is dumping diverted exports from depressed Europe. Meanwhile, Brazilian manufacturers trying to export to China face steep non-tariff barriers on manufactured goods, such as obstructive state purchasing agents. Rubens

7 Babb dismisses the new developmentalist policies of the BRICS as a mere adaption of the basic Washington Consensus paradigm.
Ricúpero, a former finance minister, thinks that rather than acquiesce in the disappearance of its industries, Brazil will move towards managed trade with China, at least in some sectors”. (2012)

d) The constraining power of markets

International economic law and policies enforced by the IFIs are not the only forces constraining development policy in emerging economies. There is also the pressure of global markets. All the BRICS are eager to attract foreign investment and maintain access to global capital markets. Fear that the pursuit of heterodox policies will cause negative reactions by foreign investors can be as, if not more, constraining than international treaties.

6) Conclusion

This preliminary survey of the complex forces affecting international economic law and policy in the 21st Century suggests that individual and collective action by emerging economies could ensure that these bodies of law and policy are more receptive to developmental experimentation and alternative strategies. It is too soon to say to what extent this will occur, but not too soon to say this is a development in global governance well worth closer attention.
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