SNIS Final Report

From Rule-Takers to Rule-Makers. Emerging Powers in the Regulation of International Trade

1. Abstract of Executive Summary

This project set out to understand when and under which conditions emerging powers evolve from rule-takers to rule-makers in trade regulation. Our findings underline that the translation of growing market power into regulatory influence is a complex process that presupposes the domestic transition from interventionist to regulatory states alongside the insertion into the sites of global regulatory cooperation. Looking at four countries (China, Brazil, India, Mexico) and three policy areas (competition, intellectual property rights (IP), service-trade related labour mobility), we find a mismatch between the role the countries' regulatory agencies strive to play at the international stage and their contested consolidation at home. While the domestic delegation of regulatory capacity to competent authorities seems particularly challenging, these authorities' standing is innately nurtured through the transgovernmental ties with fellow regulators elsewhere. Transgovernmental technocratic networking sustains these countries' insertion into and diffusion of established rules. In the few cases where emerging countries establish themselves as the promoters of new, alternative trade rules, it is the combination of organized domestic interests, strong domestic regulatory capacity and effective international networking that sustains the transition from rule-takers to rule-makers.

2. Executive Summary

In the light of the current shifts in the international distribution of economic power one of the most pressing questions of our times is to understand under what conditions emerging countries will embrace the institutions and norms of the established international order or whether they will set out to create own, alternative rules.

Focusing on three sensitive fields of economic governance that are at the core of developing countries' transition towards market economies our project set out to answer two questions:

- *To what extent are Brazil, China, India and Mexico evolving from rule-takers to rule-makers in the fields of competition law, intellectual property rights (IP) and labour mobility?* (descriptive analysis)
- *Under what conditions do these emerging markets choose to design, uphold and promote own regulatory approaches in these fields, which institutional venues do they use, and why?* (causal analysis).

We defined "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. Whereas our original proposal foresaw the dependent variable in a dichotomous way, we decided to diversify it, depending on 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 allowed 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 1. Possible outcomes of regulatory insertion

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

Our analytical framework investigated the explanatory potential of realist conceptions of market power next to political-economic, institutional and historical-cultural factors. Concretely, we hypothesized that a country's shift to rule-making in the selected policy fields is a function of: 1) its relative market power and the diversity of its internal market; 2) the size of the domestic industries affected by the regulatory provisions in question as well as the presence of influential interest groups; 3) its regulatory capacity in the respective fields; and 4) historical and cultural legacies in particular at their influence shaping ideas/worldviews. These conjectures were not proposed as competing ones. Instead our design followed a configurational logic meaning that we assumed various interactions between causal factors.

We focused on three emerging powers (Brazil, China, India) which converge in the sense that they have acquired a considerable degree of market power giving them a certain leeway towards external influences. This is less so for our fourth country case, Mexico, which given its strongly asymmetric trade dependence vis-à-vis the US, is less shielded from economic and political pressures.

Apart from the differentiation of the dependent variable, a second extension of our original theoretical framework consisted in the introduction of a supplementary set of explanatory factors related to the "supply-side" of regulatory shifts. These factors include, on the one hand, the imposition of international norms onto emerging countries via political conditionality or legal authority of existing international agreements, and, on the other hand, the diffusion through softer horizontal means such as socialization and policy learning in transgovernmental networks. This distinction turned out to be relevant when comparing competition policy rules for which no binding international framework exists with IP or also GATS mobility rules which have been codified in the WTO and, in the case of IP, have been subject to use of conditionality measures on the part of the EU and US.

On this basis, we developed a **push and pull-model** of regulatory insertion that combines our domestic level variables included in the original set of hypotheses with international-level ones (see Lavenex/Serrano 2015). Starting from the domestic approach in favour or against a particular international rule, this model conceptualizes international influences as potential opportunity structures which can empower particular domestic actors over others and thereby affect the path of regulatory insertion.

The model argues that complaisant **forms of rule-taking or rule-promotion** are favoured when governmental elites support an existing international norm. 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 either by raising the costs of non-compliance; offering mechanisms for domestic elites to "lock-in" domestic regulatory choices in trade agreements and thereby weaken domestic opposition (Putnam 1988; Moravcsik 1998); or, finally, contributing to the improvement of domestic regulatory capacity to introduce pertinent rules e.g. through cooperation in transgovernmental networks. We speak in this case of rule-taking via technocratic empowerment. Once emerging countries have developed strong regulatory capacity at home and have thus taken up an international rule, they can also start contributing to the further promotion of this rule at the international stage. Here again, insertion into pertinent transgovernmental networks and involvement in international trade negotiations will be necessary conditions.

The contestation of international norms and the **transition towards alternative rule-makers**, in contrast, are expected when governmental elites predominantly oppose pertinent international norms. In this case, we 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). While evolution towards alternative rule-making thus presupposes domestic rule-contestation, an active international mobilisation depends on a number of other preconditions, above all an economic impetus for international rule-making stemming from the pressure of important industries and their lobby organizations, and, secondly, strong regulatory capacity, that is, the existence of a key domestic regulator that is capable of defining alternative rules and of upholding them in international venues. Again, this capacity will be stronger, the more this domestic regulator is inserted in pertinent transgovernmental venues.

As documented below, our case studies generally corroborate these expectations. They show that it is crucial to assess the interplay between international influences that "supply" rules on the one hand and diverse domestic constellations that create a bottom-up "demand" for particular rules on the other hand in order to understand emerging countries' insertion into the structures of international governance. An important additional finding is that more often than not, transition towards rule-making is limited because of the contested domestic consolidation of pertinent regulators. In fact, the development of regulatory capacity presupposes first a complex transition of emerging countries from interventionist/developmentalist towards regulatory states, implying delegation of regulatory competences from the political sphere to independent technocratic agencies that govern at arms' length from politics. This transition process is much more demanding than existing studies of emerging powers' international ascendance usually concede, and it is often fraught with inconsistencies and instances of institutional de-coupling between the newly created regulators and their domestic constituencies. The result is an ambiguous picture in which some emerging country regulators become active in the international realm with policies that are not consolidated at home, thus limiting their capacity to develop genuinely new regulatory templates and constraining their scope of influence both domestically and internationally.

Our empirical research included the collection of a rich data set from various sources: available secondary literature; primary documents from the four countries under study as well as from pertinent transgovernmental and international organizations (i.a. WTO, UNCTAD, OECD, International Competition Network, WIPO, CBD, EU, US etc.); field trips and expert interviews with regulators, politicians, experts and civil society organizations in Beijing, Brasilia, Rio de Janeiro, Sao Paulo, Mexico City, New Delhi, Washington, D.C., Brussels and Geneva. In addition, we regularly cross-checked our data and interpretation with our institutional project partners from the OECD, WIPO and the WTO.

In the following, we give a brief overview of the research results for the four countries and three policy areas starting with competition policy, followed by IP and then service-related labour mobility.

Competition law and policy

Global competition governance, unlike IP and labour mobility, is not highly legalized. An attempt was once 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. The void of international competition law has led to a multiplicity of models, that of American or European competition traditions, or of others. 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.

Despite the failure to establish competition law within the WTO, one can observe increasing institutionalization of competition rules across the globe at the domestic and international level. The number of jurisdictions adopting competition law and policy has grown rapidly from mere a few dozen at the beginning of the 1990s to over 120 as of today largely due to either external conditionality imposed by a third party or internal demand for economic reform and development. This trend is promoted in particular by mature regimes such as the US and the EU which are projecting their competition policy preferences beyond their borders (Kovacic, 2008). Competition provisions have been inserted into regional trade agreements (RTAs), which have gradually developed into two “families” of practices, the EC-style agreements and the North-American one (Solano & Sennekamp, 2006). At the same time,

competition policy has been increasingly discussed at soft law venues (e.g. ICN, OECD, UNCTAD, BRICS) among which the ICN and OECD are credited for their approach of setting benchmarks in the form of best/recommended practices pushing for voluntary convergence that are widely recognized and shared among technocrats of national competition authorities (NCAs).

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 exists even if they haven't been highly effective in homogenising the regime (Rowley/Campbell 2005). Whereas the benefit of domestic competition regimes (in contrast to IP) is rarely debated, existing multilateral platforms have failed to sufficiently explore the relationship between development goals and competition problems and competition law implementation (Svetiev, 2013). Some commentators call for new perspectives from developing countries that could include their dire economic conditions and the treatment they receive from the world community and suggest that substantial convergence can be achieved and will naturally occur even in the face of varying perspectives (Fox, 2006). 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 policies 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 proactively exporting their own 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 through gradual reform and system overhaul or by a 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. Brazil, driven by its strong aspiration to be a leading and credible competition enforcer and its foreign policy of South-South cooperation, provides technical assistance to several neighbouring countries sharing its experiences in competition law enforcement. Also Mexico has taken a leading role within regional frameworks as a "secondary diffuser" of competition rules initially developed in the EU and US (Aydin, *forthcoming*). India is increasingly engaging internationally, most noteworthy as a current co-chair of the ICN Merger Working Group. It is however too early to conclude if this comparatively recent activism will lead to lasting rule promotion such as practiced by Brazil and Mexico.

Despite its huge market power, China has only sparely engaged in shaping international best practices on competition policy as compared to Brazil, India and Mexico. China is not a member of the ICN and keeps a low profile at other multilateral competition policy venues such as UNCTAD. Although its Anti-Monopoly Law (AML) retains some Chinese characteristics, the merger review regulations issued after the AML enactment show a high level of convergence with EU practice (Wang, 2014). 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/Wang, 2014).

Overall, these findings counter our market power hypothesis in the sense that market power does not translate into rule-making activity in the cases under study.

The diffusion of competition law, in our four cases, 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 or venues featured by epistemic socialization such as the OECD Competition Committee or the related OECD Global Forum on Competition. In this regard, domestic political delegation and institutional set-up are crucial to the effectiveness of such horizontal rule transfer. In the case of Brazil, technocrats of the NCAs, through their participation to such settings, 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. 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. Thus tangible reform steps could be realized and "locked in" in a phased approach (Wang, 2015). In a similar effort, Mexican competition enforcers used the advice and reputation of OECD peer reviews in order to "lock in" competition reform against the resistance of influential domestic conglomerates (Lavenex/Serrano, *forthcoming*). For India the OECD played a less distinguished role compared to Brazil and Mexico, but the NCA gathered input from various international sources, including regular presentations by international experts and workshops co-organized with institutions such as UNCTAD and the OECD. In the case of China, the drafting of the Chinese AML was more a "shopping around" process than a direct transplant of either US or EU templates. Apart from the usual suspects such as the US and EU laws, the laws of Japan, Russia, Chinese Taipei and former Eastern European countries are referred to on specific legal practices (Wang & Krizic, 2014). Its tripartite enforcement structure and its ministerial anchoring fundamentally limit the authority of the respective regulators both domestically and in terms of their capacity to contribute actively to inter- and transgovernmental governance. In fact, inter-ministry competition gives more incentive for separate approaches instead of a joint one and contributes to the fragmentation of international linkage. A more institutionalized and coercive effort, such as bilateral agreements and policy dialogues, seems to be more resilient to political interests. However, the tripartite enforcement system does give more leeway to the three enforcement agencies to choose preferred rules in preferred ways (Wang, 2014).

With regard to regulatory capacity, a mismatch between international exposure of NCAs and their performance of domestic enforcement is noticed in the case of Brazil, India and Mexico. In the case of Brazil, one would expect to see its international fame of being a credible enforcer mirrored in sound domestic enforcement. However, before the reform of 2011, domestic enforcement had long been criticized for inefficiency and inadequate detection of violations due to limited budget and human resources. Even after the reform, it is very unlikely to fill the expanded team with qualified personnel in a short run. In the Mexican case, one would equally expect that important international activism such as the repeated chairmanship of the ICN would reflect in sound domestic enforcement. While efforts on the side of the Mexican competition authority are undeniable, many cases were successfully confronted by conglomerates in domestic courts, revealing the still difficult stance of the NCA in the domestic political economy environment. The Indian case is also illustrative of

the gap between best practices promoted in transgovernmental networks and domestic implementation. Lack of administrative capacity hinders domestic norm application, even though the legal and institutional set-up suggest mature regimes. This being said, recent activism by the Competition Commission of India (CCI) shows its commitment and increasing capacity to enforce competition law against all types of market participants (e.g. Verghis et al. 2015).

In all cases, the transition from state intervention to market economy serves as the premise for the development of domestic competition policies – and, consequently, emerging countries international engagement in the matter. Our analysis shows that the completion of the process and the development of a working competition practice at the domestic level are a lengthy process, even the strong push from a pro-market reformist government exists. The adoption of domestic competition regimes as a precondition for more assertive "rule-making" abroad demands a complex set of reforms including not only legislative changes but also administrative ones like the empowerment of independent competition authorities and the mobilisation of economic interest groups engaging with the new regulatory framework. Interestingly, the case of competition policy shows that this complex domestic transition towards what one could refer as the "regulatory state" (Majone 1997; Levi-Faur 2011) is sometimes de-coupled from emerging countries' international behaviour in this field. Thus, while China has kept a low profile struggling with its own, tailored approach to competition policy, the Brazilian, Indian and Mexican competition authorities have all started to play an active role in the international promotion of established policy templates, notwithstanding their limitations to enforce these very same templates within their own jurisdictions.

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).

In our project we covered three IP issues: trademarks and copyrights, genetic resources and traditional knowledge, and patents – with a focus on the latter. 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 "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 IP. Whether this reflects domestic interests (eventual linkages with the patent's issue), ideational or market incentives (the explanatory factors covered in our analytical framework) is part of ongoing research (Serrano/Muzaka 2016; Serrano 2016; Bannerman/Burri/Morin/Serrano 2016), given that the Nagoya Protocol has entered into force only in 2014.

Among all the different IP issues already mentioned, patents have become the most salient one, in particular 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. Patents were therefore a main research focus (see in particular Serrano 2015; Serrano/Burri 2014; Krizic/Serrano 2015).

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 (in particular 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 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 an 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). Compared with Brazil, two 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), 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, even though one has to concede that the implementation of patent laws in China is patchy even if rapidly improving in particular due to the recent creation of specialised IP courts in major urban centres (e.g. 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 despite the fact that 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.

Services-related labour mobility

In contrast to the fields of competition policy and IP, in which the EU and US have been eager to promote their own template towards emerging countries, labour mobility is a field

where it is the latter who have acted as demandeurs. Our four emerging countries have been supporting the introduction of maximalist labour mobility provisions in the international negotiations leading up to the 1995 General Agreement on Trade in Services (GATS) (China as a WTO outsider at the time), and have continued supporting larger openings for both skilled and less skilled, independent and employed service professionals since. While the multilateral WTO venue has been stalled, emerging countries have followed up on this agenda in their bilateral FTA negotiations. Brazil's, China's, India's and Mexico's performance as rule-makers has however diversified over time and has led to different outcomes. Out of our sample, only China has succeeded in negotiating far-reaching commitments with developed economies on labour mobility in its bilateral free trade and investment agreements like the ones with Switzerland, New Zealand, and, above all, Australia (ChAFTA). India, while being the most vocal demandeur on "mode 4", has hitherto had less success in concluding similar deals with OECD partners, but has been granted important concessions in its FTA with Japan and can be considered as a rule-maker, apart from Japan especially in South-South PTAs. Mexico has over time restricted its demands to the level of commitments agreed in NAFTA, while Brazil has gradually disengaged with this agenda.

In sum, the main indications of China and India acting as rule-makers on "mode 4" are the following: the broader categories of service providers, especially regarding categories delinked from investment of commercial presence ("mode 3"); the granting of longer rights of stay; the inclusion of new, non highly-skilled subcategories such us nurses, care workers, language, yoga or arts instructors (in India-Japan FTA) chefs, martial arts, Mandarin teachers, etc. (in China-New Zealand and ChAFTA); social and employment rights for spouses and dependents of service workers; and, in the case of ChAFTA, "guaranteed access" for a quota of up to 1800 contractual service suppliers annually in certain occupations, commitment to expeditious and transparent immigration procedures, cooperation on mutual skill recognition, and, in the Memorandum of Understanding allowing for Investment Facilitation Arrangements (IFA) the possibility for Chinese owned companies registered in Australia undertaking large infrastructure development projects to negotiate increased labour flexibilities. Finally, a Work and Holiday Arrangement was negotiated in parallel to ChAFTA, which grants Australian visas for up to 5000 Chinese workers and holidaymakers annually.

In line with the project's "supply and demand"-model of regulatory insertion, our findings underline that whereas multilateral advances have stagnated both due to complexities of the Doha round, rising market power gives emerging countries an opportunity to push for their preferred rules in bilateral trade negotiations. The extent to which they succeed depends however not only on their overall market power but on the existence of sizeable industries benefiting from mode 4 liberalization and, above all, on the coherence and consistency of their negotiating positions and domestic policies (regulatory capacity).

In India, the important IT sector and in particular its interest association NASSCOM, India's most influential services lobby group, has played an important role in keeping "mode 4" high on India's negotiation table. While lobbying in China is a different story, abundant manpower and cheap labour costs have accompanied foreign investment for years especially in the construction sector, mining and natural resources extraction, and some specific professions such as chefs and martial arts teachers have become an export sector in itself. While India's IT professionals and these specific professions mainly fall under the category of independent professionals (IP), China's construction workers move as contractual service providers, therefore explaining China's greater offensive interests for CSS. The case of Brazil, in contrast, is indicative of the absence of significant lobbying by domestic industry and interest groups, which also explains the countries' lower profile on mode 4. 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 summarized above, 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, these actors have obviously not been influential enough to push the government towards more proactive positions and to convince it of the sizeable gains from this agenda. In contrast to China and India, Brazil can therefore not be seen as having seriously attempted to become a rule-maker on mode 4. A similar conclusion applies to Mexico which, although initially very vocal in GATS negotiations, has come to accept the deal reached within NAFTA as standard, even if this is only marginally more expansive than GATS.

While Brazil's and Mexico's positioning as rule-makers have thus declined due to weak domestic push-factors, and, in the case of Mexico, satisfaction with the deal reached within NAFTA, we observe that China has topped India as innovative power on mode 4. This is unexpected given India's very vocal stance on mode 4 issues in the Uruguay and Doha Rounds (Mashayekhi 2000). Furthermore, this picture could eventually be revised did India succeed with some of its positions in the protracted FTA negotiations with the EU. In contrast to India, 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. And yet, China's greater success in concluding "GATSm4+" deals with Western partners is corroborated by what we refer to as regulatory capacity. While India has consistently defended the developmentalist agenda in trade talks, its influence has remained limited due to inconsistencies in negotiation positions and incoherent domestic policies relevant for mode 4. In comparison, the Chinese positions have been formulated with more caution and more consistently 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. India has been found to defend unstable positions in bilateral negotiations, following often excessive moving targets. In addition, India's regulatory capacity is reduced by the incoherence of its domestic policies manifested in the fragmentation within the negotiating elites and clashes between competent ministries. Moreover, India's negotiation positions have been found to lack coherence with domestic policies, thereby undermining its credibility in negotiations. For instance, while asking for concessions on international migration, 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). The lack of trust in India's regulatory capacity has also been invoked by its trade partners as a reason to be hesitant on mode 4 concessions. This criticism is corroborated 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 of our three emerging countries while India is assessed as being the most restrictive country among the cases analysed. Finally, India's regulatory capacity is further challenged by the fact that the traditional developmentalist focus on lower-skilled

categories and mode 4 has become increasingly questioned by influential external actors, in particular think tanks operating in close interaction with the government and India's main services lobby association, NASSCOM. Several industries in India have reached a competitive status that generates a genuine interest not only on mobility for personnel, but also for firms themselves. These voices shift India's priorities much closer to the ones of the developed countries and their service industries – a fact that also shows in the joint lobby activities by NASSCOM, the EU and US service industry associations in the context of TiSA – notwithstanding the Indian government's vocal refusal to join these "club" negotiations (Hufbauer 2012). In sum, lack of regulatory capacity has undermined India's ability to implement new rules on mode 4 in international agreements. In comparison, while much more discreet, China has consistently followed a low-key agenda that is consistent with its domestic situation, and has eventually succeeded in including highly innovative expansive mobility norms in its trade agreements, in particular with Western partners (Jurje and Lavenex 2015a, 2015b, 2015c).

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 2)

Table 2: 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.

Contribution from external project partners (Mira Burri, WTI, University of Bern and Simon Evenett, University of St. Gallen):

Mira Burri from the WTI has worked together with Omar Serrano on the case of IP (see above). Our second external partner, Simon Evenett from the University of St. Gallen has acted as an expert advisor throughout the duration of the project and has taken up the complementary task of studying the broader picture of emerging power insertion into the global trade regime. Based on the project's conceptual framework, he addressed the question if emerging countries are better conceived as rule takers or rule breakers in the global trading system, The research focused on the compliance of the BRICS with eight international trade norms, ranging from codified WTO rules such as the ban of local content requirements, over the resort to multilaterally unregulated protectionist instruments such as public procurement discrimination, to more informal norms such as the eschewal of protectionism between BRICS participants (i.e. 'BRICS solidarity').

To evaluate norm-compliance of the BRICS' trade policy, a 'large-n' quantitative analysis was conducted relying on data from the Global Trade Alert (GTA). Based at the University of St. Gallen, the GTA project gathers information on various types of policy measures affecting foreign trade since the onset of the global economic crisis. Pertinent data for our project were collected from among 7000 policy measures included in the database as per today, which are coded in terms of the type of measure, the implementing and affected jurisdictions and the expected effects on trade (discrimination / liberalization).

The results of this research suggest that in absolute terms a case could be made that the BRICS have departed from the global trade norms under investigation. But such an assessment – apart from ignoring the liberalizing measures introduced by BRICS members during the same period – does not account for the similarly high frequency of norm deviations undertaken by other G-20 nations. In other words, in relative terms the BRICS seem no more rule breakers than other G-20 members or the group of G-7 (Evenett 2015, GTA 2015).

Practical application of results:

The study gives a unique insight into the complexities experienced by emerging countries in their efforts to become rule-makers. The results suggest the need to look deep into their domestic transition towards regulatory states alongside their international activism in particular at their participation in transgovenmental policy networks and epistemic communities. The results can be applied in policy design in foreign relations and economic cooperation.

Questions that merit further explanation:

Methodologically, we hope that further studies will pick up our proposed explanatory model of regulatory insertion to analyse other fields of international governance, thereby examining whether it is generalizable for other policy areas and emerging countries.

Practically, the behaviour of China seems to deserve further studies beyond the policy fields selected in this project since it has been the most paradoxical, in particular towards its more recent activism.

Finally, we think that future studies of emerging countries' insertion into the structures of international governance should focus more on non-traditional institutional venues such as transgovernmental and transnational activist networks as well as epistemic communities, also in the South-South diffusion of policies.

Policy recommendations:

For emerging countries, our results indicate the importance of both domestic reforms and international networking. Domestically, improving regulatory capacities and presenting a united domestic front are necessary conditions for being successful as a rule-maker internationally. Appropriate resources given the enormous complexity of these issues and domestic coordination mechanisms (e.g. Brazil's GIPI) should be allocated.

Internationally, Transnational Activist Networks (including those of academics) as well as transgovernmental ties are useful complements as a source of information, capacity building and cooperation for South-South initiatives. Regulators may consider using the reputation of transgovernmental fora in order to increase their domestic standing in case their domestic reform efforts are contested by vested interests.

Finally, reform-oriented policy makers may consider signing up to binding international agreements in order to "lock in" domestic reforms against powerful vested interests. Other costs and benefits of accession should however be considered.

For established powers, our results show that emerging countries' insertion into existing regulatory orders is facilitated by horizontal transgovernmental approaches of policy diffusion. These are conducive to technocrat clusters when domestic political delegation to regulatory agencies in the target countries is sufficient for autonomous international linkage.

Project publications (published and in the pipeline)

Journal Special Issues

Lavenex/Serrano (eds.) (in preparation) Understanding the Rise of the Regulatory State in Emerging Economies, Special Issue Proposal to be submitted to Regulation and Governance

Lavenex/Serrano (eds.) (in preparation) The EU and US facing emerging countries: limits of regulatory power?, Special Issue Proposal to be submitted to Journal of European Integration

Overarching Papers

Lavenex/Serrano (2014) From rule-takers to rule-makers? Patterns of adaptation, resistance and initiative among emerging powers in the world trade regime, paper presented at the SASE conference at the University of Chicago, July 2014, to be submitted to Review of International Political Economy.

Lavenex/Serrano/Wang (2015) The limits of transgovernmentalism. Emerging countries and the contested transition towards regulatory states, presented at the ISA New Orleans, February 2015, to be submitted as part of a special issue of Regulation & Governance.

Lavenex/Krizic/Serrano (2015) EU and US regulatory power under strain? Emerging countries between rule-takers and rule-makers, to be submitted as part of a special issue of Journal of European Integration.

Competition Policy (broad)

Svetiev, Yane & Wang, Lei. (2014). China's Competition Policy: Between technocracy and industry policy. Paper presented at the Workshop on "Power shifts in global trade regulation: patterns of influence, contestation and accommodation", Lucerne, Switzerland. (forthcoming)

Wang, Lei, & Krizic, Ivo. (2014). External vs. domestic: the evolution of China's competition regime. Paper presented at the Workshop on "Power shifts in global trade regulation: patterns of influence, contestation and accommodation", Lucerne, Switzerland. (forthcoming)

Wang, Lei. (2014). China and Global Competition Governance: Policy diffusion and convergence. Paper presented at the International Studies Association Conference 2014, Toronto, Canada. (forthcoming as part of a special issue on emerging economies)

Wang (2014) State-led or Market-Oriented: A comparative study of China, Brazil and South Korea's move to competition regimes (forthcoming as part of a special issue on regulation and governance)

Wang (2015) Are Transgovernmental Networks effective? A review of the reform of the Brazilian Competition Policy System. Paper presented at the International Studies Association Conference 2015, New Orleans, USA

Lavenex/Serrano/Wang (2015) Limits of Transgovernmentalism in global governance: Insights from emerging markets. Paper presented at at the International Studies Association Conference 2015, New Orleans, USA

Wang (work in progress) A book chapter in a book project titled *Competition Law and Policy in Developing Countries: Early Experiences and Reforms* (proposed publishing time in mid 2016)

Krizic (2014) Between rule-taking and rule-contesting: Emerging countries and the international regulation of public procurement. Paper presented at FLACSO-ISA Joint International Conference, Buenos Aires, July 2014.

Krizic (2015) Explaining diverging pathways in the international regulation of competition policy and public procurement. Paper presented at the European Union Studies Association (EUSA) Conference, Boston, March 2015.

Krizic (2014) Economic power shifts and change in EU external procurement policy. Paper presented at the International Studies Association Conference, Toronto, March 2014.

Krizic (2015) Exporting best and bad practices - the limits of EU and US approaches to liberalize promotion of public procurement in Brazil, China, Brazil and India (to be submitted as part of a special issue of Regulation and Governance).

Intellectual Property Rights

Serrano (2015) China and India's insertion in the intellectual property rights regime: sustaining or disrupting the rules? New Political Economy (forthcoming)

Serrano/Burri (2015) Making use of TRIPS flexibilities: Compulsory licensing regimes in India and Brazil. Chapter in an edited book on Emerging Economies Intellectual Property Rights and Public Health, CNPq, English and Portuguese versions (forthcoming)

Serrano/Burri (2014) Transnational Policy Networks and the South-South Diffusion of Novel Approaches to Intellectual Property Rights (forthcoming as part of a special issue on emerging economies)

Krizic/Serrano (2015) The EU and the BIC in intellectual property protection – between divergence and convergence, paper presented in Brussels at a conference on emerging economies in May 2015

Bannerman/Burri/Morin/Serrano (2016) 'Rising Powers at the World Intellectual Property Organization: Changing Interests and Stable Institutions' Paper to be presented at the ISA Conference in Atlanta 2016

Serrano/Muzaka (2016) Teaming-up? Coalitions of emerging powers in the homologation of TRIPS and the CBD, paper to be presented at the ISA Conference in Atlanta 2016

Serrano (2016) Emerging countries, rule-makers vis-à-vis established hegemons? Access and Benefit Sharing. Proposal part of a special issue on emerging economies, the EU and the US

Serrano (Work in progress) Book project: Rule-makers or Rule-takers? Trade Policy in Emerging Economies, proposal to be submitted to a major university press in 2016

Service Labour Mobility

Jurje/Lavenex (2014) "Trade Agreements as Venues for 'Market Power Europe'? The Case of Immigration Policy", JCMS: Journal of Common Market Studies, 2014, 52: 320–336.

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Jurje/Lavenex (forthcoming) "ASEAN Economic Community: what model for labour mobility?" in Pierre Sauvé and Simon Lacey (eds.): ASEAN Economic Community: Progress and Prospects, Springer Publisher.

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Jurje/Lavenex (forthcoming) "Rule-making beyond the status quo: rising powers and trade-related international mobility" (to be submitted as part of a special issue of Regulation and Governance).

Jurje/Lavenex (forthcoming) " GATS striking back: emerging countries' counter-agenda on services liberalization" (to be submitted as part of a special issue of Journal of European Integration).

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