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EDITORS' INTRODUCTION

Managing Growth in a Changing World: What Lessons Can the BRICS Learn from Each Other?

James J. Nedumpara[+] & Pallavi Kishore[++]

The BRICS group of countries[1] is a heterogeneous mix with more differences and diversities among them than any apparent similarities or commonalities. They form some of the fastest growing economies in the world and represent the hope for a global economic revival. The BRICS group, if recent statistics are to be believed, accounts for more than a quarter of the world's GDP, and well over 40 percent of the global population. As of 2013, the five BRICS countries represent almost 3 billion people, 17 percent of the world trade, a combined nominal GDP of US$16 trillion, and an estimated US$4 trillion in combined foreign reserves.[2]

Most of the BRICS countries grew remarkably in the last two decades. Foreign investment came in at unprecedented levels; disposable income levels and consumption patterns saw dramatic changes. There was an effort in most of the BRICS countries to open up their economies to the forces of free market.

A more dramatic development was the rise of the BRICS as an influential group in changing the apparatus of global economic governance. BRICS countries have pledged to work together to create a more equitable international economic order. In a way, the rise of G-20

+ Associate Professor and Executive Director, Centre for International Trade and Economic Laws, Jindal Global Law School, O. P. Jindal Global University.

++ Associate Professor and Assistant Director, Centre for International Trade and Economic Laws, Jindal Global Law School, O. P. Jindal Global University.

1 The BRICS group includes Brazil, China, India, Russia and South Africa. The acronym 'BRIC' was coined by Goldman Sachs, an investment bank, in 2001.

2 *Emerging vs. developed economies : Power Shift:* ECONOMIST, Aug. 4, 2011, http://www.economist.com/blogs/dailychart/2011/08/emerging-vs-developed-economies.BRICS group includes Brazil, China, India, Russia and South Africa. *See also* Geethanjali Nataraj & Abhirup Bhunia, *Cementing the BRICS*, http://orfonline.org/cms/sites/orfonline/modules/analysis/AnalysisDetail.html?cmaid=65175&mmacmaid=65032.

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as a forum of global economic governance marks the growing clout of BRICS economies. In the past, the members of the current BRICS group had resisted assuming obligations on the emerging areas of international economic law. For example, India and Brazil played a less prominent role in the multilateral trade negotiations running upto the Doha Round whereas China and Russia remained outside the GATT/ WTO until 2001 and 2012 respectively.[3]

For decades, the economies in the BRICS group were searching for a development model that could accommodate their development concerns and aspirations. For example, the law and development literature in the twentieth century spoke about the advantages of transplanting values and systems from the Northern institutions to Southern countries.[4] However, this approach has become inadequate especially when the socioeconomic realities and legal cultures and traditions in these economies differ so widely.

In this context, horizontal learning based on the experience of similarly-situated countries appeared a more appropriate strategy than wholesale importation of Western development and regulatory models. The BRICS project on transnational horizontal learning assumes significance in this regard. As Trubek writes, a "new school of law and development" has been pressing for adopting an approach grounded on careful empirical study of local conditions and on learning through horizontal transnational comparison by networks and experts".[5] However, the new development model focused on the use of domestic law as an implement to facilitate economic growth and highlighted the importance of empowering the developmental state.

For decades, both India and Brazil focused on import substitution policies and state led industrialisation. In the 1960s and 1970s, the state -led *dirigiste* model of development found its commanding heights.[6] However, in the early 1990s, both these countries adopted neoliberal

3 China joined the World Trade Organization (WTO) in December 2001, whereas Russia joined the WTO in August 2012. *See* World Trade Organization, Understanding The Wto : The Organization, Members And Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

4 *See generally* The New Law and Economic Development: A Critical Appraisal (David M. Trubek & Alvaro Santos eds., Cambridge University Press 2006).

5 See in this issue, David Trubek, *Scan globally, reform locally: the horizontal learning method in law and development*, 5 Jindal Global L. Rev. [ ] (2014).

6 Prabhat Patnaik and C. P. Chandrasekhar, *India: dirigisme, structural adjustment, and the radical alternative, in* Globalisation And Progressive Economic Policy (2010) (arguing that post-independence India was one of the classic cases of *dirigiste* – i.e., state-directed – economic development).

policies that sought to protect markets against state intervention. The 1991 economic reforms in India and the implementation of the 1994 *Plano Real* in Brazil were notable developments in the neoliberal direction. Joining the WTO in the mid-1990s implied that India and Brazil would have to limit their policy space on a number of areas such as tariff and industrial policy, food subsidies, administrative controls, health and product safety, intellectual property rights and forced domestic use or localisation requirements. As the international economic law community quickly learnt, adopting a 'one-size-fits-all' approach was harsh on developing countries and small economies.[7] This was especially true for developing countries such as India and Brazil which had their own unique set of challenges. However, engagement with international bodies and institutions that advocated hardcore neoliberal policies led these countries to frame and design their own development models. For example, the constraints imposed by the agreement on Trade-related Intellectual Property Rights (TRIPS) did not limit India and Brazil in carving out policy space to provide more development friendly pharmaceutical product patent regimes.[8] Accordingly, the developmental state that emerged in the shadows of the WTO processes in Brazil and India embraced the 'new development' model in the new millennium which sought to benefit from the participation in the global economy while avoiding the dangers of free trade fundamentalism. While both India and Brazil dismantled state monopolies in a number of sectors through disinvestment and eliminated other restrictive import regime and investment policies, the state proactively engaged in supporting and guiding sectors where these economies had competitive advantage.[9] The special benefits given to the regional aircraft industry in Brazil[10] and the information technology industry in India[11] are clear illustrations. In

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7 David Trubek, *Reversal of Fortune? International Economic Governance, Alternative Development Strategies and the Rise of BRICS*, European University Institute, Florence, Italy (June, 2012), http://media.law.wisc.edu/s/c_638/3fwq9/eui_paper_final_june_2012.pdf.

8 Amy Kapczynski, *Harmonization and its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 Cal. L. Rev. 1571.

9 *See* David Trubek, Diogo Coutinho & Mario Schapiro, *Towards a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions*, (University of Wisconsin Legal Studies Research paper Series No. 1207), http://ssrn.com/abstract=2144939; *see also* Gregory Shaffer, James Nedumpara & Aseema Sinha, *Indian Trade Lawyers and the Building of State Trade-related Legal Capacity* (University of Minnesota Law School Legal Studies Research Paper Series No. 14-08), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390673##.

10 Michelle Ratton Sachez Badin, *Development Responses to the International Trade Legal Game: Cases of Intellectual Property and Export Credit Law Reforms in Brazil, in* Law And The New Developmental State: The Brazilian Experience In Latin American Context (David Trubek et al. eds, 2013).

11 The Information Technology industry availed a ten-year tax holiday in India under Sections 10 A and 10 B of the Income Tax Act 1961.

other words, both these countries did not implement neoliberal economic policies in their original form but adapted them to suit their unique conditions.

It is easy to make broad generalisation about the development narrative of India and Brazil or some other BRICS economies as attempted above. Although Brazil and India follow heterodox economic policies and have implemented similar development models at various stages of their economic development, their approaches and concerns have been very different.[12] In the above context, the broader BRICS project seeks to delve deep into specific areas of law and policy such as trade and finance, corporate governance, foreign investment, international taxation, regionalism and judiciary where the scope for horizontal learning is more feasible and discernible. In short, the focus of the BRICS project is to understand the role of law in development based on local experiences in these economies.

A. BRICS SYMPOSIUM ON MANAGING GROWTH IN BRICS ECONOMIES

This *Jindal Global Law Review* (*JGLR*) special issue on BRICS comes out of an international conference on the theme entitled "Managing Growth in a Changing World: What Lessons can the BRICS Learn from each other?" held at Jindal Global Law School, India, in December 2012. The conference which was organised in association with the Getulio Vargas Foundation (FGV) Law School, São Paolo, and the Centre for WTO Studies, Indian Institute of Foreign Trade, India was the second iteration of the *Law and Development Dialogue* initiated by FGV in November 2010. The Jindal conference aimed at continuing the dialogue in India where participants from the BRICS economies examined the legal and regulatory strategies employed in Brazil, Russia, India, China, and South Africa in order to harness the positive and mitigate the negative impacts stemming from rapid economic growth. Each of the BRICS countries has challenges, but some of the lessons could be useful to everyone.

This special issue of *JGLR* features a series of papers on topics as wide-ranging as foreign direct investment and tax reforms. Although this special issue focuses mainly on India and Brazil, the *Law and Development Dialogue* seeks to include other BRICS countries in the ongoing project on horizontal learning. On December 4, 2012, the

12 Both countries followed import substitution policies with strategic support for key industries for several decades. *See* T. N Srinivasan & Suresh Tendulkar, Reintegrating India With The World Economy (2003).

Jindal conference organised a high-level diplomatic forum which included Mr. Paulo Estivallet de Mesquita, Head, Department of Economic Affairs, Brazil; Mr. Marc Reynhardt, Counsellor-Political (Multilateral), High Commission of South Africa, New Delhi; Mr. Danis Alipov, Minister-Counsellor, Embassy of the Russian Federation, New Delhi; Dr. Rahmat Mohamad, Secretary-General, Asian-African Legal Consultative Organization, New Delhi and Mr. Amar Sinha, Joint Secretary, Ministry of Commerce and Industry, Government of India who also chaired the session. During the high-level diplomatic forum, the participants discussed the impact of globalisation on legal education in the BRICS context, the imperative for a joint BRICS agenda for a development-friendly world and the emergence of BRICS as a vital political organisation.

In this brief introduction, we would also like to reflect on the experiences from the BRICS economies, especially from Brazil and India, to explore whether there are any lessons for the BRICS group to learn from each other.

B. BRICS: ROLE OF STATE AND THE MARKET

The articles in this issue of *JGLR* offer various points of departure. José Ghirardi's article entitled *Everybody Has a Car, But Nobody Moves* explores the development narrative which has been at work in Brazil for the past decade, particularly since the election of president Luís Inácio Lula da Silva.[13] Ghirardi argues that Brazil seems to have accepted that individual consumption is the driving force behind mature, successful societies, and that maximizing the number of consumers and their market choices is ultimately the surest way to achieving societal welfare. Ghirardi highlights the potentially challenging consequences of Brazil's development narrative which is widely branded as 'consumption as social inclusion'. The role of the government, in this narrative, is to create optimum conditions for the enjoyment of individual choices, but it does not pay enough attention to the collective needs of the society.

Maria Lucia Padua Lima, on the other hand, argues the need for public investment in sectors such as infrastructure to attract greater FDI in Brazil and other BRICS economies.[14] In this narrative, the developmental state will need to play a more active role in providing these backbone services rather than leaving it to private investors to

13 See in this issue, José Ghirardi, *Everybody has a Car But Nobody Moves: Contradictions in Brazil's Social Inclusion via Consumption Model*, 5 JINDAL GLOBAL L. REV. (2014).

14 See in this issue, Maria Lucia Padua Lima, *FDI in Brazil: Some Considerations*, 5 JINDAL GLOBAL L. REV. (2014).

bridge the gap. A related issue is the role of the government in enhancing business and investor confidence in these economies. The controversy surrounding the introduction of General Anti-Avoidance Rules (GAAR) by the Indian parliament to overcome a decision by the Supreme Court concerning taxation of capital gains in an overseas transaction of equity shares indicates how an unwarranted state action could affect foreign investor sentiments and business environment in an emerging economy.

Charles Maddox demonstrates how tax policies could affect investor confidence and eventually the GDP growth in emerging economies.[15] These three studies clearly indicate the limits and possibilities of an activist state. In sectors such as infrastructure, the developmental state may have to play an activist role as a facilitator, whereas tinkering with economic laws and established practices which may affect business confidence is likely to be viewed adversely. This view comports with the changing role of the new developmental state where law has a constraining force in regulating the activist state.

The role of the administrative state[16] is increasingly becoming noticeable in the field of trade remedies. Trade remedies were operated primarily as legal instruments by firms in developed countries to keep out cheaper foreign imports from low cost countries, which generally included developing countries. Abhijit Das and Meghna Sharafuddin capably demonstrate how leading antidumping users have been applying such restrictive measures beyond their original term to provide trade protection.[17] Recent statistics indicate that emerging economies such as Brazil, India and China have become the undisputed leaders in using trade remedies.[18] The use of trade remedies by BRICS economies clearly points to the role of the administrative state in using legal instruments which were traditionally developed by industrialised nations to advance their own interests in the face of competitive pressures.

C. DEVELOPMENTAL STATE IN AN INTERDEPENDENT WORLD

BRICS countries proactively engage with international economic law

15 See in this issue, Charles Maddox, *Tax Policy and Economic Reform in the BRIC: A Case of Tax Structuring in the Face of India's Anti-Avoidance Rules*, 5 JINDAL GLOBAL L. REV. (2014).

16 The phrase 'administrative state' was coined by Dwight Waldo in 1948.

17 See in this issue, Abhijit Das & Meghna Sharafuddin, *Sunset Reviews: Important Provisions Made Irrelevant*, 5 JINDAL GLOBAL L. REV. (2014).

18 Dan Wei, *Antidumping in Emerging Countries in the Post-crisis Era: A Case Study on Brazil and China*, J. INT'L. ECON. L (2013); *see also* Organization of Economic Cooperation and Development, 8th G-20 Trade and Investment Measures Report, OECD, 8th G-20 Trade and Investment Measures report, http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=340.

institutions. While they are part of multilateral bodies such as the World Bank and the WTO, these economies also constantly explore bilateral and regional trade and investment agreements. These preferential trade agreements (PTA) permit relatively narrower flexibilities when compared to multilateral treaties. Although Brazil has been reluctant to embrace bilateral investment treaties, India and China have been fairly active in exploring cooperation in investment matters with other capital-exporting countries. The negotiations for 'mega-PTAs' such as the Trans-Pacific Partnership (TPP) and Trans-Atlantic Trade Investment Partnership (TTIP) have significant implications for BRICS economies in terms of trade diversion and preference erosion. As Geetanjali Sharma suggests, BRICS nations will have to identify a common baseline on the scope and coverage of issues in PTA negotiations.[19] Again, the inclusion of 'behind-the-border' issues such as technical regulations and standards, product safety protocols and currency issues could severely undermine the development space the BRICS economies have carefully preserved all this while.

The role of global models in creative regulatory structures is a highly debated issue. Yugank Goyal argues that the BRICS countries will have to reconfigure their regulatory models especially in the field of corporate governance.[20] Goyal highlights the role of informal institutions and practices in corporate governance reforms in the BRICS countries. Goyal's arguments highlight the mistake of using transplants and Western imports of regulations in developing countries when these countries have a structured and well-functioning model of economic governance. This view reaffirms the new development philosophy that law reforms should take into account distinctive features of national legal cultures and institutions.

D. CONCLUDING REMARKS

The experience of individual BRICS countries in creating a development paradigm can be instructive for other members of the BRICS group. Each nation has its own set of peculiarities and challenges but those do not detract from the fact that the members of the BRICS group have similar trajectories of growth and development patterns. The Jindal BRICS conference touched upon only a few topics for

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19 See in this issue, Geetanjali Sharma, *Regionalism and BRICS: Understanding BRICS' Trade Policy Agenda in the Era of Growing Regional Trade Agreements*, JINDAL GLOBAL L. REV. (2014).

20 See in this issue, Yugank Goyal, *Corporate Governance and Informal Institutions: Experiences of BRICS Economies*, JINDAL GLOBAL L. REV. (2014).

horizontal learning and experience sharing. Nonetheless, the experience of India and Brazil on topics such as international trade, foreign investment, regionalism, international taxation and corporate governance can shed light on the approaches and responses each BRICS member can adopt in its development model. We hope that the articles included in this issue encourage the possibilities for horizontal learning from BRICS economies.

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