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From rule-takers to rule-makers? Patterns of adaptation, contestation and initiative among emerging powers in the world trade regime[1]

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Abstract

This paper looks comparatively at four emerging markets (Brazil, China, India and Mexico) and at their insertion (adaptation/contestation) within existing trade-rules in the framework of

[1] This working paper summarizes the main findings of the research project "From Rule-Takers to Rule-Makers. Emerging Powers in the Regulation of International Trade" (http://www.snis.ch/project_rule-takers-rule-makers-emerging-powers-regulation-international-trade). Funding by the SNIS is gratefully acknowledged. We thank Ivo Krizic, Wang Lei and Flavia Jurje for their valuable research assistance in the project.

the Post-Washington consensus (PWC). A theoretical framework is proposed that links the analysis of international processes of rule diffusion with the domestic processes creating either demand for or contestation to these rules. This framework adopts a sectoral approach in order to highlight variation across different rules of the global economy in countries' positioning in the global trade regime. Our preliminary findings suggest that overall, emerging economies insert quite smoothly into the liberal trade order that others designed. Although contrary developmentalist tendencies persist, "two-level games" often circumvent cleavages within ruling elites. In most cases, emerging countries have taken up existing rules, sometimes implementing them in creative ways, and have started promoting these rules themselves. In those cases, where we find attempts at the creation of alternative rules, mainly in the field of intellectual property rights and, to some extent, service-trade related labour mobility, the conjuncture international codification and pressure by influential domestic interest groups benefiting from alternative approaches seem to have triggered the transition towards international rule-making. For these efforts to be successful however, we find that the development of regulatory capacity is of crucial importance.

Introduction

Emerging countries' insertion into the global trade regime, whose rules have been originally designed by the Western powers, is a complex process. On the one hand, emerging countries are influenced by international dynamics such as legal obligations resulting from membership in multilateral regimes (notably the WTO), political pressure exerted in bilateral trade negotiations, or subtler epistemic influences emanating from exchanges amongst technocrats or membership in regulatory networks.

On the other hand, domestic politics in emerging countries play a crucial role in generating demand for or at times mobilizing resistance to regulatory changes associated with the Post-Washington Consensus (PWC), in particular given developmentalist legacies (Sikkink 1991; Wade 1992; Woo-Cumings 1999). Studies of policy diffusion and regulatory transfer have often neglected this "demand-side" of political change. In the case of emerging powers, knowledge of their domestic political cleavages, the roles of political and bureaucratic elites and interest groups is of upmost importance if we want to understand their positioning in the system of global governance. The following considerations underline the importance of the domestic level.

Firstly, their sheer market size gives emerging economies at least to some extent a choice whether to adapt, and how much, or whether to promote own, alternative rules (Drezner 2007; Narlikar 2010; Nye 2011). In this paper, we distinguish four possible outcomes of their insertion into international trade rules: passive insertion (rule-taking); active insertion, whereby they start themselves to promote the established approaches (rule-promotion);

contestation (rule-contestation); and the promotion of own, alternative rules, in which case we speak of emerging countries as true rule-makers.

Secondly, emerging economies are defined as being in a process of transition, which means that they are unlikely to have fixed unitary preferences for either PWC rules or alternative developmentalist orientations. Frequently, there will be cleavages between elites (Amsden/DiCaprio/Robinson 2012). Political economy suggests that governments' positions will reflect the ones of their most influential domestic economic interest groups (Büthe and Mattli 2011; Moravcsik 1998). The position of interest groups can however vary across issue-areas: sectors characterized by strong export-oriented industries organized in interest groups are likely to embrace PWC norms, while protected, non-competitive sectors are likely to reject them.

Finally, insertion in or contestation of the PWC also hinges upon the role of domestic bureaucratic structures. Many policies constituting the PWC or pertaining to the international trade regime today do not only prescribe rules of conduct but also stipulate concrete institutional structures, such as the introduction of politically independent regulatory agencies. These reforms can pose considerable challenges to established bureaucracy-government relationships in emerging countries.[2] At the same time, the development of regulatory capacity is a precondition for participating actively as rule-promoters or rule-makers in today's international structures (Bach and Newman 2007; Farrell and Newman 2014; Lavenex 2014).

In order to capture the dynamics of international inducement and domestic (counter-) response we look at three major emerging economies on different continents (Brazil, China, India) and one middle power (Mexico) as contrast case. We focus on three policy areas that vary with regard to their extent of international codification and promotion while showing different interest groups constellations and regulatory implications in emerging economies: intellectual property protection (IP), competition policy, and services-related labour mobility (so-called GATS mode 4).

By comparing patterns of regulatory insertion and contestation in different sectors, we follow Hollingsworth, Schmitter and Streeck (1994: 8-9) in the belief that it is no longer possible to study capitalism as a whole. Rather, in order to capture its diversity, the spread of capitalism or – for our purpose – the PWC needs to be broken down into different economic sectors as the key unit for comparative analysis. The project thus follows a comparative case study design comparing four countries and three broad sectors (policy-areas) involving, at a later stage, combination of fuzzy-set QCA and process-tracing. Our period of analysis concentrates roughly on the last two decades, that is, from the phase preceding the conclusion of the

[2] The regulatory state in the South has been defined as a polymorphous state in which developmentalist legacies persist and where regulatory agencies appear as "relatively hollow institutional shells"; transplants from Northern institutions that need to be adapted to local political contexts involving both inter-institutional competition and collaboration (Dubash/Morgan 2012).

Uruguay Round of trade negotiations in which our policies got partly codified, until today. The analysis draws from secondary literature, primary documents, relevant databases and over 200 semi-structured expert interviews conducted with relevant stakeholders in the EU, US and the four countries under study.

Our preliminary findings suggest that overall, emerging economies insert quite smoothly into the liberal trade order that others designed, learning in the process to push for their own interests. Although contrary developmentalist tendencies persist, "two-level games" involving the instrumental use of international influences have helped reformist governments to circumvent cleavages within ruling elites. We also find some evidence of governments (in particular Brazil) at times promoting developmentalist policies at the international level, to push against liberal market rules being promoted domestically. In most cases, emerging countries have taken up existing rules, sometimes implementing them in creative ways, and have started promoting these rules themselves. In those cases where we find attempts at the creation of alternative rules, mainly in the field of intellectual property rights and, to some extent, services-related labour mobility, the conjuncture international codification and pressure by influential domestic interest groups benefiting from alternative approaches seem to have triggered the transition towards international rule-making. For these efforts to be successful however, we find that the development of regulatory capacity is of crucial importance.

The paper proceeds by first providing a multilevel model of policy diffusion, adoption, contestation and counter-diffusion. It then applies the model to three sectoral cases: intellectual property rights, competition policy and the mobility of services (Gats mode 4). In each one of these the policies of four emerging countries (Brazil, China, India and Mexico) is empirically assessed. The last section summarises the main findings.

I. Towards a multilevel model of regulatory insertion

We propose to study the insertion of emerging powers in the PWC and international trade regime as a function of the interplay between international influences domestic constellations. As noted above, our three emerging powers (Brazil, China, India) converge in the sense that they have acquired a considerable degree of market power, which gives them a certain leeway towards external influences. This is less so for Mexico which, given its strongly asymmetric trade dependence vis-à-vis the US, is less shielded from economic and political pressures. Both the market power acquired and the fact that alternative policy paradigms – usually summarized under the label "Developmentalism" – have a strong tradition in these emerging countries (Wade 1992; Woo-Comings 1999) signify that the latters' insertion into the PWC or resistance to it must be understood as a conjuncture of international "push-factors" and domestic "pull" or "reject".

The transition from governed markets in the "Developmentalist" tradition to an order based on the PWC of liberalized markets is not dichotomous but follows a continuum of liberalization often leading to polymorphous states (Dubash/Morgan 2012). Table 1 below seeks to capture the nature of the transition implied in these processes.

Table 1. Continuum Ideal Typical Trade Regimes

Governed market (Developmentalism) →	*Regulated liberal market (PWC)*
State-led export promotion and import substitution strategies	Free trade regime
Limited IP norms /widespread technology transfer	Strong IP protection (including some technology transfer)
National champions/SOEs	Strong competition regime
Barely regulated immigration policy, priority on emigration policy	Restrictive immigration policy with liberalization for highly skilled
Developmentalist/interventionist state (public planning agencies)	Regulatory state (technocratic independent regulatory agencies)

Most current norms of the international trade regime reflect the regulated liberal market (PWC) model and have been championed by the "old" trade hegemons, the EU and the US. This certainly applies to IP and competition policy. Labour mobility is generally not treated in a liberal manner with the exception of the so-called "mode 4" commitments in the General Agreement on Trade in Services (GATS). So far, these commitments only apply to highly skilled professionals, mainly within international corporations.

We define “rule-making” behaviour, our dependent variable, in terms of the active promotion of rules that depart from the rules promoted by the traditional trade hegemons EU and US. In doing so we consider whether emerging countries adopt established international norms in domestic legislation (rule-taking) or not (rule-contesting), and whether they decide to become internationally active on their respective domestic position or not (summarized in table 2). This allows us to differentiate two international options: either promotion of established rules further through secondary diffusion (rule-promoting) or, in conjunction with domestic rule-contestation, promotion of own, different international rules. We only regard this second case as a distinctive form of "rule-making" while activities geared at diffusing existing rules that do not challenge established normative frameworks are referred to as "rule-promotion".

Table 2. Possible outcomes of regulatory insertion

		International level	
		Passive	Active
Domestic level	Adopt	Rule-taking	Rule-promoting
	Reject	Rule-contesting	Rule-making

We suggest that the choice for either one of these forms of insertion into the global trade regime is a function of the interplay between a) international influences to adopt an international rule and b) the domestic constellation of preferences regarding the respective rule. These two clusters of independent variables are introduced below.

Supply-side: International "push"

The literature on policy diffusion and external governance differentiates between two different types of international influences: coercive and co-optive ones (Dobbin et al. 2007; Lavenex 2014). Coercive mechanisms presuppose a hierarchical relationship of dominance and subordination. Theoretically, two forms of hierarchical steering or coercion can be differentiated (Lavenex 2014: 889f.; Scharpf 1997: 172f.): through legal authority or overwhelming political power. Although we are dealing with international influences which – if we were to follow (neo)realist understandings – take place in a context of anarchy, one can say that in the case of trade regulations, a certain process of legalization has taken place that confers *legal authority* to the international norms codified in the WTO. The concept of legalization distinguishes three dimensions shaping the degree of legal authority conferred to a particular rule: the degree of obligation of the rule; its precision – referring to the remaining scope for domestic discretion; and the delegation of enforcement powers to an independent (judicial) body (Abbott et al 2000). In order to study the impact of international legal authority on emerging countries' insertion into the PWC we select three areas of trade regulation that differ in this respect: IP as a case of strongly legalized international rules (in TRIPS); GATS mode 4 as a case of legally binding, but little precise and enforceable case; and competition policy as a case that has not yet been converted into binding international rules and that is regulated by 'soft law' (Abbott and Snidal 2000) in transgovernmental networks such as in particular the International Competition Network ICN, the UNCTAD and OECD.

The second form of coercive instrument is sometimes connected to the first and consists in the exercise of political power through *conditionality*. Whereas legal authority refers to emerging countries' commitments under multilateral regimes, conditionality is a mechanism predominantly exercised in bilateral trade negotiations.[3] While legal authority can exert an influence in the absence of political conditionality, political conditionality is re-enforced by the presence of legal authority. As a mechanism, it works through the threat of sanctions or the promise of rewards in exchange for compliance with a certain demand (Schimmelfennig and Sedelmeier 2005). In order to study the impact of conditionality, our cases include two fields in which the traditional trade hegemons, the EU and US, promote their (PWC) rules via formal bilateral trade negotiations. One of these fields is backed by highly legalized international rules (see above), IP, thereby allowing for stronger forms of conditionality. The second case sees a weaker form of conditionality because it cannot hinge on the same legal authority (competition rules). In the third case, there is no conditionality because the offensive interests are on the side of the emerging countries (GATS mode 4).

[3] In some cases, conditionality is also exercised via multilateral institutions, such as for instance in the definition of the "single undertaking" obliging GATT and acceding WTO members to accept its rules in full or in the definition of WTO accession criteria, such as in the case of China.

Next to coercive international influences, scholarship has underlined subtle forms of epistemic co-option and economic competition as mechanisms of policy diffusion (Lavenex 2014: 890ff.). These influences are more diffuse than the coercive ones (which normally take place in formal negotiation settings) and therefore more difficult to identify. As pointed out in the literature on *transgovernmental networks* or regulatory cooperation (Slaughter 2004; Raustiala 2002; Farrell and Newman 2014) international relations today are interspersed with direct links among public officials working in national regulatory bodies who interact on a regular basis for information exchange, diffusion of best practices, and capacity-building. Insofar as these transgovernmental networks reach out to new regulators in the "global south", they deploy a co-optive influence. Both EU and US regulators have developed a complex web of transgovernmental exchanges with third country administrations in which they provide trainings and seek to teach and socialize the latter into their own approaches. To operationalize these co-optive transgovernmental influences, we look at the extent of participation in transgovernmental exchanges (such as, for competition, the ICN, but also bilateral programmes offered by the EU and US and pertinent activities by other international organizations such as the OECD).

The second form of non-coercive international influence is market driven and results from the trans-border interaction of economic actors. Export industries in emerging countries may lobby their governments for regulatory adaptation to secure their access to "northern" markets and to maintain competitive advantages. This diffusion mechanism has been coined as *transnational competition* in the literature and was first introduced by David Vogel (1998) to characterize the regulatory outreach emanating from California's market for automobiles. While reacting to a regulatory prescription in another major market's law, emerging countries align with the pertinent rule not because of a direct international demand, legal obligation, teaching or socialization effort, but because their firms and regulators fear negative externalities from not doing so (Bach and Newman 2007; Damro 2012; Lavenex 2014: 891). External market pressure is thus translated into an internal demand articulated by domestic interest groups.

Demand-side: Domestic "pull" or "reject"

As in the case of international influences, we expect domestic dynamics to flow from both political and economic considerations. In political terms, the presence of a pro-liberalization "reform" government should act as a strong domestic "pull" for established international trade (PWC) norms. Research on emerging countries' economic transition and insertion into international regimes has however underlined the persistence of strong ideological cleavages in the ruling elites in most of these countries (Narlikar 2010; Sikkink 1991; Bianculli 2013; Mukherji 2013; Leonard 2012; Kou/Zang 2014; Leycegui 2012). Thus, we distinguish

situations with a predominantly pro-PWC *governmental elite*[4] and constellations in which the ruling elites are deeply divided or clearly opposed to a given international rule. As indicators of a governmental "pull" for a particular international norm we take legislative planning and reform proposals as well as information gathered through interviews with government officials.

Secondly, from a public choice perspective, a government's interest to join international trade rules should be a function of domestic industries benefiting from a particular international rule and their organization in *interest groups*.[5] We expect economic interest groups affected by a particular norm to lobby their home government in favour or against adoption and promotion of the norm (Büthe and Mattli 2011, Moravcsik 1998). As indicators of interest group pressure, we take, next to information on their general importance, statements in the groups' political communications as well as information gathered through interviews with interest group and government representatives.

Thirdly, research on rule diffusion and cooperation has stressed the importance of states' *regulatory capacity* to promote and uphold their preferred rules (Bach and Newman 2007, 2010; Farrell and Newman 2014), including their capacity to liaise with other regulators in transgovernmental networks (Lavenex 2014). In line with this literature, we operationalize this variable in terms of technocratic independence and size of relevant regulatory bodies.

Towards a "push-and-pull" model of regulatory diffusion and contestation

As indicated, we assume international and domestic influences to interact in diverse ways in shaping emerging countries' response to the PWC. Herewith we go beyond existing studies that either emphasize the role of policy transfer and diffusion at the international level or focus on domestic processes alone. Starting from the domestic approach in favour or against a particular international rule, we conceptualize international influences as potential opportunity structures which can empower particular domestic actors over others and thereby affect the path of regulatory insertion. In the following, we develop a set of hypotheses proposing causal constellations leading to an) emerging countries' insertion in the PWC via either rule-taking or

[4] By governmental elite we understand those possessing political power (de jure or de facto) and as such able to define economic institutions and policies shaping the incentives of key economic actors in their decisions i.a. over investment and the organization of production (Robinson 2012).

[5] The literature on the political economy of trade has made two main distinctions when analysing interest groups affecting trade policy; those based on special interests (coalitions of different business and labour groups) and those based on broader class alliances. Hiscox (2002) contends that given that trade is essentially redistributive, whether alliances are group or class based ultimately depends on inter-industry factor mobility. Given that emerging economies for a number of reasons such as limits to labour mobility (e.g. Hukou in China) and more generally the presence of dual economies (large sectors with significant productivity differentials) tend to have low inter-industry factor mobility we expect coalitions attempting to shape trade policy in emerging markets to form along special interests (narrow industry-based, rent-seeking) and not along broader class alliances.

rule-promoting and b) emerging countries' reject of the PWC via either rule-contesting or rule-making.

In methodological terms, we expect regime-insertion to be the result of a complex set of variables that take a configurational logic rather than follow simple causal paths. The configurational logic means that we assume that there exist various interactions between the different causal factors, including the possibility that different combinations of factors can lead to the same outcome (equifinality, see Ragin 2006: 291; Ragin 2000: 64ff.).[6]

We discuss first "passive" reactions to PWC rules, either rule-taking or rule-contesting, before turning to "active" forms of international engagement via rule-promoting or rule-making.

We start from the assumption that a **governmental elite supporting** a particular international norm will normally opt for rule-taking. Opposition on the part of influential domestic interest groups may however counteract the process of regulatory adaptation and lead to only partial rule-taking. The same is true if the country lacks the regulatory capacity to implement the rule. Here, international influences can come into play: international pressure through international norms (legal authority) or negotiations (political conditionality) can be used by the reform government as a mechanism to "lock-in" regulatory choices and thereby weaken domestic opposition (Putnam 1988; Moravcsik 1998). Conversely, cooperation in transgovernmental networks should be conducive to developing the regulatory capacity necessary to introduce pertinent rules. We speak in this case of rule-taking via technocratic empowerment.

A different constellation exists when **governmental elites predominantly oppose** pertinent international norms. In this case, we should expect rule-contesting to take place. Two considerations motivate this assumption: firstly, as noted above, emerging countries are characterized by considerable market power, which means that they do have the possibility to make regulatory choices (Drezner 2007; Narlikar 2010; Nye 2011). Secondly, research on external rule-promotion in the context of EU enlargement has shown that even in the presence of overwhelming power asymmetries the effectiveness of political conditionality depends on the existence of domestic reform coalitions in the target countries (Schimmelfennig and Sedelmeier 2005; Vachudova 2013)

In addition to engaging into a particular course of action domestically, both rule-takers and rule-contesters may subsequently also become internationally active, either as new promoters of established rules or as alternative rule-makers. **Rule promotion** presupposes domestic rule-taking and is a sign of an emerging country's rise as international actor in international trade

[6] The configurational approach follows a middle ground between quantitative and qualitative reasoning and allows for an iterative process of theory-building in the parallel development of theory-guided empirical research and theoretical reflection (Blatter and Haverland 2012). In a first step we will conduct a fuzzy-set Qualitative Comparative Analysis (fsQCA) as a means to identify the necessary and sufficient conditions for transitions towards “rule-making”. In the second step, once possible causal configurations have been established by the fsQCA, we will engage in detailed causal process-tracing of systematically selected cases. This phase is geared at empirically retracing the interactions and causal mechanisms that bind the causal factors into causal configurations (George and Bennet 2005).

regulation. The role of rule-promoter is usually associated with "middle powers" like Turkey, South Korea or Mexico (Aydin 2014; Coopers 2014; Jordaan 2003). These countries have internalized the norms of the PWC and promote them to their own "southern" trade partners. A necessary condition for this outcome is next to the fact of having passed the stage of "rule taking" also the existence of domestic interest groups pushing for the opening of new markets via the PWC norms and the development of the necessary regulatory capacity to uphold and promote the norms. The mobilization of domestic interest groups should be a function of their exposure to international markets; that is the existence of transnational market incentives. The existence of legal authority and political conditionality on the part of traditional trade hegemons and emerging countries' participation in transgovernmental networks should not be decisive for the transition towards rule-promotion, but they should act as facilitating factors.

Emerging countries rise as alternative **rule-makers**, in contrast, presupposes domestic contestation of PWC rules (rule-contesting). As in the case of rule-promotion, however, also this type of international activism requires certain incentives. We expect similar incentives to be at play in both types of international activism. Also, alternative rule-making must flow from rational cost-benefit calculations and will be incited by the expectation of certain economic benefits. These economic benefits result from the conjuncture of transnational market incentives and domestic interest group pressure. The existence of legal authority for a given PWC rule and the exercise of political conditionality on the part of traditional trade hegemons may act as additional triggers of resistance and counter-reaction, thus also playing a supportive role in this constellation. Transgovernmental networking, in contrast, is not likely to have major tangible effects on counter-mobilization.

In the following, we present, based on this analytical scheme, our results concerning Brazil's, China's, India's and Mexico's positioning in three sectors representing different aspects of the PWC: Intellectual property protection; competition policy, and (services related) labour mobility (GATS mode 4).

II. Emerging countries' insertion into the international trade regime

Intellectual Property Rights

Intellectual property rights (IP) is one of the most institutionalized and contested issues in global trade regulation. Developing and emerging countries have resisted moves towards the institutionalization of IP fearing that industrialised countries were attempting to keep their technological lead in the nascent knowledge economy (Correa 2000; Drahos 1997). The combination between this initial contestation and almost twenty years of regulatory adaption pressure make the IP regime an ideal case to study initiatives from emerging economies and the extent to which these countries are reshaping global trade rules or not. Given than IP policies involve trade-offs, especially the conflicting objectives of creating and using/disseminating knowledge (Shadlen 2005); pre-existing ideas on development appear to affect the design of national IP systems. A crucial aspect found to affect policy-choices was

the extent to which policymakers believe that restricting access to knowledge (maximalist interpretations) is a precondition to innovation and improving economic welfare (as is promoted among others by transgovernmental networks such as the WIPO and the Trilaterals –the patent offices of the US, EU and Japan); or whether on the contrary they believe that the exclusion from knowledge (minimalist interpretations) is an obstacle to innovation, cultural flourishing, and economic development (Haunss and Shadlen 2009).

Broadly speaking, one may categorise IP issues along three main fields: trademarks and copyrights, genetic resources and traditional knowledge, and patents – with the latter being the most controversial field. In the fields of copyrights and trademarks, emerging countries have clearly acted as rule-takers as part of their obligations under the WTO TRIPS Agreement. While copyrights have had a low profile in administrative legal reforms, trademarks have had more salience given their role in the well-functioning of a market economy. Nevertheless, infringement in trademarks and copyrights have been mainly dealt as problems of regulatory capacity and as such have not involved overt rule-contestation. At the same time, emerging countries domestic regulatory adaptation has not generated international activism in the sense of rule-promotion towards third countries in these fields.

A different situation exists regarding Genetic Resources (GR) and associated Traditional Knowledge (TK) where emerging countries have effectively turned into rule-makers (Serrano/Muzaka 2016). Shifting from an initial reluctance to link GR and IP, reflected in domestic rule-contestation, emerging countries have led a major effort to commodify GR and to ensure compensation from users (mainly industrialised countries). Domestic rule-contestation has been motivated by the failure of the Convention on Biodiversity (CBD, launched after the Rio Summit in 1992) to prevent misappropriation of GR. In doing so, a process of learning from the existing trade hegemons can be detected; first by improving their regulatory capacities, and second by engaging in regime shifting in organisations such as the CBD, FAO, WIPO, WHO, and finally the WTO in an attempt to legalise an area in which they have a comparative advantage as highly diverse countries.

Domestic rule-contestation has translated into the negotiation and adoption of the Nagoya Protocol which was originally opposed by the US and the EU. The United States has continued its opposition to the idea of access and benefit sharing (ABS) while European countries have changed their position becoming more supportive of the efforts made by the biologically "megadiverse" countries (amongst which the four included in this study). As with previous cases in our research, we find that internal divisions have weakened the positions of emerging countries in this area, in particular as only India has ratified the Nagoya Protocol. Brazil is de facto following it through an executive order and China has also started implementing it without ratifying it. Notwithstanding, India turns out to be the country most inclined to act as a rule-maker in the area of GR. This may reflect domestic interests (eventual linkages with the patent's issue), as well as ideational or market incentives. In case an ABS system comes into being (which is unlikely now given the strong opposition of the US), all

our four cases would have taken part in creating new norms through the principles enshrined in the Nagoya Protocol.

Among the different IP issues, patents have become the most salient one, through its impact in sectors with social implications – notably the pharmaceutical. It is perhaps not surprising that within the IP regime, transgovernmental cooperation has been at its furthest in patent offices. [7] Particularly for large markets, and given the space for interpretation that resulted from the TRIPS agreement (which had to balance the interests from industrialised and developing countries) domestic practice can sometimes lead to rule-making. Domestic implementation/interpretation (maximalist or minimalist) of IP norms (in cases when such practice leads to disputes at the WTO and to appellate body decisions) thicken the agreement by filling in the gaps that existed from the negotiation. Thus, potentially elevating (or diminishing) the costs of TRIPS membership (Okediji 2004). It may also encourage emulation in third countries. Domestic practice may evolve into international rule-making. Rule-making can also take a more direct form, through the challenging of international IP norms at multilateral fora such as the WTO or the World Intellectual Property Organization (WIPO).

Our empirical results show that China and Mexico follow maximalist policies and that Brazil and India follow minimalist ones. Drawing on our analytical framework, these differential outcomes can be explained by a combination of supply- and demand factors. In the case of Brazil, we found conflicts between domestic IP regulators (INPI, the patent office) which became socialized with international templates and hence followed a maximalist approach and other sectors of the bureaucracy seeking a minimalist one. Both sets of actors have attempted to link with international networks, either transgovernmental ones promoting the maximalist policies or transnational activist networks and epistemic communities opposing the former (see Serrano/Burri 2015). This international networking has been used as a strategy to push for these groups' opposing preferences domestically. In the end, the minimalist coalition, represented by the Health Ministry, the Foreign Ministry (Itamaraty) and at times the Executive (Casa Civil) has circumscribed to a certain degree the domestic adoption of stringent patent regulations (rule-contestation). Business groups supporting the maximalist

[7] Transgovernmental networks (TGNs) are able to exert supranational influence through their direct interaction with similar officials from other countries and more importantly by the possession of specialised knowledge, which often shields them from the supervision of other branches of government such as foreign ministries (Raustiala 2002). However, not all actors within TGNs have the same influence, their reliance on expertise, deriving in part from regulatory capacities (e.g. resources and personnel) often reinforce the existing dominance of major economic powers and inequalities between North and South (Lavenex, 2014; Raustiala 2002). As such TGNs are "sites of power" (Tope, cited in Raustiala 2002: 5). We find the existence of such networks in particular with regards to patent offices. The main actors promoting maximalist policies through TGNs are the patent offices of the United States, European Union and Japan (USPTO, EPO and JPO) cooperating closely under the Trilateral Patent Offices programme (also known as the Trilaterals). The main aim of the latter is to improve the efficiency of the global patent system. Another important TGN is found at the World Intellectual Property Organization (WIPO) which provides training and capacity-building to patent offices.

coalition have however blocked attempts to modify the Brazilian Patent law to increase flexibilities, as has been long sought by the minimalist coalition, and despite efforts to give ANVISA (an agency of the Health Ministry) the power to vet pharmaceutical patents INPI has sought to defend what it sees as its turf, with the result that domestic implementation is a mixture of maximalist and minimalist policies. Despite following contradictory policies domestically, Brazil has actively promoted minimalist approaches in international fora, most notably the Development Agenda at WIPO. This reflects the stronger coordination (compared to other developing countries) that exists in Brazil on IP issues through a grouping of ministries (the GIPI) and the weight of the Executive and the Foreign Ministry (Itamaraty) in foreign policy. India has also actively contested the IP regime in multilateral fora and has put forward initiatives, often in cooperation with Brazil and South Africa. Unlike Brazil, concrete Indian policies have begun to diffuse to other developing countries (including Brazil and South Africa) in particular the interpretation of inventive step contained in India's section 3d of its Patents Act. However, we find that these initiatives have mainly diffused through non-governmental channels, in particular transnational activist networks (see Serrano/Burri 2014). Unlike Brazil, in India transnational market incentives to the promotion of minimalist patent policies (as was expected in our model) are significant. India remains one of the main producers of generic pharmaceutical products, exporting each year nearly $12 billion USD worth of goods; half of its annual production.[8] In addition, two other factors explain India's greater international impact and its ambitions at alternative rule-making: firstly, domestic contestation against maximalist patent policies has been more consistent than in Brazil (although sectors in favour of maximalist policies also exist – in particular the Council for Scientific and Industrial Research), and, secondly, influential economic interest groups (the generics industry in particular), international and domestic civil society activists, together with highly-trained and internationally active legal scholars, provided the regulatory capacities (often lacking in emerging countries) and pushed the government towards an active stance in international venues. These social and political economic claims resonated with a still strong developmentalist ideology present in many quarters of the Indian government, thus explaining India's attempts as alternative rule-making in patents (as well as ABS on GR and TK, see above).

Mexico's and China's alignment with maximalist policies diffused by the EU and US can be explained by the coincidence of reformist governments, international conditionality through NAFTA in the case of Mexico and WTO accession for China, as well as the development of a strong regulatory capacity in line with these international standards which was facilitated by the effective socialization of pertinent regulatory elites in transgovernmental bodies and expert networks (see also Sell 1995 on Mexico). At the same time, the absence of strongly organized interest groups opposing maximalist policies has favoured this path of convergence. One must concede that the implementation of patent laws in China is patchy, even if rapidly improving with the recent creation of specialised IP courts in major urban centres (e.g.

[8] See: http://www.infodriveindia.com/export-import/trade-statistics.aspx

Beijing, Guangzhou or Shanghai). In both Mexico and China reformist elites have capitalized on the international pressure exerted by NAFTA and WTO conditionality to lock-in domestic reforms of the patent system. While Mexico has started to actively promote these policies in its trade agreements (e.g. the Pacific Alliance), China, given its steep rise in patent filings (it has now surpassed the US and Japan to become the world's top filer), has moved from a peripheral position to become part of the core of the transgovernmental network regulating patents as the Trilaterals or P-3 (EU, US and Japan) expanded into the P-5 (China, South Korea, plus P-3). This has been possible even though domestically; patent rules are not always very well observed and China remains accused of infringement. As already mentioned, at least on the patents area China is rapidly increasing its enforcement capabilities. Below we present a brief overview of the positions and the main domestic debates and cleavages related to IP in our four cases.

i) Brazil

Table 4. Brazil IP: rule-contester
a) Government position: some divisions but overall consensus for developmentalist interpretation on patents and IP (intellectual property rights not always considered to be beneficial to development, need for a differentiated approach, need for strong technology transfer). Particularly on pharmaceutical patents ANVISA and Health ministry strongly against maximalist policies. However, patent office (INPI) as part of transgovernmental networks generally more favourable towards maximalist policies.
b) Interest groups: civil society against TRIPS, pharmaceutical industry (pro-TRIPS) composed of mainly foreign-owned firms, no strong private generics producers (but strong government generics producer under the Health Ministry favouring flexibilities);
c) Regulatory capacity: strong but bureaucratic rivalries (GIPI/Itamaraty/ANVISA/Health Ministry/INPI)

Brazil's position as a rule-contester is partially explained by the existing consensus in the Brazilian government on pursuing developmentalist IP policies (stronger in the Lula than the Rousseff administration), despite some divergences in regulatory agencies such as the patent office. The latter is particular of Brazil, where the economic bureaucracy retained a mixture of orthodox liberalizing technocrats and those advocating developmentalist ideas and policymaking mechanisms throughout the liberalizing wave of the late 1980s and 1990s (Sikkink 1991; Montero 2014). On IP the biggest cleavage has been between the Brazilian Patent Office (INPI) and other ministries espousing developmentalist views such as Foreign Affairs (Itamaraty) or the Health Ministry. INPI's position has been strongest to PWC ideals

throughout the mandate of Jorge Ávila, from 2006 to 2014 (Licks 2014).[9] No significant policy change is discernible in the patent office, even if the new head of INPI, diplomat Octavio Brandelli, was a leading figure in WIPO negotiations related to the establishment of the development agenda.

There has been a strong alliance between domestic civil society organizations, international NGOs and the health ministry on access to health policies. Brazil's successful anti-AIDS program and the impossibility to fund it without making exceptions to TRIPS (compulsory licenses) led to a strong coalition between state agencies (the Health Department who produced most retroviral drugs itself) and social activists both at the domestic and international level (Flynn 2011). Brazil also has strong regulatory capacities in its foreign service (Itamaraty) considered to be among the best staffed and most professional among emerging countries, and domestic agencies such as ANVISA part of the Health Ministry. In addition, Brazil has developed significant international legal expertise on IP issues through inter alia the Centre for Technology and Society (CTS) of the Getulio Vargas Foundation. The CTS has provided training to the Brazilian judiciary (recently Brazil has even established specialized IP judges) both at the federal and local level, as well as becoming the first southern institution to be accredited at WIPO meetings in Geneva (Paranagua 2009). This has contributed to cementing an epistemic community where both southern and northern-based scholars have been able to exchange ideas and practices towards promoting development-friendly interpretations of intellectual property rights. At the same time, given the strong reliance of the Brazilian manufacturing sector on foreign direct investment (FDI) influential interest groups can push for maximalist IP policies. In particular, the non-governmental pharmaceutical sector is dominated by foreign multinationals (MNCs). This explains to a large degree why reform proposals in favour of a minimalist IP legislation that makes better use of TRIPS flexibilities have been blocked for many years in the Brazilian Congress and are likely to remain so.

In sum, despite launching important international initiatives such as the development agenda at WIPO, its significant internal divisions mean that even as Brazil contests maximalist IP policies, it has not been able to impact international norms in the way India has (see the section on India below). In particular, the implementation of the development agenda at WIPO has been criticised by transnational activist networks by failing to stem the diffusion of maximalist IP policies. The latter supports our theoretical expectation that to become rule makers, emerging countries need to have strong regulatory capacities and transnational market incentives. None of which are present in the case of Brazil, whose regulatory capacities despite being significant are weakened by internal divisions and competing economic interests.

[9] See also the Economist (2012) "Intellectual Property in Brazil: Owning Ideas – Getting Serious about Patents", November 3, 2012. Available at http://www.economist.com/news/americas/21565606-getting-serious-about-patents-owning-ideas. Accessed 26.06.2014

ii) China

Table 5. China IP: partial rule-taker
a) Government position: pro-patents, autonomous innovation policies and rebalancing of the economy aimed at moving up the value chain of production; however, on pharmaceutical patents concerns on rising costs of health provisions. Major reform of health system underway.
b) Interest groups: pharmaceutical sector (pro-TRIPS/patents), strong presence of major transnational pharmaceutical firms and dependence of the health system on mark-ups from sales of branded pharmaceuticals, growing generics industry (flexibility), civil society less relevant as in other cases, but health costs and corruption in healthcare provision is an important societal concern (rising pressure for lower prices, flexibility/generics);
c) Regulatory capacity: rising (early 2000s)/ strong-contemporary (SIPO) and IP special courts in major cities

We consider China as a partial rule-taker on IP. This behaviour seems consistent with Chinese positions in other areas, where it keeps a low profile and only supports established initiatives. While on the surface opposed to Western-dominated IPR regimes, China "has been reluctant to press for a structural reform of intellectual property rights regulation in the WTO, despite lending its support to developing countries when the negotiations over the Decision on Implementation of Paragraph 6 of the Doha Declaration were under way" (Chan 2010: 115). Governmental elites, at least since WTO accession, have been largely favourable towards strengthening IP; despite criticism by industrialized countries, which have designated China as the main infringer. China has seen an explosion in patenting activity becoming one of the main filers of domestic and global patents as the country pursues autonomous innovation policies and climbs-up the value chain. This has been followed by a significant strengthening of its patent regime through a rapid increase in regulatory capacities at the State Intellectual Property Organization (SIPO). SIPO was also the first patent office of a large developing country to be granted international search authority (ISA) status at WIPO (in 1994) and can be considered together with the Korean Patent Office (KPO) to be now part of the core of the transgovernmental system governing patents under the P-5 (which also includes the European, American and Japanese patent offices).

Relevant domestic interests support a strong IP regime in pharmaceuticals due to China's political economy. China espouses a version of state capitalism in which state ownership (the government controls over 60 per cent of companies in the stock market) coexists with market forces (known as capitalism with Chinese characteristics). This type of state capitalism differs to traditional state intervention in that rather than directly exerting control of state owned enterprises (SOEs) through the public bureaucracy; the state allows the market a role working

hand in hand with private investors in novel governance arrangements (Musacchio/Lazzarini 2014). Among big economies the only other country where the state plays such a preponderant role is Russia.[10] This syncretic approach has profoundly shaped the Chinese healthcare system, where 40 per cent of Chinese hospitals revenues and nearly all their profits comes from sales of foreign-firms branded drugs.[11] Western Pharmaceutical firms have enjoyed strong support as a result. Unlike Brazil (where the state has taken a main role in reducing drug prices through negotiations with major pharmaceutical firms and the threat–and use–of compulsory licensing) and India (where a thriving generics industry has had the same effect through similar policies) pharmaceutical prices in China are among the highest in emerging markets. All of the above means that China has followed until recently a much less contentious approach than either Brazil or India in pursuing access to health policies. The Chinese healthcare sector is, however, rapidly changing. This shift may in part be attributed to domestic interest (health costs and perceived corruption in healthcare provision is an important societal concern that the party cannot ignore for legitimacy reasons). Driven by societal demands, coverage has been dramatically increased, and as part of efforts to bolster the legitimacy of the party a large-scale anti-corruption campaign has been launched by Chinese President Xi Jinping. The campaign has targeted – although not solely – western pharmaceutical companies (in particular GlaxoSmithKline); it comes at a time when the government strives to further the domestic production of generic pharmaceuticals. Improving healthcare coverage and cost-reductions are central to the government's ambitious plan to rebalance the economy away from investment and exports and towards consumption; widening social security provisions are essential in order to reduce high savings rates and increase domestic consumption.

Since the crackdown, drug prices have dropped –together with sales of western pharmaceutical firms. Whether this is a temporary or long-term effect remains to be seen. Without appealing to flexibilities under TRIPS, or enacting compulsory licenses (as Brazil and India have done) these policies may ultimately achieve the same objectives of lowering pharmaceutical prices and bolstering domestic generic drugs production, and not directly challenge existing rules. That China may be able to further the same objectives as other emerging countries solely through its domestic policies may offer some support to the view that market power is determinant for having "going-alone" power (Gruber 2000). China, with its estimated 75-billion pharmaceutical market (the third biggest in the world after the US and Japan and soon to be the second largest due to its 25 % annual growth-rate) has strong bargaining potential. However, one should not overestimate market power. The fact that the government only recently decided to take more forceful measures indicates domestic dynamics remain an essential part in explaining Chinese policies.

[10]See for example, The Economist (2012) *Special report: State capitalism*. Available at: www.economist.com/node/21542931. Accessed 25.06.2014

[11]The Economist (2014) 'Pharmaceuticals in China: so long easy money'. Available at: http://www.economist.com/node/21604178/print. Accessed 25.06.2014

iii) India

Table 6. India IP: rule-maker
a) Government position: overall developmentalist interpretation, despite a pro-patent lobby at the Ministry of Science & Technology, particularly at the Council of Scientific and Industrial Research.
b) Interest groups: strong opposition by the generics industry to TRIPS, counter-lobby at the CSIR. Civil society strongly against PWC IP norms.
c) Regulatory capacity: strong (judiciary and private legal firms).

Powerful domestic interests (both from the business sector and civil society) in favour of flexible interpretations of patents exist. India hosts the world's most successful generics pharmaceutical industry (eleven Indian companies are among the top fifty generic drug manufacturers worldwide and five—Ranbaxy, Cipla, Dr. Reddy's, Sun Pharma and Lupin—are in the top twenty, the highest for any country). Moreover, its population is still overwhelmingly rural (nearly seventy per cent of the total) and faces enormous access needs. These factors underlie a strong developmentalist orientation in the governmental elite. There is at the same time a powerful domestic lobby in favour of a strong patents regime.

In the mid 2000s as the transition period foreseen by the WTO under TRIPS came to an end, a major debate on IP took place in India between those espousing a strong IP regime (particularly at the CSIR) as a means of promoting economic development (in line with PWC principles and in part inspired by a significant rise in patenting activity) and those claiming that India should continue to pursue a flexible development-friendly IP policy. This debate led to ambiguous policies, particularly at the multilateral arena as India initially failed to support or co-sponsor the development agenda launched by Brazil and Argentina. However, the fact that the ruling United Progressive Alliance was dependent on left parties for support helped in promoting a reformed patent law in 2005, in particular its section 3(d), which allowed for significant flexibilities (Prabhala 2014). As argued elsewhere (Serrano/Burri 2014), section 3(d) of the Indian Patents Act[12] has become particularly known for its innovation and game-changing potential. It bans patents on both new uses of known substances and on new forms of known substances that do not enhance "efficacy".[13] Although many countries know limits

[12] The Patent Amendment Act, No. 15 of 2005, § 3, India Code (2005).

[13] Section 3(d) prohibits in the relevant part, patents on "the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance". An important explanatory note clarifies the restriction on patents on new forms: "For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations, and other

to the subject matter of patents,[14] the scope of section 3(d) and in particular its expansive exclusion of patents on new forms of known substances is new to patent law (Mueller 2007: 550; Kapczynski 2009a: 1590). This was revolutionary and amounted to what has been called a new definition of patents, and thus a first step towards rule-making.[15] Transnational market incentives and strong regulatory capacities (mainly highly trained and internationally active legal scholars) have translated into a push from India's private actors towards the diffusion of section 3(d) and other IP flexibilities. With the incorporation in domestic debates making reference to India's section 3(d) in reform proposals of countries such as Brazil and South Africa, and their promotion by transnational activist networks, India can be considered to have become a rule-maker in this area. As Prabhala (2013) notes "for Indian patent law to truly affect the global access and innovation landscapes, it was clear that it would have to be exported" (Prabhala 2013: 74). The author argues that the first wave of export has already taken place in the form of the Draft National Policy on Intellectual Property in South Africa in September 2013 and the patent reform process launched in October 2013 by Brazil. The latter closely mirrors the South African one and by extension the Indian one.

Interviews carried by the authors of this working paper with the legal scholars involved in the case presented by the Indian government during the Novartis case suggested the diffusion of India's practice has occurred largely through epistemic communities; in particular, among legal scholars from India, South Africa and Brazil. Over 2012-2013 there have been various meetings on patent law and India's section 3(d) organized at American, European and South African universities. Another possible diffusion mechanism that was suggested during field research in New Delhi may be the close relation that exists between Indian and South African public officials; India's former minister for Commerce and Industry Ananad Sharma for example had close personal relations with many South African officials. The above speaks of a different, more informal, pattern of transnational diffusion or rule-making to those usually followed by industrialized countries. Exchanges among industrialised countries or North-South tend to be more institutionalized and occur via transgovernmental networks, multilateral organizations, or bilateral agreements. The Indian case also provides a relevant lesson, despite some divisions and shortcomings that existed within government ministries, a coherent domestic front constituted by a strong legal community, influential economic interest groups, a vocal civil society and activist courts have created the necessary impetus and regulatory capacities for India to act as a rule-maker. At the international level the risk posed by the spread of maximalist IP policies to one of India's main export sectors (generic drugs) in particular, provided strong market incentives for India to promote its alternative (minimalist) rules.

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derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy."

[14] Many developing countries for instance exclude patents on new or second uses of known substances, which is also of importance in the pharmaceutical context (Deere 2008: 79; Helfer/Alter/Guerzovich 2009).

[15] Comment by a WTO official at a workshop in the University of Lucerne, 7.03.2014.

iv) Mexico

Table 7. Mexico IP: rule-promoter
i) Government position: overall strongly favourable to PWC IP norms, with some opposition from the health ministry and within some other ministries.
ii) Interest groups: business sector strongly favourable, some opposition from civil society and academia and from generics producers.
iii) Regulatory capacity: strong (IMPI)

The position of Mexico on intellectual property rights derives directly from NAFTA negotiations.[16] As has also been pointed in the literature, a strong intellectual property regime was the entry ticket (boleto de entrada) for NAFTA negotiations (Robert 2000). NAFTA provisions are overall stronger than those under TRIPS and the transition periods shorter; for example, NAFTA requires pipeline protection for pharmaceuticals which go beyond those required under the transition periods by TRIPS. NAFTA also allows less leeway in national implementation. IP reforms were implemented even before negotiations officially started. That no significant opposition existed is explained by the fact that unlike the US and Canada (where NAFTA generated an intense debate) Mexico at the time was an authoritarian regime and as such was able to pass the agreement with little public debate; Congress was subordinate to the executive (Zinser 1993). Efforts to discuss the treaty on the Chamber of Deputies were blocked. According to this account, the Mexican government treated negotiations as a national security issue, keeping information a state secret. Business interests were initially not consulted; however, they became strongly engaged once NAFTA negotiations started. They have remained a strong voice under the Consejo Coordinador Empresarial (CCE) in favour of PWC norms, largely due to their significant exposure to the US market.

On the crucial issue of pharmaceutical patents, the United States used NAFTA to transform both the Mexican position towards pharmaceuticals and that of Canada, particularly towards compulsory licensing (Robert 2000).[17] To-date no single compulsory licence has been emitted by either Canada or Mexico in the post-NAFTA period. The state-led Mexican

[16] According to Morales (2008: 2) NAFTA is to be conceived as a "disciplinary machine which partners abide by through arbitrated litigation or unilateral sanctions... It embodies the same values, principled mechanisms and disciplinary coverage defended by US elites on both the multilateral and unilateral front at the time... Washington understood that if trade partners wanted to benefit from 'free' access to the US market, trade partners had to abide and play by the new rules of the game promoted and/or negotiated by Washington".

[17] Compulsory licensing was at the centre of Canadian pharmaceutical policy in the period before NAFTA. The US made the abolition of Canada's compulsory licensing regime a sine qua non throughout the negotiations and as such the inclusion of intellectual property rights and the abolition of compulsory licensing became a central part in the NAFTA negotiations, abolishing Canada's compulsory licensing practice and indirectly ensuring that Mexico would not follow such a practice in the future. Under NAFTA's stringent conditions there would not be any automaticity in the granting of compulsory licensing and their authorisation would be dependent on a national emergency, extreme urgency or non-commercial use.

pharmaceutical industry had been relatively successful in the field of steroid hormones, where Mexico became a world leader. However, by the time NAFTA was signed most domestic firms had either been bought by multinationals or ceased to exist, its share of GDP was also very small at .4 per cent of GDP (Robert 2000). Since NAFTA came into effect and given the enormous access needs of still a large part of the population a generics industry (based on expired patents) came into effect. This industry has had some influence in opposing stricter IP obligations than those already in force under NAFTA/TRIPS through the health ministry. The latter depends on the generics industry to be able to provide basic health provisions given limited resources. The opposition by the health ministry has led to minor exceptions of some TRIPS + norms such as data protection rules.

Mexico complied with NAFTA requirements by creating a strong, independent and professional regulatory agency under the Economics Ministry: the Instituto Mexicano de la Protección Industrial (IMPI). The combination of strong regulatory capacities, government support, economic interests overwhelmingly focused on the US market, as well as transnational market incentives explains why Mexico out of our four cases is the only rule-promoter in this sector. Mexico has actively engaged in promoting IP norms internationally, particularly attempting to "bridge" industrialized country interests and those of developing countries led by Brazil and Argentina in their launching of the development agenda at WIPO in 2005. These initiatives have not proved successful and Mexico was strongly criticized by both Brazil and Argentina. A more recent example of Mexico's role as a rule-promoter has been the (unsuccessful due to the opposition of Colombia) attempt by Mexico to include an IP chapter in the Pacific Alliance.[18]

Competition policy

The competition regime (unlike others such as IP) is not highly legalized. An attempt was made by the European Union to legalize the regime within the WTO but it never came into fruition given the strong opposition from a wide-number of countries including both emerging/developing and industrialized ones (particularly the US). This means that although certain relatively coherent practices exist in areas where there is consensus such as on cartels, in other areas such as abuse of market dominance practices are more diverse. This has led to a multiplicity of models and thus one can speak from different American and European competition traditions, but also of others such as the Japanese one. This means that countries aiming at developing a competition regime are freer to adapt and even mix from different competition regimes, as indeed seems to occur in practice. That being said, the principle of having competition law and independent competition regulators is strongly associated with PWC ideals. Under developmentalist interpretations, industrial policy (either of the import

[18] Interview with a Mexican trade negotiator, Economics Ministry (Mexico City) 23.04.2014.

substitution or export led type) has been the priority, even if this led to industrial or market concentration.

In terms of institutionalization and international influences, besides the attempt to establish competition law within the WTO, the diffusion of competition law appears to have followed more an emulation model rather than being the result of coercion or conditionality. Transgovernmental networking is likely to have been an important part of this process through relatively weak institutional structures such as the ICN.

Due to the nature of the competition regime and particularly the lack of clearly defined rules resulting from a multiplicity of existing competition models there is less rule-contestation than in other regimes. However, through transgovernmental networks such as the ICN "best practices" have emerged and peer-pressure exist even if they haven't been highly effective in homogenising the regime (Rowley/Campbell 2005). Although still very much informal and little institutionalised, the International Competition Conference among BRICS countries (BRICS ICC), one of the recent and most notable forums initiated by and for emerging economies, has called for competition polices better representing the interests and positions of emerging economies given the specific conditions and development status of a country.

In our four country cases, little evidence can be found that emerging markets are, as rule-makers, proactively exporting their competition rules nor diverging dramatically away from international practice. On the contrary, Brazil, Mexico and India have largely incorporated the international practice into domestic law either thorough gradual reform and system overhaul or by the newly established regime. Brazil and Mexico also serve as active promoters of international competition norms at venues such as the ICN, UNCTAD and the OECD. China has been more creative in adapting international templates to its domestic competition law regime, there is however no evidence that this partial rule-taking would amount to rule-contestation or that China would start exporting alternative approaches abroad.

i) Brazil

Table 8. Brazil competition: rule-promoter
i) Government position: favourable to competition regime, coexistence of competition regime and targeted industrial policies
ii) Interest groups: favourable to competition regime, case-specific resistance
iii) Regulatory capacity: important capacity increase despite remaining problems with staff shortage

Brazil's competition law was enacted in 1994 along with several other reforms in an effort to liberalize the economy. Two aspects of the 1994 competition regime are noteworthy as compared to the setup of most other jurisdictions. The first relates to the unusual *post*-merger

notification requirements, where the screening occurs after the companies have concluded the deal and started to integrate. Second, the institutional structure featured an unusual setup of three agencies. The decision-making Economic Defense Administrative Council (CADE) relied on prior investigations conducted by the Secretariat of Economic Law of the Ministry of Justice (SDE) and the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE). Botta (2012) argues that this institutional choice reflected the local need to have close ties to political decision-makers which allowed the Brazilian regulator to fare better than its counterpart in Argentina. However, the system was continuously criticized for bureaucratic sluggishness, which is why reform was discussed for over a decade. After ministerial turf battles and other hurdles were taken, a reform was enacted in 2011, which stipulates CADE as single competition authority[19] and introduces a *pre*-merger notification system.

Brazil has transformed CADE from the "poster boy for bad competition enforcement" (GCR 2002) to one of the most respected agencies worldwide. Technocrats of the national competition agencies (NCAs), through their participation to relatively weak institutional structures such as the ICN or venues featured by epistemic socialization such as the OECD Competition Committee or the related OECD Global Forum on Competition, have not only been empowered but also established informal but close personal relations with peers from other jurisdictions. Its cartel enforcement when first introduced in early 2000 benefited from informal cooperation with the US investigators. The OECD's Recommendation on Effective Action against Hard Core Cartels and the ICN's Recommended Practices for Merger Notification & Review Procedures are two examples of sets of recommended practices Brazilian NCAs have resorted to along the years to introduce key changes to its policies, first, and then to its law, and to win support along the way. It is worth noting that the legitimacy stamped by the recommended practices and OECD peer review recommendations had significant impact on speeding up Congressional review of the proposed new law. By having two OECD peer reviews, the NCAs managed to share the peer review conclusions with the congress people and ensured that the legislators would not get carried away and introduce too many of their own ideas and of their constituents into the new law so that tangible reform steps could be realized and "locked in" in a phased approach (L. Wang, 2015).

A lack of regulatory capacity seems the main reason for bad performance in its early life cycle. Although leniency program and dawn raid were introduced into the Brazilian competition regime as early as in 2000, before the reform the accumulative number of cartel cases was not significant in comparison to the huge and diversified Brazilian economy and the number of cases brought up every year was well above the capacity SDE could handle, which resulted in a long investigation time at SDE and a limited number of cases reached CADE for decision. Weak coordination between the three agencies led to long investigations, which draw criticism from the business community. Besides institutional complexity, the main bracket for effective enforcement was linked to a lack of resources, namely in terms of size and

[19] The SDE was integrated into CADE, while the SEAS retains only competition advocacy functions.

experience of staff and high fluctuation rates due to modest wages. Staff shortage has remained an issue after the 2011 reform and led to fears among business groups that the long awaited reform would ultimately lead to growing delays. While a need for more staff persists, CADE has succeeded to cope with the situation and imposed itself as one of the leading agencies in international rankings such as the enforcement rating of the Global Competition Review (e.g. GCR 2014).

Regarding government intervention, the regime has continuously been lauded for political independence. With the election of Lula da Silva in 2002 there was some doubt whether the goals of competition policy would be replaced by state-interventionist "command and control" measures (GCR 2003), but these fears never materialized. This is not to say that competition policy has imposed itself as the only form of industrial policy in the country. It is well known that Brazil has continued to pursue "old" sector-specific industry support next to horizontal policies favouring market competition (e.g. Kröger 2012, Hochstetler/Montero 2013). The relationship between the competition authority and proponents of developmentalist intervention seems one of mutual tolerance. Indeed, the reformist government and the local bar were the driving forces for the competition regime overhaul. As summarized by a former CADE President: "We won't have an opinion on what [other parts of government] do, if they do not on what we do."

Brazil has not only embraced the norms of competition policy domestically but is also actively promoting them internationally through venues such as the ICN, UNCTAD and the OECD Competition Committee, where it has been enrolled as an active observer for several years. Driven by its strong aspiration to be leading and credible competition enforcers and its foreign policy for South-South cooperation, the Brazilian competition enforcers provide technical assistance to several neighbouring countries sharing their experiences in competition law enforcement.

ii) China

Table 9. China competition: partial rule-taker
i) Government position: favourable to competition regime
ii) Interest groups: State-owned enterprises (SOEs) carry significant weight in the national economy. Foreign invested companies in China enjoy a comparatively better access than private Chinese firms in exerting influence to the Chinese government. Public opinion is playing an increasing role in motivating enforcement agencies to initiate anti-trust investigations.
iii) Regulatory capacity: Good. Although the capacity discrepancy between different government agencies is minimal, the enforcement of competition law reveals features of path dependence from different agencies.

The competition regime in China is comparatively young among the four emerging economies with its Anti-Monopoly Law (AML) enacted in 2007 and becoming effective the year after. The legislation started in 1987 out of the political will to establish laws and regulations needed for the establishment of market economy. However, it took twenty years to have the AML codified. Such a lengthy process, on the one hand, is the response to the ever-increasing market demand for a competition regime along China's gradual economic reform since late 1970s; on the other hand, reveals the varied opinions among legislators and other interest groups with regard to when and how to have a competition regime in place. The shift in the governments' role from economic planner to regulator in several government reshuffles coupled with economic reform also contributes to the institutional set-up of a unique tri-partite enforcement taskforce.

The drafting of the Chinese AML, since the very beginning, was a process of referring to laws and experiences of other established competition regimes (X. Wang, 2014). It was more a "shopping around" process than a direct transplant of either US or EU templates. In general, the law of the EU, the US and Germany are the most referred sources. The law of Japan, Russia, Chinese Taipei and former Eastern European countries are referred to on specific legal practices (L. Wang & Krizic, 2014).

With regard to final rule selection, the AML embodies some common practice of mature competition regimes. Whether the AML lawmakers embrace the prevailing international practices depends on whether such foreign practices will achieve their policy goals (Bush, 2007). Therefore, substantively the AML does not depart from the mainstream competition law but it does have its unique Chinese characteristics. The AML provides, among others, regulations of state-owned enterprises (SOEs) that are important to the national economy or national security and prohibitions on abuse of administrative power to restrict competition. Most notably, the law aims at not only protecting competition but also "creating" competition. Such feature can hardly be found in other jurisdictions (Huang, 2008).

L. Wang (2014), when examining the formation of enforcement regulations by the Chinese competition enforcement agencies shows that the dynamics between rule-exporters (the EU and the US) and the rule-adopter, China, are both frequent and institutionalized. A more institutionalized and coercive effort, such as bilateral agreements and policy dialogues, seems to be more resilient to political interests. The tripartite enforcement system gives more leeway to the three enforcement agencies to choose preferred rules in preferred ways. Although the institutionalized EU engagement activities under the framework of EU China competition dialogue played a limited role in the legislation of the AML (L. Wang & Krizic, 2014), it is likely to be regarded as being effective in shaping the secondary rules such as merger review procedures and guidelines, which is at the discretion of the Chinese merger control enforcer (L. Wang, 2014).

The special tripartite enforcement system also involves inter-institution competition among the enforcement agencies. Such institutional arrangement, on the one hand, encourages capacity improvement; on the other hand, allows the three agencies to perform sometimes autonomously at bilateral and plurilateral venues, which is determined by and reflects their capacity discrepancy (L. Wang, 2014).

So far, China is not a member of the ICN and clearly not involved in the development of recommended practices by the ICN. X. Wang and Emch (2013) notice that considerable progress has been made by the Chinese enforcement authorities and courts during the first five years of implementation of the AML. MOFCOM, the merger control enforcer, quickly established itself as one of the most influential competition enforcement agencies with a reputation beyond China's borders. The investigation against China Telecom and China Unicom, two very large and powerful SOEs, has greatly enhanced NDRC's status as an enforcement authority. At the same time, some of the cases adjudicated in the past five years—including the China Telecom/China Unicom case—also reveal that the implementation and enforcement of the AML face considerable challenges, such as insufficient measures against administrative monopoly, lack of sufficient autonomy of the competition agencies, and resource constraints to competition law enforcement.

The investigation into several early competition cases shows that a more integrated consideration has been given by the competition authorities in their decision-making on how competitive rivalry affects a broader set of policy goals, but it is far too early to conclude that a China model of competition enforcement is in shape and ready to be transplanted in other settings (Svetiev & L. Wang, 2014).

iii) India

Table 10. India competition: partial rule-taker
i) Government position: favourable to competition regime, limitations due to fragmented polity
ii) Interest groups: Some resistance by PSUs to be covered by competition rules, initial fears by private sector that new competition rules would increase the bureaucratic burden, business and civil society groups now in favour of competition regime
iii) Regulatory capacity: weak but increasing (problems to attract qualified staff)

The Indian Competition Act was established in 2002 as part of the ongoing liberalization process and the ambition to attract foreign direct investment[20]. It follows the broad lines of modern antitrust legislation in prohibiting and screening anti-competitive agreements, abuse

[20] The Competition Act replaced the 1969 Monopolies and Restrictive Trade Practices Act, deemed inadequate to protect competition in a liberalized market economy.

of dominance and "combinations" (mergers and acquisitions). In drafting the law, the advisory committee took inspiration from different established regimes such as the EU, US and especially Canada, but also from younger systems such as South Africa and Botswana. The newly created Competition Commission of India (CCI) at first had to confine itself to advocacy activities pending a Supreme Court decision. The revised Competition Act became effective gradually from 2009 onwards, which is when the new Commission started to take up its first cases[21]. Since then, the CCI has increasingly asserted itself domestically and reached out to the international level.

Interviews conducted in Delhi suggest widespread governmental support for the enforcement of competition rules. There was some concern among observers if the CCI would effectively proceed against government related Public Sector Undertakings (PSUs), which still play a major role in the economy. PSUs are de jure covered by the Act but their de facto exemption may signal political resistance to an effective competition regime. Recent CCI actions against PSUs appear as a sign of government support for competition enforcement, most prominently the decision in 2013 to fine Coal India Limited for misuse of dominance.[22] A further aspect of political cleavages may come from resistance at the level of state governments given the highly federalized Indian polity. It is too early to evaluate this aspect since most investigations to date relate to the commercial area of Mumbai.

Despite initial suspicion, private interest groups are overall in favour of a sound competition regime and resistance is largely case-specific. When the liberalization process started in 1991, any notification requirements for mergers and acquisitions were abolished, which was favoured by influential foreign and domestic companies. Private interests were therefore at first hesitant vis-à-vis the Competition Act and opposed in particular the pre-merger notification requirements for fear of new bureaucratic hurdles. Industry groups were very interested in this period and contributed to the revision and delaying of the Bill until after the 2009 elections. Nowadays, influential players such as the industry associations FICCI and CII as well as civil society groups such as CUTS are supporting the existence of an effective competition regime. It should be noted that beyond the Delhi and Mumbai "bubbles", industry is not consistently aware of the Act's existence and implications. Case-specific industry involvement will naturally grow with increasing application of the law.

Regarding regulatory capacity, the CCI is increasing its performance but faces challenges in terms of skills and experience. The CCI's slow take-off after 2009 can mainly be attributed to internal capacity challenges. CCI members have often been post-retirement bureaucrats, who

[21] From 2009, abuse of dominance and anti-competitive agreements were enforced, the screening of combinations followed two years later in 2011.

[22] http://www.livemint.com/Companies/B5fraG92QL4gRO6bRYQuNP/CCI-imposes-1773-crore-penalty-on-Coal-India.html, On further investigations against Coal India as well as Indian Railways, see: http://zeenews.india.com/business/news/companies/cci-orders-fresh-probe-against-coal-india-limited_96805.html, http://zeenews.india.com/news/delhi/cci-orders-probe-against-indian-railways-irctc_917817.html

formerly worked in other agencies and therefore lack a genuine formation on competition issues. The implication is "learning on the job" which is also a central feature for lower staff officials and new appointees, given that competition law and economics is practically absent from academic curricula. In recent years, the CCI started hiring spreads to fill its ranks, but got problems to find qualified candidates. In addition to the scarcity of qualified labour, the few promising candidates tend to join private law firms that offer higher wages than the public sector. The wage differentials also account for a significant turnover of experienced CCI staff to the private sector. Despite these drawbacks, the regulator has asserted itself increasingly in recent years. The rising awareness of companies is certainly linked to the imposition of considerable penalties by the CCI, for instance in the cement and tyre sectors. However, the Appellate Tribunal heavily reduced most fines on the grounds that the CCI did not issue guidelines or case-specific explanations to justify the penalty amounts. This neglect seems again related to a lack of "internal capacity", which "has been a major issue" for the young agency according to CCI Chairman Ashok Chawla (GCR 2014).

The CCI is trying to cope with this challenge by actively participating in international fora such as UNCTAD and the BRICS Competition Conference, whose 3rd meeting was organized in Delhi in November 2013. In addition, the CCI gathered input from various international sources, including regular presentations by international experts and workshops co-organized with institutions such as the OECD[23]. The ICN has also been an important source of information for the Indian competition authority, just as India has become an active member of the network. Indeed, India has been engaged as a co-chair of the ICN Merger Working Group in 2014-2015 and exceled as an ICN workshop organizer during this period (ICN 2015). At the bilateral level, Memoranda of Understanding and technical assistance projects have been signed respectively conducted with, among others, the EU and US competition agencies, and most recently with Canadian counterparts. Though there is still some way to go, the above points in the direction of rule taking through technocratic empowerment.

In sum, India has embraced the norms of competition policy, which are promoted domestically and at the international level. Yet it is too early to conclude if the CCI's comparatively recent activism will lead to lasting rule promotion such as practiced by Brazil and Mexico. The lack of regulatory capacity has meanwhile prevented a comprehensive application of competition law throughout the country.

iv) Mexico

Table 11. Mexico competition: rule-promoter

[23] See the website of the Competition Commission of India for summaries of events and speakers: http://www.cci.gov.in .

i) Government position: favourable to competition regime
ii) Interest groups oligopolistic nature of Mexican economy means major conglomerates are strongly opposed to competition law, demands from civil society and academia towards a stronger competition regime.
iii) Regulatory capacity: increasing on telecoms, strong in competition commission, weak in courts.

Mexico's competition law came into being in 1993 in the context of the liberalizing policies of the late 1980s and as part of the requirements for NAFTA. With these reforms an independent regulator the Comisión Federal de Competencia (CFC) was created. It was strongly influenced by US practice, which views the regulator as an arbitrator rather than a hands-on regulator as is the case in EU practice. Governmental elites have been generally positive towards competition policy as part of liberalizing efforts, but constrained due to powerful opposition by Mexican conglomerates. The CFC has faced several challenges, particularly lack of resources and being successfully confronted by conglomerates in the courts (*juicio de amparo*). This created a perception that despite being independent and professional the CFC was generally weak (OECD 2004).

Interviews conducted in Mexico City with high-ranking officials of the CFC suggest that the CFC has tried to strengthen itself through transgovernmental regulatory networks in line to what we would expect from our model (technocratic empowerment via transnational networks). In particular Fernando Sanchez-Ugarte (president of CFC from 1994-2004) towards the end of his mandate involved the OECD in a peer-review process of Mexican law. The OECD was called in part due to the failed procedure on dominant position against Telmex, the telecoms monopoly (1998-2004). As the Telmex case shows, a major problem for the enforcement of competition policy has been the successful opposition of major conglomerates who have been able to block procedures against them through the courts (on the basis of procedural hitches). Commissioner Eduardo Perez-Motta continued the OECD's involvement as a means of pushing for reforms aimed at strengthening competition law. The OECD became a type of consultant to the Mexican government on competition matters (a role which the OECD had previously never taken).

Under Perez-Motta the CFC gained visibility due to a high number of high profile cases initiated and the Commissioners' involvement in transgovernmental networks –particularly the ICN that he presided. Despite these efforts, high-level cases brought by the CFC under Perez-Motta were ultimately defeated in judicial procedures. The relevance of the CFC has been furthered weakened by the strengthening of the telecoms regulator (COFETEL) who will be henceforth in charge of taking-on Telmex in a recent (2014) reform, which saw among other things its budget increased from 600 million to 2000 million (compared to a much smaller increase at the CFC from 600 to 620 million). The strengthening of the COFETEL however suggests that the Mexican government is serious about ending the de-facto

monopoly enjoyed by Telmex and as such may be interpreted as increasing its regulatory capacities –if only in this particular area.

Despite these domestic weaknesses, the CFC is considered a leading agency in international rankings such as the Global Competition Review (e.g. GCR 2014). Mexico has acted as a rule-promoter in the competition policy field in particular through the ICN, which was chaired by Mexican commissioner Perez-Motta in 2012-2013, and also by his predecessor Sanchez-Ugarte in 2003-2004. This behaviour is common for medium-powers in that unlike larger rising states (such as Brazil, China and India) medium-powers do not aspire to reform the international institutions and regulatory regimes to their favour; they act as status-quo powers given lacking political and economic clout to modify existing regimes, and pursue their interests through international organizations contributing to manage and maintain the prevailing world order (Aydin 2014).

Labour Mobility

The regulation of labour mobility constitutes an exception in an otherwise predominantly liberal PWC trade regime (Trachtmann 2009). Contrary to other factors of production, the free flow of labour has hardly been liberalized. At the same time, this is a field where developing countries generally desire more liberalization than the established economies. This contrasts with the other fields of trade regulation addressed in this paper.

A first step towards liberalization of this highly protected domain was the introduction of selective temporary mobility rules for trade in services in the 1995 GATS agreement (so-called "mode 4" rules). Although part of the WTO's generally highly legalized regime, GATS mode 4 rules can be considered as a case of "medium" codification. On the one hand, the positive listing approach adopted in the GATS binds states only to those sectoral commitments included in the agreement's schedules. Secondly, states have been wary not to go beyond their national status quo in their commitments, and have included various derogations and exceptions in their schedules (Dawson 2012).

The current state of multilateral commitments in the GATS reflects the preferences of the industrialized countries and their service industries: they are mainly limited to the mobility of highly skilled professional working in multinational companies, the so-called intra-corporate transferees (ICTs) as well as business visitors (Lavenex 2006; Panizzon 2010). Developing countries in contrast, led by India and, to a lesser extent, Mexico, have thought to widen the scope for legal mobility beyond these categories linked to commercial presence and foreign direct investment and to include also less skilled workers in the scope of GATS. The categories of workers de-linked from commercial presence are referred to as self-employed independent professionals and contractual services suppliers (CSS) who are workers posted by a home country company in a host country to deliver a service. These initiatives have been

backed by UNCTAD and economists who have calculated that a liberalization by destination countries of 3 per cent of their workforce would create about US$ 156 billion per year in extra economic welfare, that is roughly four times the Official Development Assistance (Winters et al. 2002:2; Martin 2006: 9). In particular India, but also China, Mexico and, in the early years, Brazil have been active in multilateral negotiations on mobility, i.a. through a "Plurilateral request on services"[24] calling for wider commitments for Contractual Service Suppliers (CSSs) and Independent Professionals (IPs) – categories de-linked from commercial presence, as well as for the removal of economic needs tests (ENTs) during the WTO Doha negotiations (Jurje and Lavenex 2014). Whereas initiatives in the framework of the WTO's Development Round have been stalled due various reasons, emerging countries have shown different levels of success in promoting more encompassing GATS mode 4 rules in bilateral trade negotiations. In the following, we discuss these attempts at rule-making and argue that domestic inconsistency within domestic constituencies and the lack of regulatory capacity have seriously constrained the positioning as rule-maker of the most vocal advocate, India. Whereas Brazil has gradually lost interest in this agenda, partly because of weak interest group pressure, and Mexico has increasingly identify with the slightly more favourable regime accorded in NAFTA, it is China which, has discreetly positioned itself as the most successful rule-maker on GATS mode 4 in bilateral deals.

i) Brazil

Table 12. Brazil labour: rule-taker
i) Government position: favourable to labour mobility but no priority
ii) Interest groups: favourable to labour mobility but weak mobilisation
iii) Regulatory capacity: weak given division of competences between various ministries and ongoing overhaul of immigration laws

When the industrial nations, above all the USA, decided to raise services onto the Uruguay Round in the mid-1980s, Brazil together with India were at the forefront of the so-called Group of 10 that declined support for the inclusion of services in the new GATT round launched in 1985 (Drake and Nicolaidis 1992: 64). This was one of the first times these countries used their veto-power under the GATT/WTO consensual decision-making principle. It was only under the mediation of the EU that Brazil, India and their partners eventually agreed to start services negotiations but separate from the GATT framework (ibid: 70). It is in this phase that the turn-around occurred: from the moment services negotiations started, Brazil and India became actively involved, voicing the most ambitious claims on what became mode 4. Initially not on the services agenda, export of labour was introduced

[24] Request filed in 2008, requesting members: Argentina, Brazil, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Morocco, Pakistan, Peru, Thailand and Uruguay; Target Members: Australia, Canada, EC, Iceland, Japan, New Zealand, Norway, Switzerland and United States.

especially on the insistence of developing countries that called for "symmetrical" commitments in the treatment of comparative advantages (Ghosh 1997: 57ff).

Whereas India maintained this lead in multilateral requests on "mode 4", Brazil gradually lost profile over this issue and interview partners in the foreign affairs department (Itamaraty), Commerce, Immigration and Labour ministries confirmed that "mode 4" was no longer a priority in Brazilian trade negotiations. The loss of interest in the trade-related mobility agenda in Brazil can be explained by the absence of significant lobbying by domestic industry and interest groups, as well as weak regulatory capacity in administrative elites.

While Brazilian negotiators first joined India in claiming for wide "mode 4" commitments in the Uruguay Round, Brazil was less vocal in the Doha round and, although officially still sustaining the developmentalist discourse, has not stood out for pursuing offensive positions in other trade negotiations conducted in the framework of Mercosur. While regretted by leading industry associations, such as the National Confederation of Industry CNI, these actors have not been influential enough to push the government towards more proactive positions and to convince it of the sizeable gains from this agenda. This is partly due to the fact that Brazil's interests are mainly perceived to be in the attraction of highly skilled professionals, especially in IT and engineering, and less in the own potential to export labour through "mode 4".

Finally, also the regulatory framework for migration and mobility in Brazil is currently not supportive of a more offensive stance in "mode 4" negotiations. On the one hand, trade diplomats from the Department of International Negotiations MDIC and the Itamaraty interviewed for this project have highlighted that the domestic immigration legislation is still very restrictive and that they would be cautious to tie their hands on agenda that they would face difficulties of implementing at home. On the other hand, the legislative and bureaucratic framework for "mode 4" is currently in a phase of comprehensive overhaul, with significant turf wars between the hitherto dominant Consejo Nacional de Inmigración in the Ministry of Labour and new competences being created in the Ministry of Justice and a specifically appointed Undersecretary on Migration attached to the Presidential office (the Secratariat of Strategic Actions, SAE). In sum, despite an early interest in the mobility agenda attached to services liberalization, due to the lack of significant economic interest group pressure and contested regulatory capacity Brazil has accommodated with the role of rule-taker on "mode 4".

ii) China

Table 13. China labour: rule-maker
i) Government position: favourable to labour mobility in particular for contractual service suppliers and investment-related labour mobility

ii) Interest groups: policy hitherto mainly government sponsored
iii) Regulatory capacity: strong and centralised in MOFCOM

China's position on multilateral "mode 4" negotiations has been less vocal than India's. Also, China has joined WTO after conclusion of the GATS, thus limiting the scope for observations at the multilateral level. Nevertheless, bilateral FTAs concluded in recent times indicate that China has indeed successfully positioned itself as a rule-maker on "mode 4".

First of all, like India, China has succeeded in obtaining concessions on less-skilled subcategories of service-providers that are de-linked from commercial presences ("mode 3" in GATS) such as chefs, martial arts, Mandarin teachers, etc. (in China-New Zealand and most recent FTA with Australia). Another achievement is the granting of social and employment rights for spouses and dependents of "mode 4" migrants in the China-Australia FTA. Compared to India, however, the FTAs concluded by China stand out in two regards: the most far-reaching commitments have been negotiated with a "Western" country, Australia (also similarly in the FTA with New Zealand). And on top of the points above – this agreement offers "guaranteed access" for a quota of up to 1800 CSS annually in certain occupations. Two countries also commit to expeditious and transparent immigration procedures and cooperation on mutual skill recognition. At the fringes of ChAFTA, finally, a Memorandum of Understanding allowing for Investment Facilitation Arrangements (IFA) gives Chinese owned companies registered in Australia undertaking large infrastructure development projects the possibility to negotiate increased labour flexibilities. In addition, a Work and Holiday Arrangement was negotiated in parallel to ChAFTA, which grants Australia visas for up to 5000 Chinese workers and holidaymakers annually. These provisions on "mode 4" and migration are all the more interesting since they are generally discussed as the main concessions granted to China under ChAFTA which otherwise privileges Australian exports (Australian Government 2014) – even if the volume of visas guaranteed remains limited.

China's development into a rule-maker for "mode 4" is sustained by the presence of strong domestic economic interests in outward labour mobility and strong and coherent regulatory capacity. Abundant manpower and cheap labour costs have accompanied foreign investment for years especially in the construction sector, mining and natural resources extraction. SOEs involved in large infrastructure projects abroad have thus developed a stake in mobility liberalisation. In addition, some specific professions such as chefs and martial arts teachers have become an export sector in itself. In contrast to India however, where the economic gains from "mode 4" openings are part of a developmentalist discourse, Chinese government officials give a relatively sober statement of their ambitions. They justify China's offensive positions on "mode 4" mainly strategically as means to obtain balance in negotiations with their OECD counterparts. They also argue that despite the abundance of competitive labour especially in low- to middle skill segments, GATS mode 4 is not a realistic solution to domestic employment problems.

Apart from tangible economic interests, this strategic offensive position has been sustained by strong regulatory capacity. Chinese positions have been formulated with caution and coherently over time. As in the cases of IP and competition policy, transition from developmentalist towards regulatory states, including deferral of administrative competence to specialized agencies and coordination with business associations turns out to be key in explaining the different performance between India and China. Negotiation competence on "mode 4" in China is centralised in MOFCOM, the ministry overall responsible for trade policy. MOFCOM has operated in coordination with major stakeholders such as the China International Contractors Association (CHINCA), which also provides training to Chinese preparing for delivering services abroad, and the All-China Federation of Trade Unions (ACFTU). China's regulatory capacity is further underscored by a recent index compiled by the OECD on Countries' Service Trade Restrictiveness. While our four emerging countries all espouse lower levels of openness than the US and the EU, when it comes to mode 4, China stands out as being the most liberal, together with Mexico.

iii) India

Table 14. India labour: rule-maker
i) Government position: favourable to labour mobility, in particular independent professionals and contractual service suppliers (CSS)
ii) Interest groups: IT-industry (NASSCOM) has continuously lobbied the government for attaining more liberalization on "mode 4" in international trade talks , but increasingly NASSCOM's positions differ from the government's developmentalist agenda
iii) Regulatory capacity: gap between external demands and internal regulations and growing gap between government position and main industry lobby (NASSCOM) limit the regulatory capacity

India has been the most vocal supporter of widening labour mobility in services negotiations, both at the multilateral level and in bilateral frameworks. India has been the initiator of the 2008 “Plurilateral request on services” (see above) and has further substantiated this request with statement papers underlining the need for clearly defined commitments on "mode 4". These include: broader sectoral coverage and market diversification, longer periods of stay, elimination of quota restrictions on visas, elimination of the wage parity clause (minimum wages and/or salary thresholds based on average salaries in the host country were suggested by the requesting countries, especially for the case of CSSs), transparency of the process and procedures, introduction of GATS visas and/or a Business Travel Card equivalent to the one defined in APEC.

While WTO Doha negotiations have been stalled, India's rule-making has had more impact in bilateral FTAs – yet not matching the success of the Chinese deals (see above). India has so-

far concluded four FTAs that also cover trade in services, with Singapore (in 2005), Korea (in 2010), Malaysia and Japan (both in 2011). These FTAs cover the largest number of sub-categories of service suppliers de-linked from commercial presence – notably, contractual service suppliers and independent professionals. Also, there is no mention of economic needs tests (ENT) or any quota restrictions, and generally the requirements with regard to visa and duration of stay are clearly outlined. Apart from these agreements with other Asian countries, India has been negotiating with the EU on the conclusion of an FTA since 2007. Greater commitments on "mode 4" have been and remain India's main offensive interest in these negotiations. Interestingly however, India's negotiation stance has somewhat shifted over the years and has lacked coherence. On the one hand, demands on "mode 4" have been modified several times. On the other hand, whereas originally, demands clearly followed the developmentalist agenda outlined above (and reflected also in the FTAs with the Asian partners), most recently, commitments relating to ICTs and the intersection between "mode 4" and "mode 3" (commercial presence) have gained more priority. Apart from a lack of coherence, India's regulatory capacity on "mode 4" is circumscribed by the fact that most demands it has hitherto made upon negotiating parties do not correspond to domestic practices in India. India hitherto lacks proper immigration legislation and a ministry has been set-up with a focus to promote emigration and links with the diaspora rather than regulating admissions. Similarly, while Indian trade negotiators have often invoked the wish to have mutual recognition of qualifications as a facilitation for cross-border service delivery, several interviewees have emphasized that for India itself it would be probably impossible to get its professional associations (like the architects or accountants) embark on a Mutual Recognition Agreement (MRA). This seems to be corroborated by the OECD index on openness in service trade according to which India has very low scores compared to most other countries. Internally, competences are split between the Ministry of Commerce who takes the lead in negotiations but faces different internal influences from the newly created Migration Institute in the Ministry of Overseas Indian Affairs, which has more developmentalist, migration-centered positions, and the liberal influence of important think tanks such as the Indian Council for Research on International Economic Relations (ICRIER) or the WTO Center. Finally, the gap is growing between the positions of the Indian government, which has continued to hold to the developmentalist agenda and to speak on behalf of all developing countries, and the main lobby organization, NASSCOM, as well as liberal think tanks in India, whose positions have moved much closer to those of the EU and US, thus focusing on mobility for highly skilled intra-corporate transferees and business people rather than lower-skilled categories. This internal dissociation is also shown in the fact that NASSCOM has joined EU and US service industry association in lobbying for more advances I the plurlateral services agreement TiSA while the Indian government has so-far refused to join the negotiations.

iv) Mexico

Table 15. Mexico labour: rule-taker
i) Government position: favourable to labour mobility, but satisfied with NAFTA deal
ii) Interest groups: focused on mobility within NAFTA
iii) Regulatory capacity: high, long-standing coordinated administration

Mexico has been a close ally of India in the "mode 4" agenda at the multilateral level. Contrary to the latter, however, Mexico has decided to join TiSA plurilateral negotiations. As transpires from the analysis of all Mexican FTAs with third countries as well as discussed in face-to-face semi-structured interviews, the Mexican administration generally opted for the model adopted in NAFTA that has a GATS+ nature, but does not offer too many rights to service suppliers independent from commercial presence. In its FTAs Mexico has liberalized the mobility of intra-corporate transferees, business visitors, and traders, but no provisions for independent professionals or contractual service suppliers were offered. The only exception is the new category of "technicians" that was liberalized in the FTA with Peru. More commitments on semi-skilled "professional service providers" are covered by Mexico's "Mutual recognition agreements".

Economic interest groups in Mexico have sustained the government's involvement on "mode 4", but given the topography of trade ties they have focused on regulations within NAFTA. Mexico's regulatory capacity in this area is comparatively high. Already at the beginning of the Uruguay Round Mexico issued a comprehensive study on the country's economic interests in mode 4 that was published in coordination with UNCTAD. This study became the reference point for developing countries' argumentation on Mode 4. Mexico's agenda narrowed again under the influence of NAFTA, but its positions have since been coherently developed in close coordination between the Ministry of Economy, the National Institute for Migration, and stakeholders from different professions. The well-developed regulatory capacity is also visible from the comparatively large number of mutual recognition agreements on qualifications signed by Mexican professional associations with international counterparts. In sum, although Mexico has been a strong supporter of India in the Uruguay Round on "mode 4", it has subsequently accommodated itself with the deal reached under NAFTA and therefore must be classified as rule-taker in our typology.

III. Comparative conclusion

In sum, our research has found more cases where emerging powers have performed as rule-takers rather than rule-makers, while in some instances they have started to promote themselves established rules as secondary rule-diffusers. This suggests that Brazil, China, India as well as Mexico converge in the sense that they remain quite adaptive to the established norms and institutions of international economic governance and have only rarely really challenged existing templates (see Table 16)

Table 16: Summary of empirical findings

	IP	Competition	GATS mode 4
Brazil	Rule-contester	Rule-promoter	Rule-taker
China	Partial rule-taker	Partial rule-taker	Rule-maker
India	Rule-maker	Partial rule-taker	Rule-maker
Mexico	Rule-promoter	Rule-promoter	Rule-taker

Despite this overall finding, important differences emerge across the three sectors analysed. IP turns out to be the most contested sector, closely followed by GATS "mode 4" while on competition policy positions have increasingly converged. In IP, China and Mexico turn out to be particularly "accommodating", while Brazil and India have shown more contestation and attempts at alternative rule-making. The introduction of IP regimes in China and Mexico are clear examples of reformist governmental elites using the pressure of international agreements (WTO accession for the former and NAFTA for the latter) to lock-in contested domestic reforms. While governing elites maintain a certain level of ambiguity over these regulatory adaptations, particularly in China, competent authorities have quickly developed significant regulatory capacity that, together with increasing coordination in pertinent transgovernmental bodies, maintains the momentum towards regulatory adaptation. While China has focused on its domestic transition sometimes developing original solutions such as in competition policy – where the international rules are much more flexible -, Mexico has developed into a middle power with international rule-promotion activities, particularly towards its own neighbourhood. Among our four countries, Brazil and India stand out for their stronger contestation of IP norms as well as their greater international engagement in other sectors. However, only India has managed to diffuse alternative IP norms, and thus is the only case that may be considered as a rule-maker in this sector. That being said, in case an ABS system comes into being in the future all of our four cases would have taken part in creating new norms through the principles enshrined in the Nagoya Protocol. According to our analysis, the prevalence of developmentalist orientations in ruling elites as well as pressure from domestic interest groups, notably the generics industry, civil society organisations and legal scholars in India and, in Brazil, civil society organizations, were decisive for this alternative path.

In competition policy, all our four countries show a considerable degree of rule-taking as well as, in all cases but China, international rule promotion via cooperation in the ICN and other

transgovernmental venues. This is interesting given that competition policy constitutes a challenge to the tradition of state intervention and public property in the economy. Contrary to IP however, which also creates "winners" and "losers", international competition rules are much less legalized; they have not been imposed over the emerging countries via political conditionality and generally allow for a much wider scope of discretion for domestic implementation than other fields of international trade regulations. Transnational regulatory networks such as the ICN or the OECD have allowed to develop strong regulatory capacity and thereby to some extent shield domestic reforms from countervailing political forces.

Labour mobility, finally, is an interesting case of emerging countries wanting to move beyond the level of liberalization accepted by the established powers, especially in the case of China and India. These instances of rule-making respond to domestic economic interests regarding comparative advantages in service trade and in the case of China may also reflect market power in bilateral negotiations. However, the case of India is also indicative of the contingencies involved in these countries' transition towards influential international actors: while its developmentalist position on "mode 4" is increasingly challenged by more "industrialist" forces in its IT industry, failure to implement pertinent policies at home and weak regulatory capacity have hitherto limited the Indian government's impact on the international scene. This last point is similar to our findings regarding Brazil's approach to patents, where sectors concerned with ensuring access to medicines are more akin towards developmentalist (minimalist) IP interpretations whereas other businesses lobbying favour of maximalist IP norms. The result is the contradictory implementation of patent rules and domestic blockages. Unlike India on "mode 4", the fact that the Brazilian government has generally taken a developmentalist position and that an organ to coordinate Brazil's IP policies exists (the GIPI), allowed Brazil to largely followed coherent external positions on patents.

In sum, emerging countries' transition towards international actors in trade regulation has only started. With their economic rise, however, it seems that their regulatory preferences have to a certain extent converged with those of "the West". It is important to note however that unlike Western countries, the four emerging economies studied here (in general large emerging economies) are internally very diverse with large sectors experiencing high-productivity growth (similar to that of industrialised countries) co-existing with similarly large sectors where productivity is stagnant or even negative. This makes large emerging economies particularly strong arenas for domestic cleavages, both in terms of (economic) interests and ideas. Although as a result some degree of contestation prevails, depicting both their economic structures, the prevalence of ideational cleavages and of less established regulatory capacities (e.g. bureaucratic rivalries), involvement in international institutions and transgovernmental/ epistemic networks have quickly strengthened the role of pertinent regulatory authorities sustaining the trend towards adaptation to the norms of the established international economic order. In only a few cases, in which strong organised interests coincided with the acquisition of strong regulatory capacity, finally, emerging countries have

also succeeded in creating new norms that depart from established templates, in our sample in specific areas of IP regulation and services-related labour mobility.

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