



## Emerging powers and the world trading system: The past and future of international economic law

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Mark Feldman


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## BOOK REVIEW

**Emerging powers and the world trading system: The past and future of international economic law**, by Gregory Shaffer, Cambridge, Cambridge University Press, 2021, xxii\_321 pp., GBP 24.99 (paper back), ISBN 978-1108495196

In *Emerging Powers and the World Trading System*, Gregory Shaffer, Chancellor's Professor at the University of California, Irvine School of Law, structures discussion around one core conundrum: the questioning of an existing trade law system by the state that created it (the United States) and the defense of that system by emerging economies that often have seen the system as unfair, indeed unfair due to a perceived bias in favour of US interests. The book reflects over two decades of work, including more than 200 interviews conducted in Brazil, India, China, the United States and Europe, culminating in extensive, co-authored case studies of Brazil (with Michelle Ratton Sanchez Badin), India (with James Nedumpara and Aseema Sinha) and China (with Henry Gao). One central theme is how the establishment of the World Trade Organization (WTO) in Geneva catalyzed the development of legal capacity – particularly in the area of international economic law – within Brazil, India and China. That enhanced legal capacity is now being redirected and adapted via rulemaking and institution building throughout the global South. The creation of a global trade institution in Geneva, led in significant part by the United States, is a characteristically twentieth century event; the trends examined in the book suggest that international trade governance in the twenty-first century will reflect quite different characteristics: emerging powers applying enhanced legal capacity on their own terms, with their preferred partners in their preferred locations.

Shaffer's case studies provide detailed accounts of how Brazil, India and China – 'the three most important emerging economies ... to the international trade legal order' (p. 22) – developed legal capacity in distinctive, but often similar, ways following WTO membership. In all three jurisdictions, advances in legal capacity included greater interagency coordination: Brazil established a Chamber of Foreign Trade (CAMEX) to coordinate trade policy among different ministries; India created an interagency committee 'to forewarn industries and trade bodies' (p. 134) of WTO decisions that could negatively impact sensitive domestic products; China's Ministry of Commerce (MOFCOM) engaged in 'constituency building' (p. 211) by involving officials from other ministries in WTO hearings.

Early WTO cases also spurred capacity-building efforts in all three jurisdictions. For Brazil, a case brought by Canada challenging Brazil's subsidization of the aircraft company Embraer 'awakened the private sector regarding WTO law's implications' (p. 85) while a US challenge to Brazil's patent law provisions during 'the height of the AIDS crisis ... rallied civil society organizations in Brazil and around the world' (p. 85). For India, 'politically sensitive complaints brought by the United States and the European Union in the WTO's first years ... pressed the Indian bureaucracy to develop new partnerships with the private sector and engage technical experts such as economists and lawyers' (p. 133). For China, after learning how the WTO 'dispute settlement system operated ... China no longer favored settling claims over litigating them, but instead strove to raise strong defenses in almost every case ... [and] also started bringing cases against the United States and the European Union as a complainant' (p. 203).

Brazil, India and China also have worked closely with private practitioners in their capacity building efforts. Brazil's 'three-pillar' structure for WTO dispute settlement consists of, first, a WTO dispute settlement division in the capital, Brasília; second, Brazil's WTO mission in Geneva; and third, Brazil's private sector, including law firms as well as the academy, think

tanks and NGOs. India worked with Brussels-based and US-based law firms when defending some early WTO complaints; over time, 'a small group of Indian lawyers in the private sector became increasingly important for providing counsel to the government on potential and actual WTO trade disputes' (p. 154). China 'worked to foster the development of internal expertise within Chinese law firms ... [by] having a Chinese law firm work with a foreign law firm in all but one of the first twenty-eight cases that China faced before WTO panels' (p. 192).

Regarding legal capacity, one notable difference between the three jurisdictions has concerned the continuity of trade expertise. Brazil and India each have faced significant structural impediments to achieving such continuity. In Brazil, foreign ministry officials rotate positions every two to three years. Indian Administrative Service officials, following three-year terms in Geneva, are required to return to India, where their portfolios often do not require trade expertise. Compared to counterparts in Brazil and India, China's MOFCOM has been better positioned to ensure continuity of trade expertise, in particular by creating, internally, a specialized WTO track.

Throughout the case studies, insights from interviews provide a depth of understanding that otherwise would not have been achievable. Examples include: Brazil's significant shift in position, when 'it became clear that the Doha Round negotiations had collapsed,' on 'negotiating "new" issues at the WTO on a "plurilateral" basis' (p. 99); efforts by India's Commerce Ministry, in response to fears of a flood of foreign products into the Indian market, to establish a "war room" to keep a vigil on around three hundred sensitive products' (p. 134); the 'critical' importance of MOFCOM's authority 'for China's implementation of WTO law, and, more deeply, for the permeation of WTO legal norms in the mentalities and practices of Chinese governmental officials and private actors' (pp. 211–212).

When analysing WTO-related capacity building in the three jurisdictions, Shaffer devotes considerable attention to placing such developments within a clear theoretical framework, specifically the framework of transnational legal orders. Shaffer defines transnational legal ordering as 'the processes through which legal norms are constructed, flow, settle, and unsettle transnationally across levels of social organization' (p. 23). Shaffer observes that the 'engagement of Brazil, India, and China with the WTO led to significant changes not only in their laws, but also in their institutions, professions, the relation of the bureaucracy to the private sector, and their norms and practices,' illustrating that trade law 'is about much more than legal texts and litigation over them' (p. 305).

Although the title of the book is 'Emerging Powers and the World Trading System,' discussion largely focuses on emerging powers and the WTO. With respect to that relationship, one interviewee observes that Brazil, India and China 'are all at the center of the WTO. Nothing can move forward in the WTO without them' (p. 306). But Brazil, India and China can move forward without the WTO: as Shaffer observes, 'the transnational legal order for trade' has 'splintered' (p. 308). One WTO official states, 'during the first five years of the Doha round, the WTO absorbed countries' trade personnel and most of the oxygen for trade negotiations. Since 2008, other parts of the trading system have received that oxygen' (p. 308). The shift in attention away from Geneva has been made possible, in part, by the significant gains in legal capacity that emerging powers like Brazil, India and China achieved in order to engage effectively with the WTO. For those emerging powers, the road to Geneva required dramatic advances in legal capacity; to the extent those advances are now in place, the road from Geneva has been quite manageable. The redirection of trade law capacity is frictionless.

The trade-related rulemaking and institution building occurring not only outside Geneva but indeed outside the West is striking. Brazil has been particularly active in the area of investment law, concluding a number of investment agreements with states in the global South; the agreements reflect distinctive policy priorities, emphasizing investment facilitation and

dispute prevention while not embracing investor-state dispute settlement. Brazil also is a member of the Shanghai-based New Development Bank (NDB) (established in 2014) and the Beijing-based Asian Infrastructure Investment Bank (AIIB) (established in 2014). In 2016, India created a new think tank, the Center for Research in International Trade (CRIT), which supports India's WTO, regional, and bilateral trade work; that work includes deepening regional ties on trade policy. India's 'Act East' policy, which was announced in 2014, similarly seeks to advance regional connectivity. For China, several institutions supporting China's Belt and Road Initiative have been established over the past several years, including, in the area of commercial dispute resolution, the International Commercial Dispute Prevention and Settlement Organization (located in Beijing) and the China International Commercial Court (tribunals located in Shenzhen and Xi'an). China also has ratified the ASEAN-led Regional Comprehensive Economic Partnership (RCEP) agreement, which creates 'the largest free trade bloc in the world, covering around 30 percent of global GDP' (p. 244); the RCEP also advances institution building by establishing an RCEP Secretariat.

The world trading system is being reshaped in significant part by emerging powers like Brazil, India and China, with that work primarily occurring in the global South. With respect to emerging powers and the world trading system, the road to Geneva has been significant, but the road from Geneva is equally noteworthy.

Shaffer observes that for 'trade liberals, this book has the arc of a tragedy ... As [emerging powers] rose in economic importance and built legal capacity to wield WTO law to defend and advance their positions, the United States became disenchanted with the legal order it had created' (p. 316). But such an arc also can be considered from a different perspective: a more dispersed world trading system can allow for reconsideration of core policy priorities and respond more effectively to regional norms, practices and expectations.

Shaffer's book is a remarkable achievement: more than two decades of work and more than a few hundred interviews supporting rigorous analysis of how emerging powers have developed trade law capacity to engage with the WTO and are now redirecting that capacity in many new contexts and locations, with such dispersion of trade-related rulemaking and institution building being further accelerated by the US retreat from the WTO. The contribution of *Emerging Powers and the World Trading System* to our understanding of global trade in the twenty-first century will be enduring and valuable.

Mark Feldman  
Peking University School of Transnational Law  
 [mfeldman@stl.pku.edu.cn](mailto:mfeldman@stl.pku.edu.cn)

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