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Tatiana Alexeeva & Pierangelo Catalano (eds)
Pravovye aspekty BRIKS = Legal aspects of BRICS = Aspetti giuridici del BRICS
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Reviewed by SALVATORE MANCUSO
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This trilingual volume was edited by Tatiana Alexeeva, Dean of the Faculty of Law of the St Petersburg branch of the National Research University ('Business High School') and Pierangelo Catalano, head of the research unit 'Giorgio La Pira' of CNR-University of Rome ('La Sapienza'). It is a collation of all the papers presented by academic scholars from the BRICS countries and Italy at the St Petersburg seminar in September 2011. As stated by the organisers, the seminar dealt with four themes:

i. Legal bases of the functioning of BRICS: international law and *ius romanum commune*;
ii. BRICS and harmonisation of legal regulation of environmental protection;
iii. BRICS and harmonisation of legal regulation of the energy sector; and
iv. BRICS and harmonisation of legal regulation of trade and finances.

The main BRICS foundations and objectives are summarised in the introduction by Pierangelo Catalano, titled 'Main objectives and foundations of BRICS — Origins and history'. The natural foundations of BRICS, emerging from the Yekaterinburg Joint Statement (16 June 2009) and from the Sanya Declaration (14–15 April 2011), lie in the fact that Brazil, Russia, India, China and South Africa hold a total population of around 3 billion people and that these countries play a fundamental role in international relations. Based on such observations and moving from a historical perspective overcoming the outcome of the Second World War, the BRICS countries call for reform of the United Nations, with particular reference to its Security Council, and push for reform of the IMF too. Considering such demands from the Roman law perspective, they emphasise the need to set up an *auctoritas publica universalis* aimed at stopping violations to the nations' sovereignty, and at fighting international usury realised through the so-called foreign debt.

Pierangelo Catalano then observes how, from the BRICS experience, environmental aspects (i e territorial expansion, demographic development, economic consistency) must be considered in the light of 'the legal history of the great spaces, with the continuity of at least two great empires', since the heritage of the Middle Empire has devolved upon China, while that of the Roman Empire survives in the Russian concept of the 'Third Rome' and in the Brazilian idea of the 'Fifth Empire'. Catalano hopes that through BRICS enforcement it would be possible to take advantage of history and restore the *ius gentium*, whose validity goes beyond agreements, being based upon the *fides*.

The four themes of the conference are addressed below.

The first theme, 'Legal bases of the functioning of BRICS: international law and *ius romanum commune*', was discussed by eight scholars.

Vladimir Mihajlovič Davydov's article is titled 'Inequality in development as start point for the creation of new centres of economic power and political influence'. The author considers that international relations vary according to the relevance of the actors and that at present, new international aggregations, in which emerging countries are participating, are taking place to move to a polycentric system of decision-taking centres. The BRICS is a union of the key representatives of five different civilizations willing to play a major role in international regulation. Each of these emerging BRICS member countries already has a coalition of contiguous states formalised into different integration agreements. Consequently the BRICS have begun to play a distinct role in Russian foreign policy due to its long-term strategy. It is therefore important to find viable cooperation solutions not only with the first group of emerging powers, but also with those which are dynamically joining them in development.

In his 'Empires, hegemony and cooperation', Paulo Borba Casella discusses the dualism between hegemony and cooperation and its implications in international law as dualism between the use of force and the use of law, where the use of force leaves behind the operation of international law. He notes how many hegemonic countries are still tempted to resort to force rather than to use the law. In his view BRICS could be one way to reshape the entire world. Borba Casella notes that empires mutually secure themselves while also helping to build the fundamental requirements and features of a multilateral system based on the centrality of international law. Since such a system is yet to be created, he argues that the BRICS could significantly contribute to this process. He thinks that the BRICS countries can set up the parameters for a multilaterally ordered world based on international law and having as its main pillars the international institutions, considering the reforms they have requested of the international financial institutions as part of the effort to redraw the map of the international financial power for the future. He then concludes by closely examining the lesson that can be drawn from Roman imperial and legal models.

Sandro Schipani's '*Ius Romanum commune* and equality among people in the BRICS perspectives' touches upon two main subjects. First, the author analyses the legal grounds of the convergence among the BRICS countries. This subject is considered looking first at international law, where common legal rules are developing, and then at Roman law, where the *ius commune* has always existed and is accompanied by the 'domestic' law of every people. The author assumes that the plurality of the laws will be preserved and that it is compatible with a harmonisation of the system. He also observes that Roman law must not be imposed but studied and voluntarily transposed: it is a common world heritage, used by four BRICS countries and opened to the dialogue with India.

The second main subject dealt with is the issue of the equality among people. Schipani proceeds from Roman law to the declaration on usury and

international debt to affirm the need to improve daily law by taking into account the views of all stakeholders. Being free from any national tie, Roman law is in the hands of people and jurists and the different points of view of the BRICS countries can enrich it. In conclusion, Schipani advocates the training of BRICS jurists based on common principles and the use of domestic law in the relations and disputes between citizens of the BRICS countries, scientific meetings and joint doctorates.

Xu Guodong, in 'Roman law and BRICS countries: codification in China and India', moves from the meaning of Roman law as the law in force in the Roman empire up to the Justinian codification, but also as synonym of the civil law legal tradition, the 'present Roman law'. He widely uses in his paper this second meaning too, considering the law as the main source of law in its form of codification. China introduced Roman law into its legal system even through Soviet law. India has not introduced Roman law into its legal system, but with regard to codification it adopts written laws even if judicial decisions constitute binding precedents (case law). The author concludes that Roman law intended as supremacy of the law (especially in the form of a code) is common to all BRICS countries, India included.

In his 'Constitutional grounds of the Brazilian participation to BRICS', Adriano Pilatti briefly examines the rules and principles of the 1988 Brazilian Federal Constitution on international cooperation, an important area for BRICS. He analyses the rules establishing the grounds and the aims of the republic and those ruling international relations, economic organisation and environmental protection.

Boris Fëdoroviè Martynov devotes his article entitled 'BRICS: a legal cooperation perspective' to possible cooperation within the ambit of BRICS and with reference to international law. Martynow analyses the general features of the civil law legal tradition, to which Brazil, China and Russia belong, to identify the differences between that and the case law system, to which the common-law countries belong, with specific reference to the attitudes of both legal traditions to international law. He also considers the contribution of the Latin-American countries, and especially Brazil, to codification and the progressive development of international law, specifying the areas of cooperation between Brazil and Russia in the field of international legal relations.

Igor Stanislavoviè Marusin engages in a discussion of 'BRICS and the perspective of creating a new international security system'. He believes that although the BRICS countries are interested in having a common approach for a stronger security, it is unlikely that their cooperation could get full military support like that of NATO. However, the author thinks that in the event of a serious deterioration in international relations, the BRICS countries could resort to common economic instruments directed against the state or states whose actions are seriously harmful to international peace and security and to the interests of the BRICS countries themselves.

Giancarlo Taddei Elmi in his contribution, 'An IT project for the bibliography on BRICS countries', deals with BRICS from a different angle.

Taddei Elmi proceeds from point 4 of part II (New areas of cooperation) of the Sanya Joint Declaration of 2011, where the collection of data on BRICS countries was indicated as one of the new areas of cooperation. He suggests a project where such data would be digitised and improved, using information technology. The author conducted internet research using both traditional and virtual databanks. The result of this survey shows that 60% of the existing information on BRICS deals with economics, 20% with international relations, 15% with socio-political issues, and 5% with legal issues, mostly international law. Although this is a preliminary study, it makes it possible to identify the necessary steps to create a proper databank, which are:

- analysis of the already existing information
- creation of a network with research centres in each BRICS country which would collect the information existing there according to common pre-determined criteria
- collection of information according to the above-mentioned criteria, structured in accordance with its content, such as economics, politics, international relations and law, which would be divided, in turn, by domain
- document development for each kind of bibliographic resource indicating the significant data both in terms of information and retrieval
- inclusion of such structured documents in an archive accessible through the web
- preparation of the search system offering the most advanced search option for the information contained in the archive
- creation of the website, which could be named 'INFOBRICS'.

The second theme, 'BRICS and harmonization of legal regulation of the environmental protection', was discussed by three scholars.

In 'The environmental law science and the necessary resort to Roman law legal categories', Paolo Maddalena analyses the present dogmatic instruments used to develop environmental law, using Italy as case study. He considers first the abundance of legal concepts relating to the idea of the liberal state and the concept of a subjective right, to move to the concept of 'collective' in the Italian Constitution and to the meaning of '*res*' with reference to the common interest. The second part of his article considers the usefulness of the concepts arising from Roman jurisprudence for a systematic creation of environmental law, with particular reference to Gaius's tripartition among *personae*, *res*, and *actiones*. *Personae* are seen in their relation with the people. *Res communes* are considered as part of the general welfare. The *actiones* are seen as public actions, amounting in a way to anticipatory class actions. In conclusion, Maddalena notes the acceptance of the above-mentioned approach by the Italian Constitutional Court and refers to some relevant decisions.

Fernando Walcacer contributes to this part with his article entitled 'Environmental law and cooperation among the BRICS: building sustainable development'. He highlights how the economic and political role of the

BRICS countries will increase substantially in the next decades. These countries could cooperate towards new environmental practices (for instance, related to the protection of the marine environment, sound management of natural resources, the fight against desertification, et cetera). He affirms that the harmonisation of BRICS environmental law, based on the balance between the quality of the environment and the dignity of human life, will contribute significantly towards achieving this aim. According to Walcacer, the different environmental situations in the BRICS countries, with particular reference to their biodiversity and natural resources, should not prevent them from sharing information about the environmental risks posed by new technologies, as well as the implementation of joint research projects related to clean technologies, following the guidelines of Chapter 34 of Agenda 21. The BRICS can also call for a more rigorous implementation of international conventions which deal directly with their own environmental sustainability.

Fei Anling's contribution, 'Legal liability on environmental protection in the development of BRICS economic cooperation', is divided into three parts. She first considers the general legal framework for environmental protection in the ambit of economic cooperation between BRICS countries, and the role that Roman law can play in this respect. Here attention is directed to what she considers the main legal concepts relating to the environment: public interest and environmental management. In this context, environmental protection through the *interdicta* of the *praetor* and the public *actiones* are considered. Then the author deals with the public administration's responsibility for environmental supervision and control of economic development. Here the Chinese scholar examines how environmental protection and economic development could imply a coexistence of opportunities and risks, as well as the public administration's responsibility for the coordination of economic development and for environmental protection, using China as case study. Finally, she examines the role of the judiciary in environmental protection to highlight how compensation is the sanction used for any damage caused to the environment. She advocates the use of non-contractual liability (liability on torts) in the environmental field and for the creation of a system of actions promoted by the public administration.

The last contribution to this section is by Dmitrij Vladimiroviè Sornikov, entitled 'Harmonization of the environmental legislation of Russia and other BRICS countries: limits and peculiarities'. The article defines the aims and problems for the harmonisation of the environmental legislation of BRICS (from the point of view of the Russian Federation) and seeks to identify possible external and internal limits to such harmonisation. The author argues for the possibility and necessity of such harmonisation, of which he outlines the general features (various types of political systems, various legal and legislative systems, different kinds of economies, different stages of development, different social, cultural and economic cooperation), and also the special limits (different levels of environmental changes, different levels of interaction between humans and the environment, different development

levels and traditions in the legal regulation of the use of environmental and natural resources). Sornikov then outlines the main practical problems in seeking to harmonise BRICS environmental law, and also describes some features of the bilateral convergence of the legislation in the field of environmental protection and use of natural resources in the BRICS countries.

The third theme, 'BRICS and harmonization of legal regulation of the energy sector', includes the contribution of six scholars.

Marcello Oliveira, in his 'Time for BRICS: building new paradigms for the conscious use of energy sources', considers first that BRICS countries have a common need for intensive use of energy sources to support their increasing growth demands. However, unlike the obsolete industrialisation model practised during the 19th and 20th century, the BRICS countries do have the opportunity to compensate for the use of underground resources with clean and renewable sources of energy providing the world with variable and effective solutions for sustainable growth. The author notes that already at the first summit in Yekaterinburg (2009), leaders of Brazil, China, Russia and India affirmed the need to diversify energy resources, including renewable energy, to secure the energy transit routes and to create new investment in energy and infrastructures, also as a common effort to decreasing uncertainty and ensuring stability and sustainability. Not surprisingly, discussions on energy policies were intrinsically related to those of climate change, promoting measures that both protect climate and fulfil socio-economic development. At the second and third editions of the summit, held in Brasilia (2010) and in Sanya (2011), the common understanding that energy is an essential resource for improving the living standards of people was reaffirmed.

Massimo Panebianco and Francesco Buonomenna, in their 'BRICS energy policy in the development of state alliances', observe that in the first three years of the BRICS (2009 to 2011) the ambition to create a new legal order was characterised by quick formation and fast development. In the area of international energy law, three regulatory sources can be traced in the corresponding paragraphs of three declarations following the meetings of leaders of the BRICS countries. These are the statement following the Yekaterinburg meeting, held in June 2009, paras 8 and 9; the statement following the Brazil meeting of April 2010, para 19; and the April 2011 Sanya Declaration, para 19. The principle of sustainable energy development in supply and distribution is affirmed in the first; the principle of close connection between energy development and environmental protection is affirmed in the second; while in the Sanya Declaration the principle of 'safe nuclear energy' to protect the human rights of concerned people is proclaimed. The authors hold that it would be premature to compare this initial BRICS *corpus juris* with that of the international groupings G8, G14 and G20, which in the last five years have been characterised by temporary and casual interests. They think that BRICS attention to energy and environmental issues is extremely important for the creation of a new *ius commune*, which would be a necessary step to get to a *ius novum* in the public energy sector.

Mingde Cao and Xinxin Zhao contributed to this section with a chapter entitled 'Energy law of China in the climate change era: from the perspective of international cooperation with BRICS countries', in which they proceed from the consideration that rapid urbanisation, industrialisation and intensive agriculture have made BRICS countries particularly vulnerable to the effects of global warming. They argue that as important economies in the world, they will through their actions have a marked impact on the emission of greenhouse gases (GHGs) world-wide. China is facing the double pressure of energy shortage domestically and GHG emission reduction internationally in the climate change era. China has already enacted several laws and regulations regarding energy saving and renewable energy, and is making a comprehensive Energy Law. These laws and regulations have played an important role in dealing with energy saving and reduction of greenhouse gas emission, but some issues remain, such as a weak handling of climate change. The authors believe that studying the energy laws and policies in BRICS countries comparatively will provide guidance for China in reconstructing its energy laws and regulations from the dimension of international cooperation, especially with BRICS countries.

The short contribution from Nadezhda Borisovna Pastukova, 'Developing cooperation among BRICS graduate institutions to train TEK specialists (experiences and perspectives)', deals with possible cooperation among BRICS graduate institutions with view to training specialists in the fuel and energy field to work on energy-related projects.

Ivan Nikolaeviè Sidorov, in his 'Legal aspects of investment attractiveness on the use of mining resources in the Russian Federation: perspectives of cooperation among BRICS', observes that mining products play an essential role in the economy of the Russian Federation. Presently they represent the main resource for the state budget which could lead to the improvement of domestic industry and state welfare. According to Russian law, corporate entities can exploit the mining resources by obtaining a state concession, and can also transfer the exploitation rights to another entity. The author argues that the concession system limits access to mining resources, since the law sets forth a lot of ambiguous requirements and there is no uniform practice in determining the concessionary duties arising from accurately established geological criteria, and that it also includes specific limitations with reference to foreign investors. Sidorov is of the view that a different approach to foreign investors could be one of the legislative measures to adopt in order to reach a proper balance between Russian strategic interests and their interest in investing in the mining sector. He also underlines that the Russian Federation can provide preferential treatment to foreign investors from the BRICS countries. In this respect international agreements would contribute to the development of Russian mining law, which is not sufficiently developed despite a long-standing need.

Aleksandr Konstantinoviè Volkov contributed to this section with an article on 'Legal aspects of *natural gas sector in BRICS countries: perspectives of development*'. He observes that relations in the gas sector of BRICS econo-

mies are presently at a preliminary stage, and that it is necessary to determine the appropriate economic model and its legal structure. Today Russia and the other BRICS countries wish to have easy access to natural gas and its export; Russian companies also wish to have access to the gas distribution markets of the other BRICS countries. Volkov thinks that giving a legal structure to the economic model depends on the conclusion of an international multilateral agreement providing the main regulatory principles for each sector concerning natural gas, namely: its extraction, investment in the industry, delivery, transportation, storage, distribution, export, tax, duties, tariff regulation and environmental protection. According to Volkov, this would require changes to the rules governing international transactions on gas: contracts would have a medium-term vision, and then a short-term one; price would be determined mainly on the 'spot' market; the application of the 'take-or-pay' rule would be eliminated. Such an approach would create real grounds for cooperation and conditions for the development of gas companies in the BRICS countries, which is extremely important in view of the creation of a natural gas world market.

The last theme of the conference was 'BRICS and harmonization of legal regulation of trade and finances', with three scholarly contributions.

Daniela Trejos Vargas in her 'International commercial law and conflicts of laws conventions as a legal framework for commercial relations' notes that since the BRICS do not share a modern common legal heritage, it is important to adopt universal legal standards, not only to trade with Europe, Japan and the US but also to foster business among the BRICS. She adds that commercial partners need legal certainty in order to conclude contracts, and this means turning to legal systems that are familiar and trustworthy. She observes that the lack of information on the legal systems of the BRICS prevents parties from entering into contracts governed by the laws of such countries. For this reason, parties end up having contracts governed by a foreign applicable law and dispute-resolution clauses which resort to a foreign court or an arbitral tribunal. She is of the opinion that one solution to address the issue is the ratification by the BRICS countries of the major conventions on international business transactions and international arbitration, especially the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law on International Commercial Arbitration, and the 1980 Vienna Convention on the International Sale of Goods (CISG).

In his 'Common legal aspects and/or of interest for the BRICS countries in the ambit of the international trade', Ignazio Castellucci begins by referring to the emergence on the world stage of new economic and political powers, as a result of which the 21st century has economic dynamics corresponding to a multipolar model. This makes it necessary to use patterns closer to the traditions of emerging and developing countries rather than the 'global' model devised in the late 20th century, mostly based on the Anglo-Saxon tradition and on individualistic and ultraliberal philosophies. The author examines the capacity of Roman and continental law to be used

as the general legal language for the majority of these developing countries. This analysis is conducted with special attention to the similarity of the social and economic model of the Roman tradition, based on the community principle and the social function of economic relations, with similar models widely present in the non-Western world. Castellucci discusses some aspects of the Roman tradition which demonstrate its suitability to bring significant benefits in non-Anglo-Saxon contexts and in south-south or east-south transnational economic relations, when compared to the above-mentioned 'global' tradition. He highlights the advantages, from the point of view of the contractual parties having the opportunity to take advantage of contractual models that better meet their economic needs and have lower costs and legal risks, and also from the macroeconomic point of view, with the overall benefit to the economy of these countries connected to the driving function of the Roman tradition, leading to a legal and economic system that creates wealth and at the same time social justice.

The last contributor, Alvaro Vereda de Oliveira, in 'The BRICS countries and the reform of the international financial system: some legal and diplomatic aspects', observes that the coalition comprising the BRICS countries is playing a central role both within the G-20 and the Bretton Woods institutions. He also notes that another newly born institution is the Financial Stability Board (FSB) created in 2009. Replacing the Financial Stability Forum (FSF), the FSB also gathers developed and emerging economies in a *de facto* technical secretariat for the G-20 in dealing with all financial matters. However, its importance to the new political, legal and diplomatic framework for the international financial system is not necessarily in keeping with adequate standards of transparency and accountability.

The present volume contributes to the study of BRICS and the role that Roman law can play in future discussions on possible common approaches to legal issues. Even if some contributions are in the Russian language, it can be said that the volume definitely enriches the study of the BRICS countries, being one of the few works in which different viewpoints from different perspectives are analysed.[1]