
New Great Powers and International Law in the 21st Century

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Abstract

Great Powers (GPs) have always been prominent in international relations. Their rise and fall often lead to structural transformations of international relations. In the past decade, the world has witnessed the rise of some New GPs (NGPs), which primarily consist of Brazil, Russia, India, China, and South Africa (BRICS). While the effect of the supremacy of the United States, an Old GP (OGPs), on international law has been examined extensively since 2000, international lawyers have hardly discussed how the rise of NGPs may shape and reshape international law. This article endeavours to examine the implications for such rise that stem from the rise of NGPs. In particular, as an 'insider' from an NGP, the author reviews the latest development in China's international legal policy and practice.

1 Introduction

In his 1989 work on Great Powers (GPs), Kennedy canvasses economic changes and military conflicts from 1500 onward. Kennedy concludes that 'the relative strengths of the leading nations in world affairs never remain constant' and that 'economic shifts heralded the rise of new Great Powers'.¹ Kennedy further predicted that China would rise as a potential Great Power (GP) if it could maintain its economic development,² and that the United States (US) would move towards a 'relative' decline.³ Kennedy made people realize once again that prediction is one of the most risky intellectual activities. While China has risen as predicted, this has occurred more quickly

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¹ P. Kennedy, *The Rise and Fall of the Great Powers* (1989), at xv, xxii.

² *Ibid.*, at 447.

³ *Ibid.*, at 534.

than expected. Additionally, Kennedy failed to predict that the US would climb to its peak as a sole Superpower and that this position would be so short-lived,⁴ even though it remains a major international player. Finally, Kennedy did not anticipate the rise of a group of new great powers (NGPs), but rather predicted that China alone would rise. Notwithstanding these minor inaccuracies, the general theme that Kennedy developed, with respect to the rise and fall of GPs and their role in international relations, can be seen to have held true.⁵

Although we cannot say that international lawyers have entirely failed to recognize the key role of GPs in international law,⁶ this issue has hardly been given serious consideration.⁷ This situation began to change significantly around the year 2000 as the Kosovo War sparked concern regarding whether, to what extent, and how the US predominance 'is leading to foundational change in the international legal system'.⁸ However, while international law studies concerning Old GPs (OGPs), in particular the US, are presently increasing, those relating to NGPs can be counted on the fingers of one hand. Stephan believed that the rise of NGPs would make international law more selective, but he wanted 'neither to condemn nor celebrate' this phenomenon.⁹ Gordon argued that the rise of NGPs would lead to a 'New, New International Economic Order' (New NIEO), but she considered it difficult to anticipate what this new order might look like and whether it would be more friendly to poor nations.¹⁰ Yasuaki opined that, as China, India, and other Asian states rose, international law would to some extent enter the 'Asian Era'.¹¹ Fidler also argued that international law would enter 'The Asian Century'; however, he suggested that this new century would be remembered not 'because countries in Asia [would] lay down the law to the rest of the world, or because China or India [would] become a superpower', but rather 'because Asia [would] host the next great challenges for, and experiments in, the governance of human affairs'.¹²

There are many shortcomings in the current literature on NGPs. For instance, since NGPs rise not only in Asia, characterizing this phenomenon as the 'Asian Century' is inaccurate. Furthermore, while Gordon set out to conduct a value-neutral study, in practice, the phenomenon may not be 'neutral'. Gordon's work embodies a further deficiency, in that it stops at asserting the rise of a 'New NIEO' without elaborating on its nature, content, and its relationship with the 'Old NIEO' launched in the 1960s. Within the context of GPs' rise and fall, the interaction between NGPs with OGP should not be ignored. Finally, and more generally, although the rise of NGPs is

⁴ D.S. Mason, *End of the American Century* (2008).

⁵ See also L. Oppenheim, *International Law* (2nd edn, 1912), at 171.

⁶ See, e.g., W.G. Grewe, *The Epochs of International Law* (2000).

⁷ See G. Simpson, *Great Powers and Outlaw States* (2004), at 165.

⁸ M. Byers and G. Nolte (eds), *United States Hegemony and the Foundation of International Law* (2003), at xv.

⁹ See Stephan, 'Symmetry and Selectivity: What Happens in International Law When the World Changes', 10 *Chicago J Int'l L* (2009) 91, at 107.

¹⁰ Gordon, 'The Dawn of A New, New International Economic Order?', 72 *L & Contemp Probs* (2009) 131, at 162.

¹¹ Yasuaki, 'A Transcivilizational Perspective on International Law', 342 *Recueil des cours* (2009) 1, at 104.

¹² Fidler, 'The Asian Century: Implications for International Law', 9 *Singapore Yrbk Int'l L* (2005) 19, at 31.

exerting increasing influence on international law, it is too early to draw any firm conclusions with respect to the full extent of the implications of this influence. Therefore, much more intellectual exploration is needed.

This article seeks to further the understanding of the implications of the rise of NGPs for international law. In particular, the author provides an 'insider's' perspective with respect to China as an NGP. This article consists of four sections. Section 2 explores the concepts of NGPs and OGPs, highlights similarities and differences between them, and provides a preliminary assessment of the role of the rise of NGPs in international law. Section 3 analyses the challenges to international law that accompany the rise of NGPs. Section 4 investigates why NGPs can increase their influence with respect to development input and democracy in international law. Since China has been widely recognized as the most powerful NGP, a case study on China is conducted in section 5.

2 NGPs, OGPs and International Law

A GPs, NGPs and OGPs

The term 'Great Powers' came into diplomatic parlance with the Chaumont Treaty (1814), which 'marks a key step in the evolution of the distinction between great and small powers'.¹³ Although various factors have been proposed to define GPs, a precise definition has not yet been achieved.¹⁴ Roughly speaking, the factors used to define the term GP can be divided into two categories: material and cognitive. Material factors include population, territory, national interest, economic development, military power, etc. Examples of cognitive factors include a state's willingness to act like a GP and the recognition by other nations of its status as a GP. Both material factors and cognitive factors are necessary for a state to be classified as a GP,¹⁵ but in making this determination not all factors are necessarily accorded equal weight; for instance, economic and military power are generally given particular emphasis.¹⁶ In this regard, two additional points warrant mention.

First, while demonstrating strength in all aspects certainly helps a state to claim GP status and improves its chances of recognition by other nations, weakness in relation to a specific aspect does not necessarily preclude the achievement of GP status, at least in a specific field. This point calls into question Bull's proposition, rooted in high politics, that strong military power is indispensable for a GP, and thus Japan cannot qualify as a GP based solely upon its economic success.¹⁷ Indeed, the conclusion that Japan cannot qualify as a GP seems preposterous in the light of the clear influence that Japan can exert on international economic governance.¹⁸ The second point worthy of

¹³ R.T. Klein, *Sovereign Equality among States* (1974), at 12.

¹⁴ See M.I. Handel, *Weak States in the International System* (1990), at 21–23.

¹⁵ See T.J. Lawrence, *The Principle of International Law* (6th edn, 1915), at 279; H. Bull, *The Anarchical Society* (1977), at 200–229.

¹⁶ See Kennedy, *supra* note 1, at xv.

¹⁷ Bull, *supra* note 15, at 200–229.

¹⁸ Japan is a member of 'the Quad' in the WTO and is the second largest contributors to the International Monetary Fund (IMF). As for Japan's privileged position in international economic rule-making see Katz Cogan, 'Representation and Power in International Organization', 103 *AJIL* (2009) 209, at 259.

mention relates to the trend of multipolarity, which is characterized by the ‘marked dispersal of power rather than a concentration’,¹⁹ due to the rise of several NGPs. This trend implies that achieving the status of a present GP does not necessarily require a degree of power and influence comparable to that exercised by GPs historically.

The lack of a definite definition of a GP, however, does not prevent people from reaching a general consensus in recognizing certain countries as GPs. For instance, during the Congress of Vienna, Austria, Russia, Great Britain, Prussia, and France were recognized as GPs. Similarly, while this article does not provide a complete explanatory definition of a GP,²⁰ for the purpose of further discussions it will define OGP and NGPs with reference to specific states.

In the remainder of this article, OGPs will refer to the Group of Seven (G7), a ‘rich club’, which consists of France, Germany, Italy, Japan, the UK, the US, and Canada.²¹ After it was formed in 1975, the G7 initially acted as the centre of international economic governance, and has, over time, extended its reach to political affairs.²² Although the establishment of the Group of Twenty (G20) in 1999 arguably suggests that the G7 states are not the sole influential actors on the international stage, the G7 continues to play a dominant role.²³

On the other hand, the term NGPs will refer to the BRIC before 2011 and, since 2011, ‘BRICS’ with the inclusion of South Africa.²⁴ In 2001, O’Neill coined the acronym ‘BRIC’, based on the initial letters of the names of Brazil, Russia, India, and China. He predicted that the BRIC would constitute an economic power comparable to the G7.²⁵ Another two economists predicted that by 2025 the economies of the BRIC could account for half the size of those of the G6 (the G7 minus Canada) and that China’s economy could overtake Japan’s by 2015 and the US’s by 2039.²⁶ In actuality, the BRIC’s economic power has been increasing more quickly than predicted. China’s Gross Domestic Product (GDP) exceeded that of Japan in 2010, making China the world’s second largest economy. The IMF predicted that China would become the world’s largest economic body by 2016, thus ending the ‘Age of America’.²⁷ This expansion of economic power has also made BRIC countries more influential in many

¹⁹ B. Cheng and E.D. Brown (eds), *Contemporary Problems of International Law* (1988), at 21.

²⁰ Indeed, most international lawyers do not care about this definition: see, e.g., G. Schwarzenberger, *Power Politics* (2nd edn, 1951), at 44; W. Friedmann, *The Changing Structure of International Law* (1964), at 34.

²¹ The ‘G7’ evolved into the ‘G8’ with the admission of Russia in 1997. However, Russia at best is a nominal member because it is excluded from rule-making concerning many fundamental affairs.

²² See, e.g., R. Penttilä, *The Role of the G 8 in International Peace and Security* (2003).

²³ See Beeson and Bell, ‘The G-20 and International Economic Governance’, 15 *Global Governance* (2009) 67.

²⁴ Sanya Declaration (2011), at para. 2, available at: <http://in.china-embassy.org/eng/zgxw/t815431.htm> (visited 10 Dec. 2011).

²⁵ O’Neill, ‘Building Better Global Economic BRICs’, 30 Nov. 2001, available at: www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf (visited 1 Oct. 2011).

²⁶ Wilson and Purushothaman, ‘Dreaming With BRICs: The Path to 2050’, 1 Oct. 2003, available at: www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf (visited 1 Oct. 2011).

²⁷ Gardner, ‘The Age of America ends in 2016: IMF predicts the year China’s economy will surpass U.S.’, available at: www.dailymail.co.uk/news/article-1380486/The-Age-America-ends-2016-IMF-predicts-year-Chinas-economy-surpass-US.html (visited 1 Nov. 2011).

international affairs.²⁸ The BRICS' political and military power further supports their classifications as NGPs. Within the BRICS, China and Russia are Permanent Members of the UN Security Council (UNSC) and are recognized Nuclear Powers; the other three states represent the most competitive candidates for positions as new Permanent Members of the UNSC, should the UNSC reform deadlock be broken.

It should be noted that there are disagreements regarding some issues among NGPs. Take climate change as an example. While China and India insist that the Kyoto Protocol approach, which sets mandatory limits on greenhouse gas (GHG) emission from developed states and several transitional economies including Russia, while not imposing such obligation on developing states including China and India,²⁹ be maintained, Russia tends to abandon this approach.³⁰ Disagreements among NGPs may damage the effectiveness of NGPs in shaping and reshaping the international legal order. Nevertheless, this does not prevent them from sharing a common interest or attitude towards many more issues upon which they can collaborate among themselves.³¹

B Differences between NGPs and OGP

Having considered the definitions of NGPs and OGP, this article now turns to a comparison of these concepts, first contrasting NGPs and OGP and then canvassing similarities. In contrasting these concepts, this article focuses on two factors: economic development and state identity. Kennedy opined that economic power is the material foundation for claiming a status as a GP. Furthermore, 'identity', as a relational concept, is key to defining the status of and understanding the action logic of actors in any community. Thus a more comprehensive comparison is arguably unnecessary.

With respect to economic development, NGPs and OGP can be contrasted by considering several key indicators. In 2010, BRICS were ranked, respectively, ninth, sixth, fourth, second, and 24th among world economies with respect to GDP at purchasing power parity (PPP).³² However, a large gap exists between the BRICS and the G7 in terms of Gross National Income (GNI) per capita at PPP.³³ Furthermore, in 2009 the total population of the BRICS had reached three billion, representing 42.5 per cent of the total world population,³⁴ while this number for the G7 is only 700 million.³⁵

²⁸ See Carin and Mehlenbacher, 'Constituting Global Leadership', 16 *Global Governance* (2010) 21.

²⁹ UN Framework Convention on Climate Change, Annex I, UN Doc. A/AC.237/18 (Pt II)/Add. 1; 31 ILM (1992) 849; Kyoto Protocol, Annex B, UN Doc FCCC/CP/1997/7/Add. 1, 10 Dec. 1997; 37 ILM (1998) 22.

³⁰ See 'COMMENT: Russia stands firm on abandoning Kyoto, kills hopes for legally binding climate deal', available at: www.bellona.org/articles/articles_2011/kyotono_russia (visited 10 Dec. 2011).

³¹ See Sanya Declaration, *supra* note 24, at para. 9.

³² World Bank, Gross domestic product 2010 (PPP), World Development Indicators database, 1 July 2011, available at: <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (visited 10 Oct. 2011).

³³ World Bank, Gross national income per capita 2010 (Atlas method and PPP), 1 July, 2011, available at: <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (visited 10 Oct. 2011).

³⁴ BRICS Joint Statistical Publication (2011), at 13.

³⁵ See US Population Reference Bureau, *2009 World Population Data Sheet*.

With respect to state identity, OGP's are western states. They tend to define themselves as advocates and defenders of political democracy, economic freedom, and ideological individualism. Furthermore, a handful of western states have historically dominated international law.³⁶ In contrast, during the Age of Colonization, Brazil, China, India, and South Africa were essentially deprived of international personality as they failed to satisfy what the West considered the 'standard of civilization'.³⁷ Today, western states have yet to recognize these four states as like-minded partners, and often accuse them of being sympathetic to so-called 'troubled states', or 'rogue states', such as Iran and North Korea.³⁸ Interestingly, these attitudes appear to be somewhat mutual, as these four states, in turn, appear unwilling to be grouped with western states. For instance, although China is willing to engage in dialogues with the G7, it is reluctant to join them. In contrast, when Russia was founded as a new state in 1991, it was initially eager to integrate itself into the western world. However, this attempt failed and, to date, Russia has not been recognized as a western state and is often blamed for acting as a protector of the so-called 'troubled states', 'rogue states', or 'failed states'.³⁹

The fact that NGPs neither define themselves nor are defined as western states has two meanings. On the one hand, several NGPs, especially China, have national regimes that are markedly different from those of western states, even though those regimes can no longer be classified as those of traditionally socialist states. On the other, some NGPs, such as India and South Africa, while having adopted national regimes similar to those in western states, still conduct themselves in international affairs in a manner which is quite different from that of western states. For instance, the attitudes of Brazil, India, and South Africa towards international human rights are significantly different from those of western states.⁴⁰

C Similarities between NGPs and OGP's

Notwithstanding the differences canvassed above, there are many similarities between NGPs and OGP's. For instance, the US and China both occupy large territories. However, the most important one for the purpose of this discussion relates to their action logic. In this respect, NGPs and OGP's alike are motivated by national interest.

The general proposition that national interest constitutes the basic action logic of states is not novel. For instance, Friedmann argued that, while political, economic, and civilizational disagreements may influence states' attitudes and actions with respect to international law, instances of conflicts between compliance with international law and state sovereignty according to 'national interest' repeatedly see the latter taking

³⁶ See Grewe, *supra* note 6, Pts 3 and 4.

³⁷ See generally G.W. Gong, *The Standard of 'Civilization' in International Society* (1984).

³⁸ See, e.g., Castañeda, 'Not Ready for Prime Time: Why Including Emerging Powers at the Helm would Hurt Global Governance', 89 *Foreign Aff* (2010) 109.

³⁹ See, e.g., Meeting Record, SC, 6627th meeting, 4 Oct. 2011, available at: www.un.org/ga/search/view_doc.asp?symbol=S/PV.6627 (visited 1 Nov. 2011).

⁴⁰ See Castañeda, *supra* note 38.

precedence.⁴¹ Likewise, Goldsmith and Posner assume that ‘states act rationally to maximize their national interests’.⁴²

Frankly speaking, few people care that small, weak states define national interest as their action logic in international law, because, generally speaking, what they pursue and bring about is of hardly any significance. Rather, they often have to rely upon GPs in order to realize their national interest through, e.g., taking advantage of confrontations between GPs.⁴³ However, applying that proposition explicitly to GPs discomforts some because it readily reminds us that GPs often pursue their own national interest at the expense of other states or the broader international community. Concerns of this nature are not without merit. Historically, international law was often employed by western powers as an instrument to conquer non-western states or territories. Thus, the history of international law for Anghie is the history of imperialism.⁴⁴ Even today, it is not uncommon to hear the argument that GPs should ‘proceed from the firm ground of the national interest, not from the interest of an illusory international community’.⁴⁵ This argument is certainly confirmed by practice.⁴⁶

The unfortunate track record of national interest as an action logic suggests that it may be reasonable to challenge whether this action logic is compatible with the role that GPs are expected to play in the international community. In other words, is this action logic legitimate for GPs? The article argues that, yes, it is; the bad record of GPs in international law ought not to negate the legitimacy of the action logic itself. The following three reasons support this proposition.

First, although any differentiation – which, unfortunately, happens often – in terms of *quality* of national interest between GPs and other states lacks legitimacy, there indeed exists a great difference between the national interest of GPs and that of other states in terms of *quantity*. For example, while it is equally legitimate for both China and Cambodia to protect their nationals living in a state embroiled in civil war, say Libya in 2011, the fact that the number of Chinese nationals present in the foreign state greatly exceeds the number of Cambodian nationals arguably results in China’s national interest exceeding that of Cambodia in terms of magnitude. This same line of reasoning supports an approach that defines GPs in terms of national interest.⁴⁷ Secondly, while small states often rely on GPs to protect their national interest, GPs are sufficiently powerful to defend their own national interest themselves. Thirdly, in the era of globalization and democratization, the national interest of states tends to de-nationalize and concretize into the interest of individuals.⁴⁸ The shift of ‘national’

⁴¹ Friedmann, *supra* note 20, at 380.

⁴² J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 7.

⁴³ See Schachter, ‘The Role of Power in International Law’, 93 *ASIL Proceedings* (1999) 200, at 201.

⁴⁴ See generally A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

⁴⁵ Rice, ‘Promoting the National Interest’, 79 *Foreign Aff* (2000) 45, at 62.

⁴⁶ See, e.g., Newman, ‘An Interview with Perry Wallace on the United States’ Withdrawal from the Kyoto Protocol’, 2 *Int’l & Comp Environmental L* (2002) 10.

⁴⁷ See R. Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (1958), at 22.

⁴⁸ See Report of the Panel on US – Sections 301–310 of the Trade Act of 1974, WT/DS152/R, 22 Dec. 1999, at para 7.73, 7.76.

interest to the interest of ‘nationals’ strengthens the legitimacy of the argument that national interest constitutes the legitimate action logic of GPs, which generally have huge populations, since promoting and protecting individual welfare is the very reason for any state to exist.

Notwithstanding the paramouncy of national interest, this action logic should not be understood as exclusively embodying a total disregard for the interests of other states or the international community. In this regard, Goldsmith and Posner’s rational choice theory of international law, which is said ‘to become standard currency in international law theory and practice’,⁴⁹ is open to debate. As mentioned above, they assume that what states seek is to maximize their national interest. It is somewhat simplified so that it may be susceptible to be misunderstood and misused.⁵⁰ Two points serve to clarify considerably the nature of this action logic:

First, although in some cases the national interest of GPs may not coincide with that of other states or the international community, in a great many cases a state’s national interest is compatible with that of other states and the international community, and these interests are indeed inter-supportive. For example, given that the BRICS accounts for over 40 per cent of the world’s population, the maintenance of the BRICS’ economic prosperity is clearly in the interest of the international community. The problem may be that GPs often fail to understand their true national interest correctly.⁵¹

Secondly, simply because GPs’ action logic focuses on national interest does not necessarily mean that GPs always seek to ‘maximize’ their national interest. Rather, they may act in a way which, though incurring negative effects, does not fundamentally damage their national interest, and at the same time can benefit others. This conception of national interest may be defined as a ‘negative approach’ compared with that of Goldsmith and Posner, which may be defined as a ‘positive approach’. The main reason that GPs adopt such an approach may be that GPs have far more resources than less powerful states so that they can internalize risks resulting from actions contrary to their national interest. In practice, such cases are easy to find. For instance, during the Asian financial crisis in the 1990s, China decided not to devalue its currency, which greatly benefited Asian states. While this decision put China’s economy under great pressure, it was able to survive that and thus earned its international reputation. Nevertheless, not all states are so willing to internalize such negative outcomes, even if they have the resources to do so. Unfortunately, this lack of will often prevents GPs from taking action, which would benefit other states and the international community. This issue can be seen in the context of the Responsibility to Protect (R2P) initiative. For instance, it was believed that the lack of strategic interest for GPs in Rwanda

⁴⁹ Gray, ‘Rule-Skepticism, “Strategy”, and the Limits of International Law’, 46 *Virginia J Int’l L* (2006) 563, at 583.

⁵⁰ Swaine, ‘Restoring and (Risking) Interest in International Law’, 100 *AJIL* (2006) 259.

⁵¹ See Leonard, ‘A Case Study in Declining American Hegemony’, 8 *Whitehead J Diplomatic & Int’l Relations* (2007) 147, at 158.

was a key reason leading to the UN's inaction and the GPs' failure promptly to control the genocide there in 1994.⁵²

As a final point in our comparison, some may wonder, in the light of the assertion that both NGPs and OGP act in accordance with the same action logic, whether cultural traditions, which are often considered to endure across time, influence the action logic of states. This question should be taken seriously because several NGPs, such as China and India, have cultural traditions that emphasize the duty of individuals to the community. Will this culturally rooted sense of duty cause countries such as China and India to act in a way that fundamentally conflicts with their national interest so as to further the interests of the international community? Generally speaking, no, it will not. A state often behaves abroad quite differently from the way it behaves at home,⁵³ and thus cultural traditions may not feature as prominently in international relations as they may domestically. Anand, a lawyer who always focused on Asian attitudes toward international law, admitted that the effect of the cultural background of a state on international law 'must not be exaggerated'.⁵⁴ Furthermore, Anand suggested that divergent actions by various states can be explained by a 'conflict of interests of the newly independent States and the Western Powers, rather than differences in their cultural and religions'.⁵⁵

D Implications of Rise of NGPs for International Law: A General Assessment

1 A General Assessment of the Dynamics

A century ago, Oppenheim pointed out that great powers were 'the leaders of the Family of Nations', and every step in the progress of international law was 'the result of their political hegemony', which, for Oppenheim, was ultimately produced by 'nothing else than [their] actual size and strength',⁵⁶ which was often included in tangible 'hard power',⁵⁷ even though he recognized that it was 'a minor Power' that frequently took the 'initiative towards the [sic] progress',⁵⁸ which is included in the intangible 'soft power'.⁵⁹

⁵² See 'Report of Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda', 15 Dec. 1999, S/1999/1257, at 43, 44.

⁵³ Alvarez rightly noted that liberal states do not necessarily do better than others internationally: Alvarez, 'Do Liberal States Behave Better?', 12 *EJIL* (2001) 183.

⁵⁴ R.P. Anand, *New States and International Law* (2008), at 50.

⁵⁵ Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law', in F.E. Snyder and S. Sathirathai (eds), *Third World Attitudes Toward International Law* (1987), at 17.

⁵⁶ Oppenheim, *supra* note 5, at 170, 171.

⁵⁷ 'Hard power' refers to the traditional components including military, economic, and technological strength: see M. Li (ed.), *Soft Power: China's Emerging Strategy in International Politics* (2011), at 3. See also M. Byers, *Custom, Power and the Powers of Rules* (1999), at 5.

⁵⁸ Oppenheim, *supra* note 5, at 170. The establishment of the International Criminal Court provides a more recent example showing that minor states can do better than GPs in advocating the initiative of progress: see Chatoor, 'The Role of Small States in International Diplomacy: CARICOM's Experience in the Negotiations on the Rome Statute of the International Criminal Court', 7 *Int'l Peacekeeping* (2001) 295.

⁵⁹ According to Nye, 'soft power' refers to 'the ability to get what you want through attraction rather than coercion or payments'. The 'soft power' of a state has three main sources: its culture; its political values; its foreign policies: J.S. Nye, *Soft Power: The Means to Success in World Politics* (2004), at x, 11. See also Byers, *supra* note 57, at 5.

Simpson's description of unequal sovereignty between GPs and other states made people realize that Oppenheim's argument that 'hard power' would only lead to 'political' hegemony is questionable.⁶⁰ As a matter of fact, GPs were rather also endowed with legalized hegemony,⁶¹ which, together with political hegemony, may also be used by GPs to shape and reshape international law. Nevertheless, Oppenheim was right in revealing that the great disparity in terms of hard power between GPs and small powers is determinant for their different roles in international law. Indeed, as indicated above, economic and military power are accorded special weight in determining the status of GPs. Furthermore, while Oppenheim was right in recognizing that minor states may exhibit amazing soft power, he failed to address the soft power of GPs, which is actually also pursued by GPs.

As for NGPs, while people hardly deny that NGPs' hard power tends to be increasing, there are disagreements about how strong it really is. For instance, while Ikenberry predicted that China would prevail over the US in the 21st century,⁶² Rehman deemed it hardly possible for China to challenge the latter.⁶³ Moreover, Shirk asserted that national problems and challenges make China a 'fragile superpower' at best.⁶⁴ On the other hand, a general consensus seems to exist: NGPs' soft power is limited. For instance, Fidler asserted that 'neither China nor India appears poised to provide the world with ideological contributions that fundamentally challenge the triumph of liberal ideology in the wake of the end of the Cold War'.⁶⁵ Nevertheless, NGPs are striving towards creation of their own soft power. China represents a prime example of this trend. In the 2005 UN Summit, China's President, Hu Jintao, presented his nation's latest conception of world order: the Harmonious World.⁶⁶ Although the Harmonious World is still in a state of evolution⁶⁷ and its current formulation was criticized as being 'too broadly worded', 'formulaic and slogan-like',⁶⁸ it is important that China has begun to seek its own soft power. Actually, the Harmonious World has inspired heated discussions,⁶⁹ and has been included in some international documents.⁷⁰

⁶⁰ See Simpson, *supra* note 7; L. Oppenheim, *International Law* (3rd edn, 1920), i, at 200.

⁶¹ See Simpson, *supra* note 7.

⁶² Ikenberry, 'The Rise of China and the Future of the West', 87 *Foreign Aff* (2008) 23, at 25.

⁶³ Rehman, 'American Hegemony: If Not US, Then Who?', 19 *Connecticut J Int'l L* (2003–2004) 407, at 420.

⁶⁴ See S.L. Shirk, *China: Fragile Superpower* (2007).

⁶⁵ Fidler, *supra* note 12.

⁶⁶ Hu Jintao, 'Build Towards a Harmonious World of Lasting Peace and Common Prosperity' ('UN Summit Speech'), 15 Sept. 2005, at paras 17, 18.

⁶⁷ Compare *ibid.*; Hu Jintao, 'Advance with the Time, Carry on the Past to Forge ahead and Build up the Asia-Africa New Strategic Partnership' ('Asian-African Summit Speech'), 22 Apr. 2005; The State Council Information Office (China), White Paper on China's Peaceful Development Road (Dec. 2005), Pt V; White Paper on China's Peaceful Development Road (Sept. 2011), Pt III.

⁶⁸ Yee, 'Towards a Harmonious World', 7 *Chinese J Int'l L* (2008) 119, at 104.

⁶⁹ See, e.g., S. Guo and J.-M.F. Blanchard (eds), *'Harmonious World' and China's New Foreign Policy* (2008).

⁷⁰ See, e.g., China-Russia Joint Statement Regarding the International Order of the 21st Century ('China-Russia Joint Statement (2005)'), 1 July 2005, available at: www.fmprc.gov.cn/eng/zxxx/t465821.htm; Declaration of Sharm El Sheikh of the Forum on China-Africa Cooperation ('China-Africa Declaration'), 12 Nov. 2009, available at: www.focac.org/eng/dsjbzjhy/hywj/t626388.htm; A Shared Vision for the 21st Century of the People's Republic of China and the Republic of India ('China-India Shared Vision'), available at: www.fmprc.gov.cn/eng/zxxx/t399545.htm (all visited 1 Oct. 2011).

Hard and soft power support and reinforce each other, and a lack of soft power may weaken the exercise of a country's hard power or make its exercise less self-regulated. Accordingly, this deficiency in soft power may reduce the potential benefits and increase the challenges associated with the rise of NGPs. However, although NGPs' own soft power is limited, they may take advantage of the soft power created by OGPs. For instance, the concept of 'democracy', a traditional soft power of western states, has been used by NGPs to support their argument for the democratization of international relations.⁷¹

Krisch described the various ways in which dominant states, in particular the US, in times of hegemony, take advantage of their power to shape and reshape international law in their interests, for instance, limiting the reach of international law, and offering resistance to multilateral treaties.⁷² Although today's NGPs have yet to become dominant states, they have still adopted some of these strategies. For instance, India, like the US, is refusing to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT), thus preventing the CTBT from entering into force. Furthermore, of all 193 UN member states, India is one of only three which have not signed the Treaty on the Non-Proliferation of Nuclear Weapons.

It is important that GPs' power, hard or soft, should not be regarded as the sole variable determining the role of GPs, OGPs, or NGPs in international law. It is my proposition that the 'power' of international law is another important variable. Therefore, the implications of the rise of NGPs for international law are fundamentally the result of the dynamic interaction between these two modalities of 'power'.

Unlike the definition given to power of NGPs, the power of international law is defined here as the manner in which international law is able to regulate international relations. The power of international law may significantly affect the manner in and extent to which the rise of NGPs influences international law. Generally, international law, compared with national law, remains 'weak law' and is subject to *Realpolitik*. Even in the 21st century, some still deny the existence of any real 'law' in international affairs.⁷³ However, with the proliferation of international rules witnessed during this past century, international law is arguably increasing its ability to regulate international relations. Indeed, nowadays, international law 'may preclude the exercise of even greater power disparities'.⁷⁴ In particular, the power of international law will increase with the strengthening of the concept of 'international rule of law', which was explicitly mentioned in the UN Assembly Resolution of the UN Decade of International Law on 17 November 1989. That resolution emphasized 'the need to strengthen the rule of law in international relations'. Furthermore, Heads of State in 2005 acknowledged 'the need for universal adherence to and implementation of the rule of law at both the national and international levels'.⁷⁵ Although calls for the

⁷¹ See in detail Pt 4B (2).

⁷² Krisch, 'International Law in Times of Hegemony', 16 *EJIL* (2005) 369, at 381–407.

⁷³ Bolton, 'Is There Really "Law" in International Affairs?', 10 *Transnat'l & Contemp Probs* (2000) 1, at 48.

⁷⁴ J.E. Alvarez, *International Organizations as Law-Makers* (2005), at 216.

⁷⁵ 2005 World Summit Outcome Document, UN Doc. A/RES/60/1, 16 Sept. 2005, at para. 134.

rule of law in international affairs are not new,⁷⁶ the resolution and the 2005 World Summit are significant because they moved this concept, which had been deeply embedded in national governance so that states hardly challenged it, onto the global agenda and endowed it with increased legitimacy. Obviously, NGPs do not dare, openly at least, to challenge the international rule of law.⁷⁷

2 *A General Assessment of the Trend*

Although the history of international law, according to the views of Anghie mentioned above, is a history of imperialism,⁷⁸ it can be learned from an examination of the similarities and differences between OGP and NGP and the dynamics underpinning the impact of GPs, including NGPs, on international law that people should not prejudge the trend of the implications of the rise of NGPs for international law. Such implications will be discussed in depth in the next two sections; however, three general trends can first be observed here. First, NGPs are inherently and continuously motivated to shape and reshape international law. What people see today may be the start of this process. Secondly, NGPs are positioned both differently from and similarly to OGPs in the process of shaping and reshaping international law. Thirdly, implications flowing from the rise of NGPs examined here are not created by NGPs alone. They are often the result of interactions between OGPs and NGPs, which implies that OGPs are partly responsible for such outcomes. Notwithstanding this shared responsibility, but for the rise of NGPs such results likely would not be produced.

3 **NGPs and the Challenges to International Law in the 21st Century**

As a rule, a rising GP may seek to pursue, exert its power, and challenge the existing international order. From a historical perspective, international law to a large degree failed to regulate the rise of GPs effectively. For instance, international law often became an instrument for GPs such as Spain, the UK, and France to legalize their overseas colonization, which is arguably responsible for today's large-scale poverty in many nations and numerous international disputes.⁷⁹ Such historical experiences give rise to concerns whether NGPs, especially China, will rise peacefully.⁸⁰ Although China has repeatedly assured the world that it will rise 'peacefully',⁸¹ many may yet wonder whether the rise of NGPs will at best repeat history and merely change the constituents of the 'international oligarchy'.⁸² Will NGPs join new a 'Holy Alliance'

⁷⁶ See, e.g., Briery, 'The Rule of Law in International Society', 7 *Nordisk Tidsskrift Int'l Ret* (1936) 3.

⁷⁷ See, e.g., Position Paper of China at the 65th Session of the UN GA, 13 Sept. 2010.

⁷⁸ See also A. Cassese, *International Law* (2nd edn, 2005), at 26–34.

⁷⁹ See, e.g., Makonnen, 'International Law and the New States of Africa', Ethiopian National Agency for UNESCO (1983).

⁸⁰ See, e.g., Buzan, 'China in International Society: Is "Peaceful Rise" Possible?', 3 *Chinese J Int'l Politics* (2010) 5.

⁸¹ See, e.g., 2005 White Paper on China's Peaceful Development, *supra* note 67; 2011 White Paper on China's Peaceful Development, *supra* note 67.

⁸² See Schwarzenberger, *supra* note 20, at 117–120.

of western states?⁸³ Or, since the NGPs define themselves as non-western states, will they bring about another crisis of international law similar to that resulting from the rise of the Soviet Union in the early 20th century?⁸⁴ Will authoritarian NGPs – China and Russia – challenge the global liberal democratic order?⁸⁵ Or can the western order survive the rise of NGPs?⁸⁶ These concerns extend beyond the academic community and constitute a serious policy concern.⁸⁷

A Dynamics of Challenges

1 The Perspective of NGPs

As was said above, major differences exist between OGP and NGPs in terms of national development and state identity. While these differences embody the potential for positive change in international law,⁸⁸ they may create challenges.

First, in the light of the large populations of most NGPs as well as the significant gap that exists between OGP and NGPs in terms of relative economic power, NGPs are highly motivated and pressured to maintain their national development. Although the pursuit of development is legitimate, it may give rise to great challenges. One key challenge in this area relates to how international law regulates the side effects of increasingly expanding economic activity, including the pursuit of economic inputs, which may both intensify conflicts among states and impose a heavy burden on an ecologically fragile world. Today, the BRICS are significant oil consumers and constitute major emitters of greenhouse gases.⁸⁹ In order to maintain their national development, NGPs will take advantage of both the effectiveness and weakness of international law as much as possible.

Secondly, as I said above, NGPs as non-western states play a very small role in traditional international law. Although the NGPs are ‘westernizing’ their state identities and traditional international law is being ‘de-westernized’, NGPs and OGP still disagree on many matters. As their influence increases, it is expected that NGPs may seek to increase their non-western inputs into the international legal order.

2 The Perspective of GPs per se

As I stated at the beginning of this section, concerns have been expressed about negative influences flowing from the rise of NGPs. These concerns are inspired in part by the fact that these GPs are ‘new’; however, more provoking is the mere fact that they are GPs.

⁸³ See Simpson, *supra* note 7, at 353.

⁸⁴ See H.A. Smith, *The Crisis in the Law of Nations* (1947), at 17–22.

⁸⁵ See Gat, ‘The Return of Authoritarian Great Powers’, 86 *Foreign Aff* (2007) 59.

⁸⁶ See Ikenberry, *supra* note 62.

⁸⁷ ‘Obama at APEC summit: China must “play by the rules”’, available at: www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQAIRu2FN_story.html (visited 20 Nov. 2011).

⁸⁸ See in detail Pt 4.

⁸⁹ Carin and Mehlenbacher, *supra* note 28, at 26, 29.

There are three approaches to addressing the GP issue prevalent among international lawyers: first, some, such as Lawrence⁹⁰ and Jessup,⁹¹ hoped in a general way that GPs will exercise their power in the interests of other states and international society as a whole. Their thinking, however, appears flawed in the light of the repeated abuses of power by GPs throughout history. Secondly, some, such as Morgenthau⁹² and Yee,⁹³ argued that GPs should be granted legal privileges because of various considerations of, for instance, function and interest of those states.⁹⁴ Unfortunately, these professionals have not paid much attention to the question whether corresponding legal obligations proper ought to be imposed on GPs. For instance, should special legal obligations be imposed on GPs that have been granted legal privileges? If not, why do GPs with ‘legal’ privileges have just a ‘political’ or ‘moral’ duty? If so, what legal obligations should be imposed on them? To what extent have such obligations been established and, in particular, honoured? The third approach consists of some denying that GPs are granted legal privileges or suggesting that the GPs issue is a political one and thus beyond the reach of international law. The writings of Wheaton,⁹⁵ Westlake,⁹⁶ and Oppenheim⁹⁷ are examples of this approach. However, it seems inconceivable that people could ignore the fact that the great gap between GPs and other states in terms of power will remain, and that this gap may be either manipulated by GPs to pursue their narrowed national interest or mobilized to maintain peace and promote prosperity, and that GPs are granted not only *de jure* privileges, but also, more frequently, *de facto* privileges.⁹⁸ As GPs tend to realize that it is more efficient and less costly to manipulate power within legal regimes than to apply raw power,⁹⁹ should not these issues be subjected to more effective legal regulation?

Obviously, all these approaches are not effective enough to regulate matters relating to GPs. In order to reduce challenges to international law by GPs, ‘New’ or ‘Old’, two fundamental legal issues must be resolved. First, legal criteria capable of defining GPs must be established, and, secondly, a legal code of conduct regulating GPs’ activities and imposing legal duties must be created.

It is neither possible nor necessary to find universally applicable legal criteria for defining GPs because the concept of a GP has different meanings in different legal contexts. However, it is possible and necessary to propose some legal criteria specific to certain legal regimes. Let us take as an example the relationship between nuclear weapons and UNSC reform. The possession of nuclear weapons is often recognized as

⁹⁰ Lawrence, *supra* note 15, at 279.

⁹¹ Jessup, ‘Introduction to the Equality of State as Dogma and Reality’, 60 *Political Science Q* (1945) 530.

⁹² Morgenthau, ‘Positivism, Functionalism, and International Law’, 34 *AJIL* (1940) 260.

⁹³ Yee, ‘Sovereignty Equality of States and the Legitimacy of “Leaders States”’, in R. St. J. Macdonald, and D.M. Johnston (eds), *Towards World Constitutionalism* (2005), at 737–772.

⁹⁴ *Ibid.*, at 754–747.

⁹⁵ H. Wheaton, *Elements of International Law* (8th edn, 1886), at 158.

⁹⁶ L. Oppenheim (ed.), *Collected Papers on International Law by Westlake* (1914), at 114.

⁹⁷ Oppenheim, *supra* note 5, at 170–171.

⁹⁸ Katz Cogan, *supra* note 18.

⁹⁹ Byers, *supra* note 57, at 6.

an indicator of a state's status as a GP.¹⁰⁰ However, since nuclear weapons are decried as the 'ultimate evil'¹⁰¹ and nuclear disarmament is a key priority with the increasing risk of nuclear proliferation, should we not propose compliance with the Nuclear Non-Proliferation Treaty (NPT) as a legal precondition to new UNSC permanent membership? Actually, a similar approach emerged in 'A More Secure World'. That report implied that a precondition for developed states to compete for UNSC permanent membership should meet a specific Official Development Aid (ODA) requirement.¹⁰²

While it appears that, as a theoretical issue, the code of conduct, including legal duties, of GPs has seldom been addressed by international lawyers, this issue in practice has long been an important concern, especially in those international legal regimes that granted GPs privileges. For instance, during the UN Charter negotiations which determined that the Big Five (consisting of the Soviet Union, the US, the UK, France, and China) would sit as permanent members of the proposed UNSC with veto rights, Mexico suggested that the UN Charter explicitly articulate why the Big Five ought to be so privileged and suggested that the Big Five ought to be required to assume 'great responsibility for the maintenance of peace' due to the 'judicial principle that more extended rights were granted to those states which have the heaviest obligations'.¹⁰³ Similarly, it was proposed that the mandate of the UNSC be reviewed after a transitional period.¹⁰⁴ However, the Big Five rejected both proposals.

Notwithstanding the outcome of this incident with the Big Five, the conduct of GPs has been addressed by some legal principles or rules, at least generally. For example, Article 2(1) of the UN Charter provides that the UN 'is based on the principle of the sovereign equality of all its members'. While this principle applies to all states, it can be said that it is substantially targeted towards the behaviour of GPs. Fox rightly pointed out that the Westphalian system was essentially devised to protect the independence of weaker states from hegemony.¹⁰⁵ However, more specific and directly targeted regulations are needed in order to control the behaviour of GPs effectively. In this regard some proposals have been suggested. For instance, 'A More Secure World' appealed to 'the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses'.¹⁰⁶ Similarly, during the debates in July 2009 in preparation for the first UN Assembly Resolution on R2P, some states demanded that the permanent members of the UNSC refrain from exercising their veto right.¹⁰⁷ Unfortunately, GPs, at least the US, seek to

¹⁰⁰ See, e.g., A. Schou and A.O. Brundtland (eds), *Small States in International Relations* (1971), at 15.

¹⁰¹ See Declaration of Judge Bedjaoui, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep. 50.

¹⁰² Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' ('A More Secure World'), UN (2004), at para. 249.

¹⁰³ See R.B. Russell, *History of the United Nations Charter* (1958), at 650.

¹⁰⁴ 4th Meeting of Commission III, 22 June 1945. Doc. 1149 III/II XI UNCIO 103, at 116.

¹⁰⁵ H. Fox, *The Law of State Immunity* (2nd edn, 2008), at 44.

¹⁰⁶ 'A More Secure World', *supra* note 102, at para. 256.

¹⁰⁷ See, e.g., Statement of Italy, UN GA, 63rd session, 97th plenary meeting, Official Records, A/63/PV.97, at 28; Statement of Switzerland, UN GA, 63rd session, 98th plenary meeting, Official Records, A/63/PV.98, at 5.

avoid the imposition of any legal duty upon them. A former US Ambassador to the UN once declared that ‘the Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace’ and that the US ‘do[es] not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law’.¹⁰⁸

Due to insufficient legal regulation of GPs, concerns have been expressed that NGPs will evolve to the point that they act in the same manner as OGP. Ewelukwa warned that the benefit to Africa from South–South cooperation ‘must not be exaggerated’, since NGPs may be unwilling to support African states, seeking instead to ‘advance their national interests’.¹⁰⁹ Bhala criticized the fact that Brazil, China, and India are no different from the US or EU and that they all ‘have used legal details to advance their narrow agendas’ and ‘have lost all sight of the common good and sacrificed the broad purpose of the Doha Development Agenda (DDA)’.¹¹⁰ In particular, he criticized the inaction of China, suggesting that it should bear a significant portion of the blame should the DDA eventually fail.¹¹¹ Therefore, China ‘may not be as rosy and glamorous as enthusiastic Sinophiles think’. Interestingly, after levelling these criticisms, Bhala came to China’s defence, pointing out that if most states act to pursue their own self-interest, then ‘why single out China from among all the national-states ...?’.¹¹²

B Evidence of Challenges

Among the challenges to international law inspired by the rise of NGPs, the fragmentation of international law and the crisis of international law’s modernity are worthy of particular concern, as they may affect the whole configuration of international law.

1 *The Fragmentation of International Law*

‘Fragmentation’ is one of most provocative international legal issues of the past decade. In April 2006, the International Law Commission (ILC) adopted the Final Report, which characterizes regionalism as a mechanism leading to the fragmentation of international law.¹¹³ The Final Report implies that regionalism often acts as an instrument for GPs to create a hegemonic sphere with the aim of maintaining supremacy or correcting the balance of power disturbed by another power.¹¹⁴ The Monroe Doctrine, invented by the US (a new GP in the 19th century), was cited as an

¹⁰⁸ Bolton’s Letter can be found at: www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30-Aug05%5B1%5D.pdf (visited 1 Nov. 2011).

¹⁰⁹ Ewelukwa, ‘South-South Trade and Investment: The Good, The Bad and The Ugly’, 20 *Minnesota J Int’l L* (2011) 513, at 548, 558.

¹¹⁰ Bhala, ‘Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too’, 45 *Texas Int’l LJ* (2009) 1, at 1.

¹¹¹ *Ibid.*, at 5, 6.

¹¹² *Ibid.*, at, 15.

¹¹³ Study Group of the ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (‘Report on Fragmentation’), A/CN.4/L.682, 13 Apr. 2006, at para. 46.

¹¹⁴ *Ibid.*

example.¹¹⁵ However, the recent regionalism under the WTO regime, which is currently a focus of the fragmentation of international law,¹¹⁶ presents a different picture. It is well known that the US has quite recently acted as a pioneer in trade regionalism. Of the 20 Free Trade Agreements (FTAs) concluded by the US by November 2011, 17 were signed after 2004.¹¹⁷ The main reason for this turn is that, with the rise of NGPs and the formation of alliances between NGPs and other developing states, OGP's can no longer readily exercise their power within the WTO forum and multilateral trade rule-making has become more difficult than before. However, the US's push for regionalism has been followed by NGPs. For instance, in October 2007, China declared FTAs to be a basic international economic strategy. As of November 2011, China had signed 10 FTAs with an additional five under negotiation and four under consideration.¹¹⁸ India, traditionally a firm supporter of multilateralism, has also turned to the FTA programme.¹¹⁹ By November 2011, India had concluded more than 10 FTAs and more than 20 FTAs or similar arrangements were under negotiation.¹²⁰ Therefore, it was not NGPs, but rather OGP's, that initiated the recent regionalism under the WTO regime. However, it can hardly be denied that NGPs make the fragmentation of international trade rules more serious. Furthermore, it should not be ruled out that NGPs may seek hegemony through regionalism as did the US in the 19th century. As a matter of fact, regional trade between China and the Association of Southeast Asian Nations (ASEAN) is said to be an instrument for China to seek leadership in the Asian area.¹²¹

More importantly, the ILC's Final Report does not distinguish between different fragmentations, i.e., fragmentation arising within the existing system and that arising outside the existing system. However, this distinction seems to be of great importance to various stakeholders in international law. An example of the former type of fragmentation consists of the rise of the US in the 19th century. Since the US is a 'western' state, the fragmentation of 'general'/'European' international law caused by the Monroe Doctrine constituted 'internal' fragmentation. On the other hand, when the Soviet Union, a state viewed as an 'outsider' by western states, argued for the so-called 'Soviet international law',¹²² that fragmentation of 'Bourgeois (Western) international law' was viewed as a fundamental shift in the nature of international

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, at para. 210. See also J. Pauwelyn, *Conflict of Norms in Public International Law* (2003).

¹¹⁷ USTR, 'Free Trade Agreement', available at: www.ustr.gov/trade-agreements/free-trade-agreements (visited 8 Dec. 2011).

¹¹⁸ Ministry of Commerce of China, 'China FTA Network', available at: <http://fta.mofcom.gov.cn/list/enrelease/1/encateinfo.html> (visited 2 Dec. 2011).

¹¹⁹ See WTO Trade Policy Review, Trade Policy Report by India, WT/TPR/G/182.18 Apr. 2007, at paras 166–171.

¹²⁰ Ministry of Commerce and Industry of India, 'Trade Agreements', available at: http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i (visited 2 Dec. 2011).

¹²¹ Chen, 'Achieving Supreme Excellence: How China Is Using Agreements with ASEAN to Overcome Obstacles to Its Leadership in Asian Regional Economic Integration', 7 *Chicago J Int'l L* (2006–2007) 655.

¹²² See generally G.I. Tunkin, *Theory of International Law* (trans. and ed. W.E. Butler, 2003); J.L. Hildebrand, *Soviet International Law* (1968).

law. This was viewed by the West as much more threatening than mere ‘internal’ fragmentation. Smith argued that the rise of the Soviet Union in 1917 constituted a ‘crisis’ of international law and was more serious than that caused by Hitler’s regime in Germany. This argument was founded on the belief that, as a western state, Germany would, at least orally, respect its international obligations, while ‘the common cultural unity upon which the law was originally founded has been destroyed its own original home, that is to say, in Europe’ with the rise of the Soviet Union.¹²³

The NGPs of today are distinguishable from the Soviet Union in the early 20th century. NGPs today are in the process of international socialization.¹²⁴ While this process is substantially tantamount to ‘westernization’ or ‘Americanization’, it may also be an important instrument for NGPs to acquire and exercise power. For instance, the author has argued elsewhere that China’s investment treaties have been largely Americanized.¹²⁵ Ikenberry accurately stated: ‘Today’s Western order, in short, is hard to overcome and easy to join.’¹²⁶ However, as Simma correctly noted, the consent of states to negotiate or join international regimes is often nominal or minimal;¹²⁷ so the accession of an NGP to a specific regime does not necessarily mean that it totally agrees with NGPs towards issues within that regime. Furthermore, as indicated above, NGPs are still reluctant to define themselves as ‘western’ states and their interests continue to diverge from those of OGP in many cases. Therefore, while the fragmentation caused by the rise of the Soviet Union occurred ‘outside’ the existing international legal order, the fragmentation accompanying the rise of NGPs is arguably occurring ‘inside’ the existing international legal order. In other words, what distinguishes the fragmentation accompanying the rise of NGPs from that caused by the rise of the Soviet Union is a ‘shift of forum’ only. Furthermore, compared with the fragmentation of international law following the rise of the Soviet Union, today’s fragmentation has to a large degree been brought about by NGPs and OGPs alike.

2 *Crisis of the Modernity of International Law*

International law is western by nature. From a historical perspective, this nature can be seen to be twofold. First, international law is the product of western civilization and is imprinted with Euro-centrism, Christian ideology, and ‘free market’ values. Secondly, international law was framed by the conquest and expansion of western GPs.¹²⁸ From the contemporary perspective, the collapse of the Soviet Union and the Socialist Camp in the late 1980s, and the spread of neo-liberalism, democracy, and human rights round the world since the 1990s demonstrates that the de-westernization movement in international law commencing in the early 20th century with

¹²³ H.A. Smith, *The Crisis in the Law of Nations* (1947), at 21, 18.

¹²⁴ See generally Goodman and Jinks, ‘How to Influence States’, 54 *Duke LJ* (2004) 621.

¹²⁵ See Cai, ‘China-US BIT Negotiations and the Future of Investment Treaty Regime’, 12 *JIEL* (2009) 457, at 460.

¹²⁶ Ikenberry, *supra* note 62, at 24.

¹²⁷ Simma, ‘Consent: Strains in the Treaty System’, in R. St. J. Macdonald and D.M. Johnson (eds), *The Structure and Process of International Law* (1983), at 480–496.

¹²⁸ Cassese, *supra* note 78, at 31.

the rise of the Bolsheviks has failed. Moreover, contemporary developments have seen the westernization of international law renewed and enhanced with new constituents such as human rights, a new modality of civilization.¹²⁹ Nowadays, all NGPs have embraced, at least rhetorically, liberalism, democracy, and human rights.¹³⁰ From the perspective of sociology, western states have largely realized the 'modernity' of international law, which is characterized by liberalism in terms of economy, democracy in terms of politics, and human rights in terms of civilization. NGPs, too, are integrated into this process of modernity.

Unfortunately, little attention has been paid to the challenges arising from the crisis of modernity of international law. This crisis is rooted in the question whether and how international law is to regulate future international relations in which NGPs tend to act in a similar fashion to OGP. Although NGPs still disagree with OGP as regards democracy and human rights issues as mentioned above, they, like OGP, tend to take increasingly liberal approaches to international economic relations, which are decisive in GPs' rise and fall. For instance, in recent years, NGPs, like OGP, in the name of liberalism and anti-protectionism, have spared no effort to seize oil around the world in order to fuel their economies. Furthermore, NGPs appear to 'collude' with OGP on some critical issues. For instance, the US, the EU, China, India, and Brazil are criticized for adopting similar approaches in pursuing their narrow interests in the Doha Round negotiations. In refusing to make the necessary compromises to finish the negotiations, these states have been accused by some of 'hav[ing] lost all sight of the common good'.¹³¹

In the 17th century, western states readily pursued the economic 'modernity' of the time: they found and conquered 'new continents' one by one, using means that included military force; natural resources appeared inexhaustible in a far less heavily populated world. With time, international law began gradually to achieve 'modernity' through legalizing the liberalization of trade, investment, etc. Today, change is happening more rapidly. For instance, energy security has become a global problem and the world struggles to feed an explosive population.¹³² Today, the impetus for economic modernity appears stronger. In particular, NGPs with a combined population of 3 billion are availing themselves of the modernity of international law (e.g., by liberal multilateral trade regimes) in order to pursue economic modernity.

It is still too early to discern its full extent, but a crisis of modernity of international law is emerging. Although a comprehensive canvassing of the risks underpinning this crisis is impossible, this article considers one example of such risks, relating to the legal regime regulating the national security review (NSR) of foreign investment.

¹²⁹ See Donnely, 'Human Rights: A New Civilization?', 74 *Int'l Aff* (1998) 1.

¹³⁰ For instance, China finally entered into the WTO in 2001 after 15 years of marathon negotiations, while Russia attained its WTO membership in 2011 after 18 years of prolonged bargaining. Also, Russia and China in a joint statement in 2005 admitted that human rights are 'universal': see China–Russia Joint Statement, *supra* note 70, at pt 6.

¹³¹ Bhala, *supra* note 110, at 3.

¹³² On 31 Oct. 2011, the world population reached 7 bn: UNFPA, *The State of World Population 2011*, at 1.

This issue, which had been hardly noticed before, recently attracted great attention.¹³³ States, especially those playing key roles in international investment, such as the US,¹³⁴ Canada,¹³⁵ China,¹³⁶ and India,¹³⁷ have established or refined the NSR mechanism. The NSR mechanism tends to be exempt from international scrutiny. For instance, the 2004 US Model BIT endows each state party with great discretion to undertake measures that ‘it considers necessary’ to protect essential security interests.¹³⁸

Indeed, foreign investment may raise the security concerns of host states. However, as the OECD warned,¹³⁹ NSR has the potential to disguise investment protectionism. Why are states, especially developed states, increasingly interested in NSR? Arguably, the main impetus for this trend consists of a desire to relieve the pressure of legal modernity in investment affairs, which, in particular, is characterized by principles of National Treatment (NT) and Most-Favoured Nation Treatment (MFN). Such principles are far too entrenched in national law and investment treaties, especially in developed states, to be openly negated. States, however, employed the NSR as an instrument to relieve the pressure generated by NT or MFN. As national security is often believed to be involved with political affairs, disputes arising from NSR measures on national security are often deemed non-justiciable in international law; if justiciable, decisions by national authorities as a rule are deferred by international bodies. Therefore, it is not necessary for states to take discriminatory measures which obviously infringe NT or MFN obligations. Rather, it is less legally risky for them to take measures in the name of NSR to disguise investment discrimination and protectionism.¹⁴⁰ Such an NSR elsewhere has been defined by this author as a ‘non-traditional’ investment risk for foreign investors, against which an effective legal remedy is difficult to seek.¹⁴¹ Therefore, the NSR mechanism in nature is designed or operated as an instrument to moderate or even negate legal modernity in investment affairs or, in other words, investment protection and investment liberalization of a high standard, which has always been advocated by OGP.

¹³³ See UNCTAD, ‘The Protection of National Security in IIAs’, UNCTAD/DIAE/IA/2008/5; OECD, *Identification of Foreign Investors: A Fact Finding Survey of Investment Review Procedures* (May 2010).

¹³⁴ See the Foreign Investment and National Security Act of 2007 (FINSA), Pub.L. 110-49, 121 Stat. 246.

¹³⁵ See Bill C-10, Pt IV.1: Investment Injurious to State Security (2009); National Security Review of Investments Regs (2009).

¹³⁶ See Rules on Security Review on Merger and Acquisition of Domestic Enterprises by Foreign Investors (2011).

¹³⁷ OECD, ‘More governments invoke national security to restrict foreign investment. OECD adopts guidelines to avoid protectionist use of security measures’, 23 July 2009, available at: www.oecd.org/daf/inv/investment-policy/moregovernmentsinvokenationalsecuritytorestrictforeigninvestmenttoecdadopts-guidelinestoavoidprotectionistuseofsecuritymeasures.htm (visited 1 Oct. 2011).

¹³⁸ 2004 US BIT Model, Art. 18 (Essential Security).

¹³⁹ OECD, *supra* note 137.

¹⁴⁰ See J.G. Merrills, *International Dispute Settlement* (4th edn, 2005), at 167.

¹⁴¹ Cai, ‘Regulation of Non-Traditional Investment Risks and Modern Investment Treaty Regime in the Era of Late Globalization’, 7 *Manchester J Int’l Economic L* (2010) 11.

4 NGPs and the Potential of International Law in the 21st Century

The positive potential for international law flowing from the rise of NGPs has received much less attention than possible challenges connected with NGPs. Section 4 considers the nature of this positive potential, as well as how it might be realized.

A *The Dynamics of Potential*

1 *The Perspective of NGPs*

Arguably, NGPs to some degree are better placed than OGP to improve international law. This is not because NGPs are endowed with some nobler morality than OGP, but rather because NGPs, which in essence are developing states, can be more sensitive than OGP in many cases to the situations of other developing states, which comprise the overwhelming majority of the world. In terms of national development, as indicated above, although the economies of NGPs, especially China and India, have expanded significantly, a huge gap still exists between NGPs and OGP in terms of relative economic power. Therefore, NGPs, like other developing states, are under tremendous pressure to accelerate their national development. From the perspective of state identity, their identity as non-western states makes NGPs, like many other developing states, more motivated than OGP to refine the current international legal order, which is dominated by OGP. It is a rule that in any society those with vested interests are reluctant to embrace reform.

2 *The Perspective of GPs per se*

While international lawyers are justified in blaming GPs for their bad track record in international law, they should also acknowledge the decisive role played by GPs in achieving and maintaining international peace and prosperity in a substantially horizontal world. Indeed, from the Congress of Vienna to the negotiations for establishing the UN, many small states have been most concerned, not with the fact that GPs are granted privileges *per se*, but with the specific nature of the privileges given and how these privileges are exercised.¹⁴² Implicit in this position is the idea that, while small states are concerned with the potential abuse of power by GPs, they recognize that GPs may greatly benefit them and the international community. This practical approach is exemplified in UN reform initiatives.¹⁴³

Indeed, it is said that GPs may be expected to benefit other states and the international community on the condition that they be granted privileges.¹⁴⁴ This argument, however, should not be taken too far. According to the examination of the action logic of GPs presented above, whether GPs act in a manner that benefits other

¹⁴² See Klein, *supra* note 13, at 26; Bross, *The Doctrine of Equality of States as Applied in International Organizations* (1959), at 156.

¹⁴³ See 'A More Secure World', *supra* note 102, at 4.

¹⁴⁴ *Ibid.*

states and the international community fundamentally depends upon their balance of national interest. Although ‘privilege’ is one modality of the national interest of GPs, it does not represent the whole of national interest.

B Evidence of Potential

In examining the potential benefits to international law stemming from the rise of NGPs, this article will focus on aspects of fundamental importance to the international community which have been poorly developed under traditional international law dominated by OGPs, but may be greatly benefited by the rise of NGPs. For developing states, ‘development deficit’ and ‘democracy deficit’ constitute major ‘deficits’ of traditional international law, and the most important positive potential may be found in relation to these aspects.

1 The Co-development Dimension of International Law

Today, international documents are filled with the discourse of ‘development’. Miserable depictions of a lack of development in developing states abound. Development is acknowledged not only as an economic and social issue, but as a matter of peace and security.¹⁴⁵ Development is defined as one of three inter-supportive pillars of the international system,¹⁴⁶ or ‘larger freedom’.¹⁴⁷ Interestingly, many – if not most of the – current challenges, countermeasures, and achievements in this area are reminiscent of an unprecedentedly ambitious but failed reform initiative in the name of the New International Economic Order about half a century ago.

From the 1950s, newly independent developing states found that the demise of the colonial regime had not improved their situation in the international economic system; rather, the South–North gap continued to widen. They recognized that the fundamental reason for this trend was that the international system ‘was established at a time when most of the developing countries did not even exist as independent States and [thus] perpetuate[d] inequality’.¹⁴⁸ Starting in the 1960s, they began to act collectively to pursue the NIEO within the UN system. A number of Assembly Resolutions were adopted,¹⁴⁹ and institutions and regimes were established.¹⁵⁰ 1974 witnessed the climax of the NIEO. In that year, several documents were adopted including the Charter of Economic Rights and Duties of States (Charter of Economic Rights), which is considered a milestone document of the NIEO.¹⁵¹

Two parallel approaches to establishing the NIEO were adopted: South–North dialogue and South–South cooperation. As regards the former, developed states at the

¹⁴⁵ *Ibid.*, at 6, 23.

¹⁴⁶ See 2005 World Summit Outcome, *supra* note 75, at paras 9, 10.

¹⁴⁷ UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 21 Mar. 2005/59/2005.

¹⁴⁸ GA Res. 3201 (S-VI), UN Doc. A/9599 (1974), at para. 1.

¹⁴⁹ See, e.g., GA Res. 1803 (XVII), UN Doc. A/RES/1803 (XVII).

¹⁵⁰ For instance, the UN Conference on Trade and Development (UNCTAD) was founded in 1964.

¹⁵¹ GA 3281 (XXIX), adopted on 12 Dec. 1974.

outset rejected the NIEO initiative.¹⁵² Although some progress was achieved,¹⁵³ South–North dialogue halted in the early 1980s and nearly disappeared in the 1990s because most developing states embraced the New Liberalism. As for the latter approach, developing states have never flagged in their enthusiasm; unfortunately, this means little for most developing states. Since the 1990s, it seems that ‘NIEO’ has practically been considered a ‘bad word’, and many policy circles and international lawyers now seem to avoid mentioning it.¹⁵⁴ However, some recent developments in international law, for example, the US’s attempt to regulate transnational corporations more effectively through investment treaties,¹⁵⁵ suggest that many claims of developing states in the NIEO movement (such as host states’ authority to regulate transnational capital) are largely justified. Therefore, the legitimacy of the NIEO movement should be reconsidered.

While several reasons have been suggested to explain the failure of the NIEO, the most important reason may be a lack of support from OGPs and the fact that, at the time, no GP hailed from the developing world. Indeed, the NIEO movement has never lacked leadership. In particular, India played a key role in NIEO initiatives.¹⁵⁶ However, weak economic power precluded India from classification as a GP.

Consider the legal regime on international investment. As recently as the late 1990s, developing states played a negligible role in the flow of international capital.¹⁵⁷ In this context, there was neither sustainable viability for the NIEO movement nor discernible benefit from it. On the one hand, many developing states had to abandon their NIEO claims – e.g., the rejection of the so-called ‘Hull Rule’¹⁵⁸ – in order to compete for capital from developed states; on the other, developing states have little willingness to negotiate investment treaties among themselves,¹⁵⁹ and those existing development-friendly investment rules are of little actual benefit.¹⁶⁰

Important changes began during this past decade. The rapid growth of investment from developing states has attracted increasing attention. In 2005, the foreign direct investment (FDI) from developing countries accounted for about 17 per cent of total outward FDI.¹⁶¹ In 2010, the FDI from developing states reached US\$388 billion,

¹⁵² In voting on the Charter of Economic Rights, all developed states said ‘No’ (Belgium, Denmark, FR Germany, Luxembourg, UK, and US) or ‘Abstain’ (Austria, Canada, France, Ireland, Israel, Italy, Japan, Netherlands, Norway, and Spain).

¹⁵³ See, e.g., GATT Pt IV: trade and development.

¹⁵⁴ For instance, the Committee on Legal Aspects of a NIEO established in 1979 within the International Law Association (ILA) was succeeded by the Legal Aspects of Sustainable Development Committee in 1992.

¹⁵⁵ See, e.g., Bipartisan Trade Promotion Authority Act of 2002, Art. 3802(b)(3); 2004 BIT Model, Annex B: Expropriation.

¹⁵⁶ Das, ‘India’s Trade Negotiations: Past Experience and Future Challenges’, 35 *Int’l Studies* (1998) 397, at 398.

¹⁵⁷ UNCTAD, *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development* (2006), at 7.

¹⁵⁸ UNCTAD, *Bilateral Investment Treaties 1995–2006*, UNCTAD/ITE/IIT/ 2006/5 (2007), at 48.

¹⁵⁹ See UNCTAD, *Bilateral Investment Treaties 1959–1999*, UNCTAD/ITE/IIA/2 (2000), at 5.

¹⁶⁰ See UNCTAD, *South–South Cooperation in International Investment Arrangements* (2005), at 36–46.

¹⁶¹ UNCTAD, *supra* note 157, at 105, 107.

accounting for 29 per cent of total world investment outflows.¹⁶² Since a handful of developing states account for the major part of this rapid growth,¹⁶³ those states are arguably comparable to most developed states in terms of investment outflows. Indeed, in 2010, China, Russia, and India were each among the top 20 investors.¹⁶⁴

This change may have far-reaching legal implications. First, the appearance of new investment sources may prompt many developing states¹⁶⁵ to reconsider their liberal investment regimes which arose following the defeat of the NIEO movement. These regimes have proved overly burdensome for developing states, as evidenced by the dramatic increase in investment disputes during the past decade.¹⁶⁶ Secondly, those existing development-friendly investment arrangements among developing states may generate benefits and will thus be strengthened.¹⁶⁷ Thirdly, developed states may have to adjust their liberal investment regimes in order to compete with NGPs investing in developing states and to tackle challenges of their public authority by investors from NGPs.¹⁶⁸

These legal implications have been noted in part by UNCTAD. In recent years, UNCTAD has devoted itself to promoting South–South cooperation in investment treaties, hoping for the emergence of a new strategy for development in developing states.¹⁶⁹ Indeed, several development-friendly investment rules have been proposed or adopted among developing states. For instance, China and India, together with several other developing states, in a communication submitted to the WTO in 2002 argued that the conduct of transnational corporations should be regulated in accordance with the Draft Code of Conduct on Transnational Corporations, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, etc,¹⁷⁰ which had been proposed during the NIEO movement. A remarkable legal practice is seen in the 2002 Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN (CAFTA), which explicitly provides for Special and Differential (S&D) treatment in investment liberalization.¹⁷¹

Compared with the international investment regime, in which the role of NGPs is still somewhat minor, NGPs figure prominently in the multilateral trade system. The role of NGPs has been decisive in the current Doha Round negotiations,¹⁷² which,

¹⁶² UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (2011), at 6.

¹⁶³ UNCTAD, *supra* note 157, at 112.

¹⁶⁴ UNCTAD, *supra* note 162, at 7.

¹⁶⁵ South–South investment is significant to some small- or medium-sized developing countries: see UNCTAD Secretariat, *South–South Investment Flows* (2004), at 3.

¹⁶⁶ See, e.g., UNCTAD, *Last Developments in Investor–State Dispute Settlement* (Mar. 2011).

¹⁶⁷ Until 2005 South–South BITs accounted for 26% of total BITs: UNCTAD, *supra* note 157, at 27.

¹⁶⁸ UNCTAD Secretariat, *The Development Dimension of International Investment Agreements* (Feb. 2009), at 11.

¹⁶⁹ See, e.g., UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010).

¹⁷⁰ WTO Working Group on the Relationship between Trade and Investment, Communication from China, Cuba, India, Kenya, Pakistan, and Zimbabwe, WT/WGTI/W/152, 19 Nov. 2002.

¹⁷¹ See CAFTA, Art. 8.

¹⁷² See, e.g., Qin, 'China, India and WTO Law', in M. Sornarajah and J. Wang (eds), *China, India and the International Economic Order* (2010), at 196.

because 'development' is the theme, are also known as the Doha Development Agenda (DDA) negotiations. It is not necessary here to examine in detail how NGPs, together with other developing states, defend the DDA, as this has been extensively discussed.¹⁷³ Rather, this article will focus on criticisms levelled at the role played by NGPs in the DDA negotiations. Critics, especially those from developed states, often accuse NGPs of failing to exercise their leadership,¹⁷⁴ and seeking their own interests as a priority, thus causing the Doha negotiations to stall.¹⁷⁵ Such accusations are not entirely unfounded. Nevertheless, three points may be proposed to rebut these criticisms from the DDA perspective. First, the national interests of China, India, Brazil, and South Africa have a special meaning from the perspective of DDA. This is because these four states, comprising only 2 per cent of the total number of states in the world, have to sustain approximately 3 billion individuals, accounting for more than 40 per cent of the world's population. Should these 3 billion individuals be denied the same inherent right to benefit from a multilateral trade system as enjoyed by those in developed states, the human impact would be tremendous. In other words, the position of NGPs in the multilateral trade system should not be evaluated solely on the basis of their status as WTO members, but also on the status of their citizens as nationals of WTO members. Secondly, developed WTO members, especially the US and the EU, tend to focus their complaints on NGPs' failure to take the lead in opening their markets, rather than on their failure to enforce commitments, including adhering to decisions by the Dispute Settlement Body (DSB). However, from the DDA perspective, what NGPs should take a leading role in is the defence of a development-oriented purpose, process, and framework of negotiations in order to remedy the highly disproportionate allocation of costs and benefits between developed and developing states arising from trade liberalization; indeed, this is the very reason why the Doha Round negotiations are referred to as the DDA. Therefore, to accuse NGPs in a general way of failure to take a leadership role is unconvincing. Thirdly, NGPs have actually begun to adopt programmes in favour of other developing states, especially LDCs, in accordance with the purpose of the WTO Agreement and the DDA. For instance, since 1 July 2010, China has unilaterally granted tariff-free treatment to 60 per cent of goods from 26 African states.

More importantly, the rise of NGPs should not be viewed as reviving the 'Old NIEO', but rather as prompting a 'New NIEO'¹⁷⁶ rooted in the 21st century. Several differences exist between the two NIEOs. For instance, sustainable development was hardly included in the 'Old NIEO', while it is a key issue in the 'New NIEO'.¹⁷⁷ They, however, have many similarities; for instance, the defence of host states' authority to regulate

¹⁷³ See, e.g., Yu, 'Access to Medicines, BRICS Alliances, and Collective Action', 34 *American J L & Medicine* (2008) 345.

¹⁷⁴ See Third World Network, *India, China, Brazil Leadership Key to Doha Success or Failure, say US* (10 May 2010).

¹⁷⁵ See Bhala, *supra* note 110, at 4, 5.

¹⁷⁶ It borrows the title of the article by Prof. Ruth Gordon: see Gordon, *supra* note 10.

¹⁷⁷ See Cai, 'From New International Economic Order Movement to Sustainable Development', 15 *Chinese J Int'l Economic L* (2008) 100.

activities of transnational corporations. Ironically, the most significant thing is that developed states which opposed the ‘Old NIEO’ may be expected to support the ‘New NIEO’. There are two main reasons for this. First, growing challenges accompanying the rise of NGPs may prompt OGP to change their attitudes toward some ‘Old NIEO’ claims of developing states. For instance, with the capital from NGPs increasingly pouring into OGPs, OGPs may adjust their traditional liberal approaches to investment treaties in order to protect their public authority, which was previously strongly advocated for by developing states. Secondly, as implied by Paul Kennedy, some OGPs may regress into ‘developing states’ for various reasons, such as economic recession. The debt crisis unfolding in the western world including Italy warns that people should not be surprised one day to find a previously developed state grouped with ‘developing states’.

This new context implies that, while the ‘Old NIEO’ was overwhelmingly aimed at favouring the ‘unilateral development’ of developing states, the ‘New NIEO’ tends to pursue the ‘common development’ of all states, which has been repeatedly advocated by China.¹⁷⁸ Thus, compared with the ‘Old NIEO’, the establishment of a ‘New NIEO’ may see more cooperation and less confrontation between developed and developing states. As a matter of fact, it is said that the Group 20 (G20), which was found in 1999 and which all OGPs and NGPs, together with several other developing states, are involved in, may over time serve as a cooperation mechanism of this kind.¹⁷⁹

2 *The Democratic Dimension of International Law*

Some argue that ‘democracy’ is ignored by lawyers, especially international lawyers.¹⁸⁰ Things have changed greatly in the past two decades. ‘Democracy’ entered into the international discourse with the collapse of the Socialist Camp. Democracy has become an important agenda for national states and international institutions. For instance, two years after the collapse of the USSR, a UN Assembly Resolution entitled ‘Enhancing the Effectiveness of the Principle of Periodic and Genuine Election’ was adopted by an overwhelming majority.¹⁸¹ Furthermore, many resolutions adopted under Chapter VII of the UN Charter are concerned with national democracy.¹⁸² Democracy has also been embraced in regional institutions.¹⁸³ In 1992, two similar opinions were published by distinguished scholars in the fields of international law and international relations respectively. Franck declared the emergence of the entitlement to democracy in international law,¹⁸⁴ and Huntington hailed the

¹⁷⁸ See 2011 White Paper on China’s Peaceful Development, *supra* note 67, Pt I.

¹⁷⁹ See *The Group of Twenty: A History*, available at: www.g20.utoronto.ca/docs/g20history.pdf (visited 10 Dec. 2012).

¹⁸⁰ Wheatley, ‘Democracy in International Law: A European Perspective’, 51 *ICLQ* (2002) 225, at 225.

¹⁸¹ A/RES/45/150, 18 Dec. 1990.

¹⁸² E. Newman and R. Rich, *The UN Role in Promoting Democracy* (2004), at 65, 69.

¹⁸³ See European Community, Declaration on the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union, 16 Dec. 1991, 31 *ILM* (1992) 1485.

¹⁸⁴ Franck, ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46.

coming of the 'third wave' of democratization.¹⁸⁵ The 2005 World Summit Outcome considers 'democracy' a 'universal value'.¹⁸⁶

However, what Franck and Huntington discussed is only one dimension of democracy, the relationship between individuals and their government at the national level. For any professionals involved in international law and international relations, another dimension of democracy – the relationship among states or the relationship between states within the international community – should not be ignored.

Although the international dimension of democracy has been given far less attention than the national dimension, the former emerged far earlier than the latter in terms of international law. As pointed out above, international law has always been blamed for creating a 'democracy deficit' because a handful of western GPs have dominated it since the 17th century so that for a long time international law was labelled 'European International Law'. The decolonization movement, which was initiated in Latin America in the 19th century and was accelerated in Asia and Africa after World War II, created a large number of new states which very soon outnumbered their former colonizers. However, since these new states possessed at best 'political and rhetorical authority',¹⁸⁷ they could make only 'limited and special' contributions and could not become 'masters' of international law.¹⁸⁸ For instance, as early as 1970, the Non-Aligned Movement (NAM), a main forum for developing states to pursue the international dimension of democracy, explicitly stated that 'the democratization of international relations' was an imperative necessity.¹⁸⁹ This claim, however, had never been taken seriously by developed states.

While making domestic democracy an international concern, the end of the Cold War also produced a 'by-product': the democratization of international relations was established as a multilateral agenda. In 1992, the same year in which Franck and Huntington published their influential works, Secretary-General Boutros Boutros-Ghali presented a report which perhaps is the first UN document openly embracing the democratization of international relations, although it has been given far less attention than it deserves. Immediately after promoting democracy at the national level,¹⁹⁰ this report continues to argue that '[d]emocracy within the family of nations means the application of its principles within the world Organization itself. ... Democracy at all levels is essential to attain peace for a new era of prosperity and justice'.¹⁹¹ Furthermore, democracy is included as one of four principles to guide the reform of the UNSC.¹⁹²

¹⁸⁵ S. Huntington, *The Third Wave* (1992).

¹⁸⁶ 2005 World Summit Outcome, *supra* note 75, at para. 135.

¹⁸⁷ Cassese, *supra* note 78, at 71.

¹⁸⁸ L. Henkin, *How Nations Behave: Law and Foreign Policy* (1968), at 118.

¹⁸⁹ Lusaka Declaration on Peace, Independence, Development Co-operation and Democratization of International Relations, 10 Sept. 1970, at para. 7, available at: http://cns.miis.edu/nam/documents/Official_Document/3rd_Summit_FD_Lusaka_Declaration_1970.pdf (visited 8 Apr. 2013).

¹⁹⁰ Report of the Secretary-General, 'An Agenda for Peace', A/47/277 - S/24111, 17 June 1992, at para. 81.

¹⁹¹ *Ibid.*, at para. 82.

¹⁹² See 'A More Secure World', *supra* note 102, at para. 249.

The pursuit of democratization of international relations may be resumed with the rise of NGPs. In recent years, NGPs have been strongly arguing for it. The main reason for this may be that, although NGPs' power is growing, they are yet to experience a proportional increase in their influence in international affairs. Thus NGPs are joining forces in this regard. For instance, the BRICS believe that they can play an important role in 'promoting greater democracy in international relations'.¹⁹³ Also, China and India consider that 'the continuous democratization of international relations and multilateralism are an important objective in the new century'.¹⁹⁴ Since the promotion of democratization of international relations is the common pursuit of the developing world, the efforts of NGPs have gained support from other developing states. For instance, China and the Arab League promised to 'promote the democratization of international relations'.¹⁹⁵ In 2009, China and 49 African states called on all states to 'act under the principles of multilateralism and democracy in international relations'.¹⁹⁶ Surprisingly, the EU has expressed its support for the trend. In a Joint Statement issued in 2004, the EU and China pledged to endeavour to 'promote multilateralism and democracy in international relations'.

In the age of international organizations, which are experiencing 'mission creep',¹⁹⁷ developing states' more effective participation in international organizations is of particular importance in promoting the democratization of international law. The IMF in 2010 witnessed the latest significant progress in this regard. On 10 November 2010, the Executive Board of the IMF approved a reform programme which comprised 'the most fundamental governance overhaul in the Fund's 65-year history and the biggest ever shift of influence', and which was 'in favor of emerging market and developing countries to recognize their growing role in the global economy'.¹⁹⁸ According to that proposal, the BRIC countries rank among the 10 largest members of the IMF. In particular, China became the third largest member in terms of both quota shares (6.394 per cent) and voting shares (6.071 per cent), third only to the US and Japan.¹⁹⁹ This progress can be defined as a step towards making the IMF more democratic.

Fundamental progress may also be expected in the UNSC. UNSC reform has been established as a UN agenda item since 1992, but little progress has been made in the past 20 years. However, while 'democracy' is not a panacea to remedy all deficiencies of the UNSC,²⁰⁰ it could certainly make the UNSC more legitimate. As a matter of fact, consensus exists among states as to what ought to be done. First, the UNSC needs

¹⁹³ Sanya Declaration, *supra* note 24.

¹⁹⁴ China–India Shared Vision, *supra* note 70.

¹⁹⁵ Declaration of China–Arab Cooperation Forum (2004), Art.2, available at: www.fmprc.gov.cn/mfa_chn/ziliao_611306/1179_611310/t253844.shtml (visited 7 Apr. 2013).

¹⁹⁶ China–Africa Declaration, *supra* note 70.

¹⁹⁷ See generally Alvarez, *supra* note 74, at chs 4, 7, and 8.

¹⁹⁸ 'IMF Executive Board Approves Major Overhaul of Quotas and Governance', Press Release No. 10/418, 5 Nov. 2010.

¹⁹⁹ IMF, 'Quota and Voting Shares Before and After Implementation of Reforms Agreed in 2008 and 2010' (3 Mar. 2011).

²⁰⁰ See P.G. Danchin and H/ Fischer (eds), *United Nations Reform and the New Collective Security* (2010), at 112.

to be enlarged to reflect the new international reality.²⁰¹ Secondly, the new UNSC must 'be more representative of the broader membership, especially of the developing world'.²⁰² It is believed that India, Brazil, and South Africa are the most competitive candidates to become new permanent members. It would not be surprising one day to see the BRICS sitting together as permanent members of the UNSC. Actually, when the BRICS happened to sit together at the UNSC in 2011, they were regarded as a 'new power bloc'.²⁰³

5 A Case Study of China's Latest International Legal Policy and Practice: A Quiet Revolution?

Today, few people deny that Kennedy's prediction with respect to China has become a reality. This NGP is considered so powerful and yet so unpredictable that, in order to understand the implications of its rise, international relations scholars, economists, and historians have proposed various theories, such as the 'Theory of China Threat',²⁰⁴ the 'Theory of China Collapse',²⁰⁵ the 'Theory of China Responsibility',²⁰⁶ the 'Theory of Chimerica',²⁰⁷ and the 'Theory of Chindia'.²⁰⁸

Unfortunately, international lawyers in China and abroad are hardly staying on top of ongoing global debates about China's rise. In this regard, Posner and Yoo are rare exceptions. Through a case study of interaction between China and the US in several international regimes, they presented a very passive conclusion, namely, international law is barely effective in regulating China's rise and mediating tensions between the two states.²⁰⁹

A China's Rise as an NGP: Evolution of Discourse

Kennedy expressed his admiration for late 15th century China as follows: 'of all the civilizations of pre-modern times, none appeared more advanced, none felt more superior, than that of China'.²¹⁰ Modern history, however, witnessed China's fall. The Opium War (1838) and the Treaty of Nanking (1842) disqualified China as a civilized

²⁰¹ See 2005 World Summit Outcome, *supra* note 75, at para. 153.

²⁰² See, e.g., 'A More Secure World', *supra* note 102, at para. 249.

²⁰³ Patel, 'Brics: UN Security Council's newest power block', available at: <http://dailymaverick.co.za/article/2011-10-07-brics-un-security-councils-newest-power-block> (visited 25 Nov. 2011).

²⁰⁴ See, e.g., Al-Rodhm, 'A Critique of China Threat Theory', 31 *Asian Perspective* (2007) 41.

²⁰⁵ See, e.g., G.G. Chang, *The Coming Collapse of China* (2001).

²⁰⁶ See, e.g., Zoellick, 'Whither China: From Membership to Responsibility?', available at: <http://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm> (visited 1 Oct. 2011); EU Commission, 'EU-China: Closer Partners, Growing Responsibilities', 24 Oct. 2006, COM(2006)631.

²⁰⁷ See, e.g., Ferguson, 'Not Two Countries, But One: Chimerica', *The Telegraph*, 4 Mar. 2007, available at: www.telegraph.co.uk/comment/personal-view/3638174/Not-two-countries-but-one-Chimerica.html (15 Oct. 2011).

²⁰⁸ See J. Ramesh, *Making Sense of Chindia: Reflections on China and India* (2005).

²⁰⁹ Posner and Yoo, 'International Law and the Rise of China', 7 *Chinese J Int'l L* (2006) 1, at 15.

²¹⁰ Kennedy, *supra* note 1, at 4.

member of the international community.²¹¹ During the next 100 years, China struggled to return to the international community as a ‘normal’ member and to restore its traditional GP status through a variety of means, including entering wars,²¹² attending international conferences,²¹³ and reforming national governance.²¹⁴

At the close of World War II, with strong support from Roosevelt, then the US President, China was reluctantly recognized as one of the ‘Police States’ and was granted permanent membership of the UNSC.²¹⁵ However, during much of the 20th century, China was not regarded as a GP.²¹⁶ Actually, it itself denied that it was a GP. In 1984, Deng Xiaoping, China’s former leader, defined China’s state identity, which remains largely true 20 years later. Deng said:

China is a huge country as well as a minor one. By huge it means that it has a huge population and a vast territory, and by minor it means that it is still a relatively poor, developing country with a per capita GNP of only US\$300. Therefore, China is in fact both a huge and a minor country.²¹⁷

In other words, China acknowledged that it was not powerful enough to claim to be a ‘GP’, but defined itself either as a ‘huge state’ in terms of population and territory, both of which are not necessarily decisive factors in a state qualifying as a GP,²¹⁸ or as a ‘developing state’ in terms of economic development.

Largely because of his conception of his state’s identity, Deng established two fundamental principles for China’s diplomacy. First, China should devote itself to its own national development and ‘keep a low profile’ in international affairs. In December 1990, Deng warned that China could not ‘qualify as the leader because we are not powerful enough to do that. We, however, absolutely should not do that, which is a fundamental national policy’, even though ‘[s]ome developing countries hope China to act as a leader of the Third World’. Nevertheless, Deng also said China could ‘not simply do nothing in international affairs and we still play our part’.²¹⁹

Secondly, Deng repeatedly stressed China’s close ties with the Third World. He required that China maintain its action logic of being sympathetic to the Third World states, even though China’s state identity would change one day, as it became a developed state. In Deng’s opinion, it was logical for China to accept the policy that it should not seek hegemony when it was still poor. However, a more important question is ‘whether or not China will exercise hegemony when it becomes developed in the

²¹¹ These two events are recognized widely as ‘turning-points in Sino-Western relations’: Gong, *supra* note 37, at 136.

²¹² See Xu, *China and the Great War* (2005), at ch. 5.

²¹³ See Lin, *From the Law of Nations to International Diplomacy* (2009), at ch. 5; Xu, *supra* note 212, at ch. 7.

²¹⁴ See Lin, *supra* note 213, at ch. 6; I.C.Y. Hsü, *China’s Entrance into the Family of Nations* (1960), Pt 3.

²¹⁵ During negotiating the new world organization, the Soviet Union, and the UK were opposed to granting China such a privileged status; see Russell, *supra* note 103, at 103, 128. Buzan, *supra* note 80, at 9.

²¹⁶ Schwarzenberger, *supra* note 20, at 121–122; Kennedy, *supra* note 1, at 447–457.

²¹⁷ Literature Research Center of the China Communist Party (CCP) Central Committee (ed.), *Selected Works of Deng Xiaoping* (1993), iii, at 94.

²¹⁸ See Handel, *supra*, note 14, at 13–14.

²¹⁹ *Selected Works of Deng Xiaoping*, *supra* note 217, at 363.

future'.²²⁰ Deng said 'No' in this regard. He pledged that China would never become a 'superpower'.²²¹

Deng's words still influence China's latest international legal policy. For example, in its 2011 White Paper on China's Peaceful Development,²²² China's government promises that '[i]t [will] never engage in aggression or expansion, never seek hegemony',²²³ and congratulates itself that 'China's peaceful development has broken away from the traditional pattern where a rising power was bound to seek hegemony'.²²⁴

With the growth of its power, especially economic power, China has sought to redefine its state identity. An important event was a speech delivered by Professor Zheng Bijian in 2003.²²⁵ In that speech, Zheng, who is believed to be a confidant of the former President Hu Jintao, argued that China had found a road of 'Peaceful Rise' in accordance with which it was developing socialism with Chinese characteristics by integrating itself into economic globalization rather than by isolating itself while mainly relying upon its own national resources. In particular, Zheng stressed that the road of 'Peaceful Rise' involves 'striv[ing] for rise while pursuing peace and not seeking hegemony'. This road is totally different from the traditional path followed by rising GPs, which is characterized by the fierce transformation of the existing international system, resort to force, etc.²²⁶

Less than a month later, Zheng's proposition was embodied in a speech by Premier Wen Jiabao at Harvard University.²²⁷ Wen declared that China was 'a rising power dedicated to peace' and that it would follow a 'road to peaceful rise and development'. For the first time, China's state leaders not only officially accepted the proposition of 'peaceful rise', but used the word 'rising power'. According to the reasoning in Kennedy's book, the word 'rise' implies the birth of a GP. Therefore, it can be assumed that the use of this language is indicative of China acknowledging its new state identity. After Wen's speech, the words 'peaceful rise' were immediately employed in various official documents, speeches, etc. In particular, Wen, at a press conference in March 2004, explained at length the meaning of 'Peaceful Rise'.²²⁸ The discourse of 'Peaceful Rise' has inspired heated discussions in China and abroad.²²⁹

²²⁰ *Ibid.*, ii, at 112.

²²¹ *Ibid.*, ii, at 94.

²²² 2011 White Paper on China's Peaceful Development, *supra* note 67.

²²³ *Ibid.*, Pt I, at para. 8.

²²⁴ *Ibid.*, Pt V, at para. 2.

²²⁵ Zheng Bijian, 'A New Path for China's Peaceful Rise and the Future of Asia', presented at Bo'ao Forum for Asia, 24 Nov. 2003, reprinted in B. Zheng, *China's Road to Peaceful Rise: Observations on Its Cause, Basis, Connotations and Prospects* (2011), at 168–172.

²²⁶ *Ibid.*

²²⁷ Wen Jiabao, 'Turning Your Eyes to China', 11 Dec. 2003, available at: www.fmprc.gov.cn/ce/ceun/eng/zt/wfm/t56090.htm (visited 1 Oct. 2011).

²²⁸ See, e.g., Premier Wen Jiabao's press conference at the conclusion of the 2nd session of the 10th National People's Congress (NPC), 15 Mar. 2004, available at: www.chinanews.com/n/2004-03-14/26/413352.html (visited 1 Oct. 2011).

²²⁹ See, e.g., S. Guo and S. Hua (eds), *New Dimensions of Chinese Foreign Policy* (2007).

A totally unexpected change, however, occurred with a speech given by the former President Hu Jintao a month after that press conference.²³⁰ In that speech, Hu used the term ‘peaceful development’ rather than ‘peaceful rise’. Since then, ‘peaceful rising’ has never appeared in any Chinese official materials. China’s first White Paper on the Path to Peaceful Development (2005) definitely replaced ‘Peaceful Rise’ with ‘Peaceful Development’. Interestingly, China’s government did not give any explanation. One guesses that state leaders noted criticisms and doubts being expressed with respect to the theory of Peaceful Rise, including that: (1) that theory would weaken China’s ability to block Taiwanese independence; (2) China’s peaceful rise might not be possible; (3) that theory would intensify concerns among China’s neighbours; (4) it was premature to discuss China’s rise; (5) that theory was contrary to Deng Xiaoping’s guidance on foreign affairs; (6) that theory could undermine support for military modernization; and (7) that theory could incite domestic nationalism.²³¹ However, hitherto the term ‘Peaceful Rise’ rather than ‘peaceful development’ has been used extensively by international organizations, states, and international relations scholars in China and abroad.²³²

As a matter of fact, a distinguished Chinese international relations scholar rightly pointed out that ‘in substance, both peaceful rise and peaceful development carry the same message that China’s growing power will not be threatening to the outside world and therefore the many variations of the “China threat theory” are to be rejected’.²³³ Nevertheless, ‘rise’ in international relations tends to remind people of the traditional pattern of the rise of GPs in modern history, including colonization, resort to war, and spheres of influence. Therefore, the replacement of ‘rise’ with ‘development’ serves to assuage concerns from the outside world whether China would follow the traditional pattern of the rise of GPs. China stresses that ‘China’s peaceful development has broken away from the traditional pattern where a rising power was bound to seek hegemony’.²³⁴

The shift of discourse from ‘Peaceful Rise’ to ‘Peaceful Development’ vividly informs people that China has realized that its rise may constitute a great challenge for other states, especially OGP, even though, from an international perspective, China is rising in a highly socialized and legalized world which is quite different from that of the 17th to the 19th centuries; from a national perspective, the embrace of peace and harmony is China’s ‘cultural and historical tradition’.²³⁵ Unfortunately, most Chinese international lawyers have employed the term ‘Peaceful Rise’ since Premier Wen delivered

²³⁰ Hu, ‘China’s Development, Opportunities for Asia’, Apr. 2004, available at: www.china.org.cn/english/features/93897.htm (visited Oct. 2011).

²³¹ See Glaser and Mederos, ‘The Changing Ecology of Foreign Policy-Making in China: The Ascension and Demise of the Theory of “Peaceful Rise”’, 190 *China Q* (2007) 291, at 302–306.

²³² See, e.g., Ikenberry, *supra* note 62; Buzan, *supra* note 80; Wang, ‘China’s Search for a Grand Strategy’, 90 *Foreign Aff* (2011) 68.

²³³ Wang, ‘Peaceful Rise: a Discourse in China’, paper prepared for conference on ‘The Rise of China: Theory and Practice’, Beijing University, Beijing, China, 5–7 Jan. 2006, citing from Glaser and Medeiros, *supra* note 231.

²³⁴ 2011 White Paper on China’s Peaceful Development, *supra* note 67, Pt V, at para. 2.

²³⁵ See *ibid.*, Pt IV.

'Turning Yours Eyes to China' in 2003, and have used the term 'Peaceful Development' since the 2005 White Paper on China's Peaceful Development was issued. They fail to discern the change and underlying logic of China's government in dealing with its state identity. Few international lawyers perceived that this shift in language was arguably connected to the old and highly disputed issue of GPs in international law.

Yee is one of the few Chinese jurists who have clear thinking on GPs. Yee once argued that 'China cannot escape from its leader State role in the world. It has no choice but to be a leader State.'²³⁶ Why should China act as a 'Leader State'? Yee explained:

This is because China comprises too big a proportion of the world, both in terms of population and economic activities. ... The international system cannot function well without China being in a leader State role. Not being in such a role will prevent China from realizing the traditional ideal of *pingtianxia* – bringing peace to the world. From this perspective, China should simply recognize the need for its leader State role, take up the responsibility of a leader State. ...²³⁷

The *pingtianxia* is in essence some kind of intrinsically ethical discipline in Confucian doctrine so that it cannot be relied upon as a continually reliable motivation of a state in anarchic international society. Therefore, it is doubted whether the traditional ideal of *pingtianxia* can prompt China to act as a Leader State. Nevertheless, Yee was right in recognizing that China in its process of rise might significantly transform international life so that it has a responsibility to make a proportionate contribution to world peace and prosperity. Unfortunately, Yee stopped at claiming in a general way that China should 'take the responsibility of a leader state'. He said little about the challenges and risks that China would have to face when required to perform the role of Leader State or Great Power and their underlying dynamics, which may be partly found in the survey below. These issues are as challenging as, if not more challenging than, simply imposing a new state identity upon China.

B China's Latest International Law Practice: Issues of Intervention, Investment Treaties and Human Rights

Obviously, it is beyond the scope of this article to discuss in detail China's recent international law practices.²³⁸ Rather, the author, from a GP perspective, would like to

²³⁶ Yee, *supra* note 68, at 104. Yee avoided the long-recognized term of 'Great Power'. Rather, he employed three phrases, 'Strong State', 'Great State', and 'Leader State'. A state qualifies as a strong state if it (a) has respected the minimum of sovereign equality and (b) has managed to reach a privileged or strong position legitimately. A strong state may be defined as a great state when it has paid respect to the value of, and has succeeded in undertaking the important responsibility towards, the international system. A great state may be considered a leader state if it is helpful to 'formulate or refine a proper vision of the international system and to build it up so that the flourishing of humanity can be achieved to a greatest extent': Yee, *supra* note 93, at 772. Yee's thinking is quite sophisticated. Nevertheless, the priority is not to produce 'new bottles', but to put 'new wine' into 'old bottles', in particular, imposing enforceable inputs upon great powers to make them more responsive and more accountable to world peace and prosperity. See my discussions in sect. 3A(2).

²³⁷ Yee, *supra* note 68.

²³⁸ See generally Xue, 'China's Open Policy and International Law', 4 *Chinese J Int'l L* (2005) 133; Xue, 'Chinese Observations on International Law', 6 *Chinese J Int'l L* (2006) 83; and Wang and Hu, 'China's Reform and Opening-up and International Law', 4 *Chinese J Int'l L* (2010) 193.

focus on the three key issues of intervention, investment treaties, and human rights. It is appropriate to focus on these topics because (1) they correspond with peace and security, development, and human rights – three pillars of the UN system supporting ‘larger freedom’, as stated above; (2) China stands at the crossroads with respect to these issues; and (3) they have not yet received sufficient attention among western international lawyers.

1 *The Intervention Issue: From Non-intervention to Responsibility to Protect*

Non-intervention in internal affairs is regarded as a principle of the modern international legal order.²³⁹ The ICJ further defines this principle as part of customary international law.²⁴⁰ Largely because it was consistently humiliated by western powers in modern history, China has always defended this principle. It was included in the famous Five Principles of Peaceful Coexistence, which are recognized as one of China’s few important contributions to international law.²⁴¹ Even today, the principle remains the cornerstone of China’s diplomacy.²⁴²

However, due to the uncertainty of its content,²⁴³ applying the principle in practice is more problematic than writing it into law. The principle is often used to shield states engaging in internal misconduct from international scrutiny. Furthermore, this principle hardly prevents powerful states from exercising coercion against other states. The difficulty of applying this principle is manifest in the dilemma about how to deal with humanitarian intervention, which divides the world.²⁴⁴ China, together with many developing states, opposes humanitarian intervention.²⁴⁵

What distinguishes China from other developing states is that, with its status as a permanent member of the UNSC, China can defeat or water down any initiative under Chapter VII of the UN Charter. This has been demonstrated with respect to attempted initiatives against Sudan,²⁴⁶ Zimbabwe,²⁴⁷ and Syria.²⁴⁸ However, inspired by the ‘Kofi Annan Query’,²⁴⁹ and in the light of the pressure imposed outside because of its sympathetic stance *vis-à-vis* Sudan in the Darfur crisis,²⁵⁰ China had

²³⁹ UN Charter, Art. 2(7).

²⁴⁰ See *Military and Paramilitary Activities in and against Nicaragua*, Merits Judgment [1986] ICJ Rep 14, at para. 202.

²⁴¹ Wang, ‘International Law in China: Historical and Contemporary Perspectives’, 221 *Recueil des cours* (1990-II), at 271.

²⁴² See, e.g., 2011 White Paper on China’s Peaceful Development, *supra* note 67, Pt III.

²⁴³ See *Military and Paramilitary Activities in and against Nicaragua*. *Supra* note 240, at para. 202.

²⁴⁴ See generally A. Orford, *Reading Humanitarian Intervention* (2003).

²⁴⁵ See UN GA, 63rd session, 98th plenary meeting, Official Records, A/63/PV.98, at 23.

²⁴⁶ ‘U.N. Vote on Sudan Could Face China Veto’, available at: www.foxnews.com/story/0,2933,132803,00.html (visited 10 Dec. 2011).

²⁴⁷ ‘2 Vetoes Quash U.N. Sanctions on Zimbabwe’ (12 July 2008), available at: www.nytimes.com/2008/07/12/world/africa/12zimbabwe.html?pagewanted=all (visited 10 Dec. 2011).

²⁴⁸ ‘Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China’, available at: www.un.org/News/Press/docs/2011/sc10403.doc.htm (visited 10 Oct. 2011).

²⁴⁹ See Report of the Secretary-General, ‘We the peoples’, A/54/2000, 27 Mar. 2000, at 35.

²⁵⁰ See Shinn, ‘China and the Conflict in Darfur’, 16 *Brown J World Aff* (2009) 85, at 91–93; Kent, ‘Compliance v Cooperation: China and International Law’, 13 *Australian Int’l LJ* (2006) 19, at 30.

to seek a new approach other than non-intervention or humanitarian intervention to cope with new modalities of threats to peace and security such as gross and systematic violations of human rights. It seems that China found the answer from the International Commission on Intervention and State Sovereignty (ICISS), an international non-governmental organization (INGO) and the author of the Report on the Responsibility to Protect (R2P).²⁵¹ Although recognizing 'the long history, and continuing wide and popular' usage of the phrase 'humanitarian intervention', the ICISS made 'a deliberate decision' not to adopt it, but to employ the phrase 'responsibility to protect'.²⁵² While changing the language does not 'change the substantive issues which have to be addressed',²⁵³ it is very helpful for China because it pulls China out of direct confrontation between the non-intervention it always defends and humanitarian intervention it always opposes, even though what China wants from R2P is to make it more ready not to 'enforce' but to 'acknowledge' humanitarian intervention.

In June 2005, China issued its first official document on UN reforms, including the concept of R2P.²⁵⁴ This document predated the 2005 World Summit Outcome, which also included this concept.²⁵⁵ This is noteworthy because, throughout its history of diplomacy, China had never before adopted a concept proposed by an INGO, much less done so rapidly. China, however, does not appear overly confident in the concept of R2P. During debates preparing for the first UN Assembly Resolution on R2P, China presented a detailed statement.²⁵⁶ It warned that the implementation of R2P 'should not contravene the principle of state sovereignty and the principle of non-interference in the internal affairs of States' and that R2P should be prevented from 'becoming a kind of humanitarian intervention'.²⁵⁷ Nevertheless, it maintained its support for the proposition that several international crimes fall within the ambit of R2P.²⁵⁸ This implies that the implementation of R2P in such circumstances does not contravene the principles of state sovereignty and of non-interference in the internal affairs of states.

The significance of China's shift from non-intervention to R2P is still emerging. Indeed, China, together with Russia, blocked a recent initiative against Syria in accordance with Chapter VII of the UN Charter in 2011. However, without China's support, it was impossible for the UNSC to adopt a decision against Sudan²⁵⁹ or Libya,²⁶⁰

²⁵¹ See ICISS, *Responsibility to Protect*, Dec. 2001, available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (visited 10 Oct. 2011).

²⁵² *Ibid.*, at 9, 11.

²⁵³ *Ibid.*, at 12.

²⁵⁴ See China's Ministry of Foreign Affairs, Position paper of the People's Republic of China on the UN Reforms, Pt III.1, available at: www.fmprc.gov.cn/eng/zxxx/t199318.htm (visited 10 Oct. 2011).

²⁵⁵ 2005 World Summit Outcome, *supra* note 75, at paras 138, 139.

²⁵⁶ See GA, 63rd session, 98th Plenary Meeting 24 July 2009, New York, *Official Records*, at 23–24.

²⁵⁷ *Ibid.*, at 23.

²⁵⁸ *Ibid.*

²⁵⁹ See, e.g., SC Res 1713 (2006), 29 Sept. 2006; SC Res 1755 (2007), 30 Apr. 2007; and SC Res 1769 (2007), 31 July 2007.

²⁶⁰ See SC Res 1973 (2011), 26 Feb. 2011; SC Res 1973 (2011), 17 Mar. 2011.

in each of which China has a huge economic interest. As China's power, especially economic power, is steadily increasing and as it increasingly engages economically with those states where events triggering R2P are likely to occur, China's attitude towards R2P may be of significance for the application of R2P because it is possible for China to use its power, especially economic power, to prompt the relevant states to change the manner in which they treat their own nationals. Actually, it has been reported that China used economic means to press Sudan to change its policy in Darfur, including discouraging Chinese corporations from investing in Sudan and cancelling Sudan's preferred trade status.²⁶¹

Furthermore, unlike some western states that focus on Responsibility to React, China attaches special weight to the other two pillars of R2P, i.e., Responsibility to Prevent and Responsibility to Rebuild,²⁶² which are the main reason R2P could be quickly accepted by those traditionally opposing humanitarian intervention at the 2005 World Summit. The fact is that China has been prominent in recent UN peacekeeping activities,²⁶³ which is of great value to R2P. Thus, it might be said that China and such states as the US are cooperating to achieve all three pillars of R2P. Notwithstanding, one also finds that China largely retains its traditional position of non-intervention because the Responsibility to React is the very core of R2P.

2 *The Investment Treaties Issue: From Protecting Inward Investment to Protecting Outward Investment and to Making Law for the World*

Trade and investment are two important instruments which have helped China rise as a NGP. China's participation in the multilateral trade system has been extensively examined, and it is widely acknowledged that China may exercise significant influence on the multilateral trade system.²⁶⁴ Examinations of China's investment treaties are far less common.²⁶⁵ Considering that China's investment treaties show that, in 2011, China has the second largest number of BITS of any country, with 130 BITS and several FTAs including an investment chapter, at first sight it is surprising that people pay little attention to what so many of China's investment treaties may offer to the investment treaty regime.

This academic phenomenon reflects the picture painted by China's traditional investment treaties, which is ultimately dependent upon China's role in international investment. For a long time there was great asymmetry between inward FDI (IFDI) and outward FDI (OFDI). For instance, in 2002, China's IFDI reached US\$ 53 billion,²⁶⁶

²⁶¹ Huang, 'U.S.–China Relations and Darfur', 31 *Fordham Int'l LJ* (2007–2008) 827, at 837, 838.

²⁶² See ICISS, *supra* note 251, at XI; UN Secretary-General, 'Implementing the Responsibility to Protect', A/63/677, 12 Jan. 2009.

²⁶³ See International Crisis Group, 'China's Growing Role in UN Peacekeeping', Asia Report N 166, 17 Apr. 2009.

²⁶⁴ See e.g., S. Panitchpakdi, *China and the WTO: Changing China, Changing World Trade* (2002); D.Z. Cass, B.G. Williams, and G. Barker (eds), *China and the World Trading System* (2003); F. Snyder, *The EU, the WTO and China* (2010).

²⁶⁵ See in particular N. Gallagher and W. Shan, *Chinese Investment Treaties: Policies and Practice* (2009).

²⁶⁶ UNCTAD, *2003 World Investment Report*, at 42.

while its OFDI was valued at a mere US\$2.7 billion.²⁶⁷ It is this asymmetry that fundamentally makes China overwhelmingly concerned with potential challenges to its sovereignty from investment treaties, rather than their positive effect in protecting its OFDI. As a result, like those of many other developing states, China's traditional investment treaties were very conservative. In particular, those treaties rigidly restrict disputes eligible for international arbitration to those concerning compensation arising from expropriation, and do not allow for resort to international arbitration without China's case-by-case consent.²⁶⁸ As a result, although many investor–state disputes arose in China, China had never appeared before an international tribunal until May 2011.²⁶⁹ Thus, international lawyers had little idea about how these treaties operated.

This picture is changing rapidly. While China maintains its attractiveness as an investment destination, its OFDI has leaped in the past decade. Between 2002 and 2010, the annual growth rate of China's OFDI was 49.9 per cent.²⁷⁰ In 2010, China's OFDI reached US\$68.8 billion, making it the fifth largest investment source.²⁷¹ Investment barriers and political risks have become important concerns for Chinese investors.²⁷² Pascal Lamy, the WTO Secretary-General, also recently warned that political factors will be an increasingly important obstacle to Chinese investors.²⁷³

In this new context, China's recent investment treaties have been oriented towards protecting its investments abroad. The most important change is that investment disputes eligible for international arbitration have been expanded to all legal disputes arising from investment.²⁷⁴ Notably, the first BIT representing China's new approach was signed in 1998 between China and Barbados, a developing state. In that BIT, China, for the first time, agreed (or required?) that any investor–state investment dispute could be submitted for international arbitration without specific consent.²⁷⁵ After surveying China–African BITs, Ewelukwa complained that there is 'little difference between China–African BITs and BITs between Africa and other Western countries'.²⁷⁶ Interestingly, Professor Chen An, a Chinese legal authority who has long been arguing for the NIEO, made an interesting proposition: China should maintain the traditional approach of case-by-case consent to international arbitration in BIT negotiations with developed states, while applying the new approach of general consent in negotiations with developing states.²⁷⁷

²⁶⁷ Ministry of Commerce of China, National Bureau of Statistics of China, and State Administration of Foreign Currency of China, *2010 Statistics Bulletin of China's Outward Foreign Direct Investment*, at 5.

²⁶⁸ See, e.g., China–UK BIT, Art. 7(1).

²⁶⁹ *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15), 24 May 2011.

²⁷⁰ *2010 Statistics Bulletin*, *supra* note 257, at 5.

²⁷¹ *Ibid.*, at 4, 5; *2011 World Investment Report*, *supra* note 162, at 9.

²⁷² See Note of the 4th China–US Strategy and Economic Dialogue (SED), 27 June 2008; Multilateral Investment Guarantee Agency, *2009 World Investment and Political Risks* (2010), at 84.

²⁷³ See 'China's expansion raises concern', available at: www.businessday.com.au/business/chinas-expansion-raises-concern-20110127-1qljt.html (visited 29 Jan. 2012.).

²⁷⁴ See, e.g., China–France BIT (2007), Art. 7.

²⁷⁵ China–Barbados BIT (1998), Art. 9.

²⁷⁶ Ewelukwa, *supra* note 109, at 558.

²⁷⁷ Chen, 'Distinguishing Two Types of Countries and Properly Granting Differential Reciprocity Treatment', 8 *J World Investment & Trade* (2007) 771.

Since September 2012, three investor–state cases have been brought by Chinese investors.²⁷⁸ As a rule,²⁷⁹ it can be assumed that Chinese investors will become one of the most active users of the investor–state arbitration mechanism since a significant amount of Chinese investment is undertaken in developing states where foreign investment, generally speaking, is more susceptible to political risks than that in developed states.²⁸⁰ However, it is too early to argue that this rule will apply to China because, if China wants to maintain its historically friendly ties with developing states, its government may make those state-run corporations which conducted more than 60 per cent of Chinese overseas investment in 2011²⁸¹ refrain from resort to international arbitration. Thus, a more probable picture may see investment disputes between Chinese investors and developing host states increasing dramatically, while international claims brought by Chinese investors may be far fewer than people anticipate. Nevertheless, these investment treaties are meaningful as Chinese investors may represent an option of ‘last resort’.

From the GP perspective, China may not stop at instrumentalizing investment treaties, i.e., protecting transnational investment in China and abroad. Rather, China may play a key role in reshaping the investment treaty regime. It is said that the ongoing China–US BIT negotiations provide a historical chance for two GPs to make law for the world. While law-making by GPs for third-party states is not new,²⁸² the China–US BIT programme is special. This is because China, as a largest developing state, a leading investment destination, and an increasingly important investment source, is well positioned to balance competing interests between developed and developing states; between capital exporting and capital importing states. Therefore, this author once argued that the China–US BIT programme ‘should not be limited to a grand bilateral bargain only’.²⁸³ Rather, it can be viewed as ‘open[ing] an unprecedented, equal dialogue between developed world and developing world, whereby it can enhance to reconstruct [*sic*] the current investment treaty regime’.²⁸⁴

3 *The Human Rights Issue: From Relativism to Universalism*

In the past two decades, human rights may have been the only issue to bring China under constant huge pressure and fierce criticism from the western world.²⁸⁵

²⁷⁸ *China Heilongjiang International & Technical Cooperative Corp., Qinhuangdaoshi Qinlong International Industrial, and Beijing Shougang Mining Investment v. Republic of Mongolia*, PCA Case No. 2009-23; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6; *Ping An Life Insurance Company of China, Limited and Ping An Insurance(Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29.

²⁷⁹ Most investment claims are brought by investors from a handful of capital exporting states, such as the US and the UK.

²⁸⁰ As of 2010, more than 90% of China’s stock OFDI is in developing states: *2010 Statistics Bulletin*, *supra* note 257, at 16.

²⁸¹ *Ibid.*, at 18.

²⁸² See Krisch, *supra* note 72, at 398–399.

²⁸³ Cai, *supra* note 125, at 507.

²⁸⁴ *Ibid.*, at 500.

²⁸⁵ See, e.g., Turack, ‘The Clinton Administration’s Response to Chin’s Human Rights’ Record’, 3 *Tulsa J Comparative & Int’l L* (1995) 1; Kent, ‘China and the International Human Rights Regime’, 17 *Human Rts Q* (1995) 3.

Comparatively speaking, China was blamed for its human rights record at home. But since the beginning of the 21st century, more concerns have been expressed as regards China's role in the human rights situation abroad. China has been blamed for hindering international endeavours to improve the human rights situation in those states with bad track records.²⁸⁶ In David Kampf's opinion, if people say that American exceptionalism has damaged international human rights, 'Chinese exceptionalism threatens more of the same'.²⁸⁷ More exaggeratedly, Ben Baxter argued that 'the rise of China' will lead to 'the fall of human rights'.²⁸⁸

Such criticisms are not totally unfounded. China's steadily increasing power, especially economic power, may make it more unyielding in the face of human rights accusations from western states, and the traditional means that pressed China to improve its human rights record, such as the MFN status accorded to China by the US,²⁸⁹ tend to be less effective. Furthermore, some developing states which are condemned by western states for their poor human rights record may, economically at least, turn to China, rather than western states as before.²⁹⁰

The underlying reason for these criticisms is that China, together with many other developing states,²⁹¹ has been considered to argue for a so-called relativism approach to human rights based on its cultural diversity, while it has argued against the universal approach which has been taken for granted among most western states.

Obviously, a thorough survey on the long-standing disputes between universality and relativism is beyond the scope of this article. Rather, it suffices to examine the evolution of relativism and universality in China from the perspective of discourse. A speech by Liu Huaqiu, then the Chinese Delegation Head to the 1993 World Conference on Human Rights, has often been cited as the authoritative expression of China's approach to relativism in human rights. Liu said:

The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development states have different human rights requirements. ... Thus, one should not and cannot think the human rights standard and model of certain countries as only proper ones and demand all other countries to comply with them.²⁹²

²⁸⁶ See Vega, 'China's Economic and Political Clout Grows in Latin America at the Expense of U.S. Interests', 14 *Minnesota J Global Trade* (2005) 377, at 393; Isanga, 'The United States, The European Union, and China: The Triadic Contest for Africa and Its Implications for International Human Rights and Democracy', 3 *NW Interdisciplinary L Rev.* (2010) 175, at 191–196.

²⁸⁷ Kampf, 'China's Rise and the Implications for International Human Rights', 1 *China Rights Forum* (2007) 43, at 43.

²⁸⁸ Baxter, 'The Rise of China and the Fall of Human Rights', *The Perspectivist*, 12 Apr. 2012.

²⁸⁹ See, e.g., Turack, *supra* note 285; R. Foot, *Rights beyond Borders: The Global Community and the Struggle over Human Rights in China* (2002).

²⁹⁰ See Isanga, *supra* note 286, at 198; Kampf, *supra* note 287, at 46.

²⁹¹ See generally W. Twining (ed.), *Human Rights, Southern Voices* (2009).

²⁹² Citing from M.C. Davis (ed.), *Human Rights and Chinese Value* (1995), at 13. For criticisms of China's relativism see, e.g., Davis, 'Human Rights in Asia: China and the Bangkok Declaration', 2 *Buffalo J Int'l L* (1995) 215; Civic, 'A Comparative Analysis of International and Chinese Human Rights Law', 2 *Buffalo J Int'l L* (1995) 285.

However, China's traditional approach to human relativism has changed. In 2005, China, for the first time, accepted 'universality' as a proper approach to human rights. The China–Russia Joint Statement (2005) provides that human rights are 'universal'.²⁹³ Interestingly, in this Joint Statement the diversity of cultures and civilizations, which was the justification for relativism in Liu's speech, is intentionally detached as an independent issue beyond human rights.²⁹⁴ In its first National Report to the UN Human Rights Council in 2008, China reported that it 'respects the principle of the universality of human rights', even though it still argued that '[g]iven differences in political systems, levels of development and historical and cultural backgrounds, it is natural for countries to have different views on the question of human rights'.²⁹⁵

Although China has recognized the universality of human rights on the international plane since 2005, the word 'universality' had never appeared in any official document in China until, in April 2009, China released its first Human Rights Action Plan. In that document, China's government argues that it has combined 'the universal principle of human rights and the concrete realities of China'.²⁹⁶ Furthermore, China's government appears to water down the so-called particularity of China, because this document mentions only the 'concrete realities of China', without further elaboration as before.

Granted, the implication of this change of discourse should not be overstated. Recognizing the concept of universality is one thing and implementing it is another. Furthermore, the value of 'universality' itself has been circumscribed because 'universality' has to coordinate with the 'indivisibility', 'interdependence', and 'interrelatedness' of all human rights.²⁹⁷ Nevertheless, if people consider that 'universality' is the very core of long confrontation between China and western states over human rights, this change of discourse is still important progress. The policy implications of this change of discourse have begun to emerge. For instance, although China used its veto in the UNSC as regards Syria, Wen Jiabo, China's Premier, openly supported the fact that 'the appeal for democracy by Arab people should be respected and be responded to seriously. The tide of democracy cannot be resisted by any power'.²⁹⁸ This argument deviates significantly from China's diplomatic tradition that it tended to defend, be silent on at least, human rights records in other developing states. Also, this change may imply that China's government will initiate or speed up some human rights programmes, in particular the ratification of the International Covenant on Civil and Political Rights that it signed in 1998,²⁹⁹ which would be a milestone event for China's human rights practice.

²⁹³ China–Russia Joint Statement (2005), *supra* note 67, pt 6.

²⁹⁴ *Ibid.*, pt 8.

²⁹⁵ China National Report Submitted in Accordance with Para. 15(A) of the Annex to Human Rights Council Res 5/1, /HRC/WG.6/4/CHN/1, Human Rights Council, 10 Nov. 2008, at para. 6.

²⁹⁶ National Human Rights Action Plan of China (2009–2010), Introduction, at para. 2. See also National Human Rights Action Plan of China (2012–2015), Introduction, at para. 8.

²⁹⁷ 2005 World Summit Outcome, *supra* note 75, at para. 13.

²⁹⁸ 'Wen Jiabo: The Appeal for Democracy by Arab People should Be Respected and Be Responded Seriously', available at: www.taizhou.com.cn/news/2012-03/14/content_549958.htm (visited 1 July 2012).

²⁹⁹ China repeatedly promises to speed up the ratification of this treaty: see, e.g., China National Report, *supra* note 295, at para. 11.

6 Conclusion

GPs are prominent in international relations, and their rise and fall often lead to structural changes of international relations. While many studies have been done about the effect of the supremacy of the US, an OGP, on international law since 2000, little attention has been paid to the rise of NGPs.

There are differences and similarities between OGPs and NGPs. Therefore, in shaping and reshaping international law, NGPs are positioned in a manner that is both different from and similar to the positioning of OGPs. The trend of the implications of the rise of NGPs for international law should not be hastily prejudged, and to what extent and how the rise of NGPs will influence international law will depend on the interaction between the power of NGPs and the power of international law.

The implications for international law accompanying the rise of NGPs include both challenges and promise. The lack of an effective mechanism for regulating GPs is a major source of these challenges. While a universal approach to regulating GPs is unnecessary and impractical, an approach tailored to specific contexts is necessary and possible. As for the fragmentation of international law in the context of GPs' rise and fall in the 21st century, it can be discerned that this phenomenon takes place more inside than outside the existing international legal order, and is contributed to by both NGPs and OGPs. Furthermore, in past centuries, the western, developed world has endeavoured to push the non-western, less-developed world to embrace the modernity of international law characterized by economic freedom, political democracy, and ideological individualism. However, in the economic field at least, the rise of NGPs makes OGPs realize that what they have been pursuing is becoming increasingly challenging for them and for international law.

The rise of NGPs arguably embodies the potential to remedy the 'development deficit' and the 'democracy deficit'. The 'Old NIEO', initiated by developing states in the 1960s, represents a historical endeavour to remedy the 'development deficit'. A lack of support from GPs is a major reason for its substantial frustration in the 1980s. A 'New NIEO' is emerging with the rise of NGPs. While, in some senses, this 'New NIEO' resumes where the 'Old NIEO' left off, compared with the 'Old NIEO' this new movement may be less confrontational and more cooperative because NGPs and OGPs have more common interest in regulating international economic affairs than before. While 'democracy' has become a new instrument enabling international law to encroach on the internal affairs of states, the 'democracy deficit' of international law itself has been paid far less attention. The rise of NGPs may help to remedy such deficit, and some progress has already been made.

As an NGP which has the potential to become a new superpower, China provides the ideal context within which to examine the relationship between NGPs and international law. From an examination of China's declaration of international legal policy, it seems that China, as an NGP, intends to act in a manner that is different from that of OGPs. However, an examination of China's latest legal practice concerning intervention, investment treaties, and human rights reveals how challenging it is for China to carry out its declared international legal policy. Nevertheless, in some sense, 'a quiet revolution' is indeed happening in Chinese international law.