

New Great Powers (NGPs) and International Law in the 21st Century

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Abstract

Great Powers(GPs) are always prominent in international relations and their rise and fall often leads to structural transformation of international relations. In the past decade, the world has been witnessing the rise of some New GPs(NGPs), which mainly include Brazil, Russia, India, China and South Africa(BRICS). While the effect of the supremacy of the United States, an Old GP(OGP), on international law has been examined extensively since 2000, international lawyers have hardly discussed what international law may be shaped and reshaped with the rise of NGPs. This article endeavors to examine the implications on international law, challenges and promise, with the far-reaching event. In particular, as an “insider” from a NGP, the author reviews the latest development of China’s international legal policy and practice.

Key Words

New Great Powers; International Law; Challenges; Promise; China

Introduction

After surveying economic changes and military conflicts from 1500 to 2000, Kennedy found that “the relative strengths of the leading nations in world affairs never remain constant” and that “the economic shifts heralded the rise of new Great Powers which would one day have a decisive impact upon the military/territorial order”.¹ Kennedy predicted that China would rise a potential GP if it could maintain its economic development,² and that the United States(US) would move towards a “relative” decline.³ Kennedy made people realize again that prediction is one of most risky intellectual activities because, although China rises as he said, it rises far more quickly than he expected; he didn’t predict that US once climbed its peak as a sole Superpower and that this supremacy seems short-lived. With several recent money-burning wars, the financial crisis and the rise of New Great Powers(NGPs), “American Century” is said to end,⁴ though it remains a major player in international affairs; he didn’t expect that the rise of a group of NGPs, not China only. Nevertheless, these events don’t damage the basic theme: GPs, key roles in international relations, rise and fall.⁵

Although we can’t say that international lawyers fail in recognizing the key role of GPs in international law,⁶ as Simpson rightly said, “the standard textbooks on international law have not been concerned, to any significant degree, with the problem of the Great Powers.”⁷ This situation has changed significantly since 2000 because Kosovo War made people deeply concerned with whether and/or how US’s predominance “is leading to foundational change in the international legal system”⁸ Although studies concerning Old GPs(OGPs), overwhelmingly US, in international law are increasing, those about NGPs can be fingered: Stephan believed that the rise of NGPs would make international law more selective but he wanted “neither to condemn nor celebrate” this phenomenon.⁹ Gordon argued that the rise of NGPs would lead to a “New, New International Economic Order”(New NIEO), but he deemed it hard to say what this new order looks like and whether it would be more friendly to poor nations.¹⁰ Yasuaki hailed that, as China, India and some other Asian states rise, international law will to some extent enter the Asian era and Asian states would play a more important role.¹¹ While Fidler also argued international law in the new century would enter “The Asian Century”, he said it wouldn’t be remembered “because countries in Asia lay down the law to the rest of the world, or because China or India becomes a superpower”, but “because Asia will host the next great challenges for, and experiments in, the governance of human affairs.”¹²

Current studies about NGPs need to be improved. For instance, since the rise of NGPs don’t occur in Asia

¹ Paul Kennedy, *The Rise and Fall of the Great Powers*, Vintage Books, 1989, at xv, xxii.

² *Id.*, at 447.

³ *Id.*, at 534.

⁴ David S. Mason, *End of the American Century*, Rowman & Littlefield, 2008.

⁵ See also Oppenheim, *International Law*, 2nd edition, Longmans, Green and Co., 1912, at 171.

⁶ See, e.g. Wilhelm G. Grewe, *The Epochs of International Law*, Walter de Gruyter, 2000.

⁷ See Jerry Simpson, *Great Powers and Outlaw States*, Cambridge University press, 2004, at 165.

⁸ Michael Byers and Georg Nolte eds., *United States Hegemony and the Foundation of International Law*, Cambridge University Press, 2003, at xv. Several journals have been concerned with this issue, e.g., 1 CHI. J. INT’L L.(2000) and 8 AUSTRIAN REV. INT’L & EUR. L.(2003).

⁹ See Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 CHI. J. INT’L L.91, 107(2009).

¹⁰ Ruth Gordon, *The Dawn of A New, New International Economic Order?*, 72 LAW & CONTEMP. PROB. 131, 162(2009).

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

¹² David P. Fidler, *The Asian Century: Implications for International Law*, 9 SYBIL 19, 31(2005).

only, the “Asian Century” perspective is not enough. Although Gordon was entitled to conduct a value-neutral study, that phenomenon in practice may not be “neutral”. It’s not enough to stop at asserting the rise of a “New NIEO” without elaborating its nature, content and its relationship with the “Old NIEO” launched in the 1960s. Furthermore, from the perspective of GPs’ rise and fall, the interaction with OGP’s shouldn’t be ignored in examining implications on international law with the rise of NGPs. More generally, although the rise of NGPs can exert increasing influences on international law in the 21st century, it is too early to assert a conclusive say. Therefore, much more intellectual explorations are needed.

This author wants to contribute to the understanding of such implications. In particular, he hopes to provide some “insider” perspective since he is from a NGP. Besides Introduction and Conclusions, this article includes four Parts. Part I gives my conception of NGPs and OGP’s, similarities and discrepancies between them, and a general assessment of such implications. Part II analyzes challenges to international law with the rise of NGPs, including the dynamics underlying such challenges. Part III investigates why NGPs can increase development input and democracy input in international law and their characteristics. Since China is widely deemed as the most powerful NGP, a case study on its international legal policy and practice is conducted in Part IV.

I. NGPs, OGP’s and International Law

A. GPs, NGPs and OGP’s

The word “Great Powers” became a prevailing diplomatic term since Chaumont Treaty(1814), which “marks a key step in the evolution of the distinction between great and small powers”.¹³ Although various factors have been proposed to define GPs, a definite definition has yet to be reached.¹⁴ Roughly speaking, these factors are divided into two categories: material and cognitive. The former include population, territory, national interest, economic development, military power, etc; the latter may be exemplified with a state’s willing to act like a GP or the recognition of GP status from other states. Both material factors and cognitive factors are necessary for a State to become a GP,¹⁵ but different weight is given to different factors, among which economic and military power are accorded with special weight.¹⁶ In this regard, two points should be added: first, demonstrating its muscle in all aspects help a State claim a status of or to be recognized as a GP, but the weakness in a specific factor doesn’t necessarily prevent a State being a GP at least in a specific field. Hedley Bull’s overwhelmingly high-politics rooted proposition, that is, strong military power is indispensable for a GP and thereby Japan can’t qualify as a GP based upon its economic success,¹⁷ may be doubted. Few people deny Japan can exert great influence on international economic governance. For example, Japan is one of members of so-called “the Quad” in WTO,¹⁸ and the second largest member in International Monetary Fund(IMF),¹⁹ which make Japan privileged in international economic rule-making.²⁰ Second, the trend of multipolarity, which is consolidated by the rise of NGPs, leads to “a

¹³ Robert T. Klein, *Sovereign Equality among States*, University of Toronto Press, 1974, at 12.

¹⁴ See Michael I. Handel, *Weak States in the International System*, Frank Cass, 1990, at 21-23.

¹⁵ See T. J. Lawrence, *The Principle of International Law*, 6th edition, D.C. Heath & Co. Publishers, 1915, at 279; Hedley Bull, *The Anarchical Society*, Macmillan, 1977, at 200-229.

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

¹⁷ Hedley Bull, *supra*, note 15 at 200-229.

¹⁸ The other three are China, EU and US.

¹⁹ “IMF Members’ Quotas and Voting Power, and IMF Board of Governors”, at <http://www.imf.org/external/np/sec/memdir/members.aspx>(visited November 4, 2011).

²⁰ See, e.g., Jacob Katz Cogan, *Representation and Power in International Organization*, 103 AJIL 209, 259(2009).

marketed dispersal of power rather than a concentration”.²¹ It implies that to be a GP isn’t necessary for a State to own power comparable to that of GPs in the history.

The lack of a definite definition of GP, however, doesn’t prevent people from reaching a general consensus on which states are GPs. For instance, during the Congress of Vienna, Austria, Russia, Great Britain, Prussia and France were recognized as GPs. Although it’s unnecessary to add a definition of GP here,²² it is necessary to present a personal conception of OGP and NGP, albeit not precisely, in order to move on further discussions.

OGPs here refer to Group 7(G7), a “rich club”, which include France, Germany, Italy, Japan, United Kingdom, the United States and Canada.²³ Since it was formed in 1975 in response to fundamental transformations in international system including the collapse of Bretton Woods System, G7 not only sits as the center of international economic governance, but extends its reach to political affairs over time.²⁴ Although the establishment of G20 in 1999 shows that G7 can’t represent the new international reality while other economic bodies have opportunities to voice, G7 will be expected to play a dominant role in the new mechanism.²⁵

NGPs here refer to “BRIC”(or “BRICs”)before 2011 and, since 2011, “BRICS” with the admission of South Africa.²⁶ In 2001, Jim O’Neill invented the “BRIC” with initials of four states of Brazil, Russia, India and China. He predicted that BRIC would constitute another economic power comparable to the G 7.²⁷ In 2003, two economists predicted that by 2025 the economy of BRIC could account for over half that of the G6(US, Japan, UK, Germany, France and Italy) and that China could overtake Japan in 2015 and the US in 2039 respectively.²⁸ Actually, BRIC’s economic power increases more quickly than expected. China’s Gross Domestic Product(GDP) exceeded that of Japan and became the world’s second largest economy in 2010. According to the IMF in 2011, China will end the “Age of America”, becoming the largest economic body in 2016.²⁹ The expansion of economic power makes BRIC more influential in many international affairs.³⁰ BRICS may be defined as NGPs also because of their political and military power. Within BRICS, China and Russia are Permanent Members of UN Security Council(UNSC) and recognized Nuclear Powers; other three states are the most competitive candidates of new Permanent Members of UNSC if the deadlock on UNSC reform will be broken through.

B. Discrepancies between NGPs and OGP

Describing here all discrepancies between NGPs and OGP is neither impractical nor necessary. Rather, a comparison of economic development and state identity between them is enough because, as Paul Kennedy rightly said, economic power is the material foundation for claiming a GP status; and because “identity”, as a relational concept, is decisive in defining the status and action logic of individuals or entities in any community.

As for discrepancy of economic power NGPs and OGP, it suffices to compare several economic indicators

²¹ Ian Brownlie, *The Relation of Law and Power*, in Bin Cheng and E.D. Brown eds., *supra* note 25, at 21

²² Indeed, most international lawyers don’t care about this definition. See, e.g., Georg Schwarzenberger, *Power Politics*, 2nd edition, Frederick A. Praeger, Inc., 1951, at 44; Wolfgang Friedmann, *The Changing Structure of International Law*, Columbia University Press, 1964, at 34.

²³ “G7” evolved into “G8” with the admission of Russia in 1997. However, Russia at best is a nominal member because it is excluded from rule-making concerning many fundamental affairs.

²⁴ See, e.g., Risto Penttilä, *The Role of the G 8 in International Peace and Security*, Oxford University Press, 2003.

²⁵ See Mark Beeson and Stephen Bell, *The G-20 and International Economic Governance*, 15 GLOBAL GOVERNANCE 67(2009).

²⁶ Sanya Declaration(April 11, 2011), para.2.

²⁷ Jim O’Neill, *Building Better Global Economic BRICs*, November 30, 2001, GoldmanSachs.

²⁸ Dominic Wilson, Roopa Purushothaman, *Dreaming With BRICs: The Path to 2050*, 1 October 2003, GoldmanSachs.

²⁹ David Gardner, The Age of America ends in 2016: IMF predicts the year China's economy will surpass U.S., at

<http://www.dailymail.co.uk/news/article-1380486/The-Age-America-ends-2016-IMF-predicts-year-Chinas-economy-surpass-US.html> (visited November 1, 2011).

³⁰ See Barry Carin and Alan Mehlenbacher, *Constituting Global Leadership*, 16 GLOBAL GOVERNANCE 21(2010).

between BRICS and G7. According to World Bank, the GDP(Purchasing Power Parity, PPP) of BRICS in 2010 is the ninth, sixth, fourth, second and 24th largest in the world,³¹ but there is a huge gap between BRICS and G7 in terms of Gross National Income Per Capita(PPP).³² Furthermore, according to *2011 BRICS Joint Statistics*, the total population of BRICS in 2009 reached 3 billions, representing 42.5% out of total world population,³³ while the total population of G7 is about 700 millions only in 2009.³⁴

As far as identity of NGPs and OGPs, all OGPs are Western States. They always define themselves as advocates and defenders of political democracy, economic freedom, and ideological individualism. Furthermore, a handful of Western States historically dominated international law.³⁵ On the contrary, During the Age of Colonization, Brazil, China, India and South Africa were once deprived of international personality because they were considered to fail in satisfying Western “standard of civilization”.³⁶ Today, Western states have yet to recognize four states as like-minded Western partners and they often criticize that four States are sympathetic with so-called “troubled states”, “rogue states”, e.g., Iran, and North Korea.³⁷ Interestingly, these four states appear not willing to be grouped in Western States. For instance, although China is willing to conduct dialogues with G7, it’s reluctant to joint it. A similar thing happens to Russia. After Russia was founded as a new state in 1991, it was once eager to integrate itself into Western world. However, Russia’s attempt failed. To date, Russia hasn’t been recognized as a Western State. Rather, it is often blamed as the protector of those “troubled states”, “rogue states” or “failed states” in eyes of Western states.³⁸

The identity of Non-Western States of NGPs has two meanings: first, several NGPs, especially China, have national regimes different from those of Western States, even though they are no longer traditional Socialist States or Communist States; second, although some NGPs, e.g., India, India and South Africa, have adopted national regimes similar to those in Western States, they may act toward many international affairs in a way that is quite different from that of Western States. For instance, the attitude of Brazil, India and South Africa toward international human rights(HRs) is significantly different from that of Western States.³⁹

C. Similarities between NGPs and OGPs

There are many similarities between NGPs and OGPs. For instance, both US and China have huge territory. Among all similarities, the most important one is the action logic, which ultimately determines the international law strategy of states, NGPs or OGPs. This action logic is national interest.

The general proposition that national interest constitutes the basic action logic of states in international law is not novel at all. For instance, Friedmann argued that, while political, economic, civilizational disagreements influence more or less states’ attitudes and activities toward international law, there is a common tension between compliance with international law and the state sovereignty according to “national interest” and the latter prevails

³¹ World Bank, Gross domestic product 2010(PPP), at http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf(visited November 2, 2011).

³² “Gross national income per capita 2010, Atlas method and PPP”, at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>(visited November 1, 2011).

³³ BRICS Joint Statistical Publication 2011, at 13.

³⁴ See US Population Reference Bureau, *2009 World Population Data Sheet*.

³⁵ See Wilhelm G. Grewe, *supra* note 6, Parts Three and Part Four; Onuma Yasuaki, *supra* note 13, at 104.

³⁶ See generally Gerrit W. Gong, *The Standard of “Civilization” in International Society*, Clarendon Press, 1984.

³⁷ See, e.g., Jorge G. Castañeda, *Not Ready for Prime Time: why Includ Emerging Powers at the Helm would Hurt Global governance*, 89 FOREIGN AFF. 109(2010).

³⁸ See, e.g., Meeting Record, Security council 6627th meeting, 4 October 2011.

³⁹ See Jorge G. Castañeda, *Supra* note 37.

repeatedly.⁴⁰ Goldsmith and Posner build their theory of international law founded upon a core assumption that “states act rationally to maximize their national interests”.⁴¹

To be impolite, few people care about that small, weak states define national interest as their action logic in international law because, generally speaking, what they pursue and bring about hardly are of significance. Rather, they often have to rely upon GPs to realize their national interest through, e.g., taking advantage of confrontations between GPs.⁴² However, applying explicitly that proposition to GPs may make people feel uncomfortable because it readily reminds them that GPs often pursue their own national interest, disregard of the interest of other states or international community. This concern isn’t ungrounded. Historically, international law was often an instrument for a handful of Western powers to conquer non-Western states or territories to pursue their national interest. Thus, Anghie argued that a history of international law is a history of imperialism.⁴³ Today, it’s not rare to hear the argument that GPs should “proceed from the firm ground of the national interest, not from the interest of all illusory international community”.⁴⁴ Also, it is not difficult to find practice confirming that argument.⁴⁵

Such awful record of the history and reality of international law make it reasonable to challenge whether the action logic of national interest contradicts with what GPs may be expected to fulfill. In other word, is this action logic legitimate for GPs? My answer is Yes. The bad record of GPs in international law doesn’t negate the legitimacy of this action logic itself. Three reasons are as follows.

First, although any differentiation—unfortunately, it happens often -- in terms of quality of national interest between GPs and other states isn’t legitimate, there is indeed great difference between national interest of GPs and that of other states in terms of quantity. For example, while it is equally legitimate for both China and Cambodia to protect their nationals in a state in civil war, say Libya in 2011, the fact that Chinese are much more than Cambodian in Libya makes China has much more national interest than Cambodia. In this sense, it’s right that GPs was defined in terms of national interest.⁴⁶ Second, while small states often rely on GPs to protect their national interest, GPs are so big as to defend their national interest themselves. Third, in the era of globalization and democratization, national interest tends to de-nationalize and concretize to interest of individuals who pursue their own interest all over the world.⁴⁷ The evolution of “national” interest to interest of “nationals” strengthens the legitimacy of the argument that national interest is the action logic of GPs, which generally have huge population, because promoting and protecting individual welfare is the very reason for any state to exist.

Nevertheless, this logic of action should not be defined or understood exclusively self-centered, disregard of interest of other states or international community. In this regard, Goldsmith and Posner’s rational choice theory of international law, which is said “to become standard currency in international law theory and practice”,⁴⁸ is open to argue. As mentioned above, that theory’s core assumption is what states seek is to maximize their national interest. It is a bit simplified so that it may be susceptible to be misunderstood and misused.⁴⁹ I would like to add

⁴⁰ Wolfgang Friedmann, *supra* note 22, at 380.

⁴¹ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, Oxford University Press, 2005, at 7.

⁴² See Oscar Schachter, *The Role of Power in International Law*, 93 AM.SOC’Y INT’L. PROC.200, 201(1999).

⁴³ See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004.

⁴⁴ Condoleezza Rice, *Promoting the National Interest*, 79 FOREIGN AFF. 45, 62(2000).

⁴⁵ See, e.g., Dave Newman, *An Interview with Perry Wallace on the United States’ Withdraw from the Kyoto Protocol*, 2 INT’L & COMP. ENVTL. L. 10(2002).

⁴⁶ See René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna*, Methuen, 1958, at 22.

⁴⁷ See Report of the Panel on United States – Sections 301-310 of the Trade Act of 1974(hereinafter referred to Panel Report of 301 Sections Case), WT/DS152/R, 22 December 1999, paras.7.73, 7.76.

⁴⁸ David Gray and Rule-Skepticism, “Strategy”, and *the Limits of International Law*, 46 VA. J. INT’L L.563, 583(2006).

⁴⁹ Edward T. Swaine, *Restoring and (Risking) Interest in International Law*, 100 AM. J. INT’L L.259(2006).

two points in order to clarify this action logic: First, although in some cases the national interest of GPs doesn't coincide with that of other states or international community, they also are compatible each other or inter-supportive in many cases, if not in most cases. Take BRICS as an example, considering the fact that over 40 percent of world population inhabit in BRICS, it can not totally deny that the maintenance of economic prosperity of BRICS is in the interest of international community. The problem may be that GPs often fail to rightly understand their real national interest.⁵⁰

Second, GPs make national interest as their action logic doesn't necessarily mean that they always seek to "maximize" their national interest. Rather, they may act in a way which, though incurring negative effects, doesn't fundamentally damage their national interest, but can benefit other states or international community. This conception of national interest may be defined as a "negative approach" compared with that of Goldsmith and Posner, which may be defined as a "positive approach". The main reason may be that GPs have far more resources to internalize risks or damages incurred by those actions contrary to their national interest. In practice, such cases are easy to find. For instance, during the Asian financial crisis in the 1990s, China decided not to devalue its currency, which greatly benefited Asian states. While this decision put China's economy under great pressure, it can endure and earn its international reputation. Nevertheless, whether GPs have enough resources to do is one thing while whether they have willing to do is another thing. Unfortunately, it's the lack of willing often prevents GPs from taking actions which benefit the interest of other states and international community. What happens to Responsibility to Protect (R2P) is the very case.⁵¹

In addition, people may wonder whether cultural traditions, which are often considered to endure across time, influence the action logic of states. This query should be taken seriously because several NGPs, e.g., China, India, have cultural traditions stressing the duty of individuals to community. In other words, whether does China or India act in a way that fundamentally conflicts with its national interest while benefits the interest of international community, e.g., in negotiations on global climate change? The answer as a rule is No. Actually, a State often behaves abroad in a way distinct from that at home.⁵² As a lawyer always stressing Asian attitudes toward international law, Anand admitted that, although cultural background may affect a State's attitude towards international law, they "must not be exaggerated".⁵³ He explicitly asserted that "it is this conflict of interests of the newly independent States and the Western Powers, rather than differences in their cultural and religions."⁵⁴

D. Implications of NGPs upon International Law: A General Assessment

1. A General Assessment of the Trend

Implications on international law in the 21st Century with the rise of NGPs will be discussed in depth in the following two Parts. Based upon discrepancies and similarities examined above, however, three general arguments about the trend may be presented here: First, NGPs are inherently and continuously motivated to shape and reshape international law. What people see today may be the start of this process; second, NGPs are positioned both differently from and similarly with OGP in shaping and reshaping international law; third, that implications

⁵⁰ See Eric K. Leonard, *A Case Study in Declining American Hegemony*, 8 WHITEHEAD J. DIPL. & INT'L REL. 147, 158 (2007).

⁵¹ See Report of Independent Inquiry Into the Actions of the United Nations during the 1994 Genocide in Rwanda, December 16, 1999, S/1999/1257, at 43, 44.

⁵² Alvarez rightly noted that liberal states don't necessarily do better than others internationally. Jose E. Alvarez, *Do Liberal States Behave Better?: A Critique of Slaughter's Liberal Theory*, 12 EJIL 183 (2001).

⁵³ R. P. Anand, *New States and International Law*, Hope India Publications, 2008, at 50.

⁵⁴ R. P. Anand, Attitude of the Asian-African States Toward Certain Problems of International Law, in Frederick E. Snyder and Surakiart Sathirathai eds., *Third World Attitudes Toward International Law*, Martinus Nijhoff Publishers, 1987, at 17.

on international law are examined in the context of rise of NGPs does not mean that they are created by NGPs only. Actually, they often are produced as the result of interactions between OGP and NGPs, which implies OGP partly are responsible for such implications. However, the important thing is that, without the rise of NGPs, it is highly possible that these implications may not be produced

2. A General Assessment of the Dynamics

In the context of GPs, an approach of power to understand the dynamics underlying implications on international law with the rise of NGPs is appropriate. It is said that such implications are fundamentally the result of the dynamic interaction between the power of NGPs and the power of international law.

First “Power” of NGPs refers to capability which may be exercised by NGPs. Power may be derived from a variety of sources, from tangible to intangible.⁵⁵ Tangible power is often labeled as “hard power”(HP), e.g., economic power, military power. Intangible power may be named as “soft power”(SP), for example, ideology, regimes. From the HP perspective, although people hardly deny that the power of NGPs tend to increase, there are disagreements on how strong it really is. For instance, Ikenberry argued that China would prevail over US in the 21st century,⁵⁶ while Rehman deemed it hardly possible for China to challenge the latter.⁵⁷ Moreover, Shirk asserted that national problems and challenges make China a “fragile superpower” at best.⁵⁸

As to SP of NGPs, people appear to have consensus: they have little SP. For instance, Fidler asserted that “neither China nor India appears poised to provide the world with ideological contributions that fundamentally challenge the triumph of liberal ideology in the wake of the end of the Cold War.”⁵⁹ Many persons in NGPs share this argument.⁶⁰ Nevertheless, NGPs tend to build their own SP. In this regard, China may be a prominent case. In 2005 United Nations Summit, China’s President Hu Jintao declared the Harmonious World(HW) as its latest conception of world order.⁶¹ Although the HW is in the evolution,⁶² and its current formulation was criticized “too broadly worded...seems to be formulaic and slogan-like”,⁶³ the important thing is that China has begun to seek its own SP. Actually, the HW has inspired heated discussions,⁶⁴ and included in some international documents.⁶⁵

HP and SP support and reinforce each other. The lack of SP may weaken the exercise of HP or make its exercise less self-regulated. Accordingly, this deficiency of SP may decrease promise while increase challenges which the rise of NGPs may bring to international law. It, however, should be noted that, although NGPs’ own SP

⁵⁵ See Michael Byers, *Custom, Power and the Powers of Rules*, Cambridge University Press, 1999, at 5.

⁵⁶ G. John Ikenberry, *The Rise of China and the Future of the West*, 87 FOREIGN AFF. 23, 25(2008).

⁵⁷ Scheherazade S. Rehman, *American Hegemony: If Not US, Then Who?*, 19 CONN. J. INT’L. 407, 420(2003-2004).

⁵⁸ See Susan L. Shirk, *China: Fragile Superpower*, Oxford University Press, 2007.

⁵⁹ David P. Fidler, *supra* note 12.

⁶⁰ See, e.g., Shi Yinghong, *China’s Peaceful Development, Harmonious World and Foreign Affairs :Achievements and Challenges*, CONTEMPORARY WORLD AND SOCIALISM, 81, 82(2008).

⁶¹ Hu Jintao, Build Towards a Harmonious World of Lasting Peace and Common Prosperity(“UN Summit Speech”), paras. 17, 18, September 15, 2005.

⁶² Compare Hu Jintao, “UN Summit Speech”, Id.; Hu Jintao, Advance with the Time, Carry on the Past to Forge ahead and Build up the Asia-Africa New Strategic Partnership(“Asian-African Summit Speech”), April 22, 2005; The State Council Information Office(China), White Paper on China’s Peaceful Development Road(December 2005)(“2005 White Paper on China’s Peaceful Development”), Part V; White Paper on China’s Peaceful Development Road(September 2011)(“2011 White Paper on China’s Peaceful Development”), Part III.

⁶³ Sienho Yee, *Towards a Harmonious World: The Roles of the International Law of Co-progressiveness and Leader States*, 7 CHINESE JIL 119, 104.(2008).

⁶⁴ See, e.g., Sujian Guo and Jean-Marc F. Blanchard eds., “*Harmonious World*” and *China’s New Foreign Policy*, Lexington Books, 2008.

⁶⁵ See, e.g. China-Russia Joint Statement Regarding the International Order of the 21st Century(“China-Russia Joint Statement(2005)”), July 1, 2005; Declaration of Sharm El Sheikh of the Forum on China-Africa Cooperation(“China-Africa Declaration”), November 12, 2009; A Shared Vision for the 21st Century of the People’s Republic of China and the Republic of India(“China-India Shared Vision”).

is poor, they may take advantage of SP created by OGP. For instance, as a traditional SP of Western states, “democracy” has been argued by NGPs to argue for democratization of international relations.⁶⁶

Second, “Power” of international law has a different meaning of “power” of NGPs. It refers to how effective international law can regulate international relations. It may significantly affect to what extent and how the rise of NGPs influences international law. Indeed, international law, compared with national law, remains “weak law” subject to *Realpolitik*. Even in the 21st century, some persons still deny there is really “law” in international affairs and assert that American “should be unashamed, unapologetic, uncompromising American constitutional hegemonists”.⁶⁷ However, with the growing density of a variety of international rules in the past century, international law increasingly increases its power to regulate international relations. Nowadays, international law “may preclude the exercise of even greater power disparities”.⁶⁸ In particular, the power of international law will increase with the proposition of “international rule of law”, which was explicitly included in UN Assembly Resolution of United Nations Decade of International Law on November 17, 1989. This Resolution expressed the conviction of “the need to strengthen the rule of law in international relations”. Furthermore, Heads of States in 2005 World Summit acknowledge “the need for universal adherence to and implementation of the rule of law at both the national and international levels”.⁶⁹ Although the appeal for and practice of rule of law in international affairs isn’t new,⁷⁰ This Resolution and 2005 World Summit are significant because they upgraded the proposition to a world agenda and because the “rule of law”, which has been deeply embedded in national governance so that states hardly challenge it, endows the proposition with great legitimacy. NGPs have expressed their support for the international rule of law.⁷¹

II. NGPs and the Challenges to International Law in the 21st Century

As a rule, a rising GP must pursue, exert its power, and challenge the existing international order. From the historical perspective, international law to a large degree failed to regulate legitimately and effectively the rise of GPs. For instance, international law often became an instrument for GPs, for instance Spain, U.K. and France, to legalize their overseas colonization, which largely is responsible for today’s many international disputes and poverty.⁷² Such historical experiences make many people worry about whether NGPs, especially China, will rise peacefully.⁷³ Actually China has to assure repeatedly that it will rise “peacefully”.⁷⁴ Therefore, people may doubt: does the rise of NGPs at best repeat the story of change of constituents of “international oligarchy”?⁷⁵ Do NGPs join new “Holy Alliance” of Western States?⁷⁶ In particular, since the NGPs define themselves as Non-Western

⁶⁶ See in detail Part III(B)(2).

⁶⁷ John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 *TRANSNAT’L & COMTEMP.PROBS.* 1, 48(2000).

⁶⁸ José E. Alvarez, *International Organizations as Law-Makers*, Oxford University Press, 2005, at 216.

⁶⁹ 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1, Sept. 16, 2005, para.134.

⁷⁰ See e.g., J.L. Briery, *The Rule of Law in International Society*, 7 *NORDISK TIDSSKRIFT INT’L RET* 3(1936).

⁷¹ See, e.g., Position Paper of the People’s Republic of China At the 65th Session of the United Nations General Assembly, September 13, 2010.

⁷² See, e.g., Yilma Makonnen, *International Law and the New States of Africa*, Ethiopian National Agency for UNESCO, 1983.

⁷³ See, e.g., Barry Buzan, *China in International Society: Is “Peaceful Rise” Possible?*, 3 *CHINESE JOURNAL OF INTERNATIONAL POLITICS* 5(2010).

⁷⁴ See, e.g., 2005 *White Paper on China’s Peaceful Development*, *supra* note 62; 2011 *White Paper on China’s Peaceful Development*, *supra* note 62.

⁷⁵ See Georg Schwarzenberger, *supra* note 22, at 117-120.

⁷⁶ See Gerry Simpson, *supra* note 7, at.353.

states, whether do they bring about another crisis of international law similar to that with the rise of the Soviet Union in the early 20th century,⁷⁷ or whether do authoritarian NGPs—China and Russia—challenge global liberal democratic order?,⁷⁸ or can the Western order survive the rise of NGPs?⁷⁹ These concerns don't stop within academic community. Rather, they emerge as a serious policy concern. For instance, US President Obama recently warned that China must “play by the rules”.⁸⁰

A. Dynamics of Challenges

1. A Perspective of NGPs

As said before, there are major discrepancies between OGP and NGPs in terms of national development and state identity. While these discrepancies bring about promise of international law,⁸¹ they may create challenges to international law.

First, the fact that NGPs have huge population while huge gap exists between OGP and NGPs in terms of relative economic power makes NGPs motivated and pressured to sustain their national development. Although this pursuit to development is legitimate, it may create great challenges. That is, how international law regulate the increasingly expanding economy and their seeking economic inputs, especially natural resource, which may both intensify conflicts among states and aggravate the burden on this ecologically fragile world. Today, BRICS have been major emitter of Greenhouse Gas and oil consumers.⁸² In order to sustain their national development, NGPs will take advantage of both the effectiveness and weakness of international law as much as possible.

Second, as said above NGPs as Non-Western States play little role in traditional international law. Although the state identity of NGPs tends to “Westernize” and the traditional international law tends to “de-Westernize”, NGPs and OGP still disagree on many international affairs. As the growth of power, it is expected that NGPs may seek to increase their non-Western inputs in international legal order.

2. A Perspective of GPs *per se*

As said in the outset of this Part, concerns have been expressed about negative influences with the rise of NGPs. They partly are inspired by the fact that they are “New” GPs; more provoking, by the fact that they are GPs.

There are three approaches among international lawyers to GPs issue: First, some expressed their expectation to GPs in a general way, such as Lawrence,⁸³ Jessup,⁸⁴ and Yee.⁸⁵ Their thinking, however, appears fragile because GPs repeatedly abuse their power in the history. Second, some argued that GPs should be granted with legal privileges, such as Morgenthau,⁸⁶ Yee.⁸⁷ Interestingly, they hardly have touched legal obligations of GPs. However, should special legal obligations be imposed on GPs with legal privileges? If not, why do GPs with “legal” privileges bear “political” or “moral” duty only? If so, what legal obligations should be imposed on? Are there any legal obligations of this kind? Third, some denied the legality of privileges of GPs or defined it as a

⁷⁷ See H. A. Smith, *The Crisis in the Law of Nations*, Stevens & Sons Limited, 1947, at.17-22.

⁷⁸ See Azar Gat, *The Return of Authoritarian Great Powers*, 86 FOREIGN AFF.59(2007).

⁷⁹ See G. John Ikenberry, *supra* note 56.

⁸⁰ “Obama at APEC summit: China must ‘play by the rules’”, at http://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQAALRu2FN_story.html (November 20, 2011).

⁸¹ See in detail Part III.

⁸² Barry Carin and Alan Mehlenbacher, *supra*, not 30, at 26, 29.

⁸³ T. J. Lawrence, *supra* not 15, at 279.

⁸⁴ P.C. Jessup, *Introduction to the Equality of State as Dogma and Reality*, LX POLITICS SCIENCE QUARTERLY, 530(1945).

⁸⁵ Sienho Yee, *Sovereignty Equality of States and the Legitimacy of “Leaders States”*, in Ronald St. John Macdonald, and Douglas M. Johnston eds., *Towards World Constitutionalism*, Martinus Nijhoff, 2005, at 737-772..

⁸⁶ Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260(1940).

⁸⁷ Sienho Yee, *supra* note 85, at 737-772.

political issue so that it is beyond the reach of international law, such as Wheaton,⁸⁸ Westlake,⁸⁹ Oppenheim.⁹⁰ However, can people be blind that the great discrepancy between GPs and other states in terms of power will remain and this discrepancy may be either maneuvered by GPs to pursue their narrowed national interest or mobilized to maintain international peace and promote international prosperity? can people ignore what GPs are granted with not only *de jure* privileges (e.g., Permanent Members of UNSC), but also, more frequently, *de facto* privileges (e.g., top officials at international organizations⁹¹)? In particular, when GPs tend to realize that it is more efficient and less costly to maneuver power within legal regimes than to apply raw power,⁹² should those political issues remain beyond any legal regulation?

Given such deficiencies, such approaches to GPs in international law are something similar to or heavily rely upon the well-known theory of “Benevolent Hegemony” in international relations, which first was advocated by Henry Luce in his “*The American Century*” in 1941.⁹³ I think that international lawyers should resolve two fundamental legal issues in order to alleviate challenges by GPs, “New” or “Old”, to international law : (a) can people find legal criteria to define GPs? ;(b) can people find legal code of conduct to regulate GPs’ activities, including their legal duty?

It is neither possible nor necessary to find universally applicable legal criteria to define GPs, e.g., negotiating a treaty concerning GPs, because GPs have different meaning in different legal regimes. However, it is possible and necessary to propose some legal criteria in a specific regime. Let’s take a look at the possibility of defining the relationship between nuclear weapons and UNSC reform. Although the possession of nuclear weapons might sometimes deteriorate rather than strengthen the possessor’s international position,⁹⁴ it is more often recognized as an indicator of GPs.⁹⁵ However, since nuclear weapons is “ultimate evil”,⁹⁶ and nuclear disarmament is imperative with the increasing risk of nuclear proliferation, is it necessary to propose a legal precondition that any state seeking new UNSC Permanent Membership shall abide by 1968 Nuclear Non-Proliferation Treaty (NPT)? Actually, a similar approach has emerged in *A More Secure World*. This Report implied that to achieve a specific requirement for Official Development Aid (ODA) is one of precondition for developed states to compete for UNSC Permanent Membership.⁹⁷

The code of conduct, including duty of GPs, which has seldom been addressed by international lawyers, had long been an important concern in international law, especially in those regimes granting GPs with privileges. For instance, during UN Charter negotiations when the so-called Big Five of Soviet Union, US, UK, France and China would sit as permanent members of the proposed UNSC with veto right, Mexico suggested that the UN Charter explicitly spell out why Big Five should be privileged and that they be imposed upon with “great responsibility for the maintenance of peace” because of the “judicial principle that more extended rights were granted to those states

⁸⁸ Wheaton, *Elements of International Law*, 8th edition, at 158.

⁸⁹ L. Oppenheim eds., *Collected Papers on International Law by Westlake*, Cambridge University Press, 1914, at 114.

⁹⁰ Oppenheim, *supra* note 5, at 170-171.

⁹¹ Jacob Katz Castañeda, *supra* note 20.

⁹² Michael Byers, *supra* note 55, at 6.

⁹³ See Henry Luce, *The American Century*, 10 LIFE 61 (1941).

⁹⁴ Michael I. Handel, *supra*, note 14, at 12.

⁹⁵ See, e.g., August Schou and Aren Olav Brundtland, eds. *Small States in International Relations*, Wiley Interscience, 1971, at 15.

⁹⁶ See Declaration of Judge Bedjaoui, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I. C. J. Reports 1996, at 50.

⁹⁷ Report of the High-level Panel on Threats, Challenges and Change, *A More secure World: Our Shared Responsibility* (“A More Secure World”), United Nations, 2004, para.249.

which have the heaviest obligations”.⁹⁸ Similarly, it was proposed that the mandate of UNSC be reviewed after a transitional period.⁹⁹ However, both proposals were rejected by Big Five.

Actually, some legal rules regulating the conduct of GPs exist. For example, Covenant of League of Nations provides a principle of “sacred trust of civilization”,¹⁰⁰ with which GPs as mandatory administrator should adhere to and was confirmed by ICJ.¹⁰¹ Also, some propositions have been suggested to control behaviors of GPs. For instance, *A More secure World* appealed “the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.”¹⁰² Similarly, during debates in July 2009 for preparing the first UN Assembly Resolution on R2P, some states required that Permanent Members of UNSC refrain from exercising veto right.¹⁰³ Unfortunately, what GPs, at least US, seek is to evade any legal duty to be imposed upon them. On August 30, 2005, Bolton, then U.S. Ambassador to the UN, declared that “the Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace” and that “We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.”¹⁰⁴

Because of the deficiency of legal regulation GPs, it is highly possible for NGPs to evolve into OGP and act in the same way as OGP. Concerns of this kind have been expressed. Ewelukwa warned that the benefit to Africa from South-South cooperation “must not be exaggerated” since NGPs may not have the “willingness” to support African states. Rather, they may seek with priority to “advance their national interests”¹⁰⁵ Bhala criticized that Brazil, China and India aren’t different from US or EU and that they all “have used legal details to advance their narrow agendas” and “have lost all sight of the common good and sacrificed the broad purpose of the Doha Development Agenda(DDA)”.¹⁰⁶ In particular, he criticized the inaction of China is one of major factors if DDA fails finally.¹⁰⁷ Therefore, China “may not be as rosy and glamorous as enthusiastic Sinophiles think”.¹⁰⁸ Interestingly, he said, if most states behave to pursue self-interest, then “why single out China from among all the national-states...?”¹⁰⁹

In particular, I would like to stress how the trend of individualization of national interest mentioned above will influence states, including NGPs’ international law policy and practice. In the past decade, international law tends to be concerned with interest of individuals. International lawyers have argued that international law should be humankind-oriented rather than traditionally state-centered.¹¹⁰ Generally speaking, the trend is welcomed, but a risk, which is becoming visible, should not be ignored: individuals may oppose governments to make

⁹⁸ See Ruth B. Russell, *History of the United Nations Charter*, Brookings Institution, 1958, at 650.

⁹⁹ Fourth Meeting of Commission III, 22 June 1945. Doc 1149 III/II XI UNCIO 103, at 116.

¹⁰⁰ Covenant of League of Nations, Article 22.

¹⁰¹ *International status of South-West Africa*, Advisory Opinion, I.C.J. Reports, 1950, at 136, 137.

¹⁰² *A More secure World*, *supra* note 97, para.256.

¹⁰³ See, e.g., Statement of Italy, General Assembly, Sixty-third session, 97th plenary meeting, Official Records, A/63/PV.97, at.28;

Statement of Switzerland, General Assembly, Sixty-third session, 98th plenary meeting, Official Records, A/63/PV.98, at.5.

¹⁰⁴ Bolton’s Letter can be found at

http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf(November 1, 2011).

¹⁰⁵ Uché U. Ewelukwa, *South-South Trade and Investment: The Good, The Bad and The Ugly*, 20 MINN. J. INT’L L.513, 548,558(2011).

¹⁰⁶ Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT’L L. J. 1, 1(2009).

¹⁰⁷ Raj Bhala, *Id.*, at 5, 6.

¹⁰⁸ Raj Bhala, *Id.*, at, 15.

¹⁰⁹ Raj Bhala, *Id.*, at, 15.

¹¹⁰ See in particular, Antônio Augusto Cançado Trindade, *International Law for Humankind: Toward A New Jus Gentium*, Recueil Des Courts(2005), Vol.316, Vol.317; Theodor Meron, *Humanization of International Law*, Martinus Nijhoff Publishers, 2006.

compromises which may disadvantage them while benefit their state or others states and international community. Governments have to take them seriously because they can't afford to lose their votes. As the result, policy space of governments in international law is narrowed.

Considering individualism has long been established in Western States, let's first look at the latest development of Bilateral Investment Treaty (BIT), which is directly concerned with individual rights, in two Western States. In December 2007, Norway publicized its new BIT Model Draft. While reiterating high standard of investment treatment and protection, this Draft mentions corporate social responsibility with the aim to balance rights of foreign investors and public authority of host states.¹¹¹ These new provisions may help alleviate recent fierce attacks on investment treaty regime, which is widely considered to pay too much heed to rights of investors while pay too little attention to sovereignty of host states.¹¹² However, they are strongly opposed by business groups, which complain they aren't provided with enough protection under the new BIT Draft. Two years later, Norway declared that it failed in designing a balanced BIT and abandoned this new BIT program. The US's BIT program is another case. In 2009, it began to update its 2004 BIT Model. However, the new BIT Model has yet to publish. It is guessed that the similar thing may also happen.¹¹³

In NGPs and many other developing states, respect for duties rather rights than of individuals to community has long been maintained because of their traditional philosophy or government-driven development strategy. However, with the democratization and marketization in these states since the end of Cold Wa", they have been successively turning to "Americanization".¹¹⁴ On the one hand, this trend shows American "soft power" is strong.¹¹⁵ On the other, this process gradually makes people in these states realize that their interests are distinct from national interest and to doubt the legitimacy for governments to submerge their interest in national interest. Accordingly, governments in NGPs have to face growing pressures from individuals and thereby tend to act in a way similar to that adhered to by OGP, which they long criticized.

B. Evidence of Challenges

Krisch described the ways of how dominant states, in particular US, interact with international law.¹¹⁶ Although today's NGPs have yet to become dominant states, much less superpower, they have adopted some of these strategies. For instance, India spares no effort to lobby UNSC reform and to seek a new Permanent Membership in UNSC. India, like US, refuses to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT), which prevents the CTBT from entering into force. Out of all 193 UN Member States, India is the one of last three which has not signed the NPT.¹¹⁷ Similarly, although international space law, especially the Outer Space Treaty (OST), does not illegalize China's anti-satellite (ASAT) test, which was conducted unexpectedly in January 2007 and solicited international outrage,¹¹⁸ it is hard to say that China respects the spirit of avoiding arm race in outer

¹¹¹ See Norway BIT Model Draft(2007), Preamble, Article 6.

¹¹² See, e.g., Wenhua shan, *From "North-South Divide" to "Private-Public Debate"*, 27 NW. J. INT'L L. & BUS. 631(2007).

¹¹³ See *Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty*, September 30, 2009

¹¹⁴ Onuma Yasuaki, *supra* note 15, at 113.

¹¹⁵ *Id.*, at 113.

¹¹⁶ Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EJIL 369(2005), at 381-407.

¹¹⁷ "contracting parties to NPT", at

<http://unhq-appspub-01.un.org/UNODA/TreatyStatus.nsf/NPT%20%28in%20alphabetical%20order%29?OpenView>(visited December 2011).

¹¹⁸ David A. Koplow, *ASAT-Isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1237-1242 (2008).

space, which has been supported by China itself.¹¹⁹

Among challenges to international law inspired by the rise of NGPs, fragmentation of international law and crisis of modernity of international law are worthy of special concerns because they may affect the whole configuration of international law.

1. Fragmentation of International Law

“Fragmentation” is one of most provoking international legal issues in the past decade. In April 2006, International Law Commission(ILC) adopted the Final Report, in which regionalism is regarded as a mechanism leading to fragmentation of international law.¹²⁰The Final Report implies that regionalism often is an instrument for GPs to create hegemonic sphere with the aim to maintain supremacy or to redress the balance of power disturbed by another power.¹²¹The Monroe Doctrine invented by US, a new GP in the 19th century, was cited as a case.¹²²However, it is found a different picture in recent regionalism under WTO regime, which is a focus of fragmentation of international law.¹²³It is well known US pioneers in the recent trade regionalism. As of November 2011, among all 20 FTAs concluded by US, 17 were signed after 2004.¹²⁴The main reason is that, with the rise of NGPs and their alliance with other developing states, OGP can no longer readily maneuver their power in WTO forum as before and they have to turn to regionalism. The US’s regionalism was followed by NGPs. For instance, In October 2007, China declared FTA as a basic international economic strategy. As of November 2011, it has signed 10 FTAs with 5 FTAs under negotiations and 4 FTAs under considerations.¹²⁵As a traditional firm supporter of multilateralism, India has also turned to FTA program.¹²⁶As of November 2011, India has concluded more than 10 FTAs and more than 20 FTAs or similar arrangements are under negotiations.¹²⁷Therefore, it is not NGPs but OGP that initiate the regionalism under WTO regime; NGPs enhance to the fragmentation of international trade rules, but there is no convincing evidence to show that NGPs seek hegemony through regionalism as did the United States through Monroe Doctrine.

Furthermore, ILC’s Final Report does not distinguish different fragmentations inspired by different of GPs: those rising within the existing system and those rising outside the existing system. The former can be illustrated by the fragmentation with the rise US in 19th century. Since US is a “Western” States, the fragmentation between “regional” international law as a result of Monroe Doctrine and “general” /”European” international law may be believed of “extent”, not of “nature”. On the other, as a state heterogeneous with Western States, the Soviet Union created so-called “soviet international law” and the fragmentation between it and so-called “Bourgeois(Western) international law” may be considered of “nature” rather than of “extent”. As a matter of fact, the rise of Soviet Union in 1917 was argued to constitute a “crisis” of international law and was more serious than that by Hitler regime because Germany, as a Western State, was considered to respect orally at least its international

¹¹⁹ Ann Kent, *Compliance v Cooperation: China and International Law*, 13 AUSTL. INT’L L.J.19, 29(2006).

¹²⁰ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law(hereinafter “Report of the Fragmentation”), Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, para.46.

¹²¹ Id.

¹²² Id.

¹²³ Id., para.210. See also Joost Pauwelyn, *Conflict of Norms in Public International Law*, Cambridge University Press, 2003.

¹²⁴ USTR, “Free Trade Agreement”, at <http://www.ustr.gov/trade-agreements/free-trade-agreements>(visited December 8, 2011).

¹²⁵ MOC of China, “China FTA network”, at <http://fta.mofcom.gov.cn/list/enrelease/1/encateinfo.html>(visited December 2, 2011).

¹²⁶ See WTO Trade Policy Review, Trade Policy Report by India, WT/TPR/G/182,18 April 2007, paras.166-171.

¹²⁷ Ministry of Commerce and Industry of India, “Trade Agreements”, at http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i(visited December 2, 2011).

obligations,¹²⁸ while “the common cultural unity upon which the law was originally founded has been destroyed its own original home, that is to say, in Europe” with the rise of the Soviet Union.¹²⁹

Indeed, NGPs are not states similar to the Soviet Union in the early 20th century. NGPs are in the process of “international socialization”, substantially tantamount to “Westernization” or “Americanization”. As the result, international legal practice of NGPs tends to internationally socialized.¹³⁰ For instance, the author elsewhere argued that China’s investment treaties largely have been Americanized.¹³¹ Actually, as rightly said by Ikenberry, “Today’s Western order, in short, is hard to overcome and easy to join”.¹³² Nevertheless, as Bruno Simma rightly noted, the consent of states to negotiate or join a specific regime might be nominal or minimal.¹³³ Actually, as indicated above, NGPs still are reluctant to define themselves as “Western States” and they still have different competing positions with OGP in many international affairs. Therefore, while the fragmentation occurred “outside” the existing international legal order with the rise of the Soviet Union, the fragmentation with the rise of NGPs may be argued to occur “inside” the existing international legal order. In other words, what distinguishes fragmentation with the rise of NGPs from that with the rise of the Soviet Union is “shift of forum” only. Equally important, compared with fragmentation of international law incurred by the rise of the Soviet Union, today’s fragmentation of international law is contributed by both NGPs (in HRs regime, trade regionalism etc.) and OGP (in climate change regime, trade regionalism etc.).

Fragmentation of international legal regimes on HRs and climate change with the rise of NGPs deserves special concerns because (a) HRs and environment have become the very base of international law,¹³⁴ (b) OGP and NGPs deeply disagree on such issues.

Traditionally, developing states are in confrontation with Western States in HRs. The focus is that, while Western States defend that HRs is universal and that civil and political rights (CPRs) should prevail over economic, social and cultural rights (ESCRs), developing states argue that HRs is of relativity and that ESCRS should be given with priority. Since Universal Declaration of Human Rights (UDHR) failed to specify the relationship between universality and relativity and the priority among different HRs, international community divides.¹³⁵

In 1993, The World Conference on Human Rights was convened at Vienna. At the first glance, universality prevailed over relativism because the “universal nature” of HRs was declared “beyond question”,¹³⁶ and “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”,¹³⁷ while the relativism embraced in Bangkok

¹²⁸ H. A. Smith, *The Crisis in the Law of Nations*, Stevens & Sons Limited, 1947, at 21.

¹²⁹ *Id.*, at 18.

¹³⁰ See generally Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004).

¹³¹ See Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 *JIEL* 457, 460 (2009).

¹³² G. John Ikenberry, *supra* note 56, at 24.

¹³³ Bruno Simma, *Consent: Strains in the Treaty System*, in R. St. J. Macdonald and Douglas M. Johnson, eds., *The Structure and Process of International Law*, Martinus Nijhoff, 1983, at 480-496.

¹³⁴ See generally Bruno Simma, *International Human rights and General International Law*, in Academy of European Law ed., *Collected Courses of the Academy of European Law*, Kluwer Law International, 1995, at 153-236; Menno T. Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law*, Oxford University Press, 2011; Philippe Sands ed., *Greening International Law*, The New Press, 1994.

¹³⁵ See generally S.K. Agrawala, T.S. Rama Rao, and J. N. Saxena eds., *New Horizons of International Law and Development Countries*, N. M. Tripathi Private LTD, 1983, at 1-70.

¹³⁶ Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, Part I, para. 1.

¹³⁷ Vienna Declaration and Programme of Action, *supra* note 136, para. 5.

Declaration was defeated.¹³⁸ However, Vienna Conference acknowledged that HRs are “indivisible and interdependent and interrelated” and must be treated “with the same emphasis”,¹³⁹ which is the same as words in Bangkok Declaration.¹⁴⁰ In particular, Vienna Conference “reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights”,¹⁴¹ which was claimed by developing states while opposed by developed states during negotiating Declaration on Right to Development (1986).¹⁴² Similar words appear in 2005 World Summit Outcome Document.¹⁴³ Therefore, it is assumed that Vienna Conference and 2005 World Summit substantially maintain the relativism in the name of “indivisibility”, “interdependence” and “interrelatedness” and they are susceptible to be misused by NGPs as a disguised relativism.

It has been recognized that climate change is so serious as to threaten the survival of human being. International community began its serious combat with climate change as United Nations Framework Convention on Climate Change (UNFCCC) was signed in 1992. UNFCCC provides the basic principle of “common but differentiated responsibilities” (CDR),¹⁴⁴ which reflects the fact that, compared with developing states, developed states not only contribute to most world climate change but have much more resources to remedy climate change. The Kyoto Protocol (1997) represents a decisive step in implementing the CDR principle. It establishes mandatory limits on greenhouse gas (GHG) emission from developed states and several transitional economies including Russia,¹⁴⁵ while it doesn’t impose such obligation on developing states including China, India, Brazil and South Africa, which historically contribute little to world climate change, but today are main sources of GHG.

There is great disagreement among states concerning the application of the CDR. Attacks come first from US. As early as Kyoto Protocol negotiations, US considered the arrangements under the CDR are lopsided. Although signed the protocol, Clinton Administration didn’t submit it to Senate for ratification. Bush Administration straightly rejected the Protocol. It blamed that it “exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy”.¹⁴⁶ Thus, US exempted itself from the universal Protocol, representing a significant fragmentation of international regime on climate change.

Durban Conference in December 2011 made people see a more serious risk of fragmentation. Since the Kyoto Protocol will expire in 2012, Durban Conference was the final opportunity to save the earth. Before the Conference, it has been reported that US, Canada, Australia, Japan, together with Russia, wanted to abandon the Kyoto Protocol.¹⁴⁷ Although the Kyoto approach was reluctantly maintained in the end, bad news came from

¹³⁸ See Bangkok Declaration, Declaration of the Ministers and Representatives of Asian States, Bangkok, 29 March-2 April 1993, para. 8.

¹³⁹ Vienna Declaration and Programme of Action, *supra* note 136, para. 5.

¹⁴⁰ Bangkok Declaration, *supra* note 138, para. 10.

¹⁴¹ Vienna Declaration and Programme of Action, *supra* note 136, para. 10.

¹⁴² Milan Bulanić, *Principles of International Development Law*, 2nd edition, Martinus Nijhoff Publishers, 1993, at 360-386.

¹⁴³ 2005 World Summit Outcome Document, *supra* note 69, paras. 13, 14 and 121.

¹⁴⁴ UNFCCC, article 3(1), 4.

¹⁴⁵ UNFCCC, Annex I; Kyoto Protocol, Annex B.

¹⁴⁶ George W. Bush, Letter to Members of the Senate on the Kyoto Protocol on Climate Change, March 13, 2001.

¹⁴⁷ See “Coal-reliant Poland says apt to lead EU at Durban”, at <http://www.reuters.com/article/2011/12/02/us-climate-durban-poland-idUSTRE7B10VR20111202>; “Canada opposes Kyoto Protocol”, at http://www.china.org.cn/environment/durban_climate_talks/2011-12/08/content_24105517.htm. “Russia stands firm on abandoning Kyoto, kills hopes for legally binding climate deal”, at http://www.bellona.org/articles/articles_2011/kyotono_russia (visited December 10, 2011).

Canada and Japan: Canada declared it withdrew from Kyoto Protocol;¹⁴⁸ Although Japan didn't follow Canada at Durban, it explicitly argued that the Kyoto Protocol shouldn't be extended after 2012.¹⁴⁹ The future choice of other industrialized states, together with Russia, may also be "time bombs".

2. Crisis of Modernity of International Law

International law in nature is Western. From the historical perspective, this characteristics has two meanings: first, international law was the product of Western civilization and imprinted with Euro-centrism, Christian ideology, and of "free market" conception; second, Western GPs framed international law largely through conquest and expansion.¹⁵⁰ From the contemporary perspective, the collapse of the Soviet Union and the Social Camp in the late 1980s, and the spread of conception of neo-liberalism, democracy and HRs around the world since the 1990s not only demonstrates that the movement of De-Westernization of international law commencing in the early 20th century with the rise of Bolshevik end; more importantly, that Westernization of international law relaunches and is enhanced with new constituents such as HRs, a new modality of civilization.¹⁵¹ Nowadays, all NGPs embrace liberalism, democracy, and HRs,¹⁵² even though their embracement sometimes is rhetoric only. From the perspective of sociology, Western States have largely realized the "modernity" of international law, which is characterized by the liberalism in terms of economy, democracy in terms of politics and HRs in terms of civilization, and NGPs are integrated into this process of modernity.

Few concerns, however, have been paid to challenges incurred by the crisis of modernity of international law. That is, whether and how international law regulates future international relations in which NGPs tend to act in similar approaches as OGP do. Indeed, NGPs still disagree with OGP toward democracy and HRs issues as mentioned above. Nevertheless, they, like OGP, tend to act in increasingly liberal approach in international economical relations, which is decisive in GPs' rise and fall. For instance, in recent years, NGPs, like OGP, in the name of arguing for liberalism and against protectionism, have spared no effort to seize oil around the world in order to fuel their economy. Furthermore, they appear to "collude" with OGP in some critical issues. For instance, US, EU, China, India and Brazil are criticized to act in same way to pursue their narrow interest in Doha Round Negotiations, including rejecting to make necessary compromises to finish Negotiations, therefore they "have lost all sight of the common good".¹⁵³

Furthermore, in about 300 years since the 17th century, Western States readily pursued the economic "modernity": they found and conquered "new continents" one by one with means including war, natural resources appeared inexhaustible, and the world was far less populated. Thus, international law has gradually realized the "modernity" through legalizing trade and investment liberalization, etc. Things, however, nowadays change greatly. For instance, energy security has become a global problem; the world hardly sustains an explosive population.¹⁵⁴ However, the motive to push the economic modernity appears much stronger. In particular, NGPs with 3 billion population are availing of modalities of modernity of international law, e.g., liberal multilateral

¹⁴⁸ CBC News: Canada pulls out of Kyoto Protocol, December 12, 2011.

¹⁴⁹ "Japan presses case for opposition to fresh Kyoto targets", at <http://mdn.mainichi.jp/mdnnews/news/20111208p2g00m0dm018000c.html> (visited December 15, 2011).

¹⁵⁰ Antonio Cassese, *International Law*, 2nd edition, Oxford University, 2005, at 31.

¹⁵¹ See Jack Donnelly, *Human Rights: A New Civilization?*, 74 INTERNATIONAL AFF.1(1998).

¹⁵² For instance, China finally entered into WTO in 2001 after 15 years of marathon negotiations while Russia attained its WTO membership in 2011 after 18 years of prolonged bargains. Also, Russia and China in a joint statement in 2005 admit that human rights are "universal". See China-Russia Joint Statement, *supra* note 65, Point 6.

¹⁵³ Raj Bhala, *supra* note 106, at 3.

¹⁵⁴ As of October 31, 2011, world population reaches 7 billion. UNFPA, *The State of World Population 2011*, at 1.

trade regime, to pursue the economic modernity.

As a matter of fact, the crisis of modernity of international law is emerging. It still is too early to discern all of them. Some risks, however, can be found. Let's take a look at the legal regime regulating national security review(NSR) on foreign investment. This issue hardly noticed before has recently attracted much attention.¹⁵⁵ States, especially key roles in international investment, e.g., US,¹⁵⁶ Canada,¹⁵⁷ Australia,¹⁵⁸ China,¹⁵⁹ India,¹⁶⁰ have established or refined their NSR regimes. Furthermore, the NSR process tends to be designed exempt from international scrutiny. For instance, 2004 US BIT Model adds the phrase "it considers" in the security review rule,¹⁶¹ which endows the domestic authorities with great discretions.

Indeed, foreign investment may raise security concerns of host states. However, as warned by OECD,¹⁶² the NSR is susceptible to disguised investment protectionism. The question is why states, especially developed states, are increasingly interested in NSR? The main consideration may be that states, especially developed states, purport to alleviate the pressure of legal modernity in investment affairs, which, in particular, is characterized by principles of National Treatment (NT) or Most-Favored Treatment(MFN). Such principles are too settled in national law or investment treaties to openly negate, especially for developed states. They, however, find that the NSR qualifies as an instrument to alleviate the pressure brought about by NT or MFN. This mechanism ostensibly doesn't damage NT or MFN because it is often involved with political affairs so that either disputes arising from it is non-justifiable in international law; if justifiable, decisions by national authorities as a rule are deferred by international bodies.¹⁶³ Therefore, NSR mechanism in nature is designed as a tool to relax legal modernity in investment affairs. However, as implied by OECD, it may lead to self-exile of international law.

III. NGPs and the Promise of International Law in the 21st Century

Compared with challenges to international law, the promise of international law with the rise of NGPs has been less noticed. Why it can bring promise of international law and what promise may it bring? These two issues will be examined in this Part.

A. Dynamics of Promise

1. A Perspective of NGPs

In my opinion, NGPs to some degree are better positioned than OGP to improve international law. This is not because NGPs are endowed with nobler morality than OGP, but because NGPs, which in essence are developing states, are more sensitive in many cases than OGP to demands of and sympathetic with other developing states, which constitute overwhelming majority of the world. From the perspective of national

¹⁵⁵ See UNCTAD, *The Protection of National Security in IIAs*, UNCTAD/DIAE/IA/2008/5; OECD, *Identification of Foreign Investors: A Fact Finding Survey of Investment Review Procedures*, May 2010.

¹⁵⁶ See The Foreign Investment and National Security Act of 2007(FINSA).

¹⁵⁷ See Bill C-10, Part IV.1: Investment Injurious to State Security(2009); National Security Review of Investments Regulations(2009).

¹⁵⁸ See Foreign Acquisition and Takeover(amended 2008).

¹⁵⁹ See Rules on Security Review on Merger and Acquisition of Domestic Enterprises by Foreign Investors(2011).

¹⁶⁰ OECD, "More governments invoke national security to restrict foreign investment. OECD adopts guidelines to avoid protectionist use of security measures", 23 Jul 2009

¹⁶¹ 2004 US BIT Model, Article 18(Essential Security).

¹⁶² OECD, *supra* note 160.

¹⁶³ See J. G. Merrills, *International Dispute Settlement*, 4th edition, Cambridge University Press, 2005, at 167.

development, as indicated above, although the economic scale of NGPs, especially China and India, is comparable with that of most OGP, there is a huge gap between them in terms of Gross National Income Per Capita(PPP). Therefore, NGPs, like other developing states, are under huge pressure to accelerate their national development. From the perspective of state identity, identity of Non-Western States make NGPs, like many other developing states, are more motivated than OGP to refine the current international legal order, which is dominated by OGP. It is a rule in any society that those with vested interest are reluctant to reform.

2. A Perspective of GPs *per se*

While international lawyers are justified to blame GPs for their bad records in international law, they should acknowledge that GPs are decisive in realizing and maintaining international peace and prosperity in this substantially horizontal world. As a matter of fact, from Congress of Vienna to negotiations for establishing UN, what small states, at least many of them, are most concerned with is not that GPs are granted with privileges itself, but what privileges are given and how privileges are exercised.¹⁶⁴ It implies that, while small states are concerned with the potential abuse of power by GPs, they expect that GPs may greatly benefit them and international community. Until now, this practical approach maintains, e.g., in initiatives about UN reform.¹⁶⁵

Indeed, it is said that GPs may be expected to benefit other states and international community on the condition that they should be granted with privileges.¹⁶⁶ This argument, however, shouldn't go too far. According to the examination of the action logic of GPs above, whether GPs act in a way that may benefit other states and international community fundamentally relies upon their balance of national interest. Although "privilege" is one of modalities of national interest of GPs and one of instruments for GPs to pursue or protect their national interest, it can't represent the whole of national interest.

B. Evidence of Promise

In examining what promise the rise of NGPs may bring to international law, an article with a limited pages has to focus on aspects of fundamental importance for international community, which are ill-developed under traditional international law dominated by OGP but may be greatly benefited from the rise of NGPs. It is said that "development deficit" and "democracy deficit", from the perspective of developing states at least, are major "deficits" of traditional international law and the most important promise may be found in these aspects.

1. Co-Development Dimension of International Law

Nowadays, numerous international documents are filled with the discourse of "development". Miserable pictures of development situation in developing states are repeatedly lamented. Development is acknowledged as both an economic and social issue and a peace and security issue.¹⁶⁷ Development is defined as one of three intersupportive pillars of international system,¹⁶⁸ or "larger freedom".¹⁶⁹ Interestingly, many--if not most--of current challenges, countermeasures and achievement remind people of an unprecedentedly ambitious but failed reform initiative in the name of NIEO about half a century ago.

¹⁶⁴ See Robert A. Klein, *supra* note 18, at 26; Bengt Broms, *The Doctrine of Equality of States as Applied in International Organizations*, Vammala, 1959, at 156.

¹⁶⁵ See *A More Secure World*, *supra* note 97, at 4.

¹⁶⁶ *Id.* See also The Statement of the Four Sponsoring Powers on the Voting Procedure in the Security Council, UNCIO, Doc.852, III/1/37(1).

¹⁶⁷ See *A More Secure World*, *supra* note 97 at 6, 23.

¹⁶⁸ See *2005 World Summit Outcome*, *supra* note 69, paras.9, 10,

¹⁶⁹ UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All* (hereinafter referred to "Larger Freedom"), 21 March 2005, /59/2005.

Since the 1950s, newly independent developing states found that the demise of colonial regime didn't improve their situation in international economic system. Rather, the South-North economic gap continued to widen. These states recognized that the fundamental reason is the "system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuate inequality"¹⁷⁰ Since the 1960s, these states began to act collectively to pursue the NIEO within the UN system. A number of Assembly Resolutions were adopted,¹⁷¹ and institutions or regimes were established.¹⁷² 1974 witnessed the climax of NIEO. In that year, several documents were adopted including Charter of Economic Rights and Duties of States(Charter of Economic Rights), which is considered as milestone documents of NIEO.¹⁷³

Two parallel approaches are adopted to establish the NIEO: South-North Dialogue and South-South Cooperation. As to the former, developed states at the outset rejected the NIEO initiative.¹⁷⁴ Although some progress was achieved since the 1960s,¹⁷⁵ South-North Dialogue halted since the early 1980s and nearly disappeared since the 1990s because most developing states embraced the "New Liberalism". As for the latter, developing states have never given up their enthusiasm. Unfortunately, it has little meaning for most developing states. Since the 1990s, the "NIEO" has almostly been considered as a "bad" word so that many policy circles and international lawyers avoid to mention it.¹⁷⁶ However, some latest developments of international law-- e.g., US seeks to regulate more effectively transnational corporations through investment treaties¹⁷⁷--inform people that many claims of developing states in the NIEO movement—e.g., host states' authority to regulate transnational capital--are largely justified. Therefore, the legitimacy of the NIEO movement should be reconsidered.

While several reasons have been suggested to explain the frustration of NIEO, the most important reason may be the lack of support from OGPs and there was no real GP in the developing world. Indeed, the NIEO movement has never lacked the leadership. In particular, India played a key role in NIEO initiatives, including the incorporation of S&D treatment provisions in GATT in 1964 and the Generalized System of Preferences (GSP) at the UNCTAD in 1968.¹⁷⁸ However, the weak economic power could not qualify India as a GP.

Let's take a look at the legal regime on international investment. Developing states had played a negligible role in the flow of international capital by the late 1990s.¹⁷⁹ In this context, there is neither sustainable viability for the NIEO movement nor discernable benefit from it: on the one hand, many developing states had to abandon their NIEO claims—e.g., the so-called "Hull Rule"¹⁸⁰--in order to compete for capital from developed states; on the other, developing states have little willingness to negotiate investment treaties among them,¹⁸¹ and those existing development-friendly investment rules are of little actual benefit.¹⁸² For instance, although China signed many BITs with other developing states by the late 1990s, mutual investment is negligible.¹⁸³

¹⁷⁰ G.A. Res.3201(S-VI), U.N. Doc. A/9599(1974), para.1.

¹⁷¹ See, e.g., G.A. Res.1803(XVII), U.N. Document A/RES/1803(XVII).

¹⁷² For instance, the United Nations Conference on Trade and Development(UNCTAD) was founded in 1964.

¹⁷³ GA 3281(XXIX), adopted on December 12, 1974.

¹⁷⁴ In voting Charter of Economic Rights, all developed states said "No"(Belgium, Denmark, Germany(Fed. Rep.), Luxembourg, UK, and US or "Abstain"(Austria, Canada, France, Ireland, Israel, Italy, Japan, Nevertheless, Norway, and Spain).

¹⁷⁵ See, e.g., GATT Part IV: trade and development.

¹⁷⁶ For instance, the Committee on Legal Aspects of A NIEO established in 1979 within the International Law Association (ILA) was succeeded by the Legal Aspects of Sustainable Development Committee in 1992.

¹⁷⁷ See, e.g., Bipartisan Trade Promotion Authority Act of 2002, Article 3802(b)(3); 2004 BIT Model, Annex B: Expropriation.

¹⁷⁸ Bhagirath Lal Das, *India's Trade Negotiations: Past Experience and Future Challenges*, 35 INT'L STUDIES 397, 398(1998).

¹⁷⁹ UNCTAD, *2006 World Investment Report*, at 7.

¹⁸⁰ UNCTAD, *Bilateral Investment Treaties 1995-2006*, UNCTAD/ITE/IIT/ 2006/5, 2007, at.48.

¹⁸¹ See UNCTAD, *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2, 2000, at 5.

¹⁸² See UNCTAD, *South-South Cooperation in International Investment Arrangements*, 2005, at 36-46.

¹⁸³ See UNCTAD Investment Treaty Database: China.

Changes happen in the last decade. Rapid growth of investment from developing states has attracted more and more attentions. In 2005, the FDI from developing countries accounted for about 17% out of total outward FDI.¹⁸⁴ According to *2011 World Investment Report*, the FDI from developing states reached \$388 billion in 2010 and its share in world investment outflows amounted to 29%.¹⁸⁵ Since most of this rapid growth is contributed by a handful of developing states,¹⁸⁶ these states can become big investors comparable to most developed states. As a matter of fact, in 2010, China, Russia and India are among the top 20 investors.¹⁸⁷

This change may have far-reaching legal implications: first, new investment sources outside developed states may prompt many developing states¹⁸⁸ to reconsider their liberal investment regimes with the defeat of NIEO movement, which have proved too burdensome for them evidenced by the dramatic increase of investor-state disputes in the past decade;¹⁸⁹ second, those existing development-friendly investment arrangements among developing states may generate benefit and, thus, will be strengthened;¹⁹⁰ third, developed states may have to adjust their liberal investment regimes in order to compete with NGPs in developing states and to tackle challenges toward their public authority by investors from NGPs.¹⁹¹

These legal implications have been partly noticed by the UNCTAD. In recent years, the UNCTAD has devoted itself to promoting South-South cooperation in investment treaties, hoping the emergence of a new strategy for the development of developing states.¹⁹² Indeed, several development-friendly investment rules have been proposed or adopted by developing states or among them. For instance, China and India, together with several other developing states, in a Communication submitted to the WTO in 2002, argued that conduct of transnational corporations should be regulated in accordance with Draft Code of Conduct on Transnational Corporation, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, etc,¹⁹³ which was proposed during NIEO movement. A remarkable legal practice is the 2002 Framework Agreement on Comprehensive Economic Cooperation China between ASEAN (CAFTA), which explicitly provides S&D treatment in investment liberalization.¹⁹⁴

Compared with the legal regime on international investment in which the role of NGPs is still moderate, the multilateral trade system has witnessed a prominent role of NGPs. NGPs have been recognized decisive in current Doha Round Negotiations,¹⁹⁵ which, because “development” is defined as the theme of negotiations, is also known as Doha Development Agenda (DDA) Negotiations. It is here not necessary to examine in detail how NGPs, together with other developing states, defend the DDA, which has been extensively discussed.¹⁹⁶ Rather, I would

¹⁸⁴ *2006 World Investment Report*, at 105, 107.

¹⁸⁵ *2011 World Investment Report*, at 6.

¹⁸⁶ *2006 World Investment Report*, at 112.

¹⁸⁷ *2011 World Investment Report*, at 7.

¹⁸⁸ South-South investment is significant to some small or medium-sized developing countries. See UNCTAD Secretariat, *South-South Investment Flows*, 2004, at 3.

¹⁸⁹ See, e.g., UNCTAD, *Last Developments in Investor-State Dispute Settlement*, IIA Issue Note, No.1, March 2011.

¹⁹⁰ Up to the year 2005 South-South BIT accounted for 26 per cent out of total BIT. UNCTAD, *2006 World Investment Report*, at 27.

¹⁹¹ UNCTAD Secretariat, *The Development Dimension of International Investment Agreements*, Geneva, February 2009, at 11.

¹⁹² See, e.g., UNCTAD, *South-South Cooperation in International Investment Arrangements*, 2005; *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs*, 2010.

¹⁹³ WTO Working Group on the Relationship between Trade and Investment, Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe, WT/WGTI/W/152, 19 November 2002.

¹⁹⁴ See CAFTA, Article 8.

¹⁹⁵ See, e.g., Julia Ya Qin, China, India and WTO Law, in Muthucumaraswamy Sornarajah and Jiangyu Wang eds., *China, India and the International Economic Order*, Cambridge University Press, 2010, at 196.

¹⁹⁶ See, e.g., Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J. L. & MED. 345(2008).

like to narrow my review to criticisms toward the role plaid by NGPs in DDA Negotiations. Critics, especially those from developed states, often accuse that NGPs fail to exercise their leadership;¹⁹⁷ rather, they seek their own interests with priority, so they should be responsible for the dilemma of Doha Negotiations.¹⁹⁸ Such accusations are not unsound at all. Nevertheless, three points may be proposed to rebut these criticisms from the DDA perspective: first, national interest of four states of China, India, Brazil and South Africa has a special meaning from the perspective of DDA. This is because these four states, which accounts for only “two” per cent out of states in the world, have to sustain about three billion individuals, which accounts for more than “forty” per cent out of world population. These three billion individuals can’t be denied the same inherent right to benefit from multilateral trade system as those in developed states because a State’s huge trade volume is one thing, but the individual benefit is another thing. In other words, the position of NGPs in multilateral trade system should not only be evaluated from the perspective of WTO Members only, but also from the perspective of individuals as nationals of WTO Members.¹⁹⁹ Second, it is found what developed states, especially US and EU, really complain focuses on NGPs’ failure to lead in opening their market rather than their failure to enforce commitments, including adhering to decisions by the Dispute Settlement Body(DSB). However, from the DDA perspective, what NGPs should take a leadership is to defend a development-oriented purpose, process and framework of negotiations in order to remedy the highly unproportionate benefit and cost from trade liberalization between developing states and developed states, which is the very reason why Doha Round Negotiation is defined as DDA. Therefore, to accuse in a general way of NGPs’ failure to take a leadership is not convincing. Third, NGPs actually have begun to adopt programs in favor of other developing states, especially LDCs, in accordance with the purpose of WTO Agreement and DDA. For instance, since July 1, 2010, China unilaterally has granted 60% of goods from 26 African states with free-tariff treatment.

The much more important thing is the rise of NGPs may not confine to reviving the “Old NIEO”, but prompting a “New NIEO”²⁰⁰ rooted in the 21st Century. Several differences exist between two NIEOs. For instance, sustainable development had been hardly included in the “Old NIEO” while it is a key issue in the “New NIEO”.²⁰¹ However, the most significant difference is that developed states, which opposed the “Old NIEO”, may support the “New NIEO”. The main reasons include (1) growing challenges from NGPs may prompt OGP to change their attitudes toward some “Old NIEO” claims of developing states. For instance, with the capital from NGPs increasingly pouring into OGPs, they may adjust their traditional liberal approaches to investment treaty in order to protect their public authority, which was strongly advocated by developing states before; (2) some OGPs may fall into “developing states” implied by Paul Kennedy because of various reasons, for example, economic recession. Debt crisis happening in Western world including Italy warns that people should not be surprised to find a current developed state would be grouped into “developing states”.

This new context implies that, while the “Old NIEO” was overwhelmingly aimed to favor the “unilateral development” of developing states, the “New NIEO” tends to pursue “common development” of all states, which

¹⁹⁷ See TWN, *India, China, Brazil leadership key to Doha success or failure, say US*(10 May 2010).

¹⁹⁸ See Raj Bhala, *supra* note 106, at 4,5.

¹⁹⁹ In this sense, it is sensible for China to repeatedly associate its development with 1.3 billion population or one fifth of world population. See, e.g., *2011 White Paper on China’s Peaceful Development*, *supra* note 62, Parts III, IV. See also Panel Report of *301 Sections Case*, *supra* note 47, paras.7.73, 7.76.

²⁰⁰ It borrows the title of the article of Professor Ruth Gordon, see Ruth Gordon, *supra* note 14.

²⁰¹ See Cai Congyan, *From New International Economic Order Movement to Sustainable Development*, 15(3)CHINESE J.INT’L ECO.L.100(2008).

has been repeatedly argued by China.²⁰² Thus, compared with the “Old NIEO”, the establishment of “New NIEO” may be more cooperative and less confrontational between developed states and developing states.

2. Democratic Dimension of International Law

It is accused that “democracy”, as a term of act, is ignored by lawyers, especially international lawyers.²⁰³ Thing has changed greatly in the past two decades. “Democracy” entered into the discourse of international relations and international law with the collapse of the Soviet Camp. Democracy has become an important agenda for national states and international institutions. For instance, at the second year of the collapse of the USSR, a UN Assembly Resolution titled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Election” was adopted with overwhelming majority.²⁰⁴ It is found that many resolutions adopted under Chapter Seven of UN Charter are concerned with national democracy.²⁰⁵ Democracy was also embraced in regional institutions. For instance, in December 1991, EU adopted a Declaration, which provides the respect for democracy is a precondition for state recognition.²⁰⁶ Both in 1992, two similar judgments were publicized by distinguished scholars in the fields of international law and international relations respectively: Frank declared the emergence of the entitlement to democracy in international law;²⁰⁷ Huntington hailed the coming of the “third wave” of democratization.²⁰⁸ *2005 World Summit Outcome* accords “democracy” with “universal value”.²⁰⁹

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

Although international dimension of democracy has been given far less attention than national dimension of democracy, the former emerged far earlier than the latter in terms of international law. In particular, Non-Aligned Movement (NAM) was a main forum for developing states to pursue the international dimension of democracy. As early as 1970 Lusaka Conference, NAM explicitly argued that “the democratization of international relations” was an imperative necessity.²¹⁰ This claim, however, had never been taken seriously by developed states.

Ironically, while bringing about its “main product” of making domestic democracy an international concern, the end of Cold War produced its “by-product”: the democratization of international relations has come to be established as a formal multilateral agenda. In the same year of 1992 when Frank and Huntington published their influential works, Secretary-General Boutros Boutros-Ghali presented a Report entitled *An Agenda for Peace*, which perhaps is the first UN document openly embracing the democratization of international relations, even though it has been given far less concerns than it deserves. Immediately after proclaiming the democracy at the national level,²¹¹ this Report continues to argue that “Democracy within the family of nations means the

²⁰² See *2011 White Paper on China's Peaceful Development*, *supra* note 62, Part I.

²⁰³ Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 ICLQ 225, 225(2002).

²⁰⁴ A/RES/45/150, 18 December 1990.

²⁰⁵ Edward Newman & Roland Rich, *The UN Role in Promoting Democracy: Between Ideals and Reality*, United Nations University Press, 2004, at 65, 69.

²⁰⁶ Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, December 16, 1991.

²⁰⁷ Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46(1992).

²⁰⁸ Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, 1992.

²⁰⁹ *2005 World Summit Outcome*, *supra* note 69, para.135.

²¹⁰ Lusaka Declaration on Peace, Independence, Development Co-operation and Democratization of International Relations, 10 September 1970, para.7.

²¹¹ Report of the Secretary-General, *An Agenda for Peace*, A/47/277 - S/24111, 17 June 1992, para.81.

application of its principles within the world Organization itself. ...The principles of the Charter must be applied consistently, not selectively,.... Democracy at all levels is essential to attain peace for a new era of prosperity and justice.”²¹² Furthermore, democracy, in *A More Secure World*, is included as one of four principles to guide the reform of the UNSC.²¹³ However, it is surprised that, while defining democracy as universal value, *2005 World Summit Outcome* is silent on the democracy among states or within international institutions.

The pursuit of democratization of international relations since 1970 Lusaka Conference at least may be resumed with the rise of NGPs. In recent years, NGPs have been strongly arguing for the democratization of international relations. The main reason for NGPs to do so may be that they find that, as their power increasingly grows, they has yet to exercise proportional say in many international affairs. Therefore, NGPs ally each other in this regard. For instance, *Sanya Declaration of BRICS Summit*(2011) affirms that BRICS have played an important role in “promoting greater democracy in international relations.”²¹⁴ In *A Shared Vision for the 21st Century*(2008), China and India consider that “the continuous democratization of international relations and multilateralism are an important objective in the new century.”²¹⁵ Since the promotion of democratization of international relation is the common pursuit of the developing world, efforts of NGPs has gained support from other developing states. For instance, in *Declaration of China-Arab Cooperation Forum* (2004), China and Arab League promise to “promote the democratization of international relations”.²¹⁶ In 2009, China and 49 African States call on all states to “act under the principles of multilateralism and democracy in international relations”.²¹⁷ Surprisingly, EU expressed its support to the democratization of international relations. In a *Joint Statement* issued on May 6, 2004, EU, together with China, pledged to endeavor to “promote multilateralism and democracy in international relations”.

In essence, the democratization of international relations and that of international law are the same thing. As is well known, international law is always blamed for “democracy deficit” because a handful of Western GPs dominate since the 17th century. For a long time, international law was labeled as “European International Law”. Non-Western world, together with small Western States, played little role. In particular, many states and territories in Non-Western world were degraded as objects in international law. The decolonization movement, which was initiated in Latin America in the 19th century and was accelerated in Asia and Africa after WW II, created a large amount of new states and they soon “dominate” in international community “in number”. However, since these new states possess at best “political and rhetorical authority”,²¹⁸ what they can bring is “limited and special” and could not become “master” of international law.²¹⁹

In the age of international organizations, which are in the process of “mission creep”,²²⁰ developing states’s more effective participation into international organizations is of special importance to promote the democratization of international law. IMF in 2010 witnessed the latest significant progress in this regard. On November 10, 2010, the Executive Board of IMF approved reform program, which is “the most fundamental governance overhaul in the Fund’s 65-year history and the biggest ever shift of influence” and which is “in favor

²¹² *Id.*, para.82.

²¹³ See *A More Secure World*, *supra* note 97, para.249.

²¹⁴ Sanya Declaration, *supra*, note 32.

²¹⁵ China-India Shared Vision, *supra* note 87.

²¹⁶ Declaration China-Arab Cooperation Forum(September 22, 2004), Article 2.

²¹⁷ China-Africa Declaration, *supra* note 65.

²¹⁸ Antonio Cassese, *supra*, note 150, at71.

²¹⁹ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, Praeger Publishers, 1968, at.118.

²²⁰ See generally José Alvarez, *supra* note 68, Chapters 4, 7 and 8.

of emerging market and developing countries to recognize their growing role in the global economy”.²²¹ According to this proposal, four members of BRICs rank among 10 largest members of IMF. In particular, China become the third largest member in terms of both Quota Shares(6.394%) and Voting Shares(6.071%), only next to US and Japan.²²² This progress is regarded as a step to make IMF more democratic.²²³

A potential fundamental progress may be expected in UNSC. UNSC reform was established as UN agenda since 1992, but little progress has been made in the past twenty years. Indeed, “democracy” is not a panacea to remedy all deficiencies of UNSC,²²⁴ but it may make UNSC more legitimate. As a matter fact, consensus exists among states: first, the UNSC need to be enlarged to reflect the new international reality;²²⁵ second, the new UNSC must “be more representative of the broader membership, especially of the developing world.”²²⁶ It is believed that India, Brazil and South Africa are the most competitive candidates for new Permanent Members of UNSC. People shouldn’t be surprised that BRICS someday sit together as Permanent Members of UNSC. Actually, BRICS happening to sit together at UNSC in 2011 is regarded as a “new power bloc” within UNSC.²²⁷

IV. A Case Study of China’s Latest International Legal Policy and Practice: A Quiet Revolution?

Today, few people deny that Kennedy’s prediction toward Chins has become reality. This NGP is considered so powerful but so unpredictable that, in order to understand its implications, international relations scholars, economists and historians have proposed various theories, such as “Theory of China Threat”,²²⁸ “Theory of China Collapse”,²²⁹ “Theory of China Responsibility”,²³⁰ “Theory of Chimerica”,²³¹ “Theory of Chindia”.²³²

Unfortunately, international lawyers in China and abroad hardly is “at present” in ongoing global debates about China’s rise. In this regard, Posner and Yoo are one of few exceptions. Through the case study of interaction between China and US in several international regimes, they presented a very passive conclusion: international law hardly is effective in regulating China’s rise and mediating tensions between two states.²³³

A. China Rises as A NGP: Evolution of Discourse

Kennedy admires China as late as the 15th Century as follows: “of all the civilizations of pre-modern times,

²²¹ “IMF Executive Board Approves Major Overhaul of Quotas and Governance”, Press Release No. 10/418, November 5, 2010.

²²² IMF, “Quota and Voting Shares Before and After Implementation of Reforms Agreed in 2008 and 2010”, 3 March 2011.

²²³ See “Zhu Min nominated as IMF’s Deputy Managing Director”, at http://www.china.org.cn/world/2011-07/13/content_22978015.htm (visited October 29, 2011).

²²⁴ See Petter G. Danchin and Horst Fischer eds., *United Nations Reform and the New Collective Security*, Cambridge University Press, 2010, at 112.

²²⁵ See 2005 World Summit Outcome, *supra* note 69, para.153.

²²⁶ See, e.g., *A More Secure World*, *supra* note 97, para.249.

²²⁷ Khadija Patel, “Brics: UN Security Council’s newest power block”, at <http://dailymaverick.co.za/article/2011-10-07-brics-un-security-councils-newest-power-block> (visited November 25, 2011).

²²⁸ See, e.g., Khablid R. Al-Rodhm, *A Critique of China Threat Theory*, 31 ASIAN PERSPECTIVE 41(2007).

²²⁹ See, e.g., Gordon G. Chang, *The Coming Collapse of China*, Random House, 2001.

²³⁰ See, e.g., Robert B. Zoellick, Whither China: From Membership to Responsibility? Remarks to National Committee on U.S.-China Relations, September 21, 2005; Commission of the European Union, *EU-China: Closer Partners, Growing Responsibilities*, October 24, 20006, COM(2006) 631.

²³¹ See, e.g., Niall Ferguson, Not Two Countries, but One: Chimerica, 4 March 2007, *The Telegraph*.

²³² See Jairam Ramesh, *Making Sense of Chindia: Reflections on China and India*, India Research Press, 2005.

²³³ Eric A. Posner and John Yoo, *International Law and the Rise of China*, 7 CHI.J.INT’L L.1, 15(2006).

none appeared more advanced, none felt more superior, than of China”.²³⁴ Modern history, however, witnessed China’s fall. *The Opium War* (1838) and *Treaty of Nanking* (1842) disqualified China as a civilized member of international community.²³⁵ In 100 years henceforth, China struggled for returning to international community as a “normal” member and restoring its traditional GP status through entering wars,²³⁶ attending international conferences,²³⁷ reforming national governance (e.g., establishment of permanent.²³⁸

At the late WW II, with strong supports from Roosevelt, then US’s President, China was reluctantly recognized as one of “Police States” and sat in UNSC as a permanent member.²³⁹ During most time of the 20th century, however, China was not regarded as a GP,²⁴⁰ and it denied itself as a GP. In 1984, Deng Xiaoping, the former China’s leader, gave his cognition of China’s state identity, which remains effective in twenty years henceforth. On October 26, 1984, Deng said

“China is a huge country as well as a minor one. By huge it means that it has a huge population and a vast territory, and by minor it means that it is still a relatively poor, developing country with a per capita GNP of only US\$300. Therefore, China is in fact both a huge and a minor country.”²⁴¹

In other words, China acknowledged that it was not powerful enough to claim itself as a “GP”, but defined itself either as “huge state” in terms of population and territory, both of which are not necessarily decisive factors to qualify a state as a GP,²⁴² or as a “developing state” in terms of economic development.

Largely because of this cognition, Deng established two fundamental principles for China’s diplomacy. On the one hand, China should devote itself to its own national development and “keep a low profile” in international affairs. On December 24, 1990, Deng said

“Some developing countries hope China to act as a leader of the Third World. We, however, absolutely should not do that, which is a fundamental national policy. We can’t qualify as the leader because we are not powerful enough to do that. We benefit nothing from that while we may lose many initiatives.... Nevertheless, we cannot simply do nothing in international affairs and we still play our part.”²⁴³

On the other hand, Deng repeatedly stressed China’s close ties with the Third World. Deng required that China maintain its action logic of being sympathetic with the Third World states, even though China’s state identity would change one day, namely, becoming a developed state. On May 7, 1978, Deng said

“As a socialist country, China shall always belong to the Third World and shall never seek hegemony. Nowadays this idea can be understood because China is still quite poor, and definitely is a Third World country. The question is whether or not China will exercise hegemony when it becomes developed in the future. ... If it remains a socialist country, China shall not exercise hegemony and it will still belong to the Third World. Should China become arrogant, act as a hegemonic power, and imposed its own willing in the world, it will deprived

²³⁴ Paul Kennedy, *supra* note 1, at 4.

²³⁵ These two events are recognized widely as “turning-points in Sino-Western relations”. Gerrit W. Gong, *supra* note 36, at 136.

²³⁶ See Guoqi Xu, *China and the Great War*, Cambridge University Press, 2005, Chapter 5.

²³⁷ See Lin Xuezhong, *From the Law of Nations to International Diplomacy*, Shanghai Classics Publishing House, 2009, Chapter 5; Guoqi Xu, *Id.*, at Chapter 7.

²³⁸ See Lin Xuezhong, *Id.*, Chapter 6; Immanuel C. Y. Hsü, *China’s Entrance into the Family of Nations*, Harvard University Press, 1960, Part Three.

²³⁹ During negotiating the new world organization, the Soviet Union and UK were opposed to grant China such a privileged status. See Ruth B Russell, *supra*, note 98, at 103, 128. Barry Buzan, *supra* note 73, at 9.

²⁴⁰ Georg Schwarzenberger, *supra* note 22, at 121-122. Kennedy also regarded China as a GP candidate. See Paul Kennedy, *supra* note 1, at 447-457.

²⁴¹ *Selected Works of Deng Xiaoping*, Vol.3, People’s Publishing House, 1993, at 94.

²⁴² See Michael I. Handel, *supra*, note 14, at 13-14.

²⁴³ *Selected Works of Deng Xiaoping*, *supra* note 241, at 363.

itself of the membership of Third World countries... ”²⁴⁴

On October 26, 1984, Deng confirmed “It will still belong to the Third World even after it is developed. China will never become a ‘superpower’”.²⁴⁵

Deng’s words still are influential on China’s latest international legal policy. For example, in its *2011 White Paper on China’s Peaceful Development*,²⁴⁶ China’s government promises that “It never engage in aggression or expansion, never seeks hegemony”,²⁴⁷ and praises itself “China’s peaceful development has broken away from the traditional pattern where a rising power was bound to seek hegemony.”²⁴⁸

With the growth of power, especially economic power, China sought to redefine its state identity. An important event is a speech entitled “The New Road of China’s Peaceful Rise and the Future of Asia” delivered by Professor Zheng Bijian in 2003.²⁴⁹ In that speech, Zheng, who is believed a confidant of President Hu Jintao, argued that China has found a road of “Peaceful Rise” in accordance with which China constructs socialism with Chinese characteristics in way of integrating itself into economic globalization rather isolating from it and mainly relying upon its own national resources. In particular, Zheng stressed that the road of “Peaceful Rise” is one “strive for rise while pursuing peace and not seeking hegemony”. This road is totally different from the traditional pattern of the rise of GPs, which is characterized by the fierce transformation of existing international system, the resort to force, etc. In one word, China will “seek peaceful international environment to develop China while avail of China’s development to maintain world peace.”²⁵⁰

Less than one month later, Zheng’s proposition was embodied in a speech by Premier Wen Jiabo at Harvard University. of “Turning Your Eyes to China”.²⁵¹ Wen declared that China is “a rising power dedicated to peace” and China will follow a “road to peaceful rise and development”. For the first time, China’s state leaders not only officially accepted the proposition of “peaceful rise”, but used the word “rising power”. According to reasoning logic in Kennedy’s book, “rise” implies the birth of a GP. Therefore, it can be assumed that China’s government considered in acknowledging its new state identity. After Wen’s speech, the word “peaceful rise” immediately was employed in various official documents, speeches, etc. In particular, Wen, at a press conference in March 2004, explained lengthly the meaning of “Peaceful Rise”.²⁵² The discourse of “Peaceful Rise” had inspired heated discussions in China and abroad.²⁵³

Totally unexpected change, however, happened with a speech given by President Hu Jintao one month after that press conference.²⁵⁴ In that speech, Hu used “peaceful development” rather than “peaceful rise”. Since then, “peaceful rising” have never appeared in any Chinese official materials. China’s first *White Paper’s Path to Peaceful Development Road*(2005) definitely replaced “Peaceful Rise” with “Peaceful Development”. Interestingly, China’s government didn’t give any explanation. It is guessed that State leaders noticed criticisms and doubts

²⁴⁴ *Selected Works of Deng Xiaoping*, Vol.2, People’s Publishing House, 1994, at 112.

²⁴⁵ *Selected Works of Deng Xiaoping*, *Id.*, at 94.

²⁴⁶ *2011 White Paper on China’s Peaceful Development*, *supra* note 62.

²⁴⁷ *Id.*, Part I, para.8.

²⁴⁸ *Id.*, Part V, para.2.

²⁴⁹ Zheng Bijian, A New Path for China’s Peaceful Rise and the Future of Asia, presented at Bo’ao Forum for Asia, November 24, 2003.

²⁵⁰ Zheng Bijian, *Id.*

²⁵¹ Wen Jiabao, Turning Your Eyes to China, December 11, 2003, Harvard University.

²⁵² See, e.g., Premier Wen Jiabo’s press conference at the conclusion of the second session of the Tenth National People’s Congress(NPC), March 15, 2004.

²⁵³ See, e.g., Sujian Guo and Shiping Hua eds., *New Dimensions of Chinese Foreign Policy*, Lexington Books, 2007.

²⁵⁴ Hu Jintao, “China’s Development, Opportunities for Asia”, April 2004..

towards the theory of Peaceful Rise.²⁵⁵ However, until now “Peaceful Rise” rather than “peaceful development” is extensively used by international organizations, states, and international relations scholars in China and abroad.²⁵⁶ This suggests that most, if not all, of those criticisms and doubts are unsound.

Actually, the evolution of discourse reveals the reason why China’s government is reluctant to assert or acknowledge its GP status: it may make people reminiscent of the traditional pattern of the rise of GPs in modern history, including colonization, resort to war, spheres of influence. This concern can be found in *2011 White Paper on China’s Peaceful Development*, which stresses that “China’s peaceful development has broken away from the traditional pattern where a rising power was bound to seek hegemony.”²⁵⁷ However, it is this sentence that reveals China’s new state identity of a GP.

China’s hesitation toward its state identity vividly tells people how the international legal practice of China as a NGP, which rises in an internationally socialized and legalized context distinct from that from the 17th to the 19th century, is complicated. Unfortunately, most international lawyers in China employ “Peaceful Rise” as Premier Wen delivered “Turning Yours Eyes to China” in 2003 and use “Peaceful Development” as *2005 White Paper on China’s Peaceful Development* was issued. They fail to discern the change and underlying logic of China’s government in dealing with its state identity. Few international lawyers continuing using “Peaceful Rise” after 2005 also fail to explore why China’s government use no longer “Peaceful Rise” and to realize what China faces in nature is a long-existing, highly disputed issue of GP in international law.

Yee is one of few Chinese jurists who have a clear thinking of GPs. In a paper published in 2008, Yee argued that “China cannot escape from its leader State role in the world. It has no choice but to be a leader State.”²⁵⁸ Why should China act as a “Leader State”? Yee explained that

“This is because China comprises too big a proportion of the world, both in terms of population and economic activities....The international system cannot function well without China being in a leader State role. Not being in such a role will prevent China from realizing the traditional ideal of *pingtianxia*—bringing peace to the world. From this perspective, China should simply recognize the need for its leader State role, take up the responsibility of a leader State,....”²⁵⁹

Perhaps what Yee wanted is to demonstrate that, compared with HW, his proposition of “co-progressiveness” is better, he stopped at claiming in a general way that China should be brave to “take the responsibility of a leader state”, which largely has been repeatedly appealed in the name of “Theory of China’s Responsibility”. Rather, he said nothing about difficulties and risks that China faces in acting as a “Leader State” or “Great Power”, which may be much more challenging for China in the future and will be partly found in examinations below.

B. China’s Latest International Law Practice: Issues of Intervention, Investment Treaties and HRs

Obviously, it is not positioned here to exhaust China’s all latest international law practice.²⁶⁰ Rather, the

²⁵⁵ Eight criticisms and doubts were summarized as follows (1) this theory will weaken China’s ability to deter Taiwan independence; (2) China’s peaceful rise may not be possible; (3) this theory will intensify concerns among China’s neighbors; (4) it is premature to discuss China’s rise; (5) this theory is contrary to Deng Xiaoping’s guidance on foreign affairs; (6) this theory could undermine support for military modernization; (7) this theory could incite domestic nationalism. See Bonnie S. Glaser and Evan S. Mederos, *The Changing Ecology of Foreign Policy-Making in China: The Ascension and Demise of the Theory of “Peaceful Rise”*, 190 *THE CHINA QUARTERLY* 291, 302-306(2007).

²⁵⁶ See, e.g., G. John Ikenberry, *supra* note 56; Jinghao Zhou ed., *supra* note 79; Barry Buzan, *supra* note 73; Wang Jisi, *China’s Search for a Grand Strategy: A Rising Great Power Finds Its Way*, 90 *FOREIGN AFF.* 68(2011).

²⁵⁷ *2011 Peaceful Development White Paper*, *supra* note 84, Part V, para.2.

²⁵⁸ Sienho Yee, *supra* note 63, at 104.

²⁵⁹ *Id.*

²⁶⁰ See generally Hanqin Xue, *China’s Open Policy and International Law*, 4 *CHINESE JIL* 133(2005); Chinese Observations on

author, from a GP perspective, would like to focus on three issues of intervention, investment treaties, and HRs because (1)they correspond with peace and security, development and HRs, three pillars of the UN system and towards “larger freedom” as said above; (2)China is at the crossroads in these issues; (3)they have yet to be given enough considerations among Western international lawyers.

1. Intervention Issue: From Non-Intervention to Responsibility to Protect

Non-intervention of internal affairs is regarded as one of principles of modern international legal order.²⁶¹ ICJ further defined it as customary international law.²⁶² Largely because of its humiliatory history since *The Opium War*(1840), China always defends the Principle. For instance, the Principle was included by China as one of famous The Five Principles of Peaceful Coexistence, which is recognized as one of few important contribution by China to international law.²⁶³ Until now, the Principle remains the cornerstone of China’s diplomacy.²⁶⁴

However, applying the Principle in practice is more provoking than writing it in law. Since its content is full with uncertainty,²⁶⁵ the Principle is not only often manipulated as a legal shield by states misconducting internally from international scrutiny, but hardly prevents powerful states from exercising coercion against other states. The focus of the dilemma is how to deal with humanitarian intervention, which divides the world.²⁶⁶ China, together many developing states, opposes humanitarian intervention.²⁶⁷

What distinguishes China from other developing states is that the status of permanent member of UNSC makes China’s opposition can defeat or water down any initiative under Chapter Seven of UN Charter, which has been demonstrated by those initiatives against Sudan,²⁶⁸ to Zimbabwe,²⁶⁹ and to Syria.²⁷⁰ However, inspired by the famous “Kofi Annan Query”,²⁷¹ especially pressure imposed on China because of its sympathy with Sudan in Darfur crisis,²⁷² China had to seek a new approach to Non-intervention alternative to humanitarian intervention to cope with new modalities of threat of peace and security such as gross and systematic violations of HRs. It is assumed that China found the answer from The International Commission on Intervention and State Sovereignty (ICISS), an International Non-governmental organization (INGO) and author of the Report of Responsibility to Protect (R2P).²⁷³ Although recognizing “the long history, and continuing wide and popular” usage of the phrase “humanitarian intervention”, ICISS made “a deliberate decision not to adopt this terminology.”²⁷⁴ This is because “particular choices of words” may constitute a hinder to deal with “the real issue” and the “humanitarian

International Law, 6 CHINESE JIL 83(2006); and Wang Zonglai and Hu Bin, *China’s Reform and Opening-up and International Law*, 4 CHINESE JIL 193(2010).

²⁶¹ UN Charter, Article 2(7).

²⁶² See *Military and Paramilitary Activities in and against Nicaragua*. Merits, Judgment. I.C.J. Reports 1986, para.202.

²⁶³ Wang Tiewa, *International Law in China: Historical and Contemporary Perspectives*, Recueil des cours (1990), Volume 221, Issue II, at 271..

²⁶⁴ See, e.g., *2011 White Paper on China’s Peaceful Development*, *supra* note 62, Part III.

²⁶⁵ For instance, the conception of “internal affairs” changes over time. See *Nationality Decrees issued Tunis and Morocco*, 1923 PCIJ, Series B, No.4, at 24.

²⁶⁶ See generally Anne Orford, *Reading Humanitarian Intervention*, Cambridge University Press, 2003.

²⁶⁷ See UN General Assembly, Sixty-third session, 98th plenary meeting, Official Records, A/63/PV.98, at 23.

²⁶⁸ “U.N. Vote on Sudan Could Face China Veto”, at <http://www.foxnews.com/story/0.2933.132803.00.html> (visited December 10, 2011).

²⁶⁹ “2 Vetoes Quash U.N. Sanctions on Zimbabwe”(July 12, 2008), at <http://www.nytimes.com/2008/07/12/world/africa/12zimbabwe.html?pagewanted=all> (visited December 10, 2011).

²⁷⁰ “Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China”, at <http://www.un.org/News/Press/docs/2011/sc10403.doc.htm> (visited October 10, 2011).

²⁷¹ See Report of the Secretary-General, *We the peoples*, A/54/2000, 27 March 2000, at 35.

²⁷² See David H. Shinn, *China and the Conflict in Darfur*, 16 BROWN J. WORLD AFF. 85, 91-93(2009); Ann Kent, *supra* note 119.

²⁷³ See The International Commission on Intervention and State Sovereignty (ICISS), *Responsibility to Protect*, December 2001.

²⁷⁴ *Id.*, at 9.

intervention” is the very phrase, therefore, the phrase “responsibility to protect” was employed.²⁷⁵ Indeed, changing the language “does not, of course, change the substantive issues which have to be addressed”,²⁷⁶ but this change is very helpful for China because it pulls China out of direct confrontation between Non-intervention it always defends and humanitarian intervention it always opposes, even though what China wants from R2P is not to make it more ready to “enforce” but to “acknowledge” humanitarian intervention.

On June 7, 2005, China issued its first official document on UN reforms. The Concept of R2P is included in that document,²⁷⁷ which is earlier than 2005 World Summit Outcome including this concept.²⁷⁸ This episode is special because, in its history of diplomacy, China has never adopted a concept which is proposed by an INGO, much less does so hastily. China, however, appears not very confident on R2P. During debates preparing for UN Assembly Resolution on R2P in July 2009, China presented a statement which is believed the most deliberate among all statements,²⁷⁹ In that statement, China warned that the implementation of R2P “should not contravene the principle of state sovereignty and the principle of non-interference in the internal affairs of States” and that R2P should be prevented from “becoming a kind of humanitarian intervention”.²⁸⁰ Nevertheless, it maintained its supports that several international crimes are within the reach of R2P.²⁸¹ This implies that the implementation of R2P in such circumstances doesn’t “contravene the principle of state sovereignty and the principle of non-interference in the internal affairs of States”.

The significance of China’s shift from Non-intervention to R2P is emerging. Indeed, China, together with Russia, blocked a recent initiative against Syria in accordance with Chapter Seven of UN Charter in 2011. It is also right that, without China’s support, it was impossible for UNSC to adopt decision against Sudan²⁸² or Libya,²⁸³ in each of which China has huge economic interest. Furthermore, compared with some Western states focusing on Responsibility to React, China attaches special concerns to another two pillars of R2P, i.e., Responsibility to Prevention and Responsibility to Rebuild,²⁸⁴ which is the main reason why R2P could be quickly accepted by those traditionally opposing humanitarian intervention in 2005 World Summit. The fact is that China has been prominent in recent UN peacekeeping activities,²⁸⁵ which is of great value to R2P. From one angle, it can be said that China and such states as US cooperate to realize all three pillars of R2P. From another angle, it implies that China largely remains its traditional position of Non-intervention because the Responsibility to React is the very core of R2P.

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

Trade and investment are two instruments which help China rise as a NGPs. China’s participation in multilateral trade system has been extensively examined and it is widely acknowledged that China may exercise

²⁷⁵ *Id.*, at 11.

²⁷⁶ *Id.*, at 12.

²⁷⁷ See *Position Paper of the People's Republic of China on the United Nations Reforms*, Part III.1.

²⁷⁸ 2005 World Summit Outcome, *supra* note 69, paras. 138, 139.

²⁷⁹ See *Id.*, at 23-24.

²⁸⁰ *Id.*, at 23.

²⁸¹ *Id.*, at 23.

²⁸² See, e.g., Security Council Resolution Res 1713(2006), September 29, 2006; Security Council Resolution 1755 (2007), April 30, 2007; and Security Council Resolution 1769 (2007), July 31, 2007.

²⁸³ See Security Council, Resolution 1973 (2011), 26 February 2011; Security Council, Resolution 1973 (2011), March 17, 2011.

²⁸⁴ See Responsibility to Protect, XI; UN Secretary-General, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.

²⁸⁵ See International Crisis Group, *China's Growing Role in UN Peacekeeping*, Asia Report N 166, 17 April 2009.

significant influences on the multilateral trade system.²⁸⁶ Works on China's investment treaties are far less,²⁸⁷ even though China is the second largest BITS signer with 130 BITS and several FTAs including Investment Chapter as of 2011. It seems that people are indifferent what China would bring to investment treaty regime.

This academic phenomenon reflects the very picture of China's traditional investment treaties, which is ultimately dependent upon China's role in international investment. For a long time, there is great asymmetry between Inward Foreign Direct Investment (IFDI) and Outward Foreign Direct Investment (OFDI). For instance, in 2002 China's IFDI reached US \$ 53 billion,²⁸⁸ while its OFDI was US \$ 2.7 billion only.²⁸⁹ It is this asymmetry that fundamentally makes China overwhelmingly concerned with potential challenge from investment treaties to its sovereignty rather than their positive effect to protect its OFDI. As the result, like many other developing states, China's traditional investment treaties were very conservative. In particular, these treaties rigidly confine disputes eligible to international arbitration to those concerning compensation amount arising from expropriation and no resort to international arbitration is allowed without case-by-case consent from China.²⁹⁰ As the result, although many investor-state disputes happened in China, China has never appeared before international tribunal as of May 2011,²⁹¹ and thus international lawyers had little idea of the operation of these treaties.

Story is changing greatly. While China remains its magic as a investment destination, its OFDI leaped in the past decade. During the period 2002-2010, its annual growth rate is 49.9 percent.²⁹² In 2010, China's OFDI reached US \$ 68.8 billion, making it the fifth largest investment source.²⁹³ Investment barriers has become an important concern for China.²⁹⁴ Furthermore, according to a recent survey, political risks has become a prominent concern for Chinese investors.²⁹⁵ At 2012 World Economic Forum, Pascal Lamy, the WTO Secretary-General, warned that political factor will be an increasingly important obstacle to Chinese overseas investment.²⁹⁶

In this new context, China's recent investment treaties have been oriented in order to protect its investment abroad. The most important change is that investment disputes eligible to international arbitration have been expanded to all legal disputes arising from investment.²⁹⁷ Noticeably, the first BIT which represented China's shift in investment treaties was signed in 1998 between China and Barbados, a developing state from Africa. In that BIT, China for the first time consented (or required?) that any investor-state investment dispute could be submitted

²⁸⁶ See e.g., Supachai Panitchpakdi, *China and the WTO: Changing China, Changing World Trade*, J. Wiley & Sons Asia ; 2002; Deborah Z. Cass, Brett G. Williams and George Barker eds., *China and the World Trading System*, Cambridge University Press, 2003; Francis Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation*, Hart Publishing, 2010.

²⁸⁷ Recent accounts, see mainly Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice*, Oxford University Press, 2009; Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43 INT'L LAW 1301(2009); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73(2007).

²⁸⁸ 2003 World Investment Report, at 42.

²⁸⁹ 2010 Statistics Bulletin of China's Outward Foreign Direct Investment, at 5,

²⁹⁰ See, e.g., China-U.K. BIT, Article 7(1).

²⁹¹ On 24 May, 2011, ICSID registered the first case against China. A Malaysian construction company asserted that China expropriated its investment. See *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15), May 24, 2011.

²⁹² 2010 Statistics Bulletin of China's Outward Foreign Direct Investment, at 5.

²⁹³ *Id.*, at 4,5; 2011 World Investment Report, at 9.

²⁹⁴ For instance, partly ignited by failure of the bid by a Chinese oil company to an American oil company out of political pressure, China warned that "...the review procedure of the Committee on Foreign Investment in the United States (CFIUS) will ensure all foreign investment, irrespective of source, to be treated uniformly, fairly." Note of the 4th China-US SED (June 27, 2008), at http://news.xinhuanet.com/newscenter/2008-06/27/content_8450010.htm (visited December 1, 2011).

²⁹⁵ See MIGA, *2009 World Investment and Political Risks*, World Bank, 2010, at 84.

²⁹⁶ See "China's expansion raises concern", at

<http://www.businessday.com.au/business/chinas-expansion-raises-concern-20120127-1qljt.html> (visited January 29, 2012).

²⁹⁷ See, e.g., China-France BIT(2007), Article 7.

for international arbitration without specific consent.²⁹⁸ After a survey of China-African BITs, someone complained that these BITs “have little difference between China-African BITs and BITs between Africa and other Western countries”.²⁹⁹ Interestingly, Professor Chen An, a Chinese legal authority who has been arguing for NIEO for more than 30 years, proposed an interesting proposition: China should maintain the traditional approach of case-by-case consent to international arbitration in BIT negotiations with developed states on the one hand; on the other, China should apply the new approach of general consent in BIT negotiations with developing states.³⁰⁰

To date, two investor-state cases have been brought by Chinese investors.³⁰¹ As a rule,³⁰² Chinese investors would become one of most active users of investor-state arbitration mechanism because Chinese investment will pour around the world, especially into developing states where foreign investment, generally speaking, is more susceptible to investment risks than that in developed states.³⁰³ However, it is too early to argue that this rule will apply to China because, if China wants to maintain its historically friendly ties with developing states, China’s government might make those state-owned corporations, which conduct more than sixty percent of Chinese overseas investment as of 2011,³⁰⁴ refrain from resort to international arbitration mechanism against developing states. Thus, a more probable picture might emerge in the future that, while “investment disputes” between Chinese investors and host states will increase dramatically, “arbitration claims” to be brought by Chinese investors might be far less as people anticipate. Nevertheless, these investment treaties are meaningful for Chinese investors because they may be “a last resort”.

From the GP perspective, China may not stop at instrumentalizing investment treaties, i.e., protecting transnational investment in China and abroad. Rather, China may play a key role in reshaping investment treaty regime. It is said the ongoing China-US BIT negotiations provides a historical chance for two GPs to make law for the world. Indeed, law-making for third states by GPs is not new.³⁰⁵ China-US BIT program, however, is special. This is because China, as a mixture of the largest developing state, a leading investment destination, and an increasingly important investment source, is well positioned to balance competing interests between developed states and developing states, between capital exporting states and capital importing states. Therefore, this author once appealed that China-US BIT program “should not be limited to a grand bilateral bargain only”.³⁰⁶ Rather, it can be considered “to open an unprecedented, equal dialogue between developed world and developing world, whereby it can enhance to reconstruct the current investment treaty regime.”³⁰⁷

3. HRs Issue: From Relativism to Universalism

In the past two decades, HRs may be the only one issue which has made China under huge pressures and fierce criticisms from the Western world.³⁰⁸ China has been blamed not only because of its national HRs record,

²⁹⁸ China-Barbados BIT(1998), article 9.

²⁹⁹ Uché U. Ewelukwa, *South-South Trade and Investment: The Good, The Bad and the Ugly*, 20 MINN.J.INT’L L.513, 558(2011).

³⁰⁰ Chen An, *Distinguishing Two Types of Countries and Properly Granting Differential Reciprocity Treatment*, 8 JOURNAL OF WORLD INVESTMENT & TRADE, 771(2007).

³⁰¹ China Heilongjiang International & Technical Cooperative Corp, Qinhuaingdaoshi Qinlong International Industrial, and Beijing Shougang Mining Investment v. Republic of Mongolia, PCA Case No. 2009-23; Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 .

³⁰² Most investment claims are brought by investors from a handful of capital exporting states, such as US, U.K.

³⁰³ As of 2010, more than 90 percent of China’s stock OFDI is in developing states. *2010 Statistics Bulletin of China’s Outward Foreign Direct Investment*, at 16.

³⁰⁴ *2010 Statistics Bulletin of China’s Outward Foreign Direct Investment*, at 18.

³⁰⁵ See Nico Krisch, *supra* note 116, at 398-399.

³⁰⁶ Cai Congyan, *supra* note 131, at 507.

³⁰⁷ *Id.*, at 500.

³⁰⁸ See, e.g., Daniel C. Turack, *The Clinton Administration’s Response to Chin’s Human Rights’ Record*, 3 TULSA J. COMP. & INT’L L. 1 (1995); Ann Kent, *China and the International Human Rights Regime*, 17 HUM.RTS.Q.3(1995).

but because of its hinder of international endeavours to improve HRs situation in those states with poor HRs record.³⁰⁹ The underlying reason is that China, together with many other developing states,³¹⁰ argued for so-called relativism based upon its cultural diversity while arguing against the universality which has been taken for granted among most Western states.

Obviously, a thorough survey on the long disputes between universality and relativism is beyond the mandate of this piece. Rather, it suffice to examine the evolution of relativism and universality in China from the perspective of discourse. Speech by Liu Huaqiu, then Chinese Delegation Head to 1993 World Conference on Human Rights, often was cited as the authoritative expression of China's relativism in HRs. Liu said,

“The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development states have different human rights requirements... Thus, one should not and cannot think the human rights standard and model of certain countries as only proper ones and demand all other countries to comply with them...”³¹¹

In 2005, China for the first time accepted the “universality”. China-Russia Joint Statement(2005) provides that HRs are “universal”³¹² Interestingly, in this Joint Statement, the diversity of cultures and civilizations, which was the justification for relativism in Liu's speech, is intentionally detached as an independent issue beyond human rights.³¹³ In the first National Report before UN Human Rights Council in 2008,³¹⁴ China reported that it “respects the principle of the universality of human rights”, even though it still argued that “Given differences in political systems, levels of development and historical and cultural backgrounds, it is natural for countries to have different views on the question of human rights.”³¹⁵

Although China has internationally recognized the universality of HRs since 2005, the word “universality” has never appeared in any official document in China until, In April 2009, China released its first HRs Action Plan. This document is the first official document including the term “universal”. In that document, China's government argues that it has combined “the universal principle of human rights and the concrete realities of China”.³¹⁶ Furthermore, China's government appears to water down the so-called particularity of China because this document mentions the “concrete realities of China” only, without further elaboration as before.

Indeed, the implication of this change of discourse should not be overstated. Recognizing the concept of universality is one thing and implementing it is another thing. Furthermore, the value of “universality” itself has been circumscribed because, as indicated in 2005 World Summit Outcome, the “universality” has to coordinate

³⁰⁹ See, e.g., UN Human Rights Council, Resolution S-18/1 of The human rights situation in the Syrian Arab Republic, 5 December 2011. Among all 47 member states, 37 states say “Yes”, 6 states abstain, 4 states including China and Russia say “No”. See also Juan Vega, *China's Economic and Political Clout Grows in Latin America at the Expense of U.S. Interests*, 14 MINN. J. GLOBAL TRADE 377, 393(2005).

³¹⁰ See generally William Twining eds., *Human Rights, Southern Voices*, Cambridge University Press, 2009.

³¹¹ Citing from Michael C. Davis ed., *Human Rights and Chinese Value: Legal, Philosophical and Political Perspective*, Oxford University Press, 1995, at 13. As for criticisms of China's relativism, see, e.g., Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L.215(1995); Melanne Andromedea Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L.285(1995).

³¹² China-Russia Joint Statement(2005), *supra* note 65, Point 6.

³¹³ *Id.*, Point 8.

³¹⁴ UN Assembly, Resolution 60/251 of Human Rights Council, 3 April 2006.

³¹⁵ China National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, /HRC/WG.6/4/CHN/1(“China National Report”), Human Rights Council, 10 November 2008, para.6.

³¹⁶ National Human Rights Action Plan of China (2009-2010), Introduction, para.2.

with the “indivisibility”, “interdependence” and “interrelatedness” of all HRs.³¹⁷ Nevertheless, if people consider that the “universality” is the very core of long confrontation between China and Western states over HRs, this change of discourse still is an important progress. This change may imply that China’s government will embark or speed up some HRs programs, in particular the ratification of the International Covenant on Civil and Political Rights it signed in 1998,³¹⁸ which would be a milestone event for China’s HRs practice..

Conclusion

GPs are prominent in international relations and their rise and fall often leads to structural change of international relations. While international lawyers have done many studies about the effect of the primacy of US, an OGP defined in the article, on international law since 2000, attention has hardly been paid to the rise of NGPs.

NGPs are exhibiting their increasing “absolute” power while huge gaps exist between them and OGPs. Furthermore, NGPs aren’t recognized and recognize themselves as Non-Western States. All these make NGPs inherently motivated to shape and reshape international law, which has been overwhelmingly dominated by OGPs. In this process, national interest maintains the basic action logic of NGPs as do OGPs. However, it doesn’t mean that states always seek to maximize their national interest, which is a “positive approach”. Rather, they may adopt a “negative approach”, in accordance with which states may act in a way benefiting other states or international community without fundamentally damaging their national interest. Moreover, the trend of de-nationalization or individualization of national interest constitutes a lasting and increasingly important factor underlying international law practice of NGPs and OGPs. This means, in shaping and reshaping international law, NGPs are positioned both differently from and similarly with OGPs.

From the perspective of rise and fall of GPs, implications on international law are produced with the rise of NGPs, but it doesn’t mean all implications are brought about by NGPs. Rather, some implications are produced as the result of interactions between NGPs and OGPs, which means the latter also contributes to such implications.

Implications on international law with the rise of NGPs include both challenges and promise. Among major reasons for such challenges is the lack of effective mechanism of regulating GPs. While a universal approach to regulate GPs is unnecessary and unpractical, a specific approach is necessary and possible. For instance, some legal criteria may be proposed to apply to NGPs which are competing for potential permanent membership of UNSC. An examination of fragmentation of international law in trade regionalism, HRs and climate change shows a perspective of GPs’ rise of fall is needed because such phenomenon: (a) occurs more inside than outside the existing international legal order; (b) is contributed by both NGPs and OGPs. Furthermore, in past centuries, the Western, developed world has endeavored to push the Non-Western, less-developed world to embrace the modernity of international law, which is characterized by economic freedom, political democracy and ideological individualism. However, in economic field at least, the rise of NGPs makes OGPs realize what they have pursued is becoming an increasing challenge for them and international law.

The remedy of “development deficit” and “democracy deficit” may be major promises with the rise of NGPs. “Old NIEO” initiated by developing states in 1960s is a historical endeavor to remedy “development deficit”. The lack of support from GPs is an important reason why it was substantially frustrated since the 1980s. A “New

³¹⁷ 2005 World Summit Outcome, *supra* note 69, para.13.

³¹⁸ China repeatedly promises to speed up the ratification of this treaty. See, e.g., “China National Report”, *supra* note 315, para.11.

NIEO” is emerging with the rise of NGPs. It, in some sense, resumes the “Old NIEO”. Nevertheless, compared with the “Old NIEO” which is much confrontational and less cooperative between developing states and developed states because its overwhelming purpose was to favor the development of developing states, “New NIEO” may be less confrontational and more cooperative because NGPs and OGP have more common interest in regulating international economic affairs than before. While “democracy” has become a new instrument for international law to intrude internal affairs of states, “democracy deficit” of international law itself has been given far less concern. The rise of NGPs may help remedy such deficit and some progress has been achieved.

As a NGP which might become a new superpower, China is the best sample to examine the relationship between NGPs and international law. From an examination of the evolution of China’s international legal policy, it seems that China, as a NGP, intends to act in a way that is different from that of OGP. However, with the examination on the China’s latest legal practice concerning intervention, investment treaties and HRs, it is found how challenging for China to carry out its declared international legal policy. Nevertheless, in some sense, “a quiet revolution” is indeed happening in Chinese international law.