

[COORDS.]

PAULO BORBA CASELLA • ELEN DE PAULA BUENO
EVANDRO MENEZES DE CARVALHO • WILLI SEBASTIAN KÜNZLI

BRICS
INTERNATIONAL LEGAL ASPECTS OF

PREFACE BY THOMAS LAW

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Presentation

The term BRIC was first coined in 2001 by Jim O'Neil in the Building Better Global Economic Report of the global investment banking Goldman Sachs, to identify Brazil, Russia, India and China. The coordination between Brazil, Russia, India and China (BRIC) began informally in 2006, with a meeting at the margin of the opening session of the UN General Assembly. Since the first Summit, held in Yekaterinburg in 2009, the dialogue between BRIC Members - which became BRICS with the entry of South Africa in 2011 - expanded its agenda and the intensity of interaction among its members.

At the fourth BRICS Summit in New Delhi (2012), the leaders of Brazil, Russia, India, China and South Africa considered the possibility of setting up a development bank to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies, as well as in developing countries. During the sixth BRICS Summit in Fortaleza (2014), the leaders signed the Agreement establishing the New Development Bank (NDB) and launched the BRICS Contingent Reserve Arrangement, focused on maintaining the financial stability of the member countries of BRICS and providing short-term liquidity support when the member countries confront the balance of payment pressure.

The levels of institutionalization and cooperation within BRICS are increasing each year. Although many studies attempt to explain the BRICS phenomenon, especially from economic and political perspectives, there is a lack of research focused on its legal international dimension. In this context, it becomes extremely opportune to broaden the understanding of the BRICS from a legal point of view, seeking to promote debates in the light of contemporary international legal issues. This book brings together the reflections of several researchers on BRICS international legal aspects.

In the first chapter *BRICS – Brazil, Russia, India, China And South Africa – As Element Of A New World Order*, Paulo Borba CASELLA analyses the scope

of BRICS as ‘element of a new world order’. According to CASELLA, BRICS can significantly contribute to shape a new international world order and the crucial issue of cooperation cannot be avoided, and evidence of that can be found in the talks about the theory and the practice of these questions, not only in Brazil, as well as in Russia, in India, in China and also in South Africa. On the other hand, several initiatives are simultaneously under way among the three Eurasian participants of BRICS, including the EURASEC – the Eurasian Economic Community and the Customs Union of the EURASEC. Other ongoing initiatives, such as the Silk Road Economic Belt and the SCO – the Shanghai Cooperation Organization, in view of its agenda and the growing number of its participants – in addition to China, Russia, India and Pakistan – could render the BRICS redundant (for the Eurasian participants) and irrelevant (vis-à-vis third countries), even before same could achieve substantial results.

The second chapter investigates the *Global Energy Governance within BRICS players: cooperation and adoption of efficient measures to achieve progress*. According to Marilda ROSADO e Fernanda VOLPON, the role and importance of the BRICS emerging powers in the international economic arena and in the energy field has significantly increased. The research examined the global governing mechanism of energy and the position of the BRICS in the current scenario of global energy governance, as well the status of promotion of renewable energy within such States. The studies demonstrated that although the BRICS countries adopt divergent public policies and consequently these States have not reached an agreement of a coordinated initiative towards global energy governance, from a broad perspective, they have potential space for implementation of regulatory regimes to achieve progress in the energy sector, especially renewable energy, resulting in more accessible energy along with environment protection.

In the third chapter, *Unfair competition in the Russian Federation and cooperation within BRICS*, Anna LAPTEVA devoted to the questions relevant to the notions “unfair competition,” “competition” and its correlation, distinguish with the contiguous notions. As demonstrated, in the literature are deduced the different characteristics of unfair competition such as acts aiming to obtain advantages through entrepreneurial activity, incursion and potential losses for entities – (competitors), arising as a result of said acts. It is set out special features of the legal regulation the competition and the struggle against unfair competition by the laws of the Russian Federation. The author argues that the Russian lawmakers on the whole have adopted the European system of anti-trust regulation (the restriction and control of monopoly activity). However, the Russian legal regulatory system against unfair competition has its specific features. In particular, it is based on the plurality of resources that have different legal validity and are linked to different branches of law. Finally, the studies also consider the problems of protection against acts of unfair competition are widely

covered in the legal practice, classification of legal protection forms (factual and juridical, jurisdictional and not jurisdictional, public and private, etc.).

The *BRICS and the law of the sea: cooperation prospects* is the fourth contribution on international legal aspects. In this chapter, *Nathalia DUCCINI*, analyzes the rise of the BRICS, its goals and, through the groups' joint declarations, the importance of the law of the sea is verified. Based on both the Fortaleza Joint Declaration, from 2014, and the Ufa Joint Declaration, from 2015, two key points related to the law of the sea are identified: piracy and maritime migration. The joint declarations are analyzed in light of the main international instrument for the regulation of the law of the sea, the United Nations Convention on the Law of the Sea, from 1982, in addition to other instruments such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Maritime Search and Rescue (SAR) and the Guidelines on the Treatment of Persons Rescued at Sea. The cooperation features and joint action plans of the group are analyzed, as well as possibilities of further cooperation in subjects such as the environmental protection, the international fisheries regime and the sustainable management of the Arctic resources. The author concludes that BRICS's rise is part of the expanding movement of International Law since it emerges as a promoter of discussion and change based on the rule of Law, perpetuating existing international organizations and expanding the international community's agenda.

The fifth chapter, *Theorizing BRICS: Critical Perspectives*, Alexander SERGUNIN argues that BRICS has always been an "uncomfortable" or exceptional case for IR (International Relations) theorists. Theories which they have tried to apply to the study of BRICS as an institution or its international activities worked poorly or did not work at all. Scholars, who want to apply Western theories to BRICS, often have to justify this against claims that BRICS is *sui generis* and that empirical knowledge of BRICS current policies are far more important to understand this grouping's international behavior than any theoretical sophistication. However, as we know from the history of science, it is useless and counterproductive to contrapose theory to empirical knowledge. Ideally, they should go hand in hand, and support each other. To continue this way of reasoning, without theoretical foundations, research on BRICS often lacks either the critical edge or credibility. In this chapter, the most popular theoretical interpretations of BRICS are critically reviewed and some alternative explanations are suggested.

The Perspectives and Achievements Regarding the International Criminal Court Among the BRICS Countries are also examined in the sixth chapter by Cássio Eduardo ZEN. In this chapter, the author examines the relationship between the BRICS countries and the International Criminal Court, pointing towards the diversity of approaches and results so far. The studies point out the International Relations and International Law adaptation to a

developing, dynamic and different world. The former international traditions are quickly eroding and are being challenged by actors and countries outside of the Western-European block. In this Copernicus shift of International Law, the informal debate forum called BRICS is a paradigmatic scenario where the five countries attempt to set a different agenda to International Relations and Law. At the same time, following the end of the Cold War, the rise of post-modern International Criminal Law and the ICC also brings in a different set of topics to the International Actors.

The seventh chapter analyses the *BRICS' and the international monetary and financial system: an overview of its Regulatory Agenda*. Since the development of 2007's economic crisis, which started in US' and in Europe's financial markets, the geopolitical situation has seen changes due to the unprecedented creation of an international coalition between Brazil, Russia, India, China and South Africa (better known by the acronym BRICS). Since then, BRICS has demanded reforms in the institutional financial architecture derived from Bretton Woods' agreement (such as in the World Bank, in the International Monetary Fund and in the dominant role of United States' currency in international monetary relations). In this chapter, Jonnas VASCONCELOS presents a brief overview of the different approaches to BRICS, we analyse the recent development of such regulatory agenda.

The Legal-Comparative Analysis of the Regulation of the Gas Industry in BRICS States, by Aleksander VOLKOV, presents the results of a comparative legal analysis of gas industry regulation in BRICS countries. The author provides a general overview of the sources of the regulatory environment in the gas sector and compares the legal regulation of natural gas production, transportation, distribution and trade in the BRICS States. The researcher describes the legal constraints of natural gas export and import. The study brought him to the numerous conclusions. Firstly, all BRICS countries try to develop their gas industries. Some BRICS countries, like Brazil, South Africa, and, to some extent, India) are radically reforming their legal systems, while others are trying to solve their problems by opening up to government and private investments within the existing regulatory system (China and Russia). Secondly, all BRICS countries currently have a high level of monopolization in production, transportation, distribution and trading (to varying degrees). However, only in Russia monopoly is legally enshrined in the area of gas export. Thirdly, it appears that all BRICS governments understand the necessity to create a competitive market environment and are taking appropriate actions. Fourthly, all BRICS countries have corruption problems, as well as problems with government failures; therefore, the effect of the reforms in the short-run will depend greatly on the political will of each respective government and to a lesser degree on the quality of legal regulation.

The chapter *BRICS and foreign investments: economic inconsistencies and policy divergences*, José Augusto FONTOURA COSTA e Ely Caetano XAVIER JUNIOR point out that further than a group of countries with relevant

economic potential, BRICS evolved as an institutionalized political forum to coordinate policies in areas beyond financial and economic regulation. Even though economic matters remained at the core of BRICS agenda, the countries failed to advance negotiations of common policies regarding foreign investment. The author argues that the lack cooperation on foreign investment issues echoes both the deep economic inconsistencies and the domestic political gaps existing among BRICS countries. The analysis comprises not only the evaluation of economic indicators such as gross domestic product and foreign direct investment flows but also a comparison of domestic policies relating to investment agreements.

In the tenth chapter, Alexandre de Oliveira MARTINS, Elen de Paula BUENO and Marina FREIRE analyze the *Role of BRICS in the international security system*. The research considers the formation of the BRICS and its role as a player in the new multipolar international order, demonstrating, in particular, its intention to participate in the international security system. Moreover, it examines the possibility of cooperation in the group through the exchange of information and sharing of intelligence. According to the study, the international problem of dualism unilateralism/multilateralism and traditional/rising countries culminates in the origin of new power arrangement attempts for a multipolar order. The studies also verified that each of the BRICS relates differently to security, military spending and intelligence activity.

In the chapter *BRICS and Space Law: challenges and perspectives for cooperation*, Jonathan Percivalle de ANDRADE examines the participation of the states in the five main treaties that form the space law, especially the almost identical participation of BRICS in these norms. According to the author, the first memory of Space Law takes place in Sanya Declaration (2011), in order to congratulate Russia for 50 years anniversary of Yuri Gagarin's flight, first human to go into space. The Space Law has remembered again only in the Declaration of Fortaleza (2014), which showed the concern of the BRICS to the peaceful use of outer space. Ufa Declaration finally reaffirmed the need of use of space for peaceful purposes, especially the importance of cooperation for development of matter, as well as freedom and equality in space exploration for peaceful purposes.

In *The New Development Bank (NDB) in the context of global governance reform: complementing the efforts of existing institutions in financing infrastructure projects and sustainable development*, Elen de Paula BUENO points out the role of the New Development Bank in supporting sustainable development and infrastructure projects. Since the first summit in 2009, the BRICS nations support the reform of the international financial institutions, especially the IMF and the World Bank. According to the countries, the dynamic process of reform is necessary to ensure the legitimacy and effectiveness of the Bretton Woods institutions. Created during the VI Summit held in Fortaleza, in 2014, the New Development Bank represents a demand for governance reform and

the same time an attempt of complementing the efforts of existing institutions in financing infrastructure projects and sustainable development.

In the Chapter *Borrowing Country-oriented or Donor Country-oriented? Comparing the Operational Institutions of NDB and AIIB*, Jiejun ZHU compares the BRICS New Development Bank (NDB) and the Asian Infrastructure Investment Bank (AIIB). The research shows the different institutional approaches for emerging economies to institutionalize the new development assistance and participate in the global economic governance. From a historical intuitionism perspective, it examines the critical juncture and structural factors leading to the creation of these new banks and different institutional proposals during the establishment negotiation processes to explain the difference.

Evandro Menezes de CARVALHO, in *The second decade of the BRICS: between the expansion and the retraction of the reformist agenda*, addresses the BRICS agenda in defense of the reform of international institutions. According to CARVALHO, the New Development Bank may strengthen, through institutional mechanisms, the BRICS agenda in defense of the reform of the IMF and the World Bank. Regarding the BRICS and the New Development Bank, the scenario reveals its expansion, despite the internal and external difficulties. In both cases, if the reform agenda of international institutions remains on the brink of BRICS, then the original project, expanded or not, via new members, will have been preserved – maintaining its original impetus on the eve of its second decade of existence. Otherwise, the BRICS will have been yet another failed attempt by diplomatic action of developing countries to reenvision the international order and the international system.

In *Building infrastructure for 21st century sustainable development*, Karin Costa VAZQUEZ analyses the New Development Bank commitment to infrastructure and sustainable development. According to VAZQUEZ, in the absence of a clear definition and criteria to qualify the very notion of ‘sustainable infrastructure’, it will be challenging for the NDB to designate infrastructure as sustainable and realize its vision around sustainable development. The author argues that the NDB is presented with an opportunity to define sustainable infrastructure and pioneer a new approach to development financing. As such, the NDB should expand on the ‘do no harm’ approach typically adopted by MDBs to incorporate a more ‘transformative’ approach towards development.

Paulo Borba Casella

Elen de Paula Bueno

Evandro Menezes de Carvalho

Willi Sebastian Künzli

[Coords.]

Preface

As the Chairman of IBRACHINA – Instituto Sociocultural Brasil + China, an Institute that was created to foster the relationships between Brazil and China, I am highly honored and pleased to present and support this book “International Legal Aspects of BRICS”.

This is the result of the joint work of a wonderful team of academics from the BRICS countries under the coordination of Full Prof. Dr. Paulo Borba Casella, Prof. Dr. Evandro Menezes de Carvalho, Prof. Willi Sebastian Künzli, and Prof. Dr. Elen de Paula Bueno. The work provided by them is released in a moment that international relationships are facing substantial changes with the rise of BRICS countries to a fundamental role in international politics and policies. This brings up important legal issues that must be addressed.

These issues have largely been reviewed and written about in international publications mainly from the perspective of US and European authors, failing to account for the view of BRICS academics. This is one of the major roles this book plays which is to contribute as an international publication with the view of BRICS academics over their own legal aspects.

The main question underlying this book is: whether and to what extent changes in the international distribution of power can modify the relationships not just inside but also between the BRICS integrated countries?

The incredible work the authors did was not to achieve one single answer to the question above, but rather to foster the discussions about the position and relationship among the BRICS countries in this new scenario and bring to light the important legal issues that arise.

To achieve the above goals, it was more than obvious that a broader discussion, which could bring together many different stakeholders, could only be done by expressing thoughts and ideas in a language at the reach of most academics, in and outside the BRICS countries. For this reason, the book was entirely written in English, in a way the all players could enjoy the debate.

By opening the discussion, Professor Casella, who is the coordinator of GEBRICS – the BRICS Study Group at the University of São Paulo Law School, provides an overview on how the BRICS built their relationship as a group of countries joined by their similarities and their desire to keep their particular identities. He argues that the issue of cooperation is been discussed not only in Brazil, but also in China, Russia, South Africa, and India. As a result, it could “shape a new international world order”. Professor Casella gives, therefore, much room for thought about not just the BRICS’s future, but also the future for the international relations.

Professor Evandro Menezes de Carvalho, Coordinator of FGV Direito Rio’s Centre for Brazil-China Studies, provides a picture of the second decade of the relations among the BRICS. In his piece “The second decade of the BRICS: between the expansion and the retraction of the reformist agenda”, Professor Evandro explores these two movements of the BRICS history.

Another important discussion involves the cooperation between the BRICS, which Nathalia Duccini discusses it in her article. She offers a review of the potential joint action of the BRICS. As a specific example of this cooperation, Prof. Dr. Elen de Paula Bueno, a brilliant academic who recently obtained her PhD at the University of Sao Paulo describes the New Development Bank experience, and its role in financing infrastructure projects and sustainable development.

Karin Costa Vazquez also discusses in her article particularly the public-private partnerships and the New Development Bank as a way of this integration between BRICS. The promotion of infrastructure is also discussed by Jiejun Zhu in an article named “Borrowing Country-oriented or Donor Country-oriented? Comparing the Operational” Institutions of NDB and AIIB”. The author brings up the difference between the New Development Bank and Asian Infrastructure Bank and its implications.

The urgent need for infrastructure development is a common characteristics of the BRICS as well as the problem in accessing funds, which have usually come at the expense of having to take risks and comply with rules imposed by a western culture that may not reflect the intrinsic values and characteristics of the BRICS. The authors contribution to this field is very much appreciated by putting light on the role of the New Development Bank and the need of joint efforts of BRICS to achieve their development goals.

Another important feature when it comes to reviewing legal aspects of BRICS is dispute resolution. When cooperation increases and relations between countries are deepened, different cultures and complex projects inevitably gives rise to disputes and the need of effective dispute resolution tools cannot be underestimated. Emílio Mendonça Dias da Silva discusses in his chapter how arbitration can be applied and its legal issue from a BRICS perspective. He

brings an important contribution to a BRICS view of how to solve dispute by taking into account the identity and culture of each of the BRICS countries, which is frequently ignored in other international publication about in this particular field.

In summary, the articles in this book are very well researched and written with enough conviction to make a valuable contribution in developing our understanding about BRICS, its legal aspects and the role they play in the international scenario. I expected that International Legal Aspects of BRICS could be a resource for academics, researchers, and graduates across all social sciences and I am proud that IBRACHINA could support this important work.

Thomas Law

Chairman of IBRACHINA – Instituto
Socio-Cultural Brasil China

The levels of institutionalization and cooperation within BRICS are increasing each year. Although many studies attempt to explain the BRICS phenomenon, especially from economic and political perspectives, there is a lack of research focused on its legal international dimension. In this context, it becomes extremely opportune to broaden the understanding of the BRICS from a legal point of view, seeking to promote debates in the light of contemporary international legal issues. This book brings together the reflections of several researchers on BRICS international legal aspects.



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