

THE RISE OF NEW ARCHITECTS OF INTERNATIONAL LAW

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I. INTRODUCTION

For approximately seventy years, the United States and its Western allies have been the primary, if not exclusive, architects of International Law.¹ As architects of International Law these nations have had substantial influence in the overlapping international economic, legal, political, and military spheres—which collectively form the global governance architecture.

However, global developments portend an increasingly likely conclusion: The existing global governance architecture will be meaningfully altered by new architects. Indeed, as former U.S. Treasury Secretary Lawrence Summers noted, 2015 likely constituted “the moment the United States lost its role as the underwriter of the global economic system.”²

The existing international governance structure faces many challenges, which stem from the new architects. The U.S. Department of Defense’s Technical Information Center (“DTIC”) recently released an analysis of

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¹ International law has become increasingly significant in global affairs and the world economy. Michael Wood, Comment, *The present position within the ILC on the topic “Identification of customary international law”: in partial response to Sienho Yee, Report on the ILC Project on “Identification of Customary International Law,”* 15 CHINESE J. INT’L L. 3, 5-6 (2016). Wood describes:

[Customary international law is] frequently invoked before international courts and tribunals, particularly in inter-State disputes, but also for example in investment cases New cases on the [ICJ] Court’s docket . . . likewise raise questions of customary international law. Other international courts and tribunals, too—even those that principally apply a particular treaty, such as the International Tribunal for the Law of the Sea—frequently resort to customary rules. Customary international law is increasingly raised in national courts as well. Many domestic constitutional orders recognize customary international law as an applicable source of law, and apply it with increasing frequency. It also regularly features in legal opinions by government legal advisers, diplomatic correspondence, and official statements by States. *Id.*

² Lawrence Summers, *Time US leadership woke up to new economic era*, FIN. TIMES (Apr. 5, 2015), <https://www.ft.com/content/a0a01306-d887-11e4-ba53-00144feab7de>.

current economic, legal, and strategic trends, and found credible threats to the existing global stability and order:

Rising powers including for example, China, Russia, India, Iran, or Brazil have increasingly expressed dissatisfaction with their roles, access, and authorities within the current international system. The inability or unwillingness to accommodate the aspirations of these powers in the future may increasingly cause some states to challenge *or even reject current rules and norms*.³

The new architects likely will substantially influence the international framework, opposing “the current set of international rules, norms, and agreements[, and] . . . make their own—and attempt to enforce them.”⁴ This essay provides a brief context for the rise of the new architects and raises some preliminary issues that are likely to arise as the new architects seek to make changes to the existing global governance architecture.

II. THE RECENT HISTORICAL PERSPECTIVE

To be an architect of International Law is to wield significant power⁵ since the financial and legal orders are inextricably linked to the formation, context, application, and enforcement of International Law.⁶ The current architects of International Law’s global governance architecture are the

³ DEFENSE TECHNICAL INFORMATION CENTER, Joint Operating Environment 2035: The Joint Force in a Contested and Disordered World 1, 8 (July 14, 2016) (emphasis added), http://www.dtic.mil/doctrine/concepts/joe/joe_2035_july16.pdf.

⁴ *Id.* at 21.

⁵ Former U.S. President Obama, in advocating for the Trans Pacific Partnership (“TPP”), recently implied that benefits accrue to the architects of international law when he stated that owning the global financial and legal orders has vested the United States with enormous power and leverage. See Andrew Hammond, *The TPP gives the U.S—rather than China—the power to influence global trade*, NAT’L POST (Oct. 7, 2015), <http://news.nationalpost.com/full-comment/andrew-hammond-the-tpp-gives-the-u-s-rather-than-china-the-power-to-influence-global-trade> (stating that “TPP has an important rules-setting component: U.S. President Barack Obama has asserted that the treaty will enable Washington, *rather than Beijing*, to create the foundation for ‘21st-century trade rules,’ including standards on trade, investment, data flows and intellectual property”).

⁶ Economic and military power are interconnected and ensconced in international law. See Teemu Ruskola, *Canton is not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859, 861 (2005). Ruskola describes how:

[T]he vocabulary for analyzing U.S. power overseas is largely military and economic, as evidenced by terms such as “gunboat diplomacy” and “dollar diplomacy.” This essay analyzes law as an important currency in its own right in American overseas imperialism. The exercise of American power has been rarely based merely on the assertion of sheer economic and military might. From the beginning, it has been mediated through the language of law, as a matter of right. *Id.*

“civilized” or “advanced” nations of the world⁷—the Western Anglo powers,⁸ led by the United States,⁹ “the indispensable nation.”¹⁰ The United States dominates the existing global governance architecture in a number of ways: First, the United States-dominated International Financial Institutions¹¹ (“IFI”) based in Washington, D.C., such as the IMF, the World

⁷ The term “civilized nations” connotes a modern nation-state which conducts itself “civilly.” See Pasha L. Hsieh, *The Transplantation of “Western” International Law in Republican China*, in LEGAL THOUGHTS BETWEEN THE EAST AND THE WEST IN MULTILEVEL LEGAL ORDER 240 n.1 (Chang-fa Lo et al. eds., 2016) (citing Proclamation of President Sun Yat-sen on the Establishment of the Republic of China on January 1, 1912) [hereinafter 1912 Proclamation]. The author noted that “with the establishment of Provisional Government we will try our best to carry out the duties of a civilized nation so as to obtain the rights of a civilized state.” *Id.* See also Gustavo Gozzi, *History of International Law and Western Civilization*, 9 INT’L CMTY. L. REV. 353, 365 (2007) (pointing to the preamble of the 1907 Hague Convention, which refers to the term “civilized nations”).

⁸ Japan also plays a substantial role as a U.S. ally, bringing great influence through the Asian Development Bank. See, *Annual Report 2015, Asian Development Bank, Members, Capital Stock, and Voting Power*, ASIAN DEV. BANK (Dec. 31, 2015), <https://www.adb.org/sites/default/files/institutional-document/182852/oi-appendix1.pdf> (detailing how the United States and Japan jointly control over 30% of the capital stock of the Asian Development Bank). The United States and Japan jointly hold more than 25% of the voting power of this institution. *Id.*

⁹ Critics contend that the United States has abused its unique position and has imposed its will on others. See Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 305 (2007) “The dangers of such arrogant and abusive ‘universalism’ are especially striking in international relations, where normative disputes that cannot be resolved by rational persuasion or appeal to agreed upon international norms tend to be settled by (political, economic, and cultural) power—of which United States today has more than anyone else.” *Id.*

¹⁰ Former President Obama has referred to the United States as “the indispensable nation.” See Barack Obama, Remarks by the President at the United States Military Academy Commencement Ceremony (May 28, 2014), <https://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony>. Former President Obama stated:

In fact, by most measures, America has rarely been stronger relative to the rest of the world Our military has no peer Meanwhile, our economy remains the most dynamic on Earth; our businesses the most innovative. Each year, we grow more energy independent. From Europe to Asia, we are the hub of alliances unrivaled in the history of nations. America continues to attract striving immigrants So[,] the United States is and remains the one indispensable nation. That has been true for the century passed and it will be true for the century to come. *Id.*

¹¹ See Larry C. Backer, *International Financial Institutions (IFIs) and Sovereign Wealth Funds (SWFs) as instruments to combat corruption and enhance fiscal discipline in Developing States*, INT’L REV. L. 1, 4 (2015), <http://www.qscience.com/doi/pdf/10.5339/irl.2015.swf.5> (discussing the IMF and World Bank as international financial institutions and their influence in shaping the conduct and policy of sovereign wealth funds).

Bank, and the International Centre for Settlement of Investment Disputes (“ICSID”) have dominated the existing political and economic architecture of the global financial system, including trading, lending, and development.¹² Second, the U.S. Dollar has reigned as the most desired currency of international business, IFI lending, and global trade¹³ and forms the principle reserve currency of the world’s central banks.¹⁴

Third, the United States protects its hegemony within the global governance architecture by vigorously projecting its military power around the world. Not only does the U.S. military flex naval dominance with powerful warships and aircraft carriers,¹⁵ but it also maintains embedded territorial military bases in the U.K., Germany, Italy, Turkey, South Korea, Saudi Arabia, Bahrain, Qatar, Japan, and Australia, among other strategic locations.¹⁶

Fourth, few other nations’ taxing authority mandate disclosure from another sovereign’s financial institutions, and the United States’ taxing authority is uniquely demanding.¹⁷ Fifth, no other sovereign’s courts wield

¹² See *About International Centre for Settlement of Investment Disputes*, ICSID (2016), <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx> (last visited Oct. 25, 2016) (noting the ICSID is based in Washington, D.C.).

¹³ The U.S. Dollar has had a powerful position in international trade since after World War II. See M.J. Stephey, *A Brief History of Bretton Woods System*, TIME (Oct. 21, 2008), <http://content.time.com/time/business/article/0,8599,1852254,00.html>.

¹⁴ The World Bank ranks global central bank reserves in gold and US Dollars. *Total Reserves (includes gold, current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/FI.RES.TOTL.CD?end=2015&start=2015&view=bar> (last visited Oct. 25, 2016).

¹⁵ Vijay Prashad, *End of exceptionalism*, FRONTLINE (July 22, 2016), <http://www.frontline.in/world-affairs/end-of-exceptionalism/article8811042.ece>.

¹⁶ See List of US military bases world-wide. Major US Bases Around the World, GOOGLE MAPS, https://www.google.com/maps/d/viewer?mid=zOzzuQ7-jtRM.k7KCFP1zgCAw&hl=en_US.

¹⁷ Another example of U.S. power in the financial realm is the Foreign Account Tax Compliance Act (“FATCA”) wherein foreign banks must report to the IRS the capital gains and income attributable to U.S. persons or risk severe penalties, including lack of access to U.S. financial markets. See Robert W. Wood, *10 Facts About FATCA, America’s Manifest Destiny Law Changing Banking Worldwide*, FORBES (Aug. 19, 2014), <http://www.forbes.com/sites/robertwood/2014/08/19/ten-facts-about-fatca-americas-manifest-destiny-law-changing-banking-worldwide/#300593551961>. The ability of the United States to essentially override domestic laws of foreign nations is exemplified by the folding of Swiss banks, which as recently as 2005 were considered a safe place to stash money anonymously, to U.S. demands. *Id.* Yet, only a few years later, the ability of the United States to enforce its taxation system on foreign financial institutions and pressuring the Swiss banks to disclose the names of account holders eliminated this anonymity. *Id.* For a history of Swiss banking secrecy laws, see Sébastien Guex, *The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy*, 74 HARV. BUS. HISTORY REV. 237 (2000). Swiss banking secrecy has even made its way into popular fiction. See JOHN GRISHAM, *THE BROKER*

such power and influence.¹⁸ The judicial arm of U.S. Federal courts is extensive,¹⁹ and the reach of U.S. justice is global.²⁰

Given the number of ways the United States controls its unique position in the global governance architecture, it should not come as a surprise that even its critics admit that the United States is “the” superpower. Russia’s Vladimir Putin has conceded that the U.S. is currently the world’s sole superpower²¹ and even critics send their children to U.S. educational institutions.²²

Notwithstanding these superlative indicia of global leadership, an incipient adjustment that poses potentially serious challenges to the United States and U.S.-led Western-Anglo hegemony is well underway.²³ This adjustment threatens to change the intellectual construct of International Law, which has long been created by and enforced through the lens of the present-day advanced or “civilized” nations.”²⁴ The precipitating factor fostering these

366 (Delta Books 2006).

¹⁸ See Nadelle Grossman, *Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, 12 FORDHAM J. CORP. & FIN. L. 393, 397 (2007) (stating that Delaware law is a global authority, often providing guidance “to courts in other jurisdictions in establishing their own . . . law”).

¹⁹ See e.g., Press Release, Department of Justice, *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption* (May 27, 2015), <https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>.

²⁰ See, e.g., *Russia accuses US of illegal overreach with FIFA corruption indictments*, THE GUARDIAN (May 27, 2015), <http://www.theguardian.com/football/2015/may/27/russia-accuses-us-overreaching-fifa-corruption-indictments> (according to the Russian Foreign Ministry, “[o]nce again we are calling on Washington to stop attempts to make justice far beyond its borders using its legal norms and to follow the generally accepted international legal procedures”).

²¹ Ilya Arkhipov & Olga Tanas, *Putin Accepts U.S. as Sole Superpower While Grumbling Over NATO*, BLOOMBERG (June 17, 2016), <http://www.bloomberg.com/news/articles/2016-06-17/putin-says-russia-wants-to-mend-ties-with-west-bears-no-grudge>.

²² See Miriam Jordan, *International Students Stream Into U.S. Colleges*, WALL ST. J. (Mar. 24, 2015), <http://www.wsj.com/articles/international-students-stream-into-u-s-colleges-1427248801>. Even the U.S. style of legal education is taking root overseas. See Haim Sandberg, *Legal Colonialism—Americanization of Legal Education in Israel*, 10(2) GLOBAL JURIST 1, 3 (2010) (noting the influence of U.S. legal education on Israeli law schools); see also Natalie Kitroeff, *Northwestern Exports to Qatar Its First U.S.-Style Law School*, BLOOMBERG (Mar. 3, 2015), <http://www.bloomberg.com/news/articles/2015-03-03/northwestern-exports-the-first-u-s-style-law-school-to-qatar>.

²³ For example, China’s importance affects U.S. monetary policy. See Enda Curran & Christopher Condon, *It’s a New World: How China Growth Concerns Kept the Fed on Hold*, BLOOMBERG (Sept. 17, 2015), <http://www.bloomberg.com/news/articles/2015-09-18/it-s-a-new-world-how-china-growth-concerns-kept-the-fed-on-hold> (stating that “China’s arrival as a global economic power . . . [is evident from how it managed] to nudge the Federal Reserve away from raising interest rates”).

²⁴ In an important forward-looking document, the U.S. Department of Defense’s elite

developments is the rise of “competitor states” or “revisionist states,” which are the potential new architects of International Law.²⁵ The “uncivilized” world’s remarkable rising economic power enables this transformation.²⁶ As discussed below in this Essay, the shift away from strict adherence to the post-World War II institutional frameworks, such as the dominance of the IMF and World Bank, the weakening of the unchallenged premier status of the U.S. Dollar,²⁷ and other geo-political shifts like the Silk Road initiative²⁸ all herald potentially significant changes to the existing global governance architecture.²⁹

III. WHO CREATES INTERNATIONAL LAW?

A. “Civilized” Nations as Architects of International Law

The historical underpinning of modern International Law is based upon the creation of International Law by the leading or civilized nations of the world. “[T]he body of rules and principles of action which are binding upon *civilized*

research unit—the Department of Technical Information Center—articulated deep concerns regarding new rising powers and their effects on the United States. DEFENSE TECHNICAL INFORMATION CENTER, *supra* note 3, at 8 (concluding that “[r]ising powers including for example, China, Russia, India, Iran, or Brazil have increasingly expressed dissatisfaction with their roles, access, and authorities within the current international system”).

²⁵ Referring to these rising powers as “competitors” and “revisionist” openly concedes these rising powers as potential new architects. *Id.* at ii. Moreover, the DTIC opines that “increasingly powerful revisionist states and select non-state actors will use any and all elements of power to establish their own sets of rules in ways unfavorable to the United States and its interests.” *Id.* at 4.

²⁶ Malcolm Scott, *Here’s the \$17 Trillion Reason Why the BRICS Summit This Week Is a Big Deal*, BLOOMBERG (July 6, 2015), <http://www.bloomberg.com/news/articles/2015-07-06/here-s-the-17-trillion-reason-why-the-brics-summit-this-week-is-a-big-deal> (explaining that “[t]he combined economic output last year of [the BRICS nations] almost matched the U.S.’s gross domestic product. Back in 2007, the U.S. economy was double [that of these countries].”).

²⁷ Jennifer Hughes et al., *China steps up currency war with dramatic renminbi devaluation*, FIN. TIMES (Aug. 11, 2015), <http://www.ft.com/intl/cms/s/0/444c5bc8-3fca-11e5-9abe-5b335da3a90e.html#axzz3rkz9RwTv>. The Yuan had been rejected as a reserve currency in 2010 but the IMF accepted it in 2015. See Andrew Mayeda, *IMF Approves Reserve-Currency Status for China’s Yuan*, BLOOMBERG (Nov. 30, 2015), <http://www.bloomberg.com/news/articles/2015-11-30/imf-backs-yuan-in-reserve-currency-club-after-rejection-in-2010>.

²⁸ See *Navigate the new Silk Road*, BLOOMBERG PROF’L (Sept. 29, 2015), <http://www.bloomberg.com/professional/blog/navigate-the-new-silk-road/>.

²⁹ For example, the concept of human rights is essentially a Western concept whose acceptance by the new architects is far from certain. See Jack Donnelly, *Human Rights and Human Dignity: An Analytical Critique of Non Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303, 303 (1982).

States in their relations with one another.”³⁰ Indeed, the term “civilized nations” is specifically listed in Article 38 of the Statute of the International Court of Justice (“ICJ Statute”), which details the various sources of international law.³¹ Article 38, viewed favorably as an articulation of the correct sources of International Law,³² enumerates the following four sources of international law: “(1) international conventions (treaties), specific or general[;] (2) international custom, as evidence of a general practice accepted as law[;] (3) general principles of law recognized by civilized nations[;] and (4) judicial decisions and teachings of highly regarded commentators of the various nations.”³³ The notion that International Law belongs to the civilized world is entrenched in states’ interactions:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.³⁴

The vital importance of “civilized nations” as a source of international law cannot be over-emphasized. For example, in *Paquete Habana*, the U.S. Supreme Court held that the prohibition against seizing an enemy’s fishing vessels during wartime had grown over time so as to become established by the “general assent of civilized nations, into a settled rule of international law.”³⁵ Over 100 years later, the Supreme Court in *Sosa* similarly relied upon the term “civilized nations” as a source of International Law, stating “courts

³⁰ See J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (Humphrey Waldock ed., 6th ed. 1978) (emphasis added). Lord Russel of Killowen stated that there is no better definition of International Law other than that the law reflects a “sum of the rules or usages which civilized states have agreed shall be binding upon them” when interacting with each other. *International Law - A Primer*, DUHAIME.ORG <http://www.duhaime.org/LegalResources/InternationalLaw/LawArticle-141/International-Law—A-Primer.aspx> (last updated Oct. 30, 2012). This conceptual basis of civilized nations was invoked by Lord Alverston in *West Rand Central Gold Mining Company Lt. v. The King. West Rand Central Gold Mining Co. Ltd. v. R.*, [1905] KB 391.

³¹ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

³² See 1 OPPENHEIM’S *INTERNATIONAL LAW* 24 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); see also 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 66 (Univ. of Chicago Press 1979) (defining the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the *civilized inhabitants* of the world”).

³³ Statute of the International Court of Justice, *supra* note 31, at art. 38 (emphasis added).

³⁴ Convention with Respect to the Laws and Customs of War on Land Preamble, July 29, 1899, 32 Stat. 1803, *reprinted in* *TEXTS OF THE PEACE CONFERENCES AT THE HAGUE, 1899 AND 1907* 48 (James Brown Scott ed., 1908).

³⁵ *The Paquete Habana*, 175 U.S. 677, 694 (1900).

should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world.”³⁶

However, not all states have been deemed or treated as “civilized nations.” Who are the “civilized nations” that enjoy the opportunity to create International Law? From the historical perspective of modern International Law,³⁷ Europeans noted the separation between nations, as they perceived that their nations were superior to uncivilized non-European nations.³⁸ Therefore, the term “civilized nations” was understood to mean European states,³⁹ which made International Law European-based law.⁴⁰ Accordingly, “civilized nations” served to distinguish “superior” European nations from the “inferior” uncivilized nations⁴¹ and the term was used to rationalize the imposition of various legal and economic initiatives onto the “uncivilized nations.”⁴²

Western legal scholars have argued that non-European countries did not participate in the development of International Law.⁴³ The classic text on International Law by Henry Wheaton makes clear the distinction between the European civilized states and the ostensibly uncivilized non-Europeans:⁴⁴

Wheaton contended that international law had always been limited to civilized and Christian people of Europe or to those of European origin. Wheaton denied the existence of the universal law of nations which all mankind, savage and civilized, Christian and Pagan, recognized, professed to obey, or in fact, did obey. He admitted that the law of nations could apply outside Europe, but that it was necessarily inferior to European international law. This attitude implies a perception of inequality and exclusion of those

³⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

³⁷ Interestingly, the earliest international law thinkers did not distinguish between nations. See Alexander Orakhelashvili, *The Idea of European International Law*, 17 *EUR. J. INT’L L.* 315, 316 (2006), <http://ejil.org/pdfs/17/2/77.pdf>.

³⁸ In the 1800s, European scholars advanced the notion that international law had a fundamentally European foundation and believed non-Europeans were not able to contribute to international law. *Id.* Of course, this suggestion contradicts the model of the universal law of nations. *Id.* at 317.

³⁹ However, even the unique status of states as the actors in international law is a relic of a bygone era; indeed, corporations are now also a powerful force with which to be reckoned. See Joel Slawotsky, *Corporate Liability for Violating International Law under The Alien Tort Statute: The Corporation through the Lens of Globalization and Privatization*, 6 *INT’L REV. L.* 1, 16 (2013), <http://www.qscience.com/doi/pdf/10.5339/irl.2013.6> (noting that large global companies such as Facebook and Google are exercising state-like power and influence).

⁴⁰ See BRIERLY, *supra* note 30, at 1.

⁴¹ Orakhelashvili, *supra* note 37, at 318.

⁴² *Id.*

⁴³ *Id.* at 317.

⁴⁴ HENRY WHEATON, *WHEATON’S ELEMENTS OF INTERNATIONAL LAW* 17-18 (1866).

who find themselves at lower stages of civilization.⁴⁵

Other legal scholars have been even more strident in labeling certain nations as uncivilized and arguing that the civilized Europeans were obligated to subjugate inferior states.⁴⁶ Under this rationale, European countries were to dominate and colonize any uncivilized nations. This Eurocentric perception pushed the idea that “a colonizer might need to take ‘punitive expeditions’ in cases of ‘inroads or other outrages committed by savages of half civilised [sic] tribes.’”⁴⁷

Thus, it is not surprising that several non-Christian and non-European states were labeled “uncivilized.” “[S]emi-barbarous states like China, Turkey and Japan, whose municipal law and the judgments of whose courts are not recognised by civilised nations’ [sic] were excluded from full participation in international law.”⁴⁸

B. *The Restatement’s “Major Legal Systems”*

The Restatement of Foreign Relations Law of the United States substitutes in the phrase “major legal systems” for the term “civilized nations.”⁴⁹ The terminology “major legal systems” connotes those nations that are integral to the financial and legal order, meaning the advanced or leading nations.⁵⁰ Significantly, most of the nations that qualify as a “major legal system” are likewise included in the list of “civilized nations.”⁵¹

Practically speaking, the nations considered to have the major legal

⁴⁵ Orakhelashvili, *supra* note 37, at 318. U.S. Congressman Steve King also echoed these sentiments. NBC News, *GOP Rep. Steve King’s jaw dropping remarks*, NBC NEWS (July 19, 2016), <http://www.nbcnews.com/card/rep-steve-king-defends-western-civilization-causes-uproar-n612021>.

⁴⁶ 3 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS* 4 (1883).

⁴⁷ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 81 (Cambridge Univ. Press 2001).

⁴⁸ Orakhelashvili, *supra* note 37, at 319. Of course, considering China “uncivilized” was ironic given that, from China’s perspective, China was a magnificent and advanced empire that defended itself against the barbarous “uncivilized” nations at its borders. See generally JOHN KING FAIRBANK, *THE CHINESE WORLD ORDER: TRADITIONAL CHINA’S FOREIGN RELATIONS* (Cambridge Univ. Press 1968).

⁴⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987).

⁵⁰ See GEBHARD BUCHELER, *PROPORTIONALITY IN INVESTOR-STATE ARBITRATION* 32, n.17 (2015) (noting that the term “major legal systems” is just a less Eurocentric version of “civilized nations”); see also Francis Fukuyama, *The End of History?*, *THE NAT’L INTEREST* 1, 8 (1989), <https://ps321.community.uaf.edu/files/2012/10/Fukuyama-End-of-history-article.pdf> (noting that by the end of the 1980s, China, the former Soviet Union and the countries of Eastern Europe had all realized that the Western “advanced” nations were successful and to integrate with the world they would need to become Westernized).

⁵¹ LINDA A. MALONE, *INTERNATIONAL LAW* 25 (Aspen Publishers 2008) (stating that laws that were recognized by civilized nations are present in almost every major legal system).

systems are those advanced countries that are militarily strong, economically powerful, and leaders in the arts and sciences.⁵² These characteristics are identical to those included in Heffter's concept of "civilized"—that European nations' cultural and racial superiority and immense power entitled European nations to be participants in International Law.⁵³ Henry Bonfils also painted states involved in International Law as those that are the leaders in various indicia of advancement:⁵⁴

This is a juridical system established by nations which demonstrated the superiority of their talents in arts, science and commerce, as well as in politics and government. Such nations are united by religion, customs and morals and ultimately by their custom of entering into treaty and diplomatic relations with one another.⁵⁵

The common denominator between "civilized" and "major" is that International Law is created and controlled by those nations that are the "winners" in the arts, sciences, finance, and law and have the military and economic power to enforce the rules and norms constituting the international order.⁵⁶ According to this notion, International Law was not relatable to "inferior" non-European nations.⁵⁷

Regardless of the terminology—civilized or major legal system—those rich nations that are militarily powerful, such as First World, U.S. and Western European nations, are the progenitors and enforcers of International Law.⁵⁸ However, times are changing. The previously "uncivilized" and "non-major systems" are becoming economically advanced and militarily assertive, and have initiated programs to become more influential, perhaps

⁵² Muradu Abdo, *Legal History and Traditions: Teaching Material*, WORDPRESS (Sept. 2008), <https://chilot.files.wordpress.com/2011/06/legal-history-and-traditions.pdf> (discussing that major legal systems are classified as such based on "such factors as its influence on the development of other legal systems; its geographical spread, the technological and economic advances of the country being classified[, etc.]").

⁵³ Orakhelashvili, *supra* note 37, at 322-23, n.49 (AUGUST WILHELM HEFFTER, *DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART* 14-17 (1844)).

⁵⁴ Orakhelashvili, *supra* note 37, at 324, n.50 (HENRY BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 5-6 (1894)).

⁵⁵ Orakhelashvili, *supra* note 37, at 324.

⁵⁶ *Id.*

⁵⁷ Jeffrey Khan, "Protection and Empire: The Martens Clause, State Sovereignty, and Individual Rights," 56 *VA. J. INT'L L.* 1, 32 (2016) (stating that the origins of "legal regulation of military conflict was limited to wars between civilized states . . . [and that] racism [was] present in the way some privileged (mainly European) civilization over the barbarism perceived in others").

⁵⁸ "When creating international norms, powerful nations characteristically advance interpretations of international law that reflect their values and advance their interests." Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 *HARV. INT'L L.J.* 1, 5 (2011).

even indispensable.⁵⁹ Ironically, as is detailed below, it is “uncivilized” China that is spearheading the effort at creating an alternative to the current global governance architecture.

IV. THE NEW ARCHITECTS

A. *Rising Economic Powers*

In terms of economic power and influence, two of the largest world economies are from states previously excluded from membership in the International Law-making club. China now enjoys the world’s second largest economy while India is the fourth largest and Japan the third largest.⁶⁰ Moreover, the GDP of the “uncivilized” nations has increased markedly, and the aggregate GDP of Brazil, Russia, India, China, and South Africa (“BRICS nations”) surpassed the EU’s GDP.⁶¹ China in particular has boomed. In 2001, U.S. GDP was eight times bigger than China’s while in 2015 the U.S. GDP was only 1.6 times China’s GDP.⁶² With regard to population, India and China represent approximately 40% of the world’s roughly 7.5 billion people.⁶³ Based solely on population, India and China are likely to become International Law architects.⁶⁴

In an example of growing economic prowess, many Chinese technology companies are becoming major players:⁶⁵ “China’s leaders are also pushing

⁵⁹ Prashad, *supra* note 15 (pointing to the “[c]onfrontations over the shipping lanes in the South China Sea and disputes over currency manipulation [which] dangerously flirt with the language of war [as examples of increasing influence.]”); see *Russia Flexes Its Military Muscle In Crimea*, SKY NEWS (Feb. 12, 2016), <http://news.sky.com/story/russia-flexes-its-military-muscle-in-crimea-10164242> (discussing the Russian annexation of Crimea); see also *infra* Part IV.

⁶⁰ See Joel Slawotsky, *The Virtues of Shareholder Value Driven Activism: Avoiding Governance Pitfalls*, 12 HASTINGS BUS. L.J. 521, 555 (2016).

⁶¹ See *Putin’s Prepared Remarks at 43rd Munich Conference on Security Policy*, WASH. POST (Feb. 12, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/12/AR2007021200555.html>.

⁶² See Malcolm Scott & Cedric Sam, *China and the United States: Tale of Two Giant Economies*, BLOOMBERG (May 12, 2016), <http://www.bloomberg.com/graphics/2016-us-vs-china-economy/>.

⁶³ *Current World Population*, WORLDOMETERS, <http://www.worldometers.info/world-population/>.

⁶⁴ According to the Defense Technical Information Center: The center of gravity for the world’s population continues to shift from the developed world to the developing world. The highest growth in population is likely to occur in Africa, while the populations of most countries in South Asia and the Middle East are expected to continue rising, with India surpassing China as early as 2022 as the most populous nation on Earth. DEFENSE TECHNICAL INFORMATION CENTER, *supra* note 3, at 10.

⁶⁵ Jethro Mullen, *Meet China’s tech behemoths*, CNN MONEY (May 17, 2016),

for China to become not just the world's largest robot buyer, but a leading robot maker . . . [Chinese companies] are developing a range of robots for use in factories, and . . . [are] now the world's largest consumer-drone maker by dollar sales."⁶⁶ The dominance of Western technology is at risk.⁶⁷

Moreover, U.S. dominance over the Internet has raised Chinese and Russian self-interest in developing an "alternative internet" and accompanying technology⁶⁸ to challenge the status quo.⁶⁹ China and Russia led an effort to create a new international code of conduct and submitted to the U.N. General Assembly a proposal to route Internet traffic through an alternative architecture.⁷⁰ These actions are designed to create a substitute to the U.S.-dominated Internet and allow other nations to adopt the new system.⁷¹

[China's] government is pushing to rewrite the rules of the global Internet, aiming to draw the world's largest group of Internet users away from an interconnected global commons and to increasingly run parts of the Internet on China's terms. It envisions a future in which governments patrol online discourse like border-control agents, rather than let the U.S., long the world's digital leader, dictate the rules.⁷²

<http://money.cnn.com/2016/05/17/technology/china-tech-ehemoths/>.

⁶⁶ Kevin Sneader & Jonathan Woetzel, *China's Impending Robot Revolution*, WALL ST. J. (Aug. 3, 2016), <http://www.wsj.com/articles/chinas-impending-robot-revolution-1470241843>.

⁶⁷ Alexander Gabuev, *How China and Russia see the internet*, WORLD ECONOMIC FORUM (Dec. 16, 2015), <http://www.weforum.org/agenda/2015/12/how-china-and-russia-see-the-internet/> (describing that the Russian and Chinese "joint push to limit alleged Western dominance in the digital sphere is not limited to regulation").

⁶⁸ For example, the World Internet Conference, held in China, focused on developing "strategic-level discussions on global Internet governance, cyber security, the Internet industry as the engine of economic growth and social development, technological innovation and philosophy of the Internet. It is expected that 1200 leading figures from governments, international organizations, enterprises, science & technology communities, and civil societies all around the world will participate the Conference." WUZHEN THEATRE FESTIVAL, <http://www.wuzhenfestival.com/en/about.aspx?classId=16> (last visited Oct. 21, 2016).

⁶⁹ Emma Graham-Harrison et al., *China and Russia: the world's new superpower axis?*, THE GUARDIAN (July 7, 2015), <http://www.theguardian.com/world/2015/jul/07/china-russia-superpower-axis>.

⁷⁰ Letter from the Permanent Representatives of China, Kazakhstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General (Jan. 9, 2015), <https://ccdcoe.org/sites/default/files/documents/UN-150113-CodeOfConduct.pdf>.

⁷¹ Cory Bennet, *China, Russia seeking their own Internet, warns former Intel chairman*, THE HILL (May 12, 2015), <http://thehill.com/policy/cybersecurity/241759-china-russia-cyber-pact-threatens-internet-says-former-house-intel-chair>.

⁷² James T. Areddy, *China Pushes to Rewrite Rules of Global Internet*, WALL ST. J. (July 28, 2015), <http://www.wsj.com/articles/china-pushes-to-rewrite-rules-of-global-internet->

Significantly, from an economic standpoint, an alternative Internet may very well lead to a change of control with respect to commerce: “It is something [Russia and China] will be able to control, . . . Traffic to these countries ‘doesn’t have to go through the World Wide Web anymore. It goes through this system, which has been set up mainly by China.’”⁷³

Thus, irrespective of the above-mentioned ICJ Statute or Restatement terminology, previously “uncivilized” and “non-advanced” nations now hold admission tickets for the club of International Law players. Together with the new powerful IFIs described below, the stage is set for the “uncivilized” to become the new architects.

B. *An Alternative Architecture*

As a counter balance to the IMF, the World Bank, and the Asian Development Bank (“ADB”), China launched a Chinese-dominated IFI called the Asian Infrastructure Investment Bank (“AIIB”).⁷⁴ While it is no surprise that both the United States and Japan “have stayed out of the China-led institution, seen as a rival to the U.S.-dominated World Bank and Japan-led Asian Development Bank,”⁷⁵ the fact that many nations have embraced the AIIB was unexpected. Japan and the U.S. “were caught off guard when a total of [fifty-seven] countries, including Group of Seven members Britain, Germany[,] and France jumped on board the AIIB bandwagon by March.”⁷⁶

The new Chinese-led bank “is seen as encroaching on the regional financial clout of Tokyo and its ally Washington”⁷⁷ and has been equated with a “Bretton Woods” moment whereby the mantle of global economic leadership may be moving to China.⁷⁸ Not surprisingly, Japan is attempting

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⁷³ Bennet, *supra* note 71.

⁷⁴ “[T]he AIIB has stoked controversy because Asia already has a multilateral lender, the Asian Development Bank (ADB).” See S.R., *Why China is creating a new “World Bank” for Asia*, THE ECONOMIST (Nov. 11, 2014), <http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-6>.

⁷⁵ Leika Kihara & Linda Sieg, *Japan unveils \$110 billion plan to fund Asia infrastructure, eye on AIIB*, REUTERS (May 21, 2015), <http://www.reuters.com/article/2015/05/21/us-japan-asia-investment-idUSKBN0O617G20150521>.

⁷⁶ *Id.*; see also Nicole Gaouette & Andrew Mayeda, *U.S. Failure to Stop China Bank Unmasks World Finance Fight*, BLOOMBERG, <http://www.bloomberg.com/news/articles/2015-04-07/u-s-failure-to-stop-china-bank-unmasks-fight-over-world-finance> (last updated Apr. 8, 2015).

⁷⁷ Kihara & Sieg, *supra* note 75.

⁷⁸ Bretton Woods led to the establishment of the IMF and World Bank and “institutionalized America’s geopolitical supremacy.” See Paola Subacchi, *American Leadership in a Multipolar World*, PROJECT SYNDICATE (Apr. 10, 2015), <http://www.project-syndicate.org/commentary/china-united-states-global-governance-by-paola-subacchi-2015->

to strengthen its ties to other Asian nations as a counter-balance to the new Chinese-led bank.⁷⁹ Indeed, China's creation and domination of the new AIIB clearly constitutes a consequential mechanism to achieving the interests of China and presages a concurrent weakening of the U.S.-led post-World War II order.⁸⁰

China's spearheading of the new bank is hardly surprising. As "nations become more prosperous and more powerful, they try to find their own independent role and place in the galaxy of nations."⁸¹ China's ambition to take a seat at the table of International Law is being realized, and China has already utilized its leverage by rejecting Taiwan's request to join the AIIB.⁸² President Xi Jinping has called for "a regional order that is more favorable to Asia and the world," and noted that because of its size, China should "shoulder[] greater responsibilities for regional and world peace and development."⁸³

Additional significant harbingers of change include the One Belt, One Road ("OBOR") initiative, which constitutes an important component of China's long-term strategic plan to regain dominance in Asia and prestige in the world.⁸⁴ Additionally, the growing recognition that the Chinese Yuan is

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⁷⁹ Naoto Saito, an economist at Daiwa Institute of Research, said "Japan must have been provoked by the establishment of the Asian Infrastructure Investment Bank by China . . . Japan's investment will help promote infrastructure projects in Asia, expanding business opportunities for Japanese companies." See Masaaki Iwamoto & Kyoko Shimodoi, *Japan Boosts Asia Infrastructure Outlays as China Champions AIIB*, BLOOMBERG (May 21, 2015), <http://www.bloomberg.com/news/articles/2015-05-21/japan-boosts-asia-infrastructure-outlays-as-china-champions-aiib>.

⁸⁰ S.R., *supra* note 74. The article states:

But the real, unstated tension stems from a deeper shift: China will use the new bank to expand its influence at the expense of America and Japan, Asia's established powers. China's decision to fund a new multilateral bank rather than give more to existing ones reflects its exasperation with the glacial pace of global economic governance reform. The same motivation lies behind the New Development Bank established by the BRICS [nations]. *Id.*

⁸¹ Surya P. Subedi, *Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism*, 30 CAL. W. INT'L L.J. 45, 62 (1999).

⁸² See Michael Schuman, *Whose Money Will the World Follow?*, BLOOMBERG (May 14, 2015), <http://www.bloomberg.com/news/articles/2015-05-14/u-s-china-rivalry-whose-money-will-the-world-follow>. According to Schuman:

The AIIB has come to represent those ambitions. Since the bank would be steered by China, Beijing could use it to draw other emerging nations into its orbit and advance its own political and economic interests. That was made clear when the mainland rejected Taiwan's application to join, apparently over what to call the island. China still considers it a runaway province. *Id.*

⁸³ *Id.*

⁸⁴ John Kemp, *China's Silk Road challenges U.S. dominance in Asia*, JAPAN TODAY (Nov. 14, 2014), <http://www.japantoday.com/category/opinions/view/chinas-silk-road>

becoming a reserve currency points to China's status as an up and coming new architect.⁸⁵ A growing list of nations is now using the Yuan for transactions instead of exclusively relying on the U.S. Dollar.⁸⁶

The New Development Bank ("NDB") is another newly constructed component of the alternative architecture to Western domination of international finance⁸⁷ and should be viewed in the context of the other initiatives.⁸⁸ The objective of the NDB is to embrace a new financial order and offer a replacement IFI.⁸⁹ This goal is stated on the bank's website. The [NDB] is "operated by the BRICS states as an alternative to the existing US-dominated World Bank and International Monetary Fund."⁹⁰

In contrast to the Chinese-dominated AIIB, the NDB is a project of several nations that are all seeking a viable substitute to the current global governance architecture: "[T]he NDB remains important as a reminder that China is not alone in seeking alternatives to the Western financial system."⁹¹

challenges-u-s-dominance-in-asia.

⁸⁵ "Russia's biggest commercial lender is issuing letters of credit in the Chinese yuan." See Kenneth Rapoza, *Russia's Sberbank Lending In Chinese Currency*, FORBES (June 7, 2015), <http://www.forbes.com/sites/kenrapoza/2015/06/07/russias-sberbank-lending-in-chinese-currency/#76e2341427da>.

⁸⁶ Li Xiang, *China, Russia to use yuan, rouble in more energy deals*, CHINA DAILY (Nov. 11, 2014), http://usa.chinadaily.com.cn/business/2014-11/11/content_18897132.htm; see Jordan Totten, Opinion, *BRICS New Development Bank Threatens Hegemony Of U.S. Dollar*, FORBES (Dec. 22, 2014), <http://www.forbes.com/sites/realspin/2014/12/22/brics-new-development-bank-threatens-hegemony-of-u-s-dollar/> (pointing to increasing reliance on Yuan denominated deals); see Chiara Albanese, *Russia Seals Deal With China on Currency Swap*, WALLST.J. (Oct. 13, 2014), <http://blogs.wsj.com/moneybeat/2014/10/13/russia-moves-closer-to-china-with-currency-swap-deal/> (commenting on Russian desire to promote the Yuan and to reduce the Dollar's importance); Liam Halligan, *The dollar's 70-year dominance is coming to an end*, THE TELEGRAPH (July 19, 2014), <http://www.telegraph.co.uk/finance/comment/liamhalligan/10978178/The-dollars-70-year-dominance-is-coming-to-an-end.html> (noting that Russia's third-largest oil producer has started settling oil trades in Chinese currency in reaction to Western imposed sanctions).

⁸⁷ "The bank was—and is—envisioned as an answer to the current international financial system, which is dominated by the West." Shannon Tiezzi, *Don't Forget About the New BRICS Bank*, THE DIPLOMAT (July 22, 2015), <http://thediplomat.com/2015/07/dont-forget-about-the-new-brics-bank/>.

⁸⁸ Scott, *supra* note 26 (noting that the NDB bank, and "a \$100 billion currency-exchange reserve program . . . along with China's "One Belt One Road" strategy" are the latest initiatives).

⁸⁹ The goal is to directly compete and offer a viable alternative to the existing Western dominated international financial order. See Halligan, *supra* note 86.

⁹⁰ Tiezzi, *supra* note 87; *BRICS, Reinventing partnership. redefining future.*, NEW DEV. BANK, <http://ndbbrics.org/> (last visited Oct. 26, 2016).

⁹¹ Tiezzi, *supra* note 87.

C. *Different Norms and Values*

The historical, cultural, religious, and political experiences of some of these “uncivilized” states translate into legal norms and understandings that are substantially different from Western notions. These differences are important to note, however, as these countries are likely to become the new International Law architects and may be injecting these norms into the new global governance architecture.

1. Brazil

Brazil, a BRICS nation, is a rising power that “has more embassies in Africa than does the United Kingdom,”⁹² and is projected to be the sixth largest economy within the next fifteen years.⁹³ However, Brazil’s enforcement of Western-based international norms and democratic principles is lackluster.⁹⁴ Critics have singled out state-sponsored torture as a consistent and pervasive problem.⁹⁵

The 2016 Rio Olympics highlighted serious human rights abuses such as state-sponsored police executions, torture, and prison abuse.⁹⁶ A host of “lesser” human rights abuses, including police brutality and Olympics-related child abuse, have also been well documented.⁹⁷ Human rights organizations have chronicled the systemic extrajudicial executions, prison torture, juvenile criminal system abuse, and violence against protesters in

⁹² Raj M. Desai & James Raymond Vreeland, *What the new bank of BRICS is all about*, WASH. POST (July 17, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/>.

⁹³ Jeanna Smialek, *These Will Be the World’s 20 Largest Economies in 2030*, BLOOMBERG (Apr. 10, 2015), <http://www.bloomberg.com/news/articles/2015-04-10/the-world-s-20-largest-economies-in-2030>.

⁹⁴ *World Report 2014: Brazil*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2014/country-chapters/brazil> (last visited Oct. 21, 2016).

⁹⁵ For example, the World Report states, “Torture is a chronic problem in police stations and detention centers. The United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment reported that it received ‘repeated and consistent’ accounts from inmates of beatings and other allegations of ill-treatment during police custody.” *Id.*

⁹⁶ See Owen Gibson, *Olympic Games 2016: how Rio missed the gold medal for human rights*, THE GUARDIAN (Aug. 2, 2016), <https://www.theguardian.com/sport/2016/aug/02/olympic-games-2016-rio-human-rights> (noting the over 20,000 families were forced to evacuate the Olympics area, the squalid conditions, and that since 2009 there have been more “more than 2,600 police killings in Rio”).

⁹⁷ See Jonathan Watts, *Rio Olympics linked to widespread human rights violations, report reveals*, THE GUARDIAN (Dec. 8, 2015), <http://www.theguardian.com/world/2015/dec/08/rio-olympics-2016-human-rights-violations-report>.

Brazil.⁹⁸ In addition, the Brazilian government has severely restricted the media and subjects journalists covering political protest to the risk of arbitrary arrest.⁹⁹

2. China

China is the major developer of the new ascending global architecture. Chinese notions of democracy and individual rights vary significantly from Western norms. For example, “in Chinese Confucianism ‘rights’ are placed strongly on the idea of collective or group rights and manifest themselves individually only in the form of duties that an individual has to the group. In this sense, in Confucianism there are no rights that are individual in nature.”¹⁰⁰ Also in contrast to Western notions of individual rights, China uses technology to limit freedom, enforce censorship, and attack political opponents.¹⁰¹

Critics have extensively reported on serious abuses of rights in China. For example, Chinese state authorities force political dissidents into psychiatric hospitals, and drug and torture them to obtain “confessions.”¹⁰² Government critics have been arrested, tortured, and killed in secret gulags and detention centers.¹⁰³ Legal experts are “deeply concerned about the continued allegations, corroborated by numerous Chinese legal sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions.”¹⁰⁴ The United Nations has severely

⁹⁸ *Annual Report: Brazil 2015/2016*, AMNESTY INT’L (2016), <https://www.amnesty.org/en/countries/americas/brazil/report-brazil/>.

⁹⁹ *World Report 2014: Brazil*, *supra* note 94.

¹⁰⁰ ROBERT WEATHERLY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* 46 (1999).

¹⁰¹ *See Xi Defends China’s Great Firewall in Push for ‘Cybersovereignty,’* BLOOMBERG (Dec. 16, 2015), <http://www.bloomberg.com/news/articles/2015-12-16/china-s-xi-defends-web-controls-in-call-for-cybersovereignty> (noting China utilizes exhaustive and comprehensive Internet censorship management regimes to quash dissidence and other news or data considered threatening to the Communist Party, including by censoring and blocking Facebook and Google).

¹⁰² Kevin Holden, *China’s web of torture and its critics*, AL-JAZEERA (Mar. 22, 2015), <http://www.aljazeera.com/news/2015/03/china-web-torture-critics-150319145251265.html> (describing how “[f]orcibly committing activists, who are subject to being shackled, tortured and given psychotropic drugs, is now being used as an alternative to the red reeducation camps.”).

¹⁰³ *World Report 2014: China*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2014/country-chapters/china> (last visited Feb. 7, 2017).

¹⁰⁴ *UN Committee Says China “Should Take Immediate Steps to Prevent Acts of Torture*, UYGHUR HUM. RTS. PROJECT (Nov. 21, 2008), <http://uhrp.org/news/un-committee-says-china-should-take-immediate-steps-prevent-acts-torture>.

criticized China with respect to state-sponsored torture.¹⁰⁵

3. India

India is rapidly becoming an economic powerhouse and has emerged as the fourth largest or—by some measures—the third biggest global economy.¹⁰⁶ This makes India an integral member of the BRICS nations. India has been harshly criticized for a variety of human rights abuses, including limitations on freedom of expression, gender discrimination, child labor, and domestic violence including an acceptance of honor killings.¹⁰⁷

V. RAMIFICATIONS OF THE NEW ARCHITECTS

A. *Changing Concepts of Norms and Values*

The fact that non-Western states' norms differ from Western states' notions is of the utmost importance because these new non-Western architects are likely to be at the forefront in reshaping International Law. Challenges and ramifications will arise as the “uncivilized” become architects of the developing international financial and legal orders. The new architects will be unwilling to remain alienated from International Law and to accept self-interested Western-imposed governance.¹⁰⁸

One of the main goals of the new architects will likely be to establish an alternative global legal and financial framework based upon the new architects' own rules and in opposition to United States' interests.¹⁰⁹ Accordingly, numerous issues will take on a different context in order to reflect the understandings that differ from the following Western notions: sources of International Law; the discourse on corporate social responsibility; and negotiations on the adoption of international treaties on labor issues, immigration, and human rights. It seems naïve at best to believe the new architects will not seek to modify current norms. As such, the fact that numerous new architects have markedly different conceptions of misconduct

¹⁰⁵ *Id.*

¹⁰⁶ Ankit Panda, *World Bank: India Overtakes Japan as World's Third Largest Economy*, THE DIPLOMAT (May 1, 2014), <http://thediplomat.com/2014/05/world-bank-india-overtakes-japan-as-worlds-third-largest-economy/>.

¹⁰⁷ See Peter Baker & Ellen Barry, *As Visit Ends, Obama Presses India on Human Rights and Climate Change*, N.Y. TIMES (Jan. 27, 2015), http://www.nytimes.com/2015/01/28/world/asia/obama-ends-visit-with-challenge-to-india-on-climate-change.html?rref=collection%2Ftimestopic%2FChild%20Labor&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection.

¹⁰⁸ Subedi, *supra* note 81, at 62.

¹⁰⁹ DEFENSE TECHNICAL INFORMATION CENTER, *supra* note 3, at 4.

and acceptable norms will likely create tension as nations struggle to redefine the basic character of International Law.

With respect to international economic law, investment treaty interpretation relies on International Law.¹¹⁰ The understanding of concepts such as due process, corruption, and national emergency may differ between the existing architects and the new architects. The definition, contours, and application of treaty obligations will have different outcomes depending upon interpretations of International Law¹¹¹ in investment tribunal rulings.¹¹² The terms and rules of international trade, the usage of certain dispute resolution techniques, and the interpretations of disputes based upon International Law may all be potentially affected.

Will International Law accept, as legitimate sources, laws from nations that deny Western oriented rights and freedoms? Will nations that accept AIIB funding (or are AIIB members) become more accepting of a Chinese model of governance? Or will the opposite occur, whereby an integrated China will serve to empower freedoms and rights in China?

B. *Example of a Potential Ramification: Transnational Litigation*

Global litigation against individuals and businesses for International Law violations will be among the issues affected by the new architects.¹¹³ In the

¹¹⁰ See Kathryn Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* 22 (OECD, Working Paper No. 2014/01, 2014), <http://dx.doi.org/10.1787/5jz0xvvgx1zlt-en> (“adjudicative bodies in international law increasingly seek to apply international law (including investment treaty law) in its general context—that is, interpreting treaties while also integrating, where relevant and applicable, other components of international law (both customary and conventional) and of domestic law”).

¹¹¹ *Id.*

¹¹² *Inceysa Vallisoletana, S.L. v. Republic of El Sal.*, ICSID Case No. ARB/03/26, Award, ¶ 224 (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf (holding that the claimant’s investment must comply with “generally recognized rules and principles of International Law”). See also Christoph Schreuer, *The Development of International Law by ICSID Tribunals*, 31 ICSID REV. 1, 8 (2016) (noting tribunals apply international law).

¹¹³ See Andrew Sanger, *Corporations and Transnational Litigation: Comparing Kiobel with the Jurisprudence of English Courts*, in AGORA: REFLECTIONS ON KIOBEL e-23 (Am. Soc’y of Int’l Law ed., 2014), [https://www.asil.org/sites/default/files/AGORA/201401/Sanger%20AJIL%20Unbound%20e-23%20\(2014\).pdf](https://www.asil.org/sites/default/files/AGORA/201401/Sanger%20AJIL%20Unbound%20e-23%20(2014).pdf). For example, Nigerian farmers sued Dutch multinational Shell for environmental damage caused abroad, the first case of its kind. Anneloes Hoff, *Nigerian Farmers Can Sue Shell in Dutch Court: Precedent for Transnational Cases against Multinationals*, OXFORD HUM. RTS. (Jan. 26, 2016), <http://ohrh.law.ox.ac.uk/nigerian-farmers-can-sue-shell-in-dutch-court-precedent-for-transnational-cases-against-multinationals/>; first; see also Karen McVeigh, *Canadian firm faces new forced labour claims over Eritrean mine*, THE GUARDIAN (Oct. 14, 2016), <https://www.theguardian.com/global->

United States, the Alien Tort Statute (“ATS”)¹¹⁴ permits aliens to file suits against defendants for violations of International Law.¹¹⁵ Pursuant to the ATS, only misconduct considered a violation of customary international law can be litigated, so, expectedly, defining customary international law through the lens of “civilized nations” is a significant issue in ATS litigation.¹¹⁶ The U.S. Supreme Court has specifically referred to the law of civilized nations in holding the following:

[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.¹¹⁷

Therefore, in ATS litigation, whether a certain misconduct is considered a violation of International Law by the “civilized nations” is of fundamental importance.¹¹⁸ However, what if the benchmarks change as International Law evolves?¹¹⁹ Ironically, modern ATS litigation, which was green lighted in *Filartiga v. Pena-Irala* in terms of state-sponsored torture, contains the inherent means necessary for its own “reversal.”¹²⁰ In *Filartiga*, the court had to decide whether state-sponsored torture was cognizable as a violation of International Law.¹²¹ After examining the state of International Law, the court found that customary international law changes over time and that, currently, state sponsored torture is an accepted violation of customary international law.¹²² In the ensuing years, courts have routinely examined sources of International Law to decide whether a particular misconduct was

development/2016/oct/14/canadian-firm-nevsun-resources-new-forced-labour-claims-eritrea-bisha-mine.

¹¹⁴ Alien Tort Claims Act, 28 U.S.C. § 1350 (2016).

¹¹⁵ *Id.* (codifying the idea that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

¹¹⁶ For a discussion of the Alien Tort Statute, corporate liability, and litigation, see Joel Slawotsky, *Corporate liability for violating international law under The Alien Tort Statute: The corporation through the lens of globalization and privatization*, INT’L REV. L. 1 (2013), <http://www.qscience.com/doi/full/10.5339/irl.2013.6>.

¹¹⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

¹¹⁸ *Id.* at 725. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 16 (D.C. Cir. 2011).

¹¹⁹ See Paul C. Szasz, *General Law-Making Processes*, in THE UNITED NATIONS AND INTERNATIONAL LAW 31 (Chris C. Joyner ed., 1997) (noting that customary international law is increasingly changing due to the “general acceleration of international interactions”).

¹²⁰ *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

¹²¹ *Id.* at 876. At the time of the ATS’s enactment, torture was not one of the three violations of international law; the key is whether the “new” tort, here torture, could be defined with the same “definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.” See *Sosa*, 542 U.S. at 732.

¹²² *Filartiga*, 630 F.2d at 887.

cognizable based upon the notion that the majority of the civilized world recognized such misconduct as a violation of an International Law norm.¹²³

However, as Judge Kaufman states in *Filartiga*, International Law changes over time. What happens when states that employ torture become International Law architects? What would happen if a majority of the nations of the world found that discrimination against certain groups based upon ethnic, gender, or religious criteria was not merely permissible but obligatory? What if, perhaps, child labor was not considered abuse, but rather an educational or mandatory activity to a majority of the nations? What about human rights that are currently entrenched in the Western world and their interference with religious, cultural, and perhaps legal systems of the new architects? Moreover, does the phrase ‘majority of civilized nations,’ refer to population or the number of states? China and India, the two most populous nations, have combined populations that dwarf the population of the United States. Thus, should a “democratically inspired” International Law paradigm rely upon rules derived from a majority of “citizens” or “states?”¹²⁴

VI. CONCLUSION

The world has changed significantly over the last few years and the economic fortunes of the “uncivilized” and developing nations are rising. Indeed, the economic power of the new architects surpasses that of the existing architects. The combined GDP of the BRICS nations is greater than the cumulative GDP of the EU.¹²⁵

International Law will no longer be dominated and shaped by the United States and its Western-aligned allies. New architects will inevitably attempt to affect International Law.¹²⁶ Technological advances may in effect become “great equalizers” and reduce the advantage over competitors the United States currently enjoys, thus empowering more serious challenges to United States hegemony.¹²⁷ This transformation likely will rewrite the rules and drastically change the institutions that have enforced the global governance architecture over the past seventy years. Since the new International Law actors have different notions and norms than the existing architects, a definitional—let alone enforcement—problem will arise with respect to

¹²³ See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 167 (2d Cir. 2009) (holding that the failure to obtain informed medical consent violates international law).

¹²⁴ For more context into these questions, see *supra* Part IV.C.

¹²⁵ See *Putin’s Prepared Remarks at 43rd Munich Conference on Security Policy*, *supra* note 61.

¹²⁶ DEFENSE TECHNICAL INFORMATION CENTER, *supra* note 3, at 20 (noting that technological advances may in effect become “great equalizers” and reduce the advantage over competitors the United States currently enjoys, thus empowering more serious challenges to United States hegemony).

¹²⁷ *Id.*

International Law. The new architects will offer radically different views on a wide array of International Law topics and non-Western norms may make their way into the existing international economic and legal framework. A different code of conduct practiced by these new “civilized” or “leading” nations, previously considered “uncivilized,” may conflict with current norms, and International Law will need to focus on the potential dichotomy between former and new standards and customs. The failure to address this impending clash of customs may lead to a fracture of the global enforcement of International Law, reduced prosperity, and heightened conflict.