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# THE RISE OF THE CORPORATE LEGAL ELITE IN THE BRICS: IMPLICATIONS FOR GLOBAL GOVERNANCE

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**Abstract:** Both international relations scholars interested in the future of global governance and sociologists of the legal profession studying the globalization of the legal services market are devoting increasing attention to rising powers, particularly the BRICS (Brazil, Russia, India, China, and South Africa). Yet very little of this rich literature addresses the intersection between these two theoretical domains. In this Article, we explore one such intersection that is likely to be increasingly important in the coming years: the role that the new corporate legal elite emerging within the BRICS countries will play in shaping global governance. We conceptualize three processes through which this new elite can exert its influence: participation in corporate legal networks, engagement in the integration of the legal industry and of the world economy generally, and facilitation of the global rule of capital. Based on the analysis of these processes in the BRICS context, this Article discusses the potential implications of this new corporate legal elite for global governance—both of the legal profession and of the world generally. We conclude by proposing a research agenda for advancing scholarship at the intersection of international relations and the sociology of the legal profession.

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## INTRODUCTION

The BRICS—Brazil, Russia, India, China, and South Africa—have been at the center of recent debates about the economic and political power shift from the traditional centers in the Global North to the rising powers of the Global South. This transformation began in the 1990s as each of the BRICS undertook economic reforms through which each country has more or less opened its markets to become more deeply integrated into the world economy.<sup>1</sup> Since 2000, the BRICS deepened their connection—and their impact on the world economy—by shifting from a model of globalization based primarily on inbound investment, to one in which companies based in these jurisdictions are also significant sources of outward investment.<sup>2</sup> The economic and political effects of these efforts are dramatic. By 2020, the combined economic output of Brazil, China, and India alone will surpass the aggregate production of Canada, France, Germany, Italy, the United Kingdom, and the United States.<sup>3</sup> As a political cooperation mechanism, BRICS has gone beyond being an acronym to emerge as a force for advancing the countries' joint interests, promoting multi-polarity and coordinating responses to key global challenges.<sup>4</sup>

Predictably, the opening of the BRICS markets and their increasing influence on the world stage has fueled a growing demand within each country for new laws, regulations, and administrative apparatus to govern this new economic activity and to interface with the broader economic and political environment.<sup>5</sup> This, in turn has created the need for lawyers who are capable of practicing law within this new legal and regulatory environment, particularly in corporate law fields such as

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<sup>1</sup> See, e.g., Antonio de Moura Borges et. al., *The BRIC Context in a Globalized World and Foreign Direct Investment in Brazil*, 18 LAW & BUS. REV. AM. 329, 343, 347–50 (2012).

<sup>2</sup> See U.N. Conference on Trade and Dev., Global Investment Trade Monitor: Special Edition: The Rise of BRICS FDI and Africa (Mar. 25, 2013), [http://unctad.org/en/PublicationsLibrary/webdiaeia2013d6\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2013d6_en.pdf). Over the past decade, foreign direct investment (FDI) going into the BRICS has more than tripled, totaling \$263 billion in 2012 (rising from six percent to twenty percent of world FDI), and FDI from the BRICS has increased from \$7 billion in 2000 to \$126 billion in 2012 (rising from one percent to nine percent of the world FDI). See *id.*

<sup>3</sup> UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2013, at iv (2013), available at <http://www.undp.org/content/dam/india/docs/human-development/HDR/HDR2013-Report-English.pdf>.

<sup>4</sup> For an overview of the scale and scope of BRICS cooperation, see *Fifth BRICS Summit Declaration and Action Plan*, BRICS, (Mar. 27, 2013), <http://www.brics5.co.za/fifth-brics-summit-declaration-and-action-plan/>.

<sup>5</sup> See Claire Plarre, *BRICSA: The Evolution of Five Legal Markets in Emerging World Economies*, CROSS-BORDER Q., Jan.–Mar. 2007, at 23, 23–27.

mergers and acquisitions, project finance, securities, and initial public offerings which have been fueled by the rapid rise in the number of foreign and domestic companies operating in the BRICS.<sup>6</sup> Although each of the BRICS countries has, to a greater or lesser extent, called on the growing number of international law firms seeking to serve these new markets to provide this necessary expertise—a subject to which we will return below<sup>7</sup>—each has also developed an important domestic corporate legal sector as well. Today, this new BRICS corporate legal elite, by which we mean lawyers who work in law firms based in these jurisdictions that serve a clientele composed primarily of foreign and domestic corporations, and lawyers who work in the internal legal departments of the growing number of corporations based in the BRICS, has significantly increased in size and importance in each of these jurisdictions.<sup>8</sup> Each country can now boast of several law firms comprised of hundreds—and in the case of China, more than one thousand—lawyers, as well as corporate legal departments, such as the five-hundred-lawyer general counsel office of India’s Tata Group, that are almost as large.<sup>9</sup>

Both the rise of the BRICS as important economic powers and the resulting creation of a new and increasingly vibrant corporate legal sector in these countries have been the subject of significant scholarly inquiry by both international relations scholars and academics writing about the sociology of the legal profession. Not surprisingly, the former have tended to focus on the BRICS countries as rising powers in global governance, while the latter have concentrated on how the new corporate legal sector in these countries has emerged, and the resulting struggle between these “domestic” providers and the “foreign” lawyers

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<sup>6</sup> See, e.g., Mihaela Papa & David B. Wilkins, *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, 18 INT’L J. LEGAL PROF. 175, 180 (2011) (discussing the demand for corporate attorneys in India).

<sup>7</sup> See discussion *infra* Part III.

<sup>8</sup> David Trubek, Presentation at the Conference on the Chinese Legal Profession: Globalization, Lawyers, and Emerging Economies: Preliminary Thoughts About the GLEE Project (June 11, 2011), available at [http://www.law.harvard.edu/programs/plp/pdf/Preliminary\\_Thoughts\\_on\\_GLEE\\_Project.pdf](http://www.law.harvard.edu/programs/plp/pdf/Preliminary_Thoughts_on_GLEE_Project.pdf).

<sup>9</sup> For example, Chinese law firm Dacheng had 2027 lawyers and YingKe had 1583 in 2011. See *Asia’s 50 largest Law Firms of 2011*, ALB: BRIEF (Apr. 16, 2012), <http://mideast.legalbusinessonline.com/surveys-and-ranking/asias-50-largest-law-firms-of-2011/108186>. For a discussion of India’s Tata Group and other rising powers’ corporate legal departments, see David B. Wilkins, *Is the In-House Counsel Movement Going Global?*, 2012 WIS. L. REV. 251, 273–84.

who also seek to serve these lucrative legal markets.<sup>10</sup> Relatively little of this rich literature, however, addresses the intersection of these two developments by examining the possible implications of the rising corporate legal elite in the BRICS for global governance itself.

This lack of attention is particularly noteworthy given the long tradition across multiple disciplines of studying the important role played by lawyers in the United States and other Western democracies in domestic governance.<sup>11</sup> Indeed, there is already a rich and growing literature concerning the political impact of the United States' and United Kingdom's corporate legal elite on global governance.<sup>12</sup> Yet there is almost no discussion about whether the new corporate elite arising within the BRICS is likely to have a similarly important impact—one

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<sup>10</sup> Over the past decade, there has been a proliferation of literature on emerging, rising, or new powers, particularly China and India, and their impact on global governance. *See, e.g.*, KISHORE MAHBUBANI, *THE NEW ASIAN HEMISPHERE: THE IRRESISTIBLE SHIFT OF GLOBAL POWER TO THE EAST* 235–40 (2008); AMRITA NARLIKAR, *NEW POWERS: HOW TO BECOME ONE AND HOW TO MANAGE THEM* 1–4 (2010). The study of BRICS is of a more recent date. *See, e.g.*, Christian Brüttsch & Mihaela Papa, *Deconstructing the BRICS: Bargaining Coalition, Imagined Community or Geopolitical Fad?*, 6 CHINESE J. INT'L POL. (forthcoming 2013). Legal profession scholars have paid extensive attention to the emerging elite's imports of expertise and country-specific studies of corporate lawyers and market opening. *See, e.g.*, YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 5–9 (2002); Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 58–61 (2010); Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771, 771 (2008); Wilkins, *supra* note 9, at 256. *See generally* Fabiano Engelmann, *Globalization and State Power: International Circulation of Elites and Hierarchies in the Brazilian Legal Field*, 55 DADOS 487 (2012), available at [http://www.scielo.br/scielo.php?pid=S0011-52582012000200007&script=sci\\_abstract](http://www.scielo.br/scielo.php?pid=S0011-52582012000200007&script=sci_abstract) (English abstract).

<sup>11</sup> *See, e.g.*, TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 23–26 (1987); Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 INT'L POL. SOC. 128, 131–133 (2008) (discussing how lawyers shape the representations and principles of EU government and noting how they invented European business law as a new legal specialty).

<sup>12</sup> *See generally* J.V. Beaverstock et al., *The Long Arm of the Law: London's Law Firms in a Globalizing World Economy*, 31 ENV'T & PLAN. 1857 (1999) (noting the role of law firms as major players in the globalization of law); John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169 (1996) (noting how large law firms construct legal arrangements to enable transnational business); Glenn Morgan, *Transnational Actors, Transnational Institutions, Transnational Spaces: The Role of Law Firms in the Internationalization of Competition Regulation*, in *TRANSNATIONAL GOVERNANCE* 139 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., Cambridge Univ. Press 2006) (noting how American and European law firms engage in transnational institution-building in the economic sphere).

that may resemble the economic and political impact that these states are beginning to wield generally.<sup>13</sup>

The remainder of this Article is intended to lay a conceptual framework for addressing this important gap. Specifically, we examine the possible implications of the rise of the BRICS corporate legal elite in two related arenas of global governance. The first arena looks specifically at the legal profession and asks how these new corporate lawyers are likely to influence debates over the creation of global governance mechanisms for the legal profession itself. The second arena looks more broadly to how corporate lawyers in the BRICS might affect the debate over the continuing viability of liberal internationalism—a world order characterized by the emphasis on “open markets, international institutions, cooperative security, democratic community, progressive change, collective problem-solving, the rule of law,”<sup>14</sup> and promoted by the United States as the preeminent superpower.

To investigate these arenas, we propose a tripartite perspective that builds on insights from both international relations and socio-legal scholars.<sup>15</sup> The first perspective examines networks of collective action. Lawyers have long used bar associations and other formal and informal organizations to present their views on public policy issues and to promote their collective interests. As the legal profession itself has become increasingly globalized, so too have the organizations and networks through which lawyers seek to exert their collective influence. What—if any—role are BRICS corporate lawyers playing in these networks, and what might we expect them to do in these arenas in the coming years? Similarly, what role—if any—are these international networks playing in shaping how BRICS corporate lawyers understand and express their own collective interests? Investigating such questions, we argue, will advance both the international relations imperative to map the key actors and platforms that are likely to influence global governance, as well as the socio-legal interest in understanding the extent to which these new

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<sup>13</sup> Although the notions of an economic and political power shift are well established, the idea of a “legal” power shift has not yet been discussed.

<sup>14</sup> G. John Ikenberry, *Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order*, 7 PERSP. ON POL. 71, 71–72 (2009) (discussing various models of liberal international order).

<sup>15</sup> See generally Klaus Dingwerth & Philipp Pattberg, *Global Governance as a Perspective on World Politics*, 12 GLOBAL GOVERNANCE 185, 185–98 (2006) (noting that global governance as a concept is used to capture the reality of contemporary world politics, describe a long-term project of global integration, and represent a hegemonic discourse to disguise negative effects of neoliberal economic development).

corporate lawyers will promote or undermine collective action within the bar.

The second perspective examines the rise of the BRICS corporate elite through the lens of liberal internationalism. Does this new elite seek to promote or undermine the prospects of market liberalization, either in the legal services sector or in the economy generally? For legal profession scholars, liberalization challenges the notion of the legal profession as different from other services. For global governance scholars, internationalization of the legal profession is a new governance frontier as these actors' international ambitions potentially generate demand for more global regulation.

The third perspective argues for examining the rise of the new corporate legal elite in the BRICS through the lens of the spread of global capital. As indicated above, the emergence of this elite is expressly tied to the creation of a new corporate sector in these countries and the greater integration of their markets into the world economy. But will this integration simply be a euphemism for the spread of global capital? From the perspective of international relations scholars, this question raises fundamental concerns about the privatization of global governance. For sociologists of the legal profession, it raises the specter of the "corporatization" of the legal profession, and the concomitant demise of law as a "learned profession."

The remainder of this Article proceeds in five additional Parts. In Part I, we discuss the rise of the corporate legal elite in the BRICS. Parts II–IV examine the impact of this new legal elite on the governance of the legal profession and the liberal world order through the three perspectives outlined above.<sup>16</sup> Part V briefly concludes by summarizing the discussion and identifying directions for an empirical research agenda to test some of our hypotheses and to further explore the important connection between the rising corporate legal elite in the BRICS and global governance.

#### I. CORPORATE LAWYERS IN THE BRICS: CONCEPTUALIZING THEIR INFLUENCE ON GLOBAL GOVERNANCE

Globalization has led to the "widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social

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<sup>16</sup> See generally, e.g., PHILIPP H. PATTBERG, PRIVATE INSTITUTIONS AND GLOBAL GOVERNANCE: THE NEW POLITICS OF ENVIRONMENTAL SUSTAINABILITY (2007) (analyzing the emergence of complementary systems of private governance).

life, from the cultural to the criminal, the financial to the spiritual.”<sup>17</sup> Increasingly, lawyers are being affected by this interconnectedness.<sup>18</sup> Yet, as businesses, law firms have been late to globalize due to the strict and nationally specific regulation of practice, the existence of few global legal products, and many regulatory differences between markets.<sup>19</sup> Currently the law firms with the highest revenues in the world are located in the United States and the United Kingdom, with New York and London as the centers of the global legal market.<sup>20</sup> These law firms operate at the intersection of global processes and local legal systems and play a central role in creating and enforcing the laws that form the normative infrastructure for global capitalism.<sup>21</sup> They specialize in areas of substantive law that are transnational in nature including international commercial arbitration, international trade and investment law, financial law, mergers and acquisitions, international sale of goods, capital market transactions, debt restructuring, and other similar cross-border activity.<sup>22</sup>

Until very recently, there has been little evidence of law firms based in emerging economies challenging Western dominance in the global legal sector, whether in terms of revenue, number of lawyers, or offices abroad. Although developing rapidly, most corporate law firms based in the BRICS are still relatively small by global standards.<sup>23</sup> More-

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<sup>17</sup> DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 2 (1999).

<sup>18</sup> See Gary A. Munneke, *Managing and Marketing a Practice in a Globalized Marketplace for Professional Services*, N.Y. ST. B.J., Sept. 2008, at 39, 39.

<sup>19</sup> See Beaverstock et al., *supra* note 12, at 1874; Susan Segal-Horn & Alison Dean, *The Rise of Super-Elite Law Firms: Toward Global Strategies*, 31 SERVICE INDUSTRIES J. 195, 196 (2011).

<sup>20</sup> *The 2011 Global 100: Most Revenue*, AM. LAW., <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202514393371> (last visited May 12, 2013). Although some of the highest-grossing law firms on this list have few international offices—for example, Cravath, Swaine & Moore, Wachtell, Lipton, Rosen & Katz in New York, and Slaughter & May in London—even these firms have a significant global reach through their extensive representation of non-U.S. or U.K. clients and presence in important transactions around the world.

<sup>21</sup> See, e.g., John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation*, 59 CURRENT SOC. 507, 507–08 (2011) (discussing large law firms’ pronounced influence on the development of the international legal market).

<sup>22</sup> See *id.* at 512.

<sup>23</sup> For example, India’s Amarchand Mangaldas, which is one of the largest law firms in that jurisdiction, has approximately 500 lawyers, which would make it a “mid-sized” law firm by U.S. standards. See David L. Brown, Editor’s Note, *Expanding the Playing Field*, NAT’L L.J. (Apr. 16, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?germane=1202489565842&id=1202548964711>. For Asian law firm sizes, see *supra* note 9.



over, even the largest of the new BRICS law firms have been slow to expand abroad.<sup>24</sup>

There is growing evidence, however, that corporate firms in the BRICS are beginning to move beyond these traditional limitations. Firms based in China are the most obvious example.<sup>25</sup> Since 2000, several large Chinese firms have opened international offices or entered into mergers or alliances with non-Chinese firms, culminating with the blockbuster 2012 merger between China's one-thousand-lawyer King & Wood and eight-hundred-lawyer Mallesons Stephens Jaques, one of the largest and most prestigious law firms in Australia.<sup>26</sup> The combined firm of King & Wood Mallesons is now the largest law firm in Asia, and if the rumors about a possible merger/acquisition with firms such as SJ Berwin (U.K.), Nixon Peabody (U.S.), or various other partners in Canada, Eastern Europe, or Southeast Asia come to fruition, King & Wood could quickly become one of the largest law firms in the world.<sup>27</sup> Whether or not these additional mergers take place, however, there is little doubt that King & Wood Mallesons' stature as an important regional player—and that the competence, sophistication, and at least regional reach of other important emerging-market law firms—is likely to increase significantly in the coming years.

Unlike law firms from the BRICS, multinational companies from these economies have already made their impact known outside of their home markets, with in-house lawyers playing an increasingly important role in helping to engineer this global expansion. Thus from 2006 to 2012, the number of BRICS companies in *Fortune's* Global 500 list of the world's largest corporations almost tripled from thirty-five to ninety-

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<sup>24</sup> See, e.g., Friederike Heine, *The Teeming Crowd—Is India's Dynamic Legal Elite Built to Last?*, LEGALWEEK.COM (Mar. 30, 2012), <http://www.legalweek.com/legal-week/analysis/2164473/teeming-crowd-indias-dynamic-legal-elite-built> (discussing reasons why some top Indian law firms may struggle to expand internationally).

<sup>25</sup> See Yun Krieglér, *China's Yingke Expands into Milan and Brussels*, LAW. (Mar. 18, 2003), <http://www.thelawyer.com/news-and-analysis/regions/asia-pacific/chinas-yingke-expands-into-milan-and-brussels/3002774.article>; Ariel Tung, *Where Chinese Legal Eagles Dare to Soar*, CHINA DAILY (Mar. 16, 2012), [http://usa.chinadaily.com.cn/weekly/2012-03/16/content\\_14845573.htm](http://usa.chinadaily.com.cn/weekly/2012-03/16/content_14845573.htm).

<sup>26</sup> Debra Mao & Joe Schneider, *China's King & Wood, Mallesons Combine to Form Asia's Largest Law Firm*, BLOOMBERG NEWS (Dec. 15, 2011), <http://www.bloomberg.com/news/2011-12-15/king-wood-mallesons-combine-to-create-asia-s-largest-law-firm.html>.

<sup>27</sup> Yun Krieglér, *King & Wood Mallesons Looks to Canada and Singapore for Future Expansion*, LAW. (June 18, 2012), <http://www.thelawyer.com/king-and-wood-mallesons-looks-to-canada-and-singapore-for-further-expansion/1012969.article>; James Swift, *King & Wood Mallesons Looks West for International Expansion*, LAW. (May 21, 2012), <http://www.thelawyer.com/king-and-wood-mallesons-looks-west-for-international-expansion/1012641.article>.

six.<sup>28</sup> These corporations control huge human, financial, technological, and environmental resources, and engage extensively abroad where they face multiple legal challenges. As a result, it is not surprising that many of these corporations have begun to develop increasingly large and sophisticated internal legal departments.<sup>29</sup> In-house counsel not only lends legitimacy to the choices corporations make as they engage in a proliferating number and variety of transactions, but it also forces corporations to think about responsible investment and business practices and provides early legal input into strategic decisions. For the most part, the internal counsel of corporations in the BRICS, like the lawyers working in the corporate law firms in those jurisdictions, have not yet reached the same level of technical competence and sophistication—or the same stature and authority both inside the organization and within the bar generally—that has come to characterize their Western counterparts.<sup>30</sup> Nevertheless, as with the new BRICS corporate law firms, the trend appears to point clearly in the direction of the growing sophistication and importance of in-house counsel working within BRICS-based companies.<sup>31</sup>

Given these developments, what influence will this new corporate legal elite in the BRICS have on global governance? The Commission on Global Governance defined this concept as “the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken.”<sup>32</sup> The concept has been used to describe various forms of coordination of regulatory activities in the global sphere, where demand for regulation cannot be met by a single state, the world government does not exist, and many non-state actors—such as international organizations, civil society organizations, and businesses—contribute to regulatory outcomes.<sup>33</sup> Global governance has evolved over the past decades

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<sup>28</sup> *Global 500: Our Annual Ranking of the World's Largest Corporations (2012)*, CNN MONEY, [http://money.cnn.com/magazines/fortune/global500/2012/full\\_list/index.html](http://money.cnn.com/magazines/fortune/global500/2012/full_list/index.html) (last visited May 12, 2013).

<sup>29</sup> See Wilkins, *supra* note 9, at 288–89.

<sup>30</sup> See Catherine Dunn, *Setting the Agenda for Corporate Counsel in China and India*, CORP. COUNS. (Dec. 6, 2012), <http://www.law.com/corporatecounsel> (search website for “Setting the Agenda”; then scroll down results window to Dec. 6, 2012 and follow the hyperlink with the article’s title).

<sup>31</sup> See Wilkins, *supra* note 9, at 271–84.

<sup>32</sup> COMM’N ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 2* (1995).

<sup>33</sup> See generally James N. Rosenau, *Governance, Order, and Change in World Politics*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1* (James

due to greater “juridification of political, social, and economic life as law [became] utilized to legitimate increasingly varied claims to authority,” and regulation has come to reflect greater pluralism.<sup>34</sup> At the same time, the influence of private actors in shaping global governance outcomes has been receiving more attention.<sup>35</sup> Private actors are now cooperating in the areas of rulemaking, standard-setting, and organization of industrial sectors—including the legal services sector.<sup>36</sup> As economic power becomes concentrated in the BRICS, private actors from these jurisdictions will be able to shape global governance according to their own experiences and value systems. Although BRICS as a political platform for transitioning to multi-polarity is only beginning to engage private actors, their influence is primarily exercised separately from interstate strategies and activities.<sup>37</sup>

Gauging the impact of the rising corporate legal elite in the BRICS on global governance naturally starts with exploring the elite’s potential for joint action by examining the identity of those who constitute the elite and identifying what channels of influence they use. This is in line with the understanding of global governance as an analytical perspective on the current transformations in global political organization, where the mode of steering is based on the logic of arguing in the private sector as well as traditional bargaining.<sup>38</sup> Global governance scholars analyze actors, their collaboration, and seek to explain the diffusion of rules or norms among them across institutional settings.<sup>39</sup> Similarly,

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N. Rosenau & Ernst-Otto Czempiel eds., 1992); Robert Latham, *Politics in a Floating World: Toward a Critique of Global Governance*, in APPROACHES TO GLOBAL GOVERNANCE THEORY 23 (Martin Hewson & Timothy J. Sinclair eds., 1999).

<sup>34</sup> A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY 2 (2003).

<sup>35</sup> Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3, 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); Karsten Ronit & Volker Schneider, *Global Governance Through Private Organizations*, 12 GOVERNANCE 243, 243 (1999).

<sup>36</sup> CUTLER, *supra* note 34, at 191; A. Claire Cutler et al., *Private Authority and International Affairs*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 3, 4 (A. Claire Cutler et al. eds., 1999).

<sup>37</sup> Apart from BRICS Business Council meetings, most of the official BRICS cooperation currently focuses on facilitating sectoral cooperation among government ministries.

<sup>38</sup> Dingwerth & Pattberg, *supra* note 15, at 188 (discussing analytical approaches to global governance and steering mechanisms beyond the state); Thomas Risse, *Global Governance and Communicative Action*, 39 GOV'T & OPPOSITION 288, 288 (2004) (noting that arguing and communicative action are significant tools for non-hierarchical steering modes in global governance).

<sup>39</sup> See generally MARGARET P. KARNS & KAREN A. MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE (2004) (providing a comprehensive overview of actors, processes, and challenges in global governance); David P.

legal profession scholars examine how legal elites use communities of practice to connect together and transfer knowledge.<sup>40</sup> Both literatures have focused on actors' participation in networks or their networking process as a way to examine their ability to influence outcomes.<sup>41</sup> Not only is the vocabulary of networks broader than international politics and allows for capturing private actors and transnational dynamics, but networks lend themselves to the study of socialization of new actors into established hierarchies. As the new legal elite rises, it may mimic and adopt the architectures of collective action from abroad and seek to use similar means of influence. Alternatively, it may develop in its own culturally specific way without replicating outside models.

The second process through which the rising corporate legal elite can impact global governance is by engaging in the process of global integration. The immediate place to look is in relation to the global integration of the legal industry itself. Global governance is a political response to the gap between accelerating global interactions and the limited steering capacity of national regulators.<sup>42</sup> Beginning in the last decades of the twentieth century, law has been transformed from one of the most locally bound occupations, in which constraints imposed by substantive law, language, culture, and tradition effectively confined lawyers to national, or in many cases sub-national domains, to one of increasingly global scale and scope, particularly in the corporate sector.<sup>43</sup> National legal fields have been restructuring and have become more internationalized, which has created significant pressure to abandon the largely domestic regulatory structures governing legal practice.<sup>44</sup> This has been visible in the proliferation of organizations, policy instruments, rules, procedures, and norms that regulate professions in

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Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13 GOVERNANCE 5, 5–6 (2000) (discussing policy diffusion).

<sup>40</sup> See, e.g., James Faulconbridge et al., *Institutional Legacies in TNCs and Their Management Through Training Academies: The Case of Transnational Law Firms in Italy*, 12 GLOBAL NETWORKS 48, 48–49 (2012).

<sup>41</sup> See JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 4–5 (2005); MILES KAHLER, NETWORKED POLITICS: AGENCY, POWER, AND GOVERNANCE 2 (2009); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 5–7 (2004).

<sup>42</sup> See Dingwerth & Pattberg, *supra* note 15, at 197–98.

<sup>43</sup> See, e.g., D. Daniel Sokol, *Globalization of Law Firms: A Survey of Recent Literature and an Agenda for Future Study*, 14 IND. J. GLOBAL LEGAL STUD. 5, 5 (2007) (analyzing various expanding law firms' responses to clients' global needs).

<sup>44</sup> David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 477 (1994); see also John Flood, *Transnational Lawyering: Clients, Lawyers, and Regulation*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 176, 192–93 (Leslie C. Levin & Lynn Mather eds., 2012).

the international context.<sup>45</sup> To date, most of the discussion about this trend has been from the perspective of the role played by lawyers from the United States and the United Kingdom in either supporting or opposing a more global regulatory regime. But as corporate lawyers from the BRICS and other emerging economies grow in power and stature it is plausible that they may begin to play an important role in debates over the scope and structure of any new global regulatory regime—and the broader implications of any new regime for the legal profession's claims to distinctiveness and the potential evolution of a global civic ethics.<sup>46</sup>

Moreover, the fact that this new legal elite is rising within powers that are non-Western raises important implications for their role in the project of liberal integration as a whole. At the state level, the BRICS countries have already begun to flex their collective muscles to steer the trajectory of global governance toward multi-polarity by instituting a rapidly escalating set of networked cooperation mechanisms. These mechanisms now extend across a wide range of sectors, including meetings of government ministers in areas such as foreign affairs, trade and investment, finance, health, food and agriculture, and development, as well as the heads of statistical institutions, competition authorities, development banks, magistrates and judges, and even business leaders and research institutes.<sup>47</sup> Although cooperation in the legal sector currently lags behind many of these other areas, it is plausible that the emergence of a new globalizing corporate sector might spur broader cooperation in the legal field. Whether or not BRICS corporate lawyers engage in formal cooperation, however, their proximity to important corporate decision-makers—and therefore to political leaders who are increasingly required to at least listen to these corporate titans—make these lawyers well-positioned to play an important role in shaping how BRICS political leaders decide either to support or to resist the prevailing liberal internationalism.

The third process through which corporate lawyers may influence global governance is with respect to their potential influence on

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<sup>45</sup> See KARNs & MINGST, *supra* note 39, at 19.

<sup>46</sup> Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"* 2008 J. PROF. LAW. 189, 190–92; David B. Wilkins, Presentation at the World Justice Forum: Globalization, Lawyers and the Rule of Law: Private Practice and Public Values in the Global Market for Corporate Legal Services (June 21, 2011), available at [http://www.law.harvard.edu/programs/plp/pdf/Globalization\\_Lawyers\\_Rule\\_of\\_Law.pdf](http://www.law.harvard.edu/programs/plp/pdf/Globalization_Lawyers_Rule_of_Law.pdf).

<sup>47</sup> See *supra* note 4.

whether there is a global rule of capital. A critical view of global governance suggests that the international system favors corporate and private interests through the pursuit of a neoliberal agenda and promoting a set of international legal norms (e.g., free trade) in conflict with local social context and national culture.<sup>48</sup> Concerns that neoliberalism has failed in ensuring the well-being of people in both rich and poor economies is wide-spread and has resulted in significant resistance to many policies promulgated by international economic institutions. Given that corporate lawyers in the BRICS act as advocates for the interests of global companies—both multinationals based in the West and the growing number of large companies based in the BRICS—it is easy to see these lawyers as “partners with power” in a campaign to corporatize global governance.<sup>49</sup> At the same time, however, corporate lawyers have been instrumental in pushing for the spread of the rule of law—including an independent judiciary, anti-corruption, and even basic human rights—as a way of ensuring the kind of predictability and stability upon which functioning markets ultimately depend.<sup>50</sup> Corporatization of global governance has also led to a proliferation of mechanisms to keep corporations accountable for their actions and monitor their misconduct, and has transformed some of these corporations from problem causers to problem solvers and norm entrepreneurs in international politics.<sup>51</sup> Therefore, the rising BRICS legal elite can either enhance or diminish access to the legal system and formal equality for individuals and groups, just as it can either support or hinder the promotion of a broader conception of individual rights and political accountability.<sup>52</sup>

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<sup>48</sup> Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT'L L. 1, 54–55 (2000); Peter Wilkin, *Against Global Governance? Tracing the Lineage of the Anti-Globalisation Movement*, in GLOBAL GOVERNANCE, CONFLICT AND RESISTANCE 78, 83 (Feargal Cochrane et al. eds., 2003).

<sup>49</sup> See generally ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988) (noting the change in the role of large law firms in relation to their clients and society at large). Although Nelson was primarily concerned with the extent to which corporate lawyers reflect the power of their powerful clients, it is also true that they play an important role in projecting that power as well, resulting in a widening of the gap between the legal haves and the have-nots. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103–04 (1974).

<sup>50</sup> See Yves Dezalay & Bryant G. Garth, *Corporate Law Firms, NGOs, and Issues of Legitimacy for a Global Legal Order*, 80 FORDHAM L. REV. 2309, 2310–12 (2012).

<sup>51</sup> See, e.g., JOHN RUGGIE ET AL., THE IMPACT OF CORPORATIONS ON GLOBAL GOVERNANCE: A REPORT OF THE EMPIRE AND DEMOCRACY PROJECT 31 (2004). See generally ANNE-GRET FLOHR ET AL., THE ROLE OF BUSINESS IN GLOBAL GOVERNANCE (2010).

<sup>52</sup> These perspectives are elaborated in more detail in Wilkins, *supra* note 46.

In the following Parts, we examine preliminary evidence of the impact of the rise of the corporate legal elite in the BRICS in light of each of these processes: participation in corporate legal networks, engagement in the integration of both the legal industry and the liberal regime generally, and the facilitation of the global rule of capital.

## II. CORPORATE LAWYERS' NETWORKS AND GOVERNANCE ARRANGEMENTS

While individual actors such as major multinational companies or large-scale global law firms from China or India are certainly relevant in their own right, the question of their impact on global governance is primarily the result of the collective influence of a number of individual actors and their practices. Such influence can be intended or strategic, as corporate lawyers engage in cooperation, organize in associations, and actively adjust their behavior to achieve mutually beneficial outcomes.<sup>53</sup> However, corporate lawyers' influence can also be indirect. Transnational lawmaking can be driven by the practical problem-solving and sense-making efforts of corporate lawyers that result in an accumulation of social practices and trickle-up.<sup>54</sup> The evolution of the international arbitration regime is a case in point: here both strategic evolution of the field by a group of elite lawyers and day-to-day problem-solving by ordinary practitioners steer the new private regime.<sup>55</sup>

In addition to participating in traditional bar organizations, corporate lawyers in the BRICS countries have formed a number of business associations in order to formalize the norms and practices of the profession, engage in joint activities, and represent their interests within the political structure.<sup>56</sup> These associations are meeting independently and comprise both law firms and in-house counsel organizations.<sup>57</sup> In

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<sup>53</sup> See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 243–59 (1984) (noting the benefits of international cooperation).

<sup>54</sup> Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 *ORG.* 643, 654 (2007).

<sup>55</sup> YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 23–33 (1996); see David J. McLean, *Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration*, 30 *U. PA. J. INT'L. L.* 1087, 1089–93 (2009) (discussing the shift from litigation in foreign courts to private arbitration as a means of resolving disputes).

<sup>56</sup> See, e.g., Lalit Bhasin, *Welcome to SILF*, *SOC'Y INDIAN L. FIRMS*, <http://www.silf.org.in/1/Introduction.htm> (last visited May 14, 2013).

<sup>57</sup> See, e.g., *id.*

India, the Society of Indian Law Firms (SILF) was established in 2000 to provide a forum for the exchange of ideas among India's emerging corporate law firms and has been used as a platform for cooperation, education, and political action.<sup>58</sup> In Brazil, elite law firms formed an association called the Law Firm Study Center in 1983, which proved central in helping private lawyers build capacity for participation in international institutions such as the World Trade Organization's (WTO) Dispute Settlement Body.<sup>59</sup>

Similarly, in-house counsel have engaged in cooperative action by forming associations oriented toward exchange of views, educational and networking conferences, increasing the efficiency of legal services, promoting corporate lawyers, and encouraging professional and ethical conduct among members. Examples of such associations include the long-standing Corporate Lawyers Association of South Africa (formed in 1982 as the Association of Legal Advisers of South Africa) with five hundred members, the Russian Corporate Counsel Association (which includes both Russian and multinational members), and the Hong Kong Corporate Counsel Association established in 2003.<sup>60</sup>

Although the two key parts of the corporate legal bar we are examining—top law firms and in-house counsel—have many similarities, their associational dynamics also appear to be different in important respects. Both of these segments of the corporate bar thrive through corporate globalization, which not coincidentally raises the demand for their services.<sup>61</sup> Accordingly, they share the same mutual goal of facilitating corporate globalization through the removal of national and local restrictions on trade, investment, finance, and privatization of dispute settlement. They also share the goal of building capacity in new areas of practice where domestic knowledge is underdeveloped.

Despite these similarities, there are likely to be significant differences in the interests of these two types of corporate actors—differences

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<sup>58</sup> *Genesis of the Society of Indian Law Firms*, SOC'Y INDIAN L. FIRMS, <http://www.silf.org.in/2/Brief-History.htm> (last visited May 14, 2013).

<sup>59</sup> *See generally Meet the CESA*, CENTRO DE ESTUDOS DAS SOCIEDADES DE ADVOGADOS (CESA), [http://www.cesa.org.br/conheca\\_o\\_cesa.html](http://www.cesa.org.br/conheca_o_cesa.html) (last visited Apr. 25, 2013).

<sup>60</sup> *See generally About CLASA*, CORP. LAW. ASS'N S. AFR. (CLASA), <http://www.clasa.co.za/about-us/> (last visited May 13, 2013); *About the RCCA*, RUSS. CORP. COUNS. ASS'N, <http://xn-jlahh9c.xn-p1ai/en/about/index.shtml> (last visited May 13, 2013); H.K. CORP. COUNS. ASS'N, <http://hkcca.wildapricot.org/> (last visited May 13, 2013).

<sup>61</sup> James C. Moore, *Economic Globalization and Its Impact upon the Legal Profession*, N.Y. ST. B.J., May 2007, at 35, 37; Liu, *supra* note 10, at 771 (discussing the connection between globalization and the growth of large law firms); Wilkins, *supra* note 9, at 256 (discussing the connection between globalization and the in-house counsel movement).



that stem from important distinctions in status and organizational structure between the two groups.<sup>62</sup> In most jurisdictions outside of the United States, in-house counsel have a different—and generally inferior—professional status than the corporate lawyers who work in law firms.<sup>63</sup> Indeed, even in many European countries, corporate in-house counsel are not considered full members of the bar, and therefore are not entitled to all of the perquisites of professional status, most notably the ability to have communications shielded by the attorney-client privilege.<sup>64</sup> This difference in professional status plausibly affects the kinds of networks in-house and outside lawyers are likely to develop, and more importantly, the interests these organizations are likely to pursue.

Moreover, the organizational networks and interests of corporate counsel and law firms are likely to diverge even further given their differing organizational structures and relationships to the broader interests of global capital. While law firms certainly benefit from the expansion and integration of global markets, their structure as independent firms that seek to capitalize on global activity gives them a fundamentally different perspective than in-house lawyers who are located within corporate hierarchies and whose very professional existence is largely dependent upon their corporate parents' ability to capture as much of the value of the integration of global markets as possible. As a result, even in developed markets, corporate counsel and the external law firms with whom they work have increasingly found themselves at loggerheads on a broad array of issues, ranging from the size of legal fees, to the training of junior associates, to whether professional regulation should permit or deny innovative new forms of legal practice such as multidisciplinary partnerships. These tensions are likely to be exacerbated in the BRICS where, for example, law firms may resist the opening of the legal market to protect themselves, while corporate legal departments gain influence by increasing domestic competition by allowing the entry of foreign law firms.

Some of these differences become apparent when we examine the manner in which various corporate lawyers in the BRICS participate in

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<sup>62</sup> Law firm lawyers, because they are not part of the corporate team, tend to have more autonomy than corporate counsel.

<sup>63</sup> See Katherine Hendly, *The Role of In-House Counsel in Post-Soviet Russia in the Wake of Privatization*, 17 INT'L J. LEGAL PROF. 5, 8–9 (2010); Sida Liu, *Palace Wars over Professional Regulation: In-House Counsel in Chinese State-Owned Companies*, 2012 WIS. L. REV. 547, 559–61.

<sup>64</sup> See Marcia Coyle, *European Court Limits Attorney-Client Privilege for In-House Lawyers*, NAT'L L.J. (Sept. 14, 2010), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202472041367>.

global governance through “networks.” By networks, we simply mean “any collection of actors [two or more] that pursue repeated, enduring exchange relations with one another and, at the same time, lack a legitimate organizational authority to arbitrate and resolve disputes that may arise during the exchange.”<sup>65</sup> As international relations scholars have demonstrated in a variety of contexts, as networks develop and grow they demonstrate compliance or inertial pull as the greater convergence of networked actors allows for deeper cooperation.<sup>66</sup> In the present context, networked approaches can incorporate interactions among lawyers, businesses, and the state at the domestic and international levels. At both of these levels, corporate lawyers may engage in collective action aimed at changing governance outcomes. While lawyers in emerging economies can be studied as networked actors, their networks can also be conceived of as structures influencing the behavior of network members, and, through them, producing network effects.<sup>67</sup> Corporate lawyers create various governance arrangements as they structure their interaction in pursuit of common goals, make or implement rules and policies, or provide services.<sup>68</sup> These arrangements vary across the BRICS based on specific local contexts.

BRICS lawyers are socialized into international legal associations in varying ways. The International Bar Association (IBA) was established in 1947 to influence the development of international law reform and shape the future of the legal profession throughout the world.<sup>69</sup> Its current membership is more than fifty thousand individual lawyers and over two hundred bar associations and law societies.<sup>70</sup> Associations from BRICS countries are well represented.<sup>71</sup> Brazil has four member organizations in the IBA: the Brazilian Bar Association, the Law Firm Study Centre, the São Paulo Lawyers’ Association, and the Instituto dos Ad-

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<sup>65</sup> Joel M. Podolny & Karen L. Page, *Network Forms of Organization*, 24 ANN. REV. SOC. 57, 59 (1998).

<sup>66</sup> Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211, 215 (2006).

<sup>67</sup> Cf. KAHLER, *supra* note 41, at 19–21 (noting structural effects of international networks on states’ behavior).

<sup>68</sup> See Mathias Koenig-Archibugi, *Mapping Global Governance*, in GOVERNING GLOBALIZATION: POWER, AUTHORITY, AND GLOBAL GOVERNANCE 46, 50–52 (David Held & Anthony McGrew eds., 2002) [hereinafter GOVERNING GLOBALIZATION].

<sup>69</sup> *About the IBA*, INT’L B. ASS’N, [http://www.ibanet.org/About\\_the\\_IBA/About\\_the\\_IBA.aspx](http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx) (last visited May 13, 2013).

<sup>70</sup> *Id.*

<sup>71</sup> See *IBA Member Organisations in Asia Pacific*, INT’L B. ASS’N, [http://www.ibanet.org/barassociations/BIC\\_AsiaPacific.aspx](http://www.ibanet.org/barassociations/BIC_AsiaPacific.aspx) (last visited May 13, 2013).

vogados do Rio Grande do Sul.<sup>72</sup> The Russian Federation has three member organizations: the Federal Chamber of Lawyers of the Russian Federation, the International Union (Commonwealth) of Advocates, and the Moscow Chamber of Advocates.<sup>73</sup> India has the Bar Association of India, the Bar Council of India, and SILF as members.<sup>74</sup> While China has only one member organization—the All China Lawyers Association—Hong Kong has two: the Hong Kong Bar Association and the Law Society of Hong Kong.<sup>75</sup> South Africa has the most IBA member organizations out of all the BRICS: the General Council of the Bar of South Africa, the Corporate Lawyers Association of South Africa, the Law Society of Northern Provinces, the Law Society of South Africa, the Kwa-Zulu Natal Law Society, and the Law Society of the Cape of Good Hope.<sup>76</sup> This socialization into the IBA illustrates the demand for collective action but also the diversity of collective interests—and the desire by these divergent groups to have their associations represented separately.

Ironically, although as we have seen the companies headquartered within the BRICS are significantly more global than their law firm counterparts, the large international in-house counsel associations have been less successful in penetrating these markets, and indeed have only attempted to do so relatively recently.<sup>77</sup> Both of these developments arguably reflect the traditionally low status of internal counsel in both developed and emerging markets. Thus, the Association of Corporate Counsel (ACC), the world's largest in-house organization, and arguably the oldest even though it was only established in 1982 as the American Corporate Counsel Association, wields the most influence.<sup>78</sup> Not only was there no perceived need, even in the United States, for an association catering to the interests of in-house lawyers before this time, but

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<sup>72</sup> See *IBA Member Organisations in the Americas*, INT'L B. ASS'N, [http://www.ibanet.org/barassociations/BIC\\_Americas.aspx](http://www.ibanet.org/barassociations/BIC_Americas.aspx), (last visited May 13, 2013).

<sup>73</sup> See *IBA Member Organisations in Europe*, INT'L B. ASS'N, [http://www.ibanet.org/barassociations/BIC\\_Europe.aspx](http://www.ibanet.org/barassociations/BIC_Europe.aspx) (last visited May 13, 2013).

<sup>74</sup> See *IBA Member Organisations in Asia/Pacific*, *supra* note 71.

<sup>75</sup> *Id.*

<sup>76</sup> *IBA Member Organisations in Africa*, INT'L B. ASS'N, [http://www.ibanet.org/barassociations/BIC\\_Africa.aspx](http://www.ibanet.org/barassociations/BIC_Africa.aspx) (last visited May 13, 2013).

<sup>77</sup> The demand for governance arrangements takes time to develop and depends on normative change in these countries. The Association of Corporate Counsel (ACC) has one chapter in China, the only chapter based within the BRICS. See *Chapters*, ASS'N CORP. COUNS., <http://www.acc.com/chapters/index.cfm> (last visited May 13, 2013); *cf.* Sokol, *supra* note 43, at 10 (noting the dominance of Anglo-American law firms in international capital markets).

<sup>78</sup> See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 497 n.74 (1989).

the primary reason for creating the organization was to raise the visibility and stature of corporate counsel.<sup>79</sup> Although by the end of the 1980s this effort had proved largely successful in the American context, it took more than another decade for this “in-house counsel movement” to take hold outside of the United States.<sup>80</sup> Thus it is not surprising that it was not until 2003 that the American Corporate Counsel Association dropped the “American” from its name and began aggressively recruiting non-American members.<sup>81</sup>

With offices in seventy-five countries, ACC now considers itself to be a global bar association that promotes the common professional and business interests of in-house counsel through information, education, networking opportunities, and advocacy initiatives and has thirty thousand members employed by over ten thousand organizations.<sup>82</sup> Yet, most of the lawyers who are members of these foreign chapters work for U.S. companies (even if they are not U.S. lawyers), and it is not clear whether the organization admits in-house lawyers who do not have full professional standing as lawyers.<sup>83</sup> Moreover, although there is a China chapter, independent activities of other BRICS members are not clearly represented. Another in-house association with a large-scale regional character is the In-House Community, which is thirteen years old and comprised of over eighteen thousand individual in-house lawyers from the Asia-Pacific region and the United Arab Emirates.<sup>84</sup> While this is an important networking association for Indian and Chinese counsel, its main activity is to organize an annual In-House Congress and has not shown greater institutionalization.<sup>85</sup>

Although BRICS corporate lawyers practicing in both law firms and in-house legal departments may join existing independent networks that are capable of influencing the global governance of the legal profession—and broader policy debates about globalization generally—the proliferation of these networks and their location outside of the unified structure of formal bar organizations raises important questions about how effective the new corporate elite will be in pushing its

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<sup>79</sup> *See id.*

<sup>80</sup> *See Wilkins, supra* note 9, at 253–54.

<sup>81</sup> *History of ACC*, ASS’N CORP. COUNS., <http://www.acc.com/aboutacc/history/index.cfm> (last visited May 13, 2013).

<sup>82</sup> *Membership*, ASS’N CORP. COUNS., <http://www.acc.com/aboutacc/membership/faq.cfm> (last visited May 13, 2013).

<sup>83</sup> *See Wilkins, supra* note 9, at 299.

<sup>84</sup> *See About the Community*, IN-HOUSE COMMUNITY, <http://www.inhousecommunity.com/aboutus.php> (last visited May 13, 2013).

<sup>85</sup> *See id.*

views about global governance. As Heinz, Nelson, Sandefur, and Lauman argue in their classic examination of the structure of the Chicago bar, “[s]ocial stratification divides the bar and weakens its coherence.”<sup>86</sup> With respect to the new corporate elite in the BRICS, two dimensions of social stratification are particularly significant. First, just as in the United States, the emergence of a corporate “hemisphere” of legal practice that is increasingly separate and distinct from the “individual” hemisphere where the majority of lawyers in the BRICS continue to practice threatens the ability of lawyers in these jurisdictions to pursue collective projects such as law reform or upgrading legal institutions.<sup>87</sup> Second, stratification *within* the corporate sector threatens these collective projects even further, as in-house lawyers and outside law firms battle each other for the right to control the regulatory agenda on both the domestic and the global stage.<sup>88</sup>

In the United States, these divisions, and the proliferation of specialty bar organizations that are the outward manifestation of these cleavages, have made it increasingly difficult for the bar to pursue collective projects—even projects that arguably further the collective interests of the bar as a whole.<sup>89</sup> More importantly, these divisions also adversely affect domestic governance, as it is increasingly difficult to find lawyers that can bridge the gap between different actors in the policy arena.<sup>90</sup> Even among the seemingly tight-knit network of lawyers and government officials that constitute the Washington policy elite, there is an expanding “hollow core” between actors from different economic and political interest groups that makes reaching consensus increasingly difficult.<sup>91</sup> If it is difficult for lawyers in Washington, D.C. to work together on projects of domestic governance, one wonders how difficult it

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<sup>86</sup> See HEINZ ET AL., *supra* note 41, at 318.

<sup>87</sup> See, e.g., Liu, *supra* note 63, at 559–60 (noting uncertainty about whether in-house counsel in China could join traditional lawyers’ associations).

<sup>88</sup> See, e.g., *id.* at 561–62 (documenting competition between “corporation lawyers” and small firms in China for business and political influence).

<sup>89</sup> See David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145, 1151 (1993).

<sup>90</sup> Once again, John Heinz and his collaborators have been at the forefront of drawing this connection. See Anthony Paik et al., *Political Lawyers: The Structure of a National Network*, 36 LAW & SOC. INQUIRY 892, 893–94 (2011).

<sup>91</sup> See JOHN P. HEINZ ET AL., *THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICYMAKING* 377 (1993). For evidence that this gap in the network between the sides of the policy debate is increasing, see Paik et al., *supra* note 90, at 894. Indeed, even among lawyers who are allegedly on the same side of the political spectrum, the number of individuals or organizations that span the entire network is decreasing. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 41–42, 89 (2008).

may be for lawyers in New Delhi or Brasília to coordinate around issues of the global regulation of the legal profession or global governance generally, where there may often be far less normative consensus, and where as we have seen, professional and institutional interests may sharply diverge.<sup>92</sup>

As we will see in the next Part, debates over the extent and pace of global integration in various domains underscore just how difficult achieving consensus is likely to be in the global arena.

### III. BRICS CORPORATE LEGAL ELITE AND THE PROCESS OF GLOBAL INTEGRATION

Due to their central role in international transactions and dispute processing, corporate lawyers are at the center of the debates that affect the profession across borders, both in terms of the greater integration of the legal industry itself, and the effect that this integration is likely to have on the integration of the world economy more generally. As we indicated at the outset, the traditional ways of regulating the legal profession in the BRICS—and indeed in all nations—are being challenged as governments face a tension between promoting development through greater integration of all sectors, including law, and protecting and empowering the domestic legal industry as it internationalizes. These debates have in turn fostered a broader discussion about who should be in charge of making these decisions, as governments push back against the profession's traditional view that the regulation of lawyers should largely be under the control of the bar itself. These tensions have been recently visible in India, where the authority of the Bar Council of India (BCI) and other state bar councils that have traditionally governed and supervised the legal profession were challenged in November 2010 by the Indian Ministry of Law and Justice which proposed a new “super-regulator” that would exercise supervisory jurisdic-

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<sup>92</sup> China's unified political system may militate these divisions, although anyone who followed the reporting about the bitter behind-the-scenes power struggle between various factions in the Party during the recent leadership transition will be wary of taking China's ideology of consensus-based decision making too uncritically. In any event, this may be why we have so far seen less evidence of Chinese corporate lawyers playing an active role in political activity than their counterparts in other BRICS—although the very venter of harmony put forth by the Chinese leadership will inevitably make seeing this kind of activity more difficult. *See, e.g.*, Liu, *supra* note 63, at 563–64, 570 (noting in-house counsel's inefficacy in creating change in the state-owned enterprise system).

tion over all bar councils, including the BCI.<sup>93</sup> The Law Minister argued that this new body would improve the standards of the profession by assuming plenary oversight over everything from legal education to professional discipline to imposing new standards for the provision of mandatory legal aid.<sup>94</sup> Although the proposal was ultimately abandoned when the Law Minister was replaced, the ongoing process of global integration and efforts to put legal services on regional and global trade agendas is likely to diminish domestic actors' ability to control professional regulation. These regulatory battles play out in debates focused on the opening up of legal markets to foreigners, foreign influence on domestic regulation, as well as larger normative issues about leveling the playing field for all.

A. *Corporate Lawyers and the Opening of the Legal Services Markets*

BRICS countries, now all WTO members, have been engaged in the "progressive liberalization" of trade in services through the General Agreement on Trade in Services (GATS).<sup>95</sup> While GATS put the issue of regulation of legal services on the international stage, negotiations on the issue have been stalled.

BRICS legal industries vary in terms of their levels of protectionism.<sup>96</sup> For example, Russia's legal market has been deregulated following the demise of the Soviet Union, and is now one of the most liberalized markets in the world. Foreign lawyers can provide advice on international law and their home law, they can be admitted to Russian courts as foreign legal advisers at civil and arbitration courts provided they pass various required tests, and Russian lawyers are free to practice

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<sup>93</sup> See generally Papa & Wilkins, *supra* note 6 (describing this proposal and the manner in which it and other developments underscore the increasing "globalization of governance" in the legal space).

<sup>94</sup> See *id.* at 197. See generally *About Us*, MINISTRY L. & JUST., <http://lawmin.nic.in/About.htm> (last visited May 13, 2013). In a move that underscores the growing importance of transnational knowledge in this arena, the Law Minister proposed naming this body the Legal Services Board, after a similar government board that regulates legal practice in the United Kingdom. See Papa & Wilkins, *supra* note 6, at 197. For a description of the U.K. Legal Services Board, see Flood, *supra* note 21, at 514–18.

<sup>95</sup> See General Agreement on Trade in Services art. XIX, Apr. 15, 1994, 1869 U.N.T.S. 183; Papa & Wilkins, *supra* note 6, at 198.

<sup>96</sup> See, e.g., Papa & Wilkins, *supra* note 6, at 198 (discussing the Indian government's role in protecting and fostering its legal profession); *Russia's Moj Wants Domestic Law Firms to Have Increased Presence*, RUSS. BRIEFING (Nov. 22, 2010), <http://russia-briefing.com/news/russias-moj-wants-domestic-law-firms-to-have-increased-presence.html/> (noting proposed administrative measures to ensure Russia's domestic firms' competitiveness).

Russian law at foreign firms.<sup>97</sup> The consequences of this level of openness for the Russian legal market are evident from the comments of the Russian Minister of Justice Alexander Kononov, who complained in 2010 that it is “abnormal” that “[a]bout [ninety] percent of Russia’s legal services market is occupied by foreign legal firms,” and that “[i]t is not right when the overwhelming majority of transactions in different market segments of the Russian economy refer to the English law and to the Stockholm, Hague or London commercial courts.”<sup>98</sup> The South African market has also been welcoming to foreign lawyers, although in one important respect not as open as Russia’s. Foreign lawyers in South Africa can practice home and international law as well as international finance, project management, and arbitration. However, they are not permitted to practice local law or enter into partnerships with local firms.<sup>99</sup> As a result, unlike in Russia there are several large South African law firms that compete directly with foreign firms for corporate legal business—although the recent alliance between one of that country’s top law firms and the U.K. magic circle firm Linklaters raises questions about how long this will continue to be the case.<sup>100</sup>

India, Brazil, and China, on the other hand, have protected their domestic markets to a much larger extent. China has permitted foreign law firms to maintain representative offices since 1992, but opening additional offices is possible only when the most recently established representative office has been engaged in practice for three consecutive years.<sup>101</sup> Foreign lawyers can advise on their home law, interna-

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<sup>97</sup> See, e.g., Maria Vesnovskaya, *Russian Courts to Admit Foreign Lawyers*, VOICE RUSS. (Mar. 28, 2011, 2:33 PM), <http://english.ruvr.ru/2011/03/28/48074901/>.

<sup>98</sup> See *Russia’s MoJ Wants Domestic Law Firms to Have Increased Presence*, *supra* note 96.

<sup>99</sup> See Lucy Hicks, *How to Practise in South Africa*, LAW SOC’Y ENG. & WALES (Aug. 31, 2007), <http://international.lawsociety.org.uk/ip/africa/566/practise>.

<sup>100</sup> Cf. J. Denby, *Africa’s Top Corporate Lawyers*, AFR. BUS. REV. (July 30, 2010), [http://www.africanbusinessreview.co.za/money\\_matters/rica’s-top-corporate-lawyers](http://www.africanbusinessreview.co.za/money_matters/rica’s-top-corporate-lawyers) (discussing the rising prominence of South African corporate lawyers). See generally *Magic Circle Solicitors*, LAW & LEGAL, <http://www.lawandlegal.co.uk/solicitors/tag/magic-circle/> (last visited May 13, 2013) (Magic circle firms are the top five firms in the United Kingdom). For the alliance between South Africa’s Webber Wentzel and Linklaters, see Joshua Freedman, *Linklaters Seals Alliance with South Africa’s Webber Wentzel*, LAW. (Dec. 3, 2012), <http://www.thelawyer.com/linklaters-seals-alliance-with-south-africas-webber-wentzel/1015861.article>.

<sup>101</sup> Regulations on Administration of Foreign Law Firms’ Representative Offices in China art. 7 (promulgated by the St. Council, Dec. 22, 2001, effective Jan. 1, 2002) (Lawinfochina) (China), [http://english.gov.cn/laws/2005-08/24/content\\_25816.htm](http://english.gov.cn/laws/2005-08/24/content_25816.htm) [hereinafter China Foreign Law Firms Regulation]. The three-year limit is interpreted in Article 10 of the Ministry of Justice’s Regulation on the Implementation of the Administrative Regulation on the Representative Offices of Foreign Law Firms. See Rules for the Implementation of the Administrative Regulations on Representative Offices of Foreign Law Firms in China art. 10



tional law, and on the implications of the Chinese legal environment, but they must engage Chinese firms to advise on Chinese law and can employ Chinese lawyers only as “legal consultants” and only if they have given up their Chinese practicing certificate.<sup>102</sup> Brazil has similar regulations as foreign lawyers can practice home country and international law on registration with the Brazilian Bar Association, and can only employ Brazilian lawyers, who are unable to use their title or advise on Brazilian law.<sup>103</sup> India has remained the most protectionist of all the BRICS, formally not permitting foreign lawyers to practice in the country at all. A recent Madras High Court ruling, however, has provided an opening for foreign lawyers and entitled them to participate in international arbitration proceedings in India and advise clients on foreign law on a “fly in, fly out” basis.<sup>104</sup>

While it is to be expected that all of the BRICS countries will proceed with their commitments under GATS on the liberalization of trade in services, the claim that law is a unique profession unlike other services continues to be a contentious issue in the globalization debate in each of the BRICS. The tensions regarding opening the legal services market in the BRICS have been particularly powerful as bar associations in Shanghai, New Delhi, and São Paulo mobilized to resist the weakening of barriers for foreign lawyers.<sup>105</sup> Global progress in liberalizing legal services remains slow, but bilateral and regional cooperation may provide an additional avenue for addressing trade barriers faced

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(promulgated by the Ministry of Justice, Sept. 1, 2002, effective Sept. 1, 2002) (Lawinfochina) (China), <http://renda.hefei.gov.cn/n7216006/n8681909/n8682161/n8682710/87090044.html>.

<sup>102</sup> See China Foreign Law Firms Regulation, *supra* note 101, arts. 15–16.

<sup>103</sup> See *Law Firms in Brazil: Keep Out*, ECONOMIST (June 23, 2011), <http://www.economist.com/node/18867851>. Provimento (Provision) 91/2000 governs the practice of foreign lawyers in Brazil. See *Provimento No. 91/2000*, OAB CONSELHO FEDERAL (Aug. 17, 2001), <http://www.oab.org.br/leisnormas/legislacao/provimentos/91-2000?search=91&provimentos=True>; see also WTO Secretariat, *Trade Policy Review: Brazil*, ¶¶ 303–305, WT/TPR/S/140 (Nov. 1, 2004) (discussing Provision 91/2000).

<sup>104</sup> A.K. Balaji v. Union of India, W.P. No. 5614 of 2010 (Madras H.C. Feb. 21, 2012) (India), available at [http://judis.nic.in/judis\\_chennai/qrydisp.aspx?filename=35290](http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=35290).

<sup>105</sup> For the China case, see Anthony Lin, *Shanghai Bar Association Goes After Foreign Firms*, N.Y. L.J. (May 18, 2006), <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1147856732635>. The Association’s view has changed since then. For India, the Bar Council of India’s mobilization against weakening restrictions is discussed in Kian Ganz, *SILF View Clashes with BCI SC Appeal over Foreign Lawyers but Says CA Firms Practise Illegally*, LEGALLY INDIA (July 9, 2012) <http://www.legallyindia.com/201207092942/Law-firms/silf-view-clashes-with-bci-sc-appeal-over-foreign-lawyers-but-says-ca-firms-practise-illegally>. For Brazil, see the São Paulo Bar Association’s attitude in Brian Baxter, *Brazilian Bar Concludes Foreign Law Firm Alliances Break Rules*, AM. LAW. (Sept. 29, 2010), [http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202472625756&Brazilian\\_Bar\\_Concludes\\_Foreign\\_Law\\_Firm\\_Alliances\\_Break\\_Rules](http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202472625756&Brazilian_Bar_Concludes_Foreign_Law_Firm_Alliances_Break_Rules).

by the legal profession.<sup>106</sup> As of now, lawyers in the BRICS—particularly those in law firms—are not eager to contribute to global legal integration and they seek to protect their domestic infant industry. Yet unlike the perception of gains from the multilateral regime which may be diffuse, regional and bilateral cooperation may make gains from removing barriers more explicit, potentially giving rise to a complex regulatory web of agreements.

B. *BRICS Corporate Lawyers and the Debate over a “Level Playing Field” and the Boundaries of Foreign Lawyers’ Influence*

Rising powers have often expressed concerns with the unequal distributional outcomes of the global political economy and with Western powers’ dominance in building the infrastructure of the international system and in global rulemaking.<sup>107</sup> They have resisted many Western liberal policies such as humanitarian interventions or conditionality requirements of international institutions and have been cautious in positioning themselves toward social responsibility regulations and green protectionism.<sup>108</sup> BRICS are now being perceived (a perception they are actively encouraging) as agents of change in global governance. But what is the nature of the change they want in governing the legal profession and its affairs? In the government sphere, it has been argued that they struggle to be recognized “as full and equal partners in the society of states, but also as states with specific development needs that are too easily ploughed-under in the spurious universality promoted by the North.”<sup>109</sup> A similar paradox lies at the heart of the corporate legal elite’s view about their status in the legal industry. On the one hand, top lawyers and in-house counsel in the BRICS seek to be powerful in the global legal industry. At the same time, these seemingly powerful players emphasize their need to develop and the need

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<sup>106</sup> See, e.g., MICHAEL GASIREK ET AL., CTR. FOR THE ANALYSIS OF REG’L INTEGRATION AT SUSSEX, QUALITATIVE ANALYSIS OF A POTENTIAL FREE TRADE AGREEMENT BETWEEN THE EUROPEAN UNION AND INDIA exec. summ. at 8 (2007), available at <http://www.cuts-citec.org/PDF/EU-FTAExecutiveReport.pdf> (suggesting that an EU-India free trade agreement could be used to liberalize the closed legal sector).

<sup>107</sup> This concern is present in two political platforms to create a new international architecture: BRICS, as previously discussed, and IBSA (India, Brazil, South Africa). Efforts to change the Security Council, International Monetary Fund, or establish a New BRICS Development bank reflect dissatisfaction with institutions set up by “old” powers after the war.

<sup>108</sup> See Philip Nel, *Redistribution and Recognition: What Emerging Regional Powers Want*, 36 REV. INT’L STUD. 951, 968–69 (2010).

<sup>109</sup> See *id.* at 951.

for protectionist regulation to ensure that they can compete with foreign firms.

This paradoxical claim to both power and the need for protection is frequently expressed around the desire by all parties in the debate over foreign lawyers to create a “level playing field” with respect to the issue of reciprocity of legal practice.<sup>110</sup> This issue has become increasingly contested as the BRICS have gone from seeking almost exclusively inbound investment to becoming important centers of outbound investment as well, including the export of lawyers and legal services. While the basic idea of reciprocity simply means that a host country gives the foreign nationals of another state the same treatment in law as it gives its own nationals, reciprocity has been used by Western powers and emerging economies for opposite causes: to both argue for and against barriers to practice.<sup>111</sup> For example, the American Bar Association President argued that reciprocity demanded that India should open up its legal market,<sup>112</sup> while the General Secretary of the Bar Association of India argued that reciprocity did not demand market opening when there was no reciprocity in lawyers’ ability to get work permits to access markets.<sup>113</sup> As a result, reciprocity fuels the debate instead of serving as an objective criterion for resolving it. On the U.S. side, allowing Indian lawyers to practice everywhere in the United States would be problematic given a regulatory structure in which even domestic lawyers are qualified only to practice law in the state in which they are licensed.<sup>114</sup> On the Indian side, however, the pressure to open the Indian market brings out Indian lawyers’ frustration with the asymmetries in the barriers to free movement of people, which is a critical aspect of practicing abroad.<sup>115</sup>

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<sup>110</sup> See, e.g., Papa & Wilkins, *supra* note 6, at 180–82 (noting restrictions on foreign practice in India and concerns that domestic firms will be disadvantaged in an open legal market).

<sup>111</sup> See Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L ORGS. 1, 3–4 (1986); Sreejiraj Eluvangal, *UK Firms Ship Back Indian Lawyers*, DNA (Mar. 12, 2009), [http://www.dnaindia.com/money/report\\_uk-firms-ship-back-indian-lawyers\\_1238256](http://www.dnaindia.com/money/report_uk-firms-ship-back-indian-lawyers_1238256); Karen Sloan, *ABA Seeks Obama’s Help in Fight for Reciprocity with India*, NAT’L L.J. (Nov. 11, 2010), <http://www.law.com/jsp/law/index.jsp> (search website for “ABA Seeks Obama’s Help”; then scroll down results window to Nov. 11, 2010 and follow the hyperlink with the article’s title).

<sup>112</sup> Sloan, *supra* note 111.

<sup>113</sup> See Eluvangal, *supra* note 111 (citing the General Secretary linking reciprocity to immigration).

<sup>114</sup> See, e.g., Sloan, *supra* note 111. Foreign lawyers now need to register with local authorities and do not need to pass local bar examinations to practice in the United States, but they can practice only in the state where they are registered. See *id.*

<sup>115</sup> See Eluvangal, *supra* note 111.

The reciprocity issue points out structural problems with the international system, where the notion of common values and equal opportunity is continuously debated. The Commission on Global Governance identified the creation of a global civil ethic based on shared values as vital for ensuring the quality of global governance.<sup>116</sup> Yet to what extent is there a global civil ethic with respect to legal professionals? The closest to a global ethical code is the IBA's Code of Ethics, which deals with problems relating to professional privilege, information relating to fees, specialization and advertising, and protecting the legal services consumer.<sup>117</sup> It is formally voluntary, but the IBA is the only organization that even purports to represent all lawyers—although like most organizations that purport to be universal, the IBA's actual membership is skewed toward elite lawyers.<sup>118</sup> Even with respect to this group, however, it is far from clear that BRICS corporate lawyers are fully equal members in the IBA. To answer this question and determine whether the corporate elite in the rising powers are primarily rule-makers as opposed to rule-takers, it would be necessary to investigate to what extent lawyers from these countries have promoted the IBA's code and have been proactively engaged in shaping it. Alternatively, to what extent do lawyers from the BRICS push for different codes or provisions, and do their international efforts trickle up to the global level? The IBA's ongoing discussions on professional rules on association between local and foreign lawyers may become a test case for BRICS lawyers' influence.

Ethics codes, of course, are only the most basic form of global governance of lawyers—and more often than not a crude and ineffective one at that.<sup>119</sup> The real question is how the actual norms and practices of lawyers will impact everything from the culture of legal practice to the rule of law. Bitter claims and counterclaims over these questions have been central to the debate over the entry of foreign lawyers in almost every jurisdiction, but nowhere more pronounced than in China. Despite strong resistance from the Shanghai Bar Association, foreign law firms were eventually allowed limited, but nevertheless important

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<sup>116</sup> COMM'N ON GLOBAL GOVERNANCE, *supra* note 32, at 55.

<sup>117</sup> See generally INT'L BAR ASS'N, IBA PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION (2011), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUId=1730FC33-6D70-4469-9B9D-8A12C319468C> (setting forth model ethical rules for lawyers globally).

<sup>118</sup> See Andrew Boon & John Flood, *The Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 LEGAL ETHICS 29, 32 (1999).

<sup>119</sup> See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 656–58 (1981).

access into the Chinese legal market, and many of them have earned significant profits.<sup>120</sup> This in turn led some observers to argue that foreign firms should not only be seizing the opportunities presented in the Chinese market, but should also stand up against the government's opposition to human rights lawyers and work actively to promote the rule of law in China.<sup>121</sup> But the question remains to what extent are foreign lawyers in China in a position—or even responsible—to push the host government to adopt a different set of values or to fundamentally change its regulation? Is this simply another example of Gramscian hegemony where dominant powers lead by making their agenda understood as common sense and universal, or are there values common to all lawyers Chinese and non-Chinese alike, and therefore those with less to lose should reasonably be expected to promote them?<sup>122</sup> Are there indeed values inherent in the creation of a modern legal profession—even at the corporate level—that those like China's emerging corporate legal elite who aspire to be taken seriously by other global corporate leaders will have to acquire, or at least appear to acquire, if their quest for recognition is to be successful? Although the Shanghai Bar Association's recent decision to invite foreign lawyers to join the organization suggests at least some willingness to discuss these issues, the fact that there is still a significant split within this association, and those in São Paulo and Mumbai, over the extent to which foreign lawyers should be a part of the local legal community—formally and informally—underscores just how important professional values and identity have become in the debate over the globalization of the legal profession.<sup>123</sup>

This brings us to the final framework and an investigation of whether the globalizing corporate elite in the BRICS is likely to accelerate or impede the corporatization of the regime of global governance.

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<sup>120</sup> See Liu, *supra* note 10, at 772–73. How many of the branch offices of foreign law firms operating in China are actually profitable is a hotly debated question—and a closely held secret—especially by those who are not profitable.

<sup>121</sup> See Jerome A. Cohen, *The Suppression of China's Human Rights Lawyers: Do Foreign Lawyers Care?*, U.S. ASIA L. INST. (June 6, 2011), <http://www.usialaw.org/2011/06/the-suppression-of-chinas-human-rights-lawyers-do-foreign-lawyers-care/>.

<sup>122</sup> ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 12–13 (Quentin Hoare & Geoffrey Nowell Smith eds. & trans., New York 1971) (on cultural hegemony).

<sup>123</sup> For the Shanghai Bar's invitation to admit foreign members, see Yun Kriegler, *Shanghai Bar Welcomes First Group of Special Foreign Lawyer Members*, LAW. (Sept. 18, 2012), <http://www.thelawyer.com/shanghai-bar-welcomes-first-group-of-special-foreign-lawyer-members/1014360.article>. For the continuing resistance within the Shanghai Bar, see, e.g., Liu, *supra* note 10, at 799–800 (discussing the mixed response to the Shanghai Bar Association's complaints against foreign firms). See also *supra* note 105.

#### IV. BRICS CORPORATE LEGAL ELITE AND THE GLOBAL RULE OF CAPITAL: WILL THE INCREASING CORPORATIZATION OF THE LEGAL PROFESSION FURTHER THE PRIVATIZATION OF GLOBAL GOVERNANCE?

The central challenge of globalization has been to ensure that increasing corporatization of the world economy does not undermine patterns of development that are socially inclusive and ecologically sustainable. A common criticism of global regulation is that it is ultimately the story of domination as “[t]he global law-makers today are the men who run the largest corporations, the [United States] and the [European Commission].”<sup>124</sup> Concerns over the small number of progressive private actors combined with the large inequalities generated by liberalization and privatization have led to calls to revive the public domain of the state and its citizens.<sup>125</sup> At the same time, however, a discourse of corporate social responsibility (CSR) has also emerged to minimize corporate malfeasance and improve social, environmental, and human rights dimensions of corporate performance.<sup>126</sup> The rise of the corporate legal elite in the BRICS happens against the background of this larger debate. Will these lawyers simply become agents of corporate globalization, contributing to the growing corporatization of the legal profession itself and the privatization of global governance generally? Or will they instead act as a mitigating force on corporate power, championing the profession’s traditional socially minded ideals through pro bono, CSR, or other similar practices? At present, there is evidence to support both accounts.

Practices of corporate globalization have given rise to questions of regulatory capture, which takes place when corporate interests seek to co-opt regulators to further their own ends at the expense of society as

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<sup>124</sup> JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 629 (2000).

<sup>125</sup> *See id.*

<sup>126</sup> *See* Ngaire Woods, *Global Governance and the Role of Institutions*, in GOVERNING GLOBALIZATION, *supra* note 68, at 25, 32–33 (discussing the emergence of the UN’s Global Compact initiative, a voluntary compact that promotes social responsibility among its multilateral corporation membership). For example, the very evolution of the UN Guiding Principles on Business and Human Rights suggest the global importance of the topic. The American Bar Association endorsed these principles. But whether and how corporate lawyers will actually apply these ideals to their own practices remains to be seen. Moreover, often law firms with the most elaborate social responsibility portfolios are the ones currently under attack for “legalized profiteering.” *See, e.g.*, NICK BUXTON ET AL., TRANSNAT’L INST., CORP. EUR. OBSERVATORY, LEGALISED PROFITEERING? HOW CORPORATE LAWYERS ARE FUELLING AND INVESTMENT ARBITRATION BOOM 2 (2011), available at [http://corporateeurope.org/sites/default/files/publications/legalised\\_profiteering.pdf](http://corporateeurope.org/sites/default/files/publications/legalised_profiteering.pdf).

a whole.<sup>127</sup> Regulation can be sought by industries for their own protection rather than imposed by regulators to achieve the public interest, and, even if this is not the case at the outset, regulation can be captured later on.<sup>128</sup> However, private actors can also be crucial regulatory entrepreneurs when they are:

suffering from existing regulation either as corporate consumers of poorly regulated services or products; as newcomers to an industry whose regulation has been captured by established firms; as firms at risk from the negative publicity and fallout from an industry disaster; or from the fact that other firms with whom they must compete are not on a level playing field.<sup>129</sup>

One of the core features of “emerging” markets is that they lack a range of institutions to facilitate their functioning, which often results in higher transaction costs and operating challenges.<sup>130</sup> Such institutional voids facilitate capture—capture that is paradoxically exacerbated by the fact that corporate lawyers are endowed with specialist expertise which is often greater than that of government officials, thereby allowing these private actors to play a key role in generating needed infrastructure where the interests of their corporate clients are most at stake (e.g., helping the government write laws in new areas such as merger and acquisition). Furthermore, self-regulation of legal practice itself in emerging economies can also be perceived as a form of regulatory capture as it may work against the public interest. For example, as we have seen, professional regulation in these countries frequently regulates restrictions on the entry of foreign lawyers that may only serve to entrench the market share of domestic practitioners, thereby artificially inflating prices for both domestic and foreign consumers. Similarly, professional regulation also often includes “restrictions on advertising and other means of promoting a competitive process within the profession; restrictions on fee competition; and restrictions on or-

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<sup>127</sup> See Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in *THE POLITICS OF GLOBAL REGULATION* 1, 10 (Walter Mattli & Ngaire Woods eds., 2009).

<sup>128</sup> BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION: CREATING, DESIGNING, AND REMOVING REGULATORY FORMS* 38 (1980).

<sup>129</sup> Walter Mattli & Ngaire Woods, *Introduction*, in *THE POLITICS OF GLOBAL REGULATION*, *supra* note 127, at ix, x–xi.

<sup>130</sup> TARUN KHANNA ET AL., *WINNING IN EMERGING MARKETS* 6 (2010).

ganizational form.”<sup>131</sup> Finally, as we suggested in Part III, the rise of corporate lawyers in the BRICS runs the risk of creating separate corporate and individual “hemispheres” within the bar, thereby exacerbating inequality both among lawyers and, more importantly, among the clients that these two hemispheres serve.

Similarly, at the global level, there is also a trend toward creating a legal order that is increasingly private, autonomous, and transnational in that the laws are removed from local and national legal systems.<sup>132</sup> International and investment arbitration are cases in point. Both of these legal institutions have been introduced to improve the environment for international business by allowing a neutral venue for resolving international business disputes.<sup>133</sup> They enabled businesses to evade what they perceive to be the inefficiencies and inadequacies of domestic courts, rather than providing additional incentives for these potentially powerful actors to improve these institutions. In addition, these private institutions have also raised questions of accountability, transparency, and legitimacy.<sup>134</sup>

Notwithstanding these potential negative implications, except for occasional challenges in enforcing arbitration awards, BRICS countries have not only embraced and developed international arbitration, but some of them have sought to strategically position themselves as arbitration hubs.<sup>135</sup> BRICS countries have reformed their arbitration regulations, thereby encouraging delocalization of disputes and reducing their dependence upon local or national systems of law. Even legal enforcement, which re-localizes arbitration to produce an award, has been

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<sup>131</sup> Frank H. Stephen & James H. Love, *Regulation of the Legal Profession*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 987, 993 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

<sup>132</sup> A. Claire Cutler, *Transnational Law and Privatized Governance*, GLOBALIZATION & AUTONOMY, [http://globalautonomy.ca/global1/summary.jsp?index=RS\\_Cutler\\_TNLF.xml](http://globalautonomy.ca/global1/summary.jsp?index=RS_Cutler_TNLF.xml) (last visited May 13, 2013).

<sup>133</sup> See *About ICSID*, INT’L CENTRE FOR SETTLEMENT INVESTMENT DISP., [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home) (last visited May 13, 2013); see also Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. I–II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

<sup>134</sup> See DEZALAY & GARTH, *supra* note 55, at 49–51; Dezalay & Garth, *supra* note 50, at 2329, 2335–36.

<sup>135</sup> See, e.g., DEZALAY & GARTH, *supra* note 55, at 18–29, 278 (noting socialization of lawyers into the elite arbitration network and adoption of Western arbitration norms); Grant Hanessian, *BRICS, Not CRIBs: The “Rebalancing” of International Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011, at 245, 248–53 (Arthur W. Rovine ed., 2012).



simplified.<sup>136</sup> BRICS have been more cautious in terms of investment arbitration, where delocalization of disputes is not yet complete and subordination of local autonomy to, as critics argue, the autonomy of transnational financial and investment corporations, is still being resisted.<sup>137</sup> However, as BRICS investors grow increasingly concerned about investing abroad, their resistance is weakening. China is an example of this shift as it joined the main investment arbitration body, the International Center for Settlement of Investment Disputes (ICSID), and has adopted more flexible investment arbitration provisions in its treaties with other countries.<sup>138</sup>

The potential link between the rise of the corporate legal elite in the BRICS and the dominance of global capital poses a significant challenge to the self-understanding—and projection—of professionalism and independence for these new lawyers.<sup>139</sup> To mitigate the negative effects of greater privatization of governance, respond to social activists, and protect and enhance their reputations, many law firms in the BRICS have adopted voluntary CSR initiatives and other programs to promote pro bono work and public service.<sup>140</sup> Such initiatives are already well established in BRICS multinationals. Of course, it is far from clear whether pro bono and CSR practices by BRICS corporate lawyers will result in anything like the transformation of the structural failings of neoliberalism, or the improvement of the judicial system for ordinary citizens, or the empowerment of the disadvantaged members within these countries. At present, corporate lawyers' independence from their clients and re-definition of their public commitments remain highly contested.

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<sup>136</sup> See Hanessian, *supra* note 135.

<sup>137</sup> See Cutler, *supra* note 132. On BRICS' investment arbitration policies, see Mihaela Papa, *BRICS as Agents for Change in Global Governance: The Case of Investment Arbitration*, in *GLOBAL GOVERNANCE: CRITICAL LEGAL PERSPECTIVES* (Grainne de Burca et al. eds., forthcoming Nov. 2013).

<sup>138</sup> NORAH GALLAGHER & WENHUA SHAN, *CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 2* (2009).

<sup>139</sup> See David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 *BUS. & SOC'Y* 68, 78–79 (2010); Christopher J. Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 *GEO. J. LEGAL ETHICS* 153, 178–81 (2013).

<sup>140</sup> See, e.g., *Finding the Words for Pro Bono in China*, PILNET (May 4, 2012), <http://www.pilnet.org/public-interest-law-news/blogs/30000-lect/154-translating-pro-bono-in-china.html> (describing the growing interest in pro bono by private lawyers in China); Arpita Gupta, *Pro Bono and the Corporate Legal Sector in India* (Nov. 30, 2012) (unpublished manuscript) (on file with author).

## CONCLUSION: TOWARD AN EMPIRICAL RESEARCH AGENDA

The emergence of the corporate legal elite in the BRICS countries is a new phenomenon both in terms of the growing law firm elite and its influence and the greater relevance of emerging powers' corporations and their legal counsel. Yet despite the elite's rapid growth and the prevalence of BRICS-focused economic and political power shift debates in international relations scholarship, the actual role this elite is likely to play in shaping the trajectory of global governance has remained largely overlooked. By conceptualizing three pathways for the corporate legal elite to express their influence—participation in corporate legal networks, engagement in the integration of the legal industry and the broader project of global integration, and the global rule of capital—we believe that it is possible to begin to uncover this new corporate legal elite's influence both on the legal profession and the liberal world order more generally.

The analysis of this new elite's pathways of influence further underscores the complex relationship between the role that BRICS corporate lawyers will play in structuring the evolving global regulation of the legal profession, and its impact on global integration more generally. The more successful BRICS corporate lawyers are in designing and penetrating the leadership ranks of the new global networks regulating the legal profession, the more they may be able to present themselves as promoters and guardians of the rule of law and other "universal" standards favored by the champions of liberal integration, thus further enhancing their status and power on the global stage. But this global legitimacy may make it more difficult for this new elite to continue to push for restrictions on the global integration of the legal profession itself—at the same time that it may increase pressure on BRICS corporate lawyers to demonstrate that they can resist simply being the handmaidens of global capital.

Similarly, the rise of the corporate legal elite in the BRICS is a new challenge for the liberal world order and dominant international hierarchies. The BRICS' economic success and political ambition raise questions about government and business actors' commitment to producing global public goods rather than perpetuating the current system's inefficiencies. Yet this challenge becomes more nuanced because, as the protection of legal markets suggests, the new elite's rise is likely to result in a stop-and-go pattern of economic integration rather than full liberalization, and can open political opportunities for pacing the global rule of capital or its redistribution. Yet how influential are legal constituencies in shaping global governance trajectories? In terms of

the economic power shift from North and West to South and East, corporate lawyers' influence in the BRICS is already visible. Nevertheless, as indicated above, their joint regulatory mobilization in the legal arena (BRICS legal cooperation) is largely missing. This is surprising given the popular characterization of the BRICS as a developmental community for "superpowers in training." For the United States and other traditional superpowers in the West, legal values have been at the center of soft power and public diplomacy, and legal accountability is celebrated and reproduced by using law as an export product in the private sector. The question is whether the BRICS will pursue a similar path in their quest to reach superpower status, and if they do, what legal values they will attempt to export in both the private and public sectors.

From what we have presented here it seems reasonable to expect that law—and corporate lawyers—will play an increasingly important role both within each of the BRICS countries and in the engagement of these new powers, both individually and collectively, with the broader structures of global governance. We close, however, by briefly suggesting two developments—each aimed at a different part of our argument—that might cut against BRICS corporate lawyers having such an elevated role.

The first raises questions about whether the corporate lawyers we see arising in the BRICS are likely in the future to have the same ability to influence governance debates as their counterparts in the West have traditionally enjoyed in the past. Indeed, to be even more challenging, is it likely that corporate lawyers anywhere will enjoy this kind of influence? As we saw in Part I, the Anglo-American model of both the large law firm and sophisticated in-house counsel appear to be defusing throughout the BRICS. At the same time, however, these models are also under increasing pressure in the United States as corporate clients attempt to turn corporate legal services into a commodity that can increasingly be delivered by legally trained non-lawyers, or even by computers and other smart technology.<sup>141</sup> As one of us has argued elsewhere, this kind of de-professionalization might be particularly likely to occur in the BRICS where technology has already played a crucial role in development in many other sectors, and where norms of professional autonomy are less established.<sup>142</sup>

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<sup>141</sup> The late Professor Larry Ribstein was particularly articulate in expressing this view. See, e.g., Larry E. Ribstein, *Delaweyering the Corporation*, 2012 Wis. L. Rev. 305, 307; Larry E. Ribstein, *The Death of Big Law*, 2010 Wis. L. Rev. 749, 761.

<sup>142</sup> See Wilkins, *supra* note 9, at 304.

The second development questions whether the underlying vision of global governance as a cooperative institutionalized order is sustainable. The post-Cold War multilateral successes spurred states to manage world affairs through effective international cooperation, which would both serve states' interests and provide global public goods. Yet deadlocks in international negotiations on trade, nuclear proliferation, climate change, and in other issue areas as well as concerns with neoliberal ideology visible during the financial crisis (e.g., in the European Union in particular) have led to a crisis of confidence in deepening institutionalization. Theoretically each of the BRICS countries has an option to marginalize global policymaking and focus on domestic policies and issues of its huge population, but we are seeing the contrary phenomenon. The BRICS are striving to gain better seats in key international institutions and strategizing to become global rule-makers. Not all of the BRICS are democratic, yet they jointly want a more democratic international order. But the way the BRICS will operate may be significantly different: on average, they treat sovereignty and the privatization of governance with greater caution than major powers and civil society's reach and influence is less forceful. While the BRICS may seek to reclaim the relevance of state-led cooperation and formal institutions in an increasingly privatized and fragmented global governance, the question is whether corporate lawyers can become regulatory entrepreneurs, raising their credibility and stature together with the states, or whether they will thrive on the inadequacies of the existing multilateral order.

Needless to say, these are both large and difficult questions with implications far beyond the scope of this Article. Indeed, these are precisely the kind of questions that we hope to explore in the project on Globalization, Lawyers, and Emerging Economies (GLEE) to which we both belong.<sup>143</sup> By employing a variety of qualitative and quantitative empirical methodologies, social movement frameworks, and network analysis we hope to contribute to a broader understanding of how the BRICS corporate legal elite is developing and how their struggles for power and influence, both domestic and international, are likely to affect—and be affected by—broader trends such as the de-professionalization of the corporate sphere and the fragmentation of the international one. We hope that this brief examination of the important inter-

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<sup>143</sup> For a description of this project, see *Globalization, Lawyers, and Emerging Economies (GLEE)*, HARV. L. SCH. PROGRAM ON LEGAL PROF., <http://www.law.harvard.edu/programs/plp/pages/glee.php> (last visited May 12, 2013).

section between the rise of the corporate legal elite in the BRICS and global governance will encourage other scholars to join us in investigating these important issues.