

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 market for legal services are devoting increasing attention to the BRICS countries of Brazil, Russia, India, China, and South Africa, as well as other emerging powers. Yet very little of this rich literature addresses the intersection between these two 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 that is beginning to emerge inside each of the BRICS countries will play in shaping global governance. How will the rise of this new corporate legal elite within these rising powers affect the shape and scope of global regulation of the practice of law and other professional services? How will it shape – or undermine – the liberal internationalist project more generally? By examining the architecture of the global networks within which BRICS corporate lawyers increasingly function, their potential role in achieving greater global integration, and their likely impact on corporatization and privatization of global governance, this article sheds light on this neglected intersection and underscores the need for further empirical and theoretical investigation of these important questions.

1. Introduction

Over the last twenty years, the BRICS countries have undertaken numerous economic reforms. Beginning in the 1990s, each country has more or less opened its economy to foreign capital and has become more deeply integrated into the world economy. Since 2000, these countries have also begun to move from a model of globalization based primarily on in-bound investment, to one in which companies based in these jurisdictions are also significant sources of outward investment.

Predictably, this market opening has fueled a growing demand within the BRICS for laws, regulations, and administrative apparatus to govern this new corporate sector, which in turn has created a need for lawyers who are capable of practicing corporate law. Today, this new corporate legal elite – by which we mean lawyers who work in law firms of increasing size and scope which serve a clientele composed primarily of foreign and domestic corporations, and lawyers who work in the internal legal departments within corporations based or operating in the BRICS – has grown significantly in both size and importance in each of these jurisdictions. Although the vast majority of lawyers in the BRICS are solo and small firm practitioners serving individual clients, each country can now boast of several law firms comprised of hundreds – and

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in the case of China, more than 1000 – lawyers, and in-house legal departments, such as the 500 lawyer general counsel office of India’s Tata Group, that are almost as large.

Both the rise of the BRICS as important economic powers and the resulting creation of a new corporate legal elite in these countries have been the subject of significant scholarly inquiry. Not surprisingly, international relations scholars have tended to focus on the growing power of the BRICS as state actors in global governance, while sociologists of the legal profession have concentrated on how the new corporate elite might destabilize existing hierarchies within the global corporate legal services market. What is surprising is how little attention has been devoted to the possible implications of a rising corporate legal elite in the BRICS for the project of 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 US and other Western democracies in domestic governance.³ Indeed, there is already a rich and growing literature that concerning the political impact of the US and UK corporate legal elite on global governance.⁴ Yet there is almost no discussion about whether the new corporate elite within the BRICS and other key emerging powers is likely to have a similarly important impact – one that may come to loom as large as the economic and political impact that these states are beginning to wield generally.

In this article, we explore how the rise of the corporate legal elite in emerging economies might present two conceptual challenges for global governance. The first conceptual challenge relates to how these new corporate lawyers might influence the growing global governance of the legal profession itself. Beginning in the last decades of the twentieth century, law has been transformed from one of the most locally bounded 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.⁵ This transformation has in turn created significant pressure to abandon the largely domestic regulatory structures governing legal practice and to develop a transnational

³ See, e.g., Halliday, Terrance, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (U. Chicago Press 1987).

⁴ For an overview of the rich literature of the globalization of the corporate legal sector see Beaverstock J, Smith R and Taylor P (1999) *The long arm of the law: London’s law firms in a globalizing world economy*. *Environment and Planning A* 31(10): 1857–1876; Flood J (1996) *Megalawyering in the global order: The cultural, social and economic transformation of global legal practice*. *International Journal of the Legal Profession* 3(2/3): 169–214; Morgan G and Quack S (2006) *Global networks or global firms? The organizational implications of the internationalisation of law firms*. In: Ferner A, Quintanilla J and Sanchez-Runde C (eds) *Multinationals and the Construction of Transnational Practices: Convergence and Diversity in the Global Economy*. London: Palgrave Macmillan; Faulconbridge, JR and Muzio, D. (2008) *‘Organizational professionalism in globalizing law firms’*, *Work, Employment and Society*, 22: 7–25. While the debate on the corporate legal sector in emerging economies has increased, the question of their joint influence on global governance structures was left unexplored. For the dynamics of the rise of the corporate legal sectors in emerging economies see Wilkins D. (2012) *Is the In-House Counsel Movement Going Global?* *Wis.L.Rev.* 251; Liu S (2008) *Globalization as boundary-blurring: international and local law firms in China’s corporate law market*, *Law & Society Review*, 42(4), pp. 771-804.

⁵ See, e.g., D. Dan Sokol, *Globalization of Law Firms: A Survey of Recent Literature and an Agenda for Future Study*, 14 *Ind. J. Global Legal Studies* 5 (2007)

model capable of coping with this new reality.⁶ Although most of the discussion about this trend has been from the perspective of the role being played by lawyers from the US and UK, as corporate lawyers from the BRICS and other emerging powers grow in power and stature, it is certainly plausible that they may begin to play an important role in debates over the scope and structure of this new global regulatory regime.

The second conceptual challenge relates to the impact that this new corporate legal elite might have on the liberal world order more generally. Since the fall of the Soviet Union – ironically the event that also ushered in the rise of the BRICS and other emerging powers – the world order has been dominated by the United States, the United Kingdom, and Western Europe, which have promoted a liberal internationalism based on faith in the power of free markets and capitalism, democratization, and human rights. As economic power becomes concentrated in emerging economies, private actors from these jurisdictions will be able to shape global governance according to their own experiences and values, which may or may not be liberal in its outlook. As many others have noted, the BRICS are at the center of this power shift, with a share of global GDP in purchasing power parity terms that will be greater than the G7 share around 2020.⁷ Indeed, these countries have already begun to flex their collective muscles toward steering the trajectory of global governance toward multi-polarity by instituting a rapidly escalating set of networked cooperation mechanisms, that now extend across a wide range of sectors, including meetings of ministers of foreign affairs, trade and investment, finance, health, food and agriculture, development, heads of statistical institutions, competition authorities, development banks, magistrates and judges; business fora and research institutes. Although cooperation in the legal sector currently lags other areas such as finance, it is plausible that the emergence of a new globalizing corporate sector might spur broader cooperation. But whether or not this happens, given their proximity to this growing economic power, the new breed of corporate lawyers arising in the BRICS jurisdictions appear to be particularly well positioned to play an important role in how these countries decide to shape – or resist – the prevailing Washington consensus favoring liberal internationalism.

The remainder of this article proceeds in five additional parts. In Part 2, we situate corporate lawyers into the context of global governance, and then discuss the rise of the corporate legal elite in the BRICS. Parts 3-5, we examine the impact of the new corporate legal elite on the governance of the legal profession and the liberal world order through three perspectives.⁸ The first perspective examines corporate lawyers through global governance arrangements and architectures to which they belong. The second perspective investigates global governance as a project of internationalization of the profession and the evolution of a global civic ethics. The final perspective examines global governance as a euphemism for the rule of global capital. Part Six briefly concludes by summarizing the discussion and identifying directions for an empirical

⁶ John Flood, *Transnational Lawyering: Clients, Lawyers, and Regulation*, in *Lawyers in Practice: Ethical Decision Making in Context* (Levin and Mather, eds; U of Chicago Press 2012)

⁷ IMF 2012. *World Economic Outlook* (April). Washington, D.C. [Dataset]. See generally, O'Neill J (2001) *Building Better Global Economic BRICs*. New York: Goldman Sachs Global Research

⁸ For a three-tiered analytical approach to global governance see, for example, Pattberg, Philipp H. (2007) *Private Institutions and Global Governance: the New Politics of Environmental Sustainability*. Edward Elgar.

research agenda to test some of our hypotheses and to further explore the important connection between the rising corporate elite in the BRICS and global governance.

2. Corporate Lawyers in Global Governance: Theoretical Background

The origins of global governance as an important concept in international relations theory also dates back to the fall of the Berlin Wall when it became possible to envision a post-Cold War order in which the management of world affairs could be accomplished through effective international cooperation. The concept itself embedded the transformations of the role of the state and the growing relevance of non-state actors in the sphere where the central authority or world government does not exist. Instead, what exists is global governance, comprising governance in the global sphere or the coordination of activities that span the globe, as well as coordination at all levels of social interaction up to the global level.⁹ A group of eminent public figures joined to reflect on this world through the International Commission on Global Governance, and defined global governance 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 cooperative action may be taken.”¹⁰

Global governance then evolved into a social science concept and a research agenda. The demand for research in this area has grown parallel to the three trends of global governance: greater juridification of political, social and economic life as law is utilized to legitimate increasingly more varied claims to authority; increasing pluralism in forms of regulation and governance; and, enhanced significance of privatized governance arrangements.¹¹ While the bulk of early global governance scholarship dealt with state-related questions, scholars soon recognized that the business world contributes to global governance through self-regulation across a number of industries and that private authority can significantly impact global governance outcomes.¹² Subsequent scholarship found an upward trend in the management of global affairs by economic actors and demonstrated how these actors cooperate in the areas of rule-making, standard-setting and organization of industrial sectors – including the legal services sector.¹³

⁹ Latham, Robert. (1999) *Politics in a Floating World: Toward a Critique of Global Governance*. In *Approaches to Global Governance Theory*, edited by Martin Hewson, and Timothy J. Sinclair, Albany: State University of New York Press page 28.; Rosenau, James N. and Czempiel, Ernst-Otto (1992) *Governance without Government: Order and Change in World Politics* eds. Cambridge: Cambridge University Press, pp. xii, 311.

¹⁰ Commission on Global Governance (CGG), 1995. *Our Global Neighborhood. The Report of the Commission on Global Governance*. Oxford: Oxford University Press, page 2.

¹¹ Cutler, Claire (2003) *Private Power and Global Authority*, Cambridge University Press, page 8.

¹² Ronit, Karsten and Schneider, Volker (1999) *Global Governance through Private Organizations*. *Governance*, 12: 243–266; Bierstecker, Thomas J. 2002. *The Emergence of Private Authority in Global Governance*, Cambridge University Press.

¹³ Cutler, A. Claire (2003) *Private Power and Global Authority*, Cambridge University Press, page 8, page 4; Cutler, A. Claire, Haufler, Virginia and Porter, Tony (1999) *Private Authority and International Affairs*, SUNY Press.

The growing influence of corporate power on global governance has been well documented both in the light of its negative and positive consequences. On the one hand, there has been a proliferation of mechanisms that strive to keep corporations accountable for their actions, particularly following up on corporate misconduct and civil society pressures.¹⁴ On the other hand, some corporations have successfully transformed from problem causers to problem solvers and norm entrepreneurs in international politics.¹⁵

The rise of corporate lawyers in the BRICS can therefore be seen as a microcosm of debates on the growing influence of corporate power on global governance. Given their role as advocates for the interests of global companies – both multinationals based in the West and the growing number of important companies based in the BRICS – it is easy to see these lawyers as “partners with power” in a campaign to corporatize the regime of global governance.¹⁶ At the same time, corporate lawyers have also been instrumental in pushing for the spread of the rule of law, including an independent judiciary, anti-corruption, and even basic human rights, if only as a way of ensuring the kind of predictability and stability upon which functioning markets ultimately depend.¹⁷ In this section we explore this duality by first introducing corporate lawyers in the BRICS as global governance actors and then developing an analytical framework to explore their impact.

2.1. The Rise of the Corporate Legal Elite in the BRICS

Globalization led to the “widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social life, from the cultural to the criminal, the financial to the spiritual.”¹⁸ Law firms have been affected by this interconnectedness. Yet they are late globalizing businesses primarily due to strict and nationally specific regulation of practice, the existence of few global legal products, and many regulatory differences between markets.¹⁹ Currently the world’s highest revenue firms – at the same time those that are most globalized - are located in the US and the UK, with New York and London as the centers of the global legal market.²⁰ The practices of such law firms have been well documented in terms of their influence

¹⁴ See, for example, John Ruggie et al. (2004) *The Impact of Corporations on Global Governance, A Report of the Empire and Democracy Project (2003-2004)*, New York: Carnegie Council.

¹⁵ Annegret Fohl et al. (2010) *The Role of Business in Global Governance: Corporations as Norm-Entrepreneurs*. New York: Palgrave Macmillan.

¹⁶ See Robert Nelson, *Partners with Power* (University of Chicago Press 1988). 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 not’s. See Galanter, *Why the Have’s Come out Ahead*. *Law & Society Review* (1974). [Also cite the book written on the 30th anniversary of Galanter’s article]

¹⁷ [Cite Dezelay and Garth, etc.]

¹⁸ Held, David, Anthony McGrew, David Goldblatt, and Jonathan Perraton. 1999. *Global Transformations. Politics, Economics and Culture*. Stanford: Stanford University Press, page 2.

¹⁹ Segal-Horn, Susan and Alison Dean (2011) *The Rise of Super-Elite Law Firms: Toward Global Strategies*. *The Services Industries Journal* 31(2). Also Beaverstock et al. (1999) *op.cit.* 3.

²⁰ *The 2011 Global 100: Most Revenue, The American Lawyer*

<http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202514393371>. 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-US or UK clients and presence in important transactions around the world.

abroad including in emerging economies.²¹ 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. They specialize in areas of substantive law that are transnational in nature including international commercial arbitration, international trade and investment law, financial law, cross-border M&A, international sale of goods, capital market transactions, debt restructuring and other areas.

Until very recently, there has been little evidence of law firms based in the emerging economies challenging “Western” dominance in the global legal sector. Although growing rapidly in both size and scope, most corporate law firms based in the BRICS are still relatively small by global standards.²² Moreover, even the largest of the new BRICS law firms have been relatively slow to expand abroad. There is growing evidence, however, that emerging powers corporate firms are beginning to move beyond these traditional limitations. Firms based in China are the most obvious example. Since the late 2000s, several large Chinese firms have opened international offices or entered into mergers or alliances with non-Chinese firms, culminating with the blockbuster merger between China’s 1000 lawyer King & Wood and 800 lawyer Mallesons Stephens Jacques, one of the largest and most prestigious law firms in Australia in 2012.²³ 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 (UK), Nixon Peabody (US), 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.²⁴ Whether or not King & Wood’s ambitious plans actually come to fruition, however, there is little doubt that the firm’s stature as an important regional player – and the competence, sophistication, and at least regional reach of other important emerging market law firms – are likely to increase significantly in the coming years.

Moreover, unlike law firms from emerging economies, multinational companies from these economies have rapidly made their impact known abroad, and their in-house lawyers have helped engineer their global expansion. For example, the Fortune’s Global 500 world’s largest corporations listed 35 corporations from BRICS countries in 2006 and only six years later, there are 96 of them on the list.²⁵ These corporations control huge human, financial, technological and environmental resources and engage extensively abroad where they face multiple legal

²¹ See note 3 and Flood, John 2011 The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation. *Current Sociology* 59(4) 507-529.

²² 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 US Standards. See [National Law Journal 250, which indicates that the median firm on the list has about 500 lawyers]

²³ Debra Mao and Joseph Schneider, China’s King & Wood, Mallesons combine to form Asia’s Largest Law Firm, Bloomberg News, available at <http://www.bloomberg.com/news/2011-12-15/king-wood-mallesons-combine-to-create-asia-s-largest-law-firm.html>

²⁴ Yun Kriegler, King & Wood Mallesons looks to Canada and Singapore for Future Expansion, *The Lawyer*, June 18, 2012, available at <http://www.thelawyer.com/king-and-wood-mallesons-looks-to-canada-and-singapore-for-further-expansion/1012969.article>; James Swift, King & Woods Looks West for International Expansion, *The Lawyer*, May 21, 2012, available at <http://www.thelawyer.com/king-and-wood-mallesons-looks-west-for-international-expansion/1012641.article>

²⁵ Global 500, Annual Ranking of the World’s Largest Corporations for 2012, Available at http://money.cnn.com/magazines/fortune/global500/2012/full_list/index.html

challenges. As a result, it is not surprising that many emerging market companies have begun to develop increasingly large and sophisticated internal legal departments.²⁶ In-house counsel not only lends legitimacy to the choice corporations make as they engage in a proliferating number and variety of transactions, but it also helps corporations think about responsible investment and business practices and provide early legal input into strategic decisions. For the most part, the general counsels and other lawyers employed as internal counsel in emerging markets, like the lawyers working in the corporate law firms in these jurisdictions discussed above, 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.²⁷ Nevertheless, as with their law firm counterparts, the trend seems to point clearly in the direction of their growing sophistication and importance.²⁸ And like their law firm brethren (a “brotherhood” we should add that is becoming increasingly feminized, particularly in the emerging world), the general counsels of the important companies emerging from the important new emerging powers are likely to serve as pillars of globalization. As a result, the question of how to conceive of their role in global governance is that much more important.

2.2. Analytical Framework to Examine the New Corporate Legal Elite

As we indicated in Part I, the growing engagement of corporate lawyers across borders has facilitated the proliferation of organizations, policy instruments, rules, procedures and norms that regulate the legal profession in the international context. Given their increasing importance in the global legal profession generally, it is not surprising that the emerging BRICS legal elite is beginning to influence this process. At the same time, corporate legal sector in the BRICS may encourage or constrain the evolution of the liberal world order in at least four ways.²⁹ First, the corporate legal sector may promote – or obstruct – the development of the kind of legal infrastructure within the BRICS that could provide greater predictability, transparency and stability in economic transactions. Second its growing power can either enhance or diminish access to the legal system and formal equality for individuals and groups. Third, corporate lawyers can either support or hinder the promotion of a broader conception of individual rights and political accountability beyond basic access to legal institutions and formal equality. Finally,

²⁶ See David B. Wilkins, *Is the In-House Counsel Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 *Wisc. L. Rev.* 251, 287-300 (2012).

²⁷ See Catherine Dunn, *Setting the Agenda for Corporate Counsel in China and India*, *Corporate Counsel Magazine*, Dec. 6, 2012, available at http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202580416285&=&Setting_the_Agenda_for_General_Counsel_in_China_and_India=&et=editorial&bu=Corporate%20Counsel&cn=cc20121206&src=EMC-Email&pt=Corporate%20Counsel%20Daily%20Alerts&kw=Setting%20the%20Agenda%20for%20General%20Counsel%20in%20China%20and%20India&slreturn=20121106085848.

²⁸ Wilkins, *In-House Counsel Movement*, *supra* note __, at 271-283 (noting that some companies, such as India’s Tata Group, already have very large and sophisticated internal legal departments and arguing that the processes of globalization are likely to lead toward a further dissemination of this phenomenon, albeit with many significant variations).

²⁹ These perspectives are elaborated in more detail in Wilkins, David (2011) *Globalization, Lawyers and the Rule of Law: Private Practice and Public Values in the Global Market for Corporate Legal Services*. Presentation at the World Justice Forum, Barcelona, June 21.

the corporate legal sector can play an important role in either reproducing or challenging the authority of international institutions.

There are many ways to analyze the rise of the corporate legal elite and its impact on global governance. We believe that three approaches at the core of global governance debates are particularly informative. For ease of reference we will refer to these analytical approaches as architectural, integrationist and corporatist.³⁰ The architectural approach maps the actors and the processes of global governance to understand who participates and how, and what are the channels of influence. The architecture of governance has become reflected in the vocabulary of networks that is broader than international politics, and private actor networks are its integral parts.³¹ The second analytical perspective on global governance is to examine it as a long-term process of global integration, where global governance is a response to the gap between accelerating global interactions and limited steering capacity of national regulators.³² This in turn leads to the greater legalization and regulatory activity in the international sphere and raises questions about further liberalization of the legal industry and the role of foreign lawyers in BRICS regulatory developments. Legalization is now reflected in the increasing number of rules that regulate actors' behavior, and the internationalization of previously domestic concerns. National legal fields are restructuring and becoming more internationalized due to globalization-influenced shifts in economic activity and laws as well as the use of legal fields as assets in competition for capital.³³ The final perspective on global governance is a critical one, where the international system in place is perceived to be favoring 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 the local social context and national culture.³⁴ Concerns that neoliberalism has failed in ensuring well-being of people in both rich and poor economies have been well-spread and vocalized through the resistance to policies of international economic institutions.

In the following Part, we examine the impact of the rise of the corporate legal elite in the BRICS in light of each of these approaches.

3. Corporate Lawyers' Networks and Governance Arrangements

³⁰ For an overview of global governance see, for example, Karns, Margaret P. and Mingst, Karen A. (2004) *International Organizations: The Politics and Processes of Global Governance*, Boulder: Lynne Rienner; for a discussion of analytical dimensions see Pattberg, Philipp (2006). *Global Governance: Reconstructing a Contested Social Science Concept*, London School of Economics and Political Science, GARNET Working Paper: No 04/06.

³¹ Kahler, Miles (ed.) (2009) *Networked Politics: Agency, Power, and Governance* (Cornell Studies in Political Economy), p. 2; Slaughter, Anne-Marie (2004) *A New World Order*, Princeton University Press.

³² Pattberg, Philipp (2006). *Global Governance: Reconstructing a Contested Social Science Concept*, London School of Economics and Political Science, GARNET Working Paper: No 04/06.

³³ Trubek, D.M., Dezalay, Y., Buchanan R. and Davis J.R. 1994. *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*. 44 *Case Western Law Review* (1993-1995), p. 477.

³⁴ Paul, Joel Richard (2000) *Cultural Resistance to Global Governance*, 22 *Mich. J. Int'l L.* 1.; Cochrane, Feargal, Duffy, Rosaleen and Jan Selby (eds.) (2004) *Global Governance, Conflict and Resistance*, Palgrave Macmillan.

While individual actors such as a major multinational company or a large-scale global law firm from China or India are certainly relevant in their own right, the question of their impact on global governance is primarily a question of 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.³⁵ However, corporate lawyers' influence can also be indirect. Transnational law-making 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.³⁶ 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 steer the new private regime.

Corporate lawyers in the BRICS countries have been 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. These associations are independent from the bar and oriented toward a smaller subset of the bar in the corporate sector. In 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. In Brazil, elite law firms have formed an association called Law Firm Study Center in 1983, which proved central in enabling private lawyers to build capacity to participate in international dispute settlement institutions such as the World Trade Organization's dispute settlement body.

Similarly, in-house counsel have also engaged in cooperative action through by forming associations, which have been largely oriented toward exchange of views, educational and networking conferences, increasing efficiency of legal services, promoting corporate lawyers as well as encouraging professional and ethical conduct among members. Examples of such associations include a long-standing Corporate Lawyers Association of South Africa (formed in 1982 as the Association of Legal Advisers of South Africa) with 340 members; the Russian Corporate Counsel Association comprising both Russian and multinational members or the Hong Kong Corporate Counsel Association established in 2003.

Although the two key parts of the corporate legal bar we are examining - top law firms and in-house counsel - therefore have some important similarities, their associational dynamics also appear to be different in important respects. Both of these private actor types thrive through corporate globalization, which not coincidentally raises the demand for their services. As such, 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. However, there are also likely to be significant differences in the

³⁵ For a discussion of the gains from international cooperation see Keohane, Robert. 1984. *After hegemony: Cooperation and discord in the world political economy*. Princeton: Princeton University Press

³⁶ Quack, Sigrid (2007) *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, *Organization* 14 (5), 643-666.

interests of these two types of corporate actors – differences that stem from important differences in status and organizational structure between the two groups.

Thus, 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.³⁷ Indeed, even in many European countries, corporate 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 with internal counsel shielded by the attorney-client privilege.³⁸ 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 structure and relationship 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 capture as much of the rent from this activity as possible for themselves gives them a fundamentally different perspective than in-house lawyers who are located within corporate hierarchies and whose very existence is therefore completely 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 the whether professional regulation should permit or deny innovative new forms of legal practice such as multidisciplinary practice.³⁹ These tensions are likely to be exacerbated in emerging markets where, for example, law firms may join to resist the opening of the legal market to protect themselves, while corporate legal departments gain by increasing domestic competition.

We can see some of these differences when we examine the manner in which various corporate lawyers in the BRICS participate in global governance through “networks,” by which we 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.”⁴⁰ 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.⁴¹ In the present context, networked approaches can incorporate interactions among

³⁷ See, e.g., Katherine Hendly, *The Role of In-House Counsel in Post-Soviet Russia in the Wake of Privatization*, 17 *Int'l J. of the Legal Profession* 5 (2010); Sida Liu, *Palace Wars over Professional Regulation: In-House Counsel in Chinese State-Owned Companies*, 2012 *Wisc. L. Rev.* 547 (2012).

³⁸ See Marcia Coyle, *European Court Limits Attorney-Client Privilege for In-House Lawyers*, *Nat'l L. J.*, Sept 14, 2010.

³⁹ See David B. Wilkins, *Team of Rivals: Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *Fordham L. Rev.* 2078 (2010) (documenting this tension).

⁴⁰ Podolny JM and Page KL. (1998) *Network Forms of Organization*. *Annual Review of Sociology*, 24, 57-76.

⁴¹ Slaughter, Anne-Marie and David Zaring, 2006. *Networking Goes International: An Update*. *Annual Review of Law and Social Science*, Vol. 2: 211-229, p. 215.

lawyers, businesses and the state at the domestic level and at the international level. 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.⁴² 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.⁴³ These arrangements vary across BRICS based on specific local contexts.

To what extent are BRICS lawyers socialized into international legal associations? 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. It has membership of more than 45,000 individual lawyers and over 200 bar associations and law societies. Associations from BRICS countries are well represented.⁴⁴ Brazil has four member organizations in the IBA: Brazilian Bar Association, the Law Firm Study Centre (CESA), Sao Paulo Lawyers' Association and Instituto dos Advogados Rio Grande do Sul. Russian Federation has three member organizations: Federal Chamber of Lawyers of the Russian Federation, International Union (Commonwealth) of Advocates and Moscow Chamber of Advocates. India has the Bar Association of India, the Bar Council of India and the Society of Indian Law Firms as members. While China has only one member organization – All China Lawyers Association, Hong Kong has two: Hong Kong Bar Association and the Law Society of Hong Kong. South Africa has the most member organizations in the IBA out of all BRICS: General Council of the Bar of South Africa, Corporate Lawyers Association of South Africa, Law Society of Northern Provinces, Law Society of South Africa, KwaZulu-Natal Law Society and the Law Society of the Cape of Good Hope. This socialization into the IBA illustrates the demand for collective action but also the diversity of collective interests and corporate lawyers' interest in having 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. Both of these developments arguably reflect the 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, is also arguably the oldest as well, even though it was only established in 1982 – and only then as the American Corporate Counsel Association. 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 the primary reason for creating ACCA (as it was then called) was to raise the visibility and stature corporate

⁴² Kahler, Miles (ed.) (2009) *Networked Politics: Agency, Power, and Governance* (Cornell Studies in Political Economy).

⁴³ Koenig-Archibugi, Mathias. 2002. *Mapping Global Governance*. In *Governing Globalization*.

Power, Authority, and Global Governance, edited by D. Held and A. McGrew. Cambridge: Polity Press, p. 50.

⁴⁴ International Bar Association website www.ibanet.org accessed November 15, 2012

counsel.⁴⁵ But as indicated above, it took another two decades or this “in-house counsel movement” to take hold outside of the United States. Thus it is not surprising that it was not until 2003 That ACCA dropped the “American” from its name and began aggressively recruiting non-American members.

With offices in 75 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 30,000 members employed by over 10,000 organizations.⁴⁶ Yet, even most of the lawyers who are members of these foreign chapters are US corporate counsel, and it is not clear whether the organization admits in-house lawyers who do not have full professional standing as lawyers.⁴⁷ 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 In-House Community, which is 13 years old and comprised of over 18,000 individual in-house lawyers from the Asia-Pacific and the United Arab Emirates. While this is an important networking association for Indian and Chinese counsel, its main activity is to organize annual In-House Congress and has not shown greater institutionalization.

Although BRICS corporate lawyers practicing in both law firms and in-house legal departments have therefore formed or joined independent networks that are capable of influencing the global governance of the legal profession, and broader policy debates about globalization generally, the very 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 views about global governance. As Heinz, Nelson, Sandefur, and Lauman argue in their classic examination of the structure of the Chicago Bar, “social stratification divides the bar and weakens its coherence.”⁴⁸ 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. 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.

In the US, 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

⁴⁵ See Robert Eli Rosen, *The In-House Counsel Movement, Professional Judgment, and Organizational Representation*, 64 *Ind. L. J.* 469 (1989).

⁴⁶ Association of Corporate Counsel website, www.acc.com accessed November 15, 2012

⁴⁷ See Wilkins, *In-House counsel Movement*, supra note __, at 299-230.

⁴⁸ See John P. Heinz, Robert Nelson, Rebecca Sandeufur and Edward Laumann, *Urban Lawyers: The New Social Structure of the Bar*, 318 (U of Chicago Press 2005)

as a whole.⁴⁹ More importantly, they have arguably made it more difficult for the project of domestic governance generally, as it is increasingly difficult to find lawyers that can bridge the gap between different actors in the policy arena.⁵⁰ 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.⁵¹ If it is difficult for lawyers in Washington DC to work together on projects of domestic governance, one wonders how difficult it may be for lawyers in New Delhi or Brasilia 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.⁵²

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

4. 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 affect 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 – has are being challenged as governments face a tension between promoting development through greater integration of all sectors, including law, and and protecting and empowering the domestic legal industry as it internationalizes and seek greater control over the standards, size, qualification, and discipline of legal practitioners. These tensions have been recently visible in India, where the the authority of the Bar Council of India (BCI) and other state bar councils which 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 jurisdiction over all bar councils, including the BCI. The Law Minister argued that this new body – which, in a move that underscores the growing

⁴⁹ See David B. Wilkins, [lawyers in context]

⁵⁰ Once again, John Heinz and his collaborators have been in the forefront of drawing this connection. See Anthony Paik, John P. Heinz, and Ann Southworth, *Political Lawyers: The Structure of a National Network* (unpublished manuscript on file with the author 2012)

⁵¹ See John P. Heinz, Edward O. Laumann, Robert L. Nelson, and Robert H. Sallisbury, *The Hollow Core: Private Interests in National Policymaking* (U of Chicago Press 1993). For evidence that this gap in the network between the sides of the policy debate is increasing, See Heinz *Political Lawyers*, supra note __. 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, *Cause Lawyers for the Political Right* (2010).

⁵² China’s unified political system may very 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 corporate lawyers playing an active role in political activity than their counterparts in other BRICS – although the very veneer of harmony put forth by the Chinese leadership will inevitably make seeing this kind of activity more difficult.

importance of transnational knowledge in the new global regulatory space, the Minister proposed calling the Legal Services Board after a similar government body in the UK which now regulates the legal profession in that country – 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.⁵³ Although the proposal was ultimately abandoned when the Law Minister was replaced, as the government seeks tighter controls, the ongoing process of global integration and efforts to put legal services on regional and global trade agendas, the long-term ability of any domestic actor to control the regulation of the profession is likely to be significantly diminished. These regulatory battles play out through the debate around opening up of the legal markets to foreigners and their influence on domestic regulation as well as larger normative issues about leveling the playing field for all.

4.1. Corporate Lawyers and the Opening of the Legal Services Markets

BRICS countries, now all of them WTO members, have been engaged in the “progressive liberalization” of trade in services through the General Agreement on Trade in Services (Article XIX of the GATS). 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. For example, Russia’s legal market has been deregulated following the demise of the Soviet Union, and a license is not required to practice law except for lawyers who appear in court on criminal matters. Foreign lawyers can provide advice on international law and their home law, and Russian lawyers are free to practice Russian law at foreign firms through partnership arrangements. The level of openness of this market led the Russian Minister of Justice Alexander Kononov to conclude in 2010 that it is “abnormal” that “(a)bout 90 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.”⁵⁴ South African market has been similarly welcoming to foreign lawyers. They can practice home and international law as well as international finance, project management and arbitration, but are not permitted to practice local law or enter into partnerships with local firms.

India, Brazil and China have protected their domestic markets to a much larger extent. China 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. They can advise on their home law, international 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 if they have given up their Chinese practicing certificate. Brazil has similar regulations as foreign lawyers can practice home country and international law on registration with the Brazilian Bar Association, and they

⁵³ See Papa and Wilkins, *supra* note ____ (describing this proposal), and the manner in which it and other developments underscore the increasing “globalization of knowledge” in the legal space. For a description of the Legal Service Board in the UK, See John Flood,

⁵⁴ Russia’s MoJ Wants Domestic Law Firms to Have Increased Presence, Russia Briefing, November 22, 2010. Available at <http://russia-briefing.com/news/russias-moj-wants-domestic-law-firms-to-have-increased-presence.html/>

can enter into partnership with Brazilian lawyers, who are then unable to use their title or advise on Brazilian law. India has remained the most protectionist and has not permitted foreign lawyers to practice in the country. The recent Madras High Court ruling, however, has provided an opening for foreign lawyers and have entitled them to participate in international arbitration proceedings in India and advise clients on foreign law on a “fly in fly out” basis.⁵⁵

While it is to be expected that all of the BRICS countries will proceed with their commitments on the liberalization of trade in services, the understanding of legal services as unique profession and unlike other services has been a contentious issue in the debate, particularly in India, Brazil and China. Powerful bar associations in Shanghai, Rio de Janeiro and New Delhi have challenged the weakening of barriers for foreign lawyers. Global progress in liberalizing legal services remains slow, but regional developments such as EU-India free trade discussions provide an additional avenue for addressing trade barriers faced by the legal profession. As of now, lawyers in these countries are not eager to contribute to global legal integration and seek to protect their domestic infant industry. Yet as the perception of gains from the multilateral regime 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.

4.2.Foreign Lawyers and BRICS Domestic Regulation: What is a Level Playing Field and what are the Boundaries of Foreign Lawyers’ Influence?

Both governments and businesses in the BRICS countries have often expressed concerns with the unequal distributional outcomes of the global political economy and major powers’ dominance in building the infrastructure of the international system and in global rule-making. 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. BRICS are now both being perceived and promoting the perception that they are the 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.”⁵⁶ A similar paradox lies at the heart of the corporate legal elite’s view about their status in 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 for protectionist regulation to ensure that they can compete with foreign firms on what is often ironically referred to as a “level playing field.”

This paradoxical claim to both power and the need for protection is frequently expressed around the desire by all parties to the debate over foreign lawyers to create a “level playing field” with respect to the issue of reciprocity of legal practice,. This issue has become increasingly contested

⁵⁵ Link to case: http://judis.nic.in/judis_chennai/qrydisp.aspx?filename=35290

⁵⁶ Nel, Philip (2010) *Redistribution and Recognition: What Emerging Regional Powers Want?* Review of International Studies 36(4), r 2010, pp 951-974.

as the BRICS have gone, as we noted in Part I, from seeking almost exclusively in-bound investment to becoming important centers of outbound investment as well – including the outbound investment 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 major powers and emerging economies for opposite causes: to both argue for and against barriers to practice. For example, the ABA President argues that reciprocity demands that India should open up its legal market,⁵⁷ while the President of the Society of Indian Lawyers argues that reciprocity demands the opposite.⁵⁸ As a result, reciprocity fuels the debate instead of serving as an objective criterion for resolving it. On the US side, allowing Indian lawyers to practice everywhere in the US 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. On the Indian side, however, the pressure to open the Indian market brings out Indian lawyers' frustration with their inability to immigrate, qualify and practice abroad.

The reciprocity issue points out structural problems with the international system, where the notion of common values and equal opportunities 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.⁵⁹ Yet to what extent is there a global civil ethic with respect to legal professionals? The closest to a global ethical code is the International Bar Association's (IBA) Code of Ethics, which deals with problems relating to professional privilege; information relating to fees; specialization and advertising; and protecting the legal services consumer. 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, its actual membership is skewed toward elite lawyers. Even with respect to this group, however, it is far from clear that BRICS corporate lawyers are fully equal members. To answer this question and determine whether the corporate elite in emerging powers are primarily rule-takers as opposed to rule-makers, it would be necessary to investigate to what extent lawyers from these countries have promoted this code and have been proactively engaged in shaping it. Alternatively, to what extent do lawyers from the BRICS push for alternative codes and do their international efforts trickle up to the global level?

Ethics Codes, of course, are only the most basic form of global governance – and more often than not a crude and ineffective one at that.⁶⁰ 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

⁵⁷ Sloan, Karen, ABA Seeks Obama's Help in Fight for Reciprocity with India, *The National Law Journal*, November 11, 2010 Available at http://www.law.com/jsp/article.jsp?id=1202474706157&ABA_Seeks_Obamas_Help_in_Fight_for_Reciprocity_With_India&slreturn=20120904153228

⁵⁸ Eluvangal, Sreejiraj, UK Firms Ship Back Indian Lawyers, *Daily News & Analysis*, March 12, 2009. Available at http://www.dnaindia.com/money/report_uk-firms-ship-back-indian-lawyers_1238256 (here president of Society of Indian Lawyers links reciprocity to immigration).

⁵⁹ Commission on Global Governance (CGG), 1995. *Our Global Neighborhood. The Report of the Commission on Global Governance*. Oxford: Oxford University Press.

⁶⁰ See generally, Richard Abel, *Why the ABA Bothers to Enact Ethical Rules*, *Tex. L. Rev.*

entry of foreign lawyers in almost every jurisdiction, but, but nowhere more pronounced than in China. After strong resistance from the Shanghai Bar Association, foreign lawyers were eventually allowed limited, but nevertheless important access into the Chinese legal market, allowing foreign firms to establish Chinese offices from which many have earned significant profits.⁶¹ This in turn led some observers like Jerold Cohen to argue that they should not only be seizing the opportunities of the Chinese market but need to stand up against government crackdown against human rights lawyers and work in line with their own moral, political and cultural values. Yet to what extent are foreign lawyers in China in a position or even responsible to push the host government with a different set of values to 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 these values common to all lawyers Chinese and non-Chinese alike, and those with less to lose can reasonably be expected to promote them? Or 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. The fact that there is now a significant split within the Shanghai Bar Association, and those in Sao Paulo and even Mumbai, over the question of whether and to what extent to oppose or welcome the entry of foreign lawyers underscores just how important answering these and other similar questions has become

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.

5. BRICS Legal Elite as a Facilitator of the Global Rule of Capital: Furthering the Corporatization of the Profession and Dispossession of the Legal System?

The central challenge of globalization has become to ensure that increasing corporatization does not undermine the 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 “the global law-makers today are the men who run the largest corporations, the US and the EC.”⁶² Concerns over the small number of progressive private actors and large inequalities generated by liberalization and privatization have led to calls for reviving the public domain of the state and its citizens. A discourse of corporate social responsibility has simultaneously emerged to minimize corporate malfeasance and improve social, environmental and human rights dimensions of corporate performance. The rise of the corporate legal elite in BRICS happens against the background of this larger debate, where corporate lawyers are both agents of corporate globalization contributing to the corporatization of the profession and privatization of global governance and possible regulatory entrepreneurs putting forward new ideas and governance models.

⁶¹ 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.

⁶² Braithwaite, John and Peter Drahos argue that frequently globalization of regulation is a story of domination in *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), page 13.

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 a whole.⁶³ Regulation can be sought by industries for their own protection rather than imposed for public interest, and even if this is not the case at the outset, regulation can be captured later on.⁶⁴ However, private sector 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 fall-out from an industry disaster; or from the fact that other firms with whom they must compete are not on a level playing field.”⁶⁵

One of the core features of “emerging” markets is that these markets lack a range of institutions to facilitate their functioning, which results in higher transaction costs and operating challenges.⁶⁶ Such institutional voids facilitate capture, and the fact that corporate lawyers are endowed with specialist expertise which is often greater than that of government officials means that they can play a key role in generating needed infrastructure (e.g., helping government write M&A laws). 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 public interest: it regulates restrictions on entry; restrictions on advertising and other means of promoting a competitive process within the profession, restrictions on fee competition; and restrictions on organizational form.⁶⁷ Finally, as we suggested in Part 3, 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.⁶⁸

At the global level, however, there is a trend towards creating a legal order that is increasingly private, autonomous, and transnational in that the laws are removed from local and national legal systems.⁶⁹ International arbitration 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. However, these institutions have also raised questions of accountability, transparency and legitimacy.⁷⁰ Despite occasional challenges in enforcing arbitration awards, BRICS countries have not only embraced

⁶³ Mattli, Walter and Woods, Ngaire (eds.) (2009) *The Politics of Global Regulation*, Princeton University Press.

⁶⁴ Barry M. Mitnick (1980) *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (New York: Columbia University Press), p. 38.

⁶⁵ Mattli, Walter and Woods, Ngaire (eds.) (2009) *The Politics of Global Regulation*, Princeton University Press.

⁶⁶ Khanna, Tarun and Palepu, Krishna G. (2010) *Winning in Emerging Markets* (Harvard Business Press)

⁶⁷ Stephen, Frank H. and James H. Love (1999) *Regulation of the Legal Profession*, page 993.

⁶⁸ Papa, Mihaela and Wilkins, David (2011) *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization. Studies and the Sociology of the Legal Profession*, *International Journal of the Legal Profession* 18(3).

⁶⁹ Cutler, Claire (2012) *Transnational Law and Privatized Governance*, Available at http://globalautonomy.ca/global1/summary.jsp?index=RS_Cutler_TNLF.xml

⁷⁰ Dezalay, Yves and Garth, Bryant G. (1996) *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago Series in Law and Society); Dezalay, Yves and Garth, Bryant G. (2012) *Corporate Law Firms, NGOs and Issues of Legitimacy of the Global Order*. *Fordham Law Review* 80(6).

and developed international arbitration, but some of them sought to strategically position themselves as arbitration hubs. 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 simplified. BRICS have been more cautious in terms of investment arbitration, where delocalization of disputes is not yet complete and subordination of local autonomy to the autonomy of transnational financial and investment corporations has been resisted.⁷¹ 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, International Center for Settlement of Investment Disputes, and has adopted more flexible investment arbitration provisions in its treaties with other countries.

The rise of the corporate legal elite in the BRICS challenges the notion of their professionalism, particularly in the context of corporate social responsibility (CSR) and corporate lawyers' independence against global capitalism.⁷² 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.⁷³ Such initiatives are already well established in BRICS multinationals. While corporate lawyers engage in pro-bono and in-house counsel incorporates social responsibility concerns, there is also a larger issue of whether the rise of these practice will result in the transformation of the structural failings of neo-liberalism, improve the judicial system for all, and/or empower the disadvantaged members of the society. Corporate lawyers' independence from their clients and redefinition of their public commitments remain highly contested.

6. Toward an Empirical Research Agenda

The emergence of the corporate legal elite in BRICS countries is a new phenomenon both in terms of the growing law firm elite and its influence and the greater relevance of emerging economies' corporations and their legal counsel. As we have suggested in this paper, it is also likely to be a new phenomenon in the arena of global governance as well, with respect to the governance of the legal profession and the liberal world order more broadly. By examining the three frameworks we have proposed - governance networks and arrangements, global governance as a process of greater global integration and global governance as a facilitator of the global rule of capital – we believe that it is possible to begin to uncover and assess these implications. The challenge is to design a research agenda that can empirically examine these crucial issues.

⁷¹ Cutler, Claire (2012) Transnational Law and Privatized Governance, Available at http://globalautonomy.ca/global1/summary.jsp?index=RS_Cutler_TNLF.xml

⁷² Vogel, David, The Private Regulation of Global Corporate Conduct: Achievements and Limitations, Business Society August 17, 2009; Whelan, Christopher J. and Neta Ziv (2012) Law Firm Ethics in the Shadow of Corporate Social Responsibility. *Georgetown Journal of Legal Ethics*, forthcoming.

⁷³ See Cummings and Trubek

Several specific research directions are particularly relevant. The first priority for research is to more extensively map the governance arrangements and social networks within which corporate lawyers are engaged. This mapping project needs to describe, analyze and explain corporate lawyers' engagement in collective action and its effectiveness. Specifically, how are corporate lawyers socialized into international networks and how is knowledge and norms diffused through these networks? A comparative study of the corporate legal elite in BRICS countries can explain the variation in network formation and effectiveness as well as help to examine corporate lawyers' collective regulatory influence. Similarly, exploring multilevel regulatory trends that affect the corporate legal profession, as well as the regulatory distinction between law firms lawyers and in-house legal departments is another promising area of research. The role of BRICS corporate lawyers in international rule-making is also understudied, and it is central to examine whether there is a shift in the political influence of BRICS countries.

Finally, while BRICS have been primarily organized toward reforming global governance through state action, corporate lawyers may also derive cooperation benefits through BRICS cooperation. As corporate lawyers are socializing into transnational corporate networks they are likely to become a more important political constituency, both in terms of affecting domestic politics and transnational regulation. As developmental peers rising against major powers' dominance in the legal industry, they have an opportunity to jointly shape both the global governance of the legal profession and the trajectory of the liberal world order.

The project on Globalization Lawyers and Emerging Economies (GLEE) to which we both belong is seeking to carry out part of this ambitious research agenda.⁷⁴ But there is plenty of room for other scholars as well. We hope by this brief examination of the important intersection between the rise of the corporate legal elite in the BRICS and global governance will encourage others to join in investigating these important issues.

⁷⁴ For a description of this project, see <http://www.law.harvard.edu/programs/plp/pages/glee/php>.