

THE DARK SIDE OF THE BRICS: THE LACK OF A LEGAL DEFINITION

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Abstract

The uniqueness of the BRICS group makes it difficult to define, especially from a legal perspective. The scopes and the levels of cooperation among the member States are so heterogeneous and multifaceted that the BRICS could be analyzed under many lenses. Most of the present-day literature attempts to explain the BRICS phenomenon especially from an economic and/or political perspective, whereas there is a lack of research focused on its legal international dimension. To make things more complicated, the BRICS themselves seem to voluntarily forget about defining the legal foundation of their cooperation. Therefore, the aim of this paper is to shed some light on what we consider a dark side of the BRICS, namely the lack of a legal definition. In order to do so, it becomes extremely important to broaden the understanding of the BRICS. The paper thus begins with a brief introduction retracing the historical steps that have led to the BRICS as we currently know it, also describing the decision-making process employed in the BRICS cooperation style. With this overall picture in mind, the paper investigates how the BRICS qualifies within the international law, assessing whether it could be classified as international organization, and whether it is a global/international actor with legal personality/legal capacity. Finally, the paper reviews some of the definitions given by prominent scholars of BRICS, in the search for an agreeable legal definition that is capable of capturing the real essence of the group.

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Keywords

BRICS - International law - International cooperation - Global South, - Legal definition, -
Ios - Multipolarity.

1. The BRICS: an introduction

In 2001, the then chief economist of Goldman Sachs, Jim O'Neil, first brought forward the idea of BRICs.¹ In the analytical report of global investment of his company, he forecast that China, Russia India, and Brazil, the four emerging markets with promising economic development, would catch up with– and by 2050 overtake – the G7 countries (the USA, Japan, Canada, France, Italy, Germany United

¹ This paper uses the two versions of the acronym: BRICs and BRICS. The first version has been used to designate the group until its enlargement to South Africa, which entailed a change in the initial shape of the acronym that now sees a capital S to denote, precisely, the new BRICS country.

Kingdom) in terms of total GDP.² The BRICs leaders saw a potential beyond the purely economic acronym O'Neil had created, and thus in 2006, the first informal meeting of the foreign ministers of Brazil, Russia, India, and China took place at the margins of a United Nations General Assembly to discuss the potential of a future cooperation among their respective countries. Three years later, shortly after the 2008 economic crises hit the then major economies and political powers - the US and the EU-, the BRICs was officially inaugurated with its first summit in Yekaterinburg, Russia. Since then, the four countries have been meeting regularly once a year, alternating themselves in the hosting of the Summit. South Africa joined the group just two years later, in 2011, during the Sanya summit, upon Beijing's invitation. The result was a new acronym strengthened with an upper-case S, bringing together the five fastest-growing emerging economies distinguished by high rates of economic development and a high-degree of export orientation, which according to Goldman Sachs experts had, in the long term, the potential to become the most dominant economic actor in the world.³

Although the BRICS was first referred to the investment opportunities of emerging economies, the regular meetings of the leaders of the BRICS countries, during several years, have turned this idea into joint efforts to participate in global governance. Thus, it would be clearly reductive to look and define the BRICS only from an economic perspective, considering exclusively the economic or financial reasons that pushed the BRICS to aggregate. Rather, the striking pace at which the BRICS economies had grown and were expected to grow was seen as the basis from which they could have legitimately requested to have a greater say in global governance. Indeed, the flourishing economic self-confidence of the BRICS found expression in an increasingly political assertiveness.⁴ Besides, remarkably large population and size of territories other than the economies of the BRICS States made them different from others. At present, the BRICS countries represent 42% of the world's population

² J. O'Neil, 'Building better global economic BRICs' (2001) Goldman Sachs Global Economics Paper no. 66. <build-better-brics.pdf> accessed March 2022.

³ M. Zakharova, V. Przhilenskiy, 'Experiences of legal integration and reception by the BRICS countries: five passengers in a boat (without a dog)' (2018) 5 (2) BRICS Law Journal 4.

⁴ A. F. Cooper, A. B. Farooq, 'BRICS and the Privileging of Informality in Global Governance' (2013) 4 Global Policy 428.

(about 3 billion of people); they account for 23% of the world's GDP and amount to an extremely large portion of territory which covers about 30% of the entire earth (40 million km²).⁵ Therefore, their cooperation proves the desire to make the voice of an important part of the world.⁶

In this regard, it is worth stressing a cornerstone of the BRICS cooperation, which is summarized in their ambition to affect global governance. Since the beginning, the political goals of these States were clear. As the joint statement issued at the end of the first meeting in Yekaterinburg reads: 'We [the BRICS] are committed to advance the reform of international financial institutions,⁷ so as to reflect changes in the global economy. The emerging and developing economies must have greater voice and representation in international financial institutions, whose heads and executives should be appointed through an open, transparent, and merit-based selection process. We also believe that there is a strong need for a stable, predictable, and more diversified international monetary system'⁸ and further agree, at point 15 of the same statement, to cooperate 'to build an harmonious world of lasting peace and common prosperity'.⁹ What distinctly emerges is the strong willingness of five countries to coordinate and have a positive impact at the global level, wanting to represent not only their respective States, but the Global South as a whole. The choice of including South Africa to the BRICS group falls precisely within this political ambition. Indeed, by encompassing the African continent, the BRICS group secured itself with a more planetary dimension. Moreover, South Africa plays a very important geopolitical reference point, as it has represented developing African countries within the G20, not to mention that it is also a founding member of the United Nations. From a more

⁵ IMF; World Bank statistic 2019.

⁶ L. Scaffardi, 'BRICS, a Multi-Centre "Legal Network"?' (2014) 5 Beijing Law Review 140.

⁷ The financial institutions to which the BRICS refer are the so-called Bretton Woods institutions: the International Monetary Fund (IMF) and the World Bank. Established in the aftermath of the Second World War, these institutions were found to be over dominated by the Western countries, especially by the US and many European countries. What the BRICS lament the most is that their economic growth is not reflected in the political power distribution within such institutions, which has always been significantly low. Therefore, they advocated for a more democratic and fairer representation.

⁸ BRIC, 'Joint Statement of the BRICs Countries' Leaders', Yekaterinburg, Russia, 2009, point 3.

⁹ Ibid., point 15. See also BRICS 'Johannesburg Declaration,' Johannesburg, South Africa, 2018, point 5.

intra-BRICS perspective, the opening up to South Africa, a country with which China has established important political interests and energy-related investments over time, and which also offers room for development to India and Brazil, certainly contributed to the choice of this particular African country, over others.¹⁰

Furthermore, some scholars have interpreted the brief quotations mentioned above, as an attempt on behalf of the BRICS to provide a counterpoint, or even a challenge to the existing institutions and to the dominant role played by the US and the dollar. However, as we will see below, this paper argues that the BRICS did not positively implement a defiance towards the existing status quo. They have never truly disengaged from the universal institutions they wanted to reform. Indeed, the institutions created by the BRICS (the New Development Bank and Contingent Reserve Agreement) are not to be considered alternative but rather complementary to the existing ones. In a way, this links with a concept and a goal that lies particularly at heart of the BRICS, which is the pursuit of multipolarity as opposed to unipolarity. The idea they bring forward is that the world witness now various poles of economic growth that should be reflected in the international political arena. The key to the BRICS' international influence is "the power of the superpowerless world".¹¹ The coming world order they ought for is inclusive of all States, where all countries are to be treated as equal members of the international community. The group, in sum, does not propose itself as a 'block' or a new pole that challenges the hegemonic one in power. Rather, it sees itself as part of the collective of powers rising together. It calls on the fact that less and emerging countries should have better representation at international level, thus asking for a reform of the international institutions to cope with this democratic deficit.¹²

¹⁰ From a purely economic perspective, other emerging countries in the African continent could have been better suited to be included in the BRICS (e.g., Nigeria), but they could have not ensured to the group the same political stability, and doubtless not the same geopolitical appeal as South Africa, see Scaffardi (n.6) and J. O'Neill, *The Growth Map. Economic Opportunity in the BRICs and Beyond* (Penguin Books 2011).

¹¹ K. Nicolaidis, 'The power of the Superpowerless', in T. Lindberg (ed.) *Beyond Paradise and Power: Europeans, Americans and the Future of a Troubled Partnership* (Routledge 2004).

¹² M. Papa, 'BRICS as a Global Legal Actor: from Regulatory Innovation to BRICS Law?', in L. Scaffardi, (eds) *The BRICS group in the spotlight* (Edizioni Scientifiche Italiane 2015).

It is no coincidence that we started talking about BRICS in a period of crisis of the Western democracies, both economically and politically. The 2008 crisis shed a light on the need for a reform of international governance institutions, particularly in the financial sphere, to reflect the new multi-polar setting, which sees now the rise of the developing world.¹³ In this sense, it becomes possible to better understand the desire and ambition of BRICS to become the voice of the developing countries, of the Global South, and to raise the demand to be better represented in the international arena, counterbalancing the US–European Union (EU) monopoly of power.¹⁴

The BRICS represented a great opportunity not only as a platform from which to stand up and to speak up to the world, but also as a venue to create networks of cooperation among the member countries. In this regard, a true escalation occurred. While the formal declaration issued at the end of the very first summit had only 16 articles, the following summits expanded the dimension and scope of the joint agenda along with the subsequent declarations, which got longer including several items and areas of cooperation.¹⁵ The BRICS collaboration covers now a wide range of matters: from trade and finance to energy, sustainability, science and technology, outer space, innovation, education, health, security, counterterrorism, climate change, corruption, physical culture, and sport. Frequently, the BRICS also expresses opinions and support during war episodes, as it was the case of the war in Iran or Syria,¹⁶ thus displaying a deeply political dimension.

When approaching the study of BRICS, we cannot but notice the striking heterogeneity of its member States. It comes naturally to question how such different countries, with very distinctive economic structure, socio-political background, legal set-ups, culture, and traditions, could make a cooperation among them work (for quite

¹³ F. D' Amico, *Previous History: from a market acronym to political-diplomatic dialogue*, in R. Bauman et. al, *BRICS: studies and documents* (Fundacao Alexandre De Gusmao 2017).

¹⁴ G. Formici, 'The role of the BRICS group in the international arena: a legal network under construction' (2019) 4 Third World Thematics: A TWQ Journal <<https://www.tandfonline.com/doi/abs/10.1080/23802014.2019.1650391>>

¹⁵ D'Amico (n.13).

¹⁶ See BRICS 'Durban Declaration', Durban, South Africa, 2013; BRICS 'Fortaleza Declaration', Fortaleza, Brazil, 2014. See also A. E. Abdenur, 'Rising Powers and International Security: the BRICS and the Syrian Conflict' (2016) 1 Rising Powers in Global Governance 109.

a long time now) even in spite of the internal political tensions that yet have occurred between some of its members.¹⁷ In fact, the BRICS countries try to move beyond these tensions through regular meetings and enhanced dialogue. On this subject, the coordination strategy adopted by the group becomes relevant and deserves a further examination.

The decision-making process within the BRICS occurs at two main levels: the level of coordination among the heads of States and the inter-ministerial cooperation. The coordination among the heads of State takes place within the Summits themselves. On this occasion, the BRICS leaders exchange their views on common international issues of concern,¹⁸ and at the end, they generally release joint statements and declarations.¹⁹ It should be noted that such official statements are not just the product of the discussions that occurred during the summits, but they are supported by heavy preparatory work carried out by groups of representatives from each of the member country before the summit takes place. Thanks to this process of intense exchange, BRICS Heads of State and government share common positions in their summits, which in turn set the course for the BRICS.

The second level of cooperation mentioned is the inter-ministerial one. It consists of regular meetings among BRICS ministries on key areas of concern (e.g., BRICS foreign ministers' meeting, BRICS health ministers' meeting, BRICS trade ministers' meeting), whose work is generally later acknowledged during the summits.

Such degrees of cooperation -which are to be considered as in continuous communication and to be mutually influenced- differ from each other in method and scope. The aim of the summits is to shape or, at least, to influence global dynamics and to advance proposals to reform global governance, whereas the inter-ministerial

¹⁷ This refers particularly to the border political and military hostilities between China and India over Tibet and the Asiatic region of Kashmir, among others.

¹⁸ Typically, the host country is responsible for setting the agenda and identifying the main issues to be addressed at the summit. The BRICS also has a rotating presidency that coordinates the implementation of the decisions taken by its leaders.

¹⁹ It is also very common for them to sign Mutual Understanding Agreements (MuA) i.e., documents that do not create rights and obligations under international law among its signatories, for example between governmental agencies, state-owned banks and ministries traditionally not involved in the classical international legalization process.

level aims at encouraging economic, political, and cultural integration among the BRICS themselves. Therefore, whereas the first level is used to shape the external dimension of BRICS and represents the platform from which the BRICS talk to the rest of the world, displaying their concerns and ambitions, the second one aims at improving the quality of intra-BRICS cooperation.

Next to these rather widespread ways of cooperation, the more interesting and innovative aspect of the BRICS regards the adoption of other collaborative instruments, which are more informal and involve many different types of actors, especially from the civil society. These softer forms of international cooperation consist of the creation of think-tanks, networks, and forums, generally put in place by experts, academics, young people, and students belonging to the different BRICS countries, promoting the exchange of best practices and know-how, and facilitating legal flows and policy transfers.²⁰ It is worth noting that these intra-BRICS activities, realized among the five States, are often integrated within the decisions concerning the BRICS' external actions. To clarify, let us take the example of health cooperation's field, where the aims pursued in the BRICS internal dimension are also reflected in its external actions by supporting existing international organizations such as the World Health Organization, and participating in global projects.²¹

More formal than the ones just mentioned, the Sherpa meetings are another fundamental landmark in the BRICS decision-making and cooperation process. During these meetings, the "sherpas"²² and "sous-sherpas" (senior officials of the member countries' foreign ministries who are in permanent contact) prepare the leaders' meetings, conduct a review of the progress achieved over the past year and the progress of BRICS' joint actions, discuss the possible implementation of previous action plans and fix priorities and principles for the next annual summit.

²⁰ Formici (n.14); Scaffardi (n. 6)

²¹ Formici (n.14).

²² The name Sherpas derives from the "Sherpa people", Nepalese ethnic groups. They serve as guides and porters across the Himalayas. Thus designated, the Sherpa groups clear and prepare the way for the head of States at the major Summit. Sherpas are generally quite influential even though they do not have the authority to make decisions over any agreement. Sherpas were already much in use relating to the G7 preparation. As for the BRICS, the first BRICS Sherpa meeting was held in 2019 under the Presidency of Brazil in Curitiba, Brazil.

As to the practical part of the economic cooperation, it mostly relies on the establishment of Economic Strategic Partnerships which have become the institutional basis of the BRICS cooperation.²³ These documents define the long-term benchmarks of the sectoral and general conceptual nature, to strengthen economic growth and increase the level of competitiveness of the BRICS economies in the international arena. As it can be noted in the 2017 Xiamen declaration, where it is stated that: ‘We note that practical economic cooperation has traditionally served as a foundation of BRICS cooperation, notably through implementing the Strategy for BRICS Economic Partnership and initiatives related to its priority areas [...]’,²⁴ such Partnerships represent a topical moment in the BRICS cooperation.

It is through this particular ‘all-dimensional and multilayer cooperation’²⁵ process that BRICS succeeded in “bridging” their distances, and positively use their differences to improve their collaboration. Indeed, the exchange of experiences -generally shared through the more unofficial venues- gains in terms of ‘richness of solutions, strategies, and final outcomes’.²⁶

2. How to define the BRICS? A public international law perspective

Once we have a rather clear image of what the BRICS is in terms of membership, objectives and scopes pursued, together with the cooperation strategy implemented to make the group successfully work and have an impact both internally and externally, we can bring the BRICS within the international law framework. The main question we are seeking to address is: what is the BRICS under international law? Considering that we have just described a whole new “cooperation platform”, capable of gluing together such different countries with the same ambitions in global

²³ The BRICS Economic Partnership 2021-2025 was approved in the BRICS, ‘New Delhi Declaration’, New Delhi, India, 2021, point 3.

²⁴ BRICS, ‘Xiamen Declaration’, Xiamen, China, 2017, point 8.

²⁵ BRICS, ‘Xiamen Declaration’, Xiamen, China, 2017, point 2.

²⁶ Scaffardi (n.6).

governance, can we use the traditional categories of international law to define if from a legal point of view?

Traditionally, Public International Law has treated States as subjects, actors with legal influence in the international system. States have legal personality on the notion of sovereignty and recognition by others, thus, they have a right to engage in law-making but, at the same time, they bear obligations and are held accountable to other States.²⁷ Therefore, singularly taken, each BRICS member State obviously is an actor under international law. However, the dimension we are investigating concerns the qualification of BRICS as an aggregation of States, as a group. In this regard, international law has adapted, over time, to recognize not only States but also non-States entities as legal actors, attributing them the ability to create, apply, and administer international legal rules. This latter category includes civil societies and international organizations. Yet, as a conglomerate of States, the BRICS cannot be qualified as an international organization. Indeed, the BRICS lacks the traditional elements generally required to be classified as such: it does not have a constitutive treaty, it has no charter whatsoever, headquarters, fixed secretariat (either physical or virtual), nor it has dedicated staff or funds to finance its activities.²⁸ Moreover, international organizations are generally equipped with a stable institutional apparatus. Their bodies are mostly made up of representatives of States (which gives an «intergovernmental» dimension to the organization), and more rarely from individuals acting in their capacity (which is the case of courts or bodies with purely secretarial/executive or organizational functions). Decision-making methods are commonly by majority (possibly qualified or weighted: e.g., art. 27, par. 3, UN Charter); for more «sensitive» issues, decisions are taken by unanimity, whereas the BRICS working methods are essentially consensus-based.²⁹ Thus, similarly to other groups as the G20, they regularly produce consensus on joint state actions with highest global impact.

²⁷ Papa (n.12).

²⁸ A. E. Abdenur, M. Folly, 'The New Development Bank and the Institutionalization of the BRICS' (2015) 3 R/evolutions: Global Trends & Regional 66.

²⁹ BRICS, 'New Delhi Declaration', New Delhi, India, 2021, point 5: "We reiterate our commitment to preserving and further strengthening the consensus-based working methods in BRICS at all levels which have been the hallmark of our cooperation".

Furthermore, as full-fledged subjects of international law, international organizations can enter treaties and bear responsibilities under international and national law.

International forums as the, G8, G20, or the Arctic Council that do not have all the features of an international intergovernmental organization, are usually defined as quasi organizations (from Greek “quasi” – pseudo), para-organizations, or as informal international institutions. These forms of concerted action between States represent a weaker form of an organization. Rather than being based on an international treaty or agreement containing their constitution, they rely upon a political declaration, which is respected by the participating States having an interest in bringing about the summit consultations, which usually deal with economic, commercial, or financial issues.³⁰ They have neither a formalized organizational structure, nor the right to make legally binding decisions, and ultimately, they do not have international legal personality. In this sense, the BRICS is closer to a G-group rather than to an organization.

Considering all the above, we understand even more how, despite the importance of the economic and financial dimensions that characterize the BRICS cooperation, and notwithstanding the impact of the Economic Strategic Partnerships mentioned before, we would be mistaken in defining it as an “Economic Integration Organization”.³¹ Other than requiring the traditional criteria to qualify as an organization (which the BRICS already lacks), an economic organization would require the transfer of sovereign competence on economic matters by its member States, which does not occur in the BRICS. And after all, how could it? Even though the BRICS countries are characterized by a considerable level of State intervention in the economy,³² they all have such different economic structures that would make it impossible for them to enter an economic organization with each other. Moreover, even if the BRICS economies are all growing fast, they are not doing so at the same pace.

³⁰ These forms of concertation are often referred to also as “summit organizations”.

³¹ “Economic Integration Organizations” can be understood as a subtype of international organizations.

³² M. Carducci, ‘Il BRICS Come “Legal Network” e le sue implicazioni costituzionali’ in *Costituzione, Economia, Globalizzazione. Liber amicorum in onore di Carlo Amirante* (Edizioni Scientifiche Italiane 2013); L. Scaffardi (n.6) 146.

In fact, the BRICS economies are situated at very different stages of development and rely on different sources for their growth, with Brazil specializing in agriculture, South Africa and Russia in commodities, India in services, and China in manufacturing.³³ Moreover, China is known for its low tariffs for manufactured products; India is protectionist when it comes to goods; and South Africa, while relentlessly enforcing its black economic empowerment and local content, is becoming increasingly protectionist, too. Also, 'when it comes to GDP per capita, Russia and Brazil are champions compared with the other members, while India has a very long way to go before catching up with the others'.³⁴

Defining the BRICS as an economic integration organization would not only be incorrect, but also extremely reductive. As mentioned before, the cooperation among the BRICS involves, indeed also non-economic fields, such as education, counterterrorism, or poverty and faces deeply political issues, albeit, we must admit, the most successful achievements of BRICS have occurred in the financial field, with the establishment of the New Development Bank (NDB) and the Contingent Reserve Agreement (CRA) in 2014.³⁵

In today's world, international cooperation is more and more characterized by informality. There are a lot of entities and State forums that do not have all the features of an international organization but make a great contribution to the development of international relations and, often, of international law.³⁶ Agreeably, the BRICS falls within this latter category of international actors. The critical thing with BRICS lies in this continuous tension between a very high degree of informality and institutionalization tendencies, which raises doubts as if BRICS might be experiencing a transition period into becoming an international organization or if this is a perpetual situation that makes it extremely different from other international cooperation experiences. As a matter of fact, occasionally, the States involved in an international forum are quite satisfied with the uncertainty of its status (e.g., the

³³ K. Kralikova, 'BRICS: Can a marriage of convenience last?' (2014) 13 *European View* 243.

³⁴ *Ibid.*

³⁵ BRICS, 'Fortaleza Declaration', Fortaleza, Brazil, 2014.

³⁶ A. Abashidze, A. Solntsev and E. Kiseleva, 'Legal Status of BRICS and Some Trends of International Cooperation' 9(36) (2016) *Indian Journal of Science and Technology* 1.

Group of 8) but, some other times, States' formations born under the informality sign, get progressively more and more institutionalized, up to becoming full international organizations. This was the case of the Association of Southeast Asian Nations (ASEAN), which has long been an international quasi-organization. Similarly to what happen with the BRICS, ASEAN was first established in 1967 with the Bangkok Declaration. A decade later, in 1976, the ASEAN Secretariat was established, indicating that a strengthening of the institutional framework was occurring, and finally, 40 years after its establishment, ASEAN adopted its Charter and turned into a full organization, officially acquiring international legal personality.

Arguably, for the BRICS, some steps in this direction were apparent in 2014 when they established two institutions on their own, the NDB and the CRA,³⁷ and when in 2015, during the Ufa BRICS summit, the BRICS Heads of States discussed the possibility of establishing a joint website that could have been regarded as a virtual secretariat.³⁸ However, such a proposition never became a reality. Therefore, whereas some years ago we could have legitimately believed that a true transformation of BRICS was occurring, now we have reasons to abandon such an idea. Indeed, the BRICS member states have not shown any recent sign of willingness to commit themselves into a joint BRICS organization. The most likely scenario is that BRICS will continue to have a very informal shape and will be used strategically by its member States as a platform of coordination to act at global level. To do this, they do not need to be an international organization and to be vested of international legal personality. They are not seeking to conclude international treaties, to send diplomatic missions, or to interact and acquire rights and duties towards third parties or other international organizations, they are trying to accomplish a global reform. However, all of this would also mean that group cannot legally stand as one in the international scene, and therefore other global players, as the EU, still have to deal with each of the BRICS states individually and on a bilateral basis.³⁹ To sum up, the BRICS countries did not

³⁷ The NDB and the CRA were created by formal treaties, under international law, and at least the NDB certainly has international legal personality.

³⁸ BRICS, 'Ufa Declaration', 2015, point 74: "We welcome the signing of the MoU on the Creation of the Joint BRICS Website among our Foreign Ministries [...] We will explore the possibility of developing the BRICS Website as a virtual secretariat".

³⁹ Kralikova (n.33).

create a new entity which can act autonomously and independently from its member States, as it is the case of the United Nations, to make an example, who “has a life on its own”. The BRICS essentially is the “total of its parts”, its States are the driving forces of the cooperation. Within the BRICS, Brazil, Russia, India, China, and South Africa agree on common issues and decide upon what positions they share, but then, this choice is singularly -and not collectively- implemented by the member States in the pertinent forum. The purposes and goals established by BRICS during the summits and meetings are the same for all its members, but the way each state acts to meet these goals could vary, respecting each state’s unique character, which is not denied or ignored by BRICS as a group. Thus, outside the NDB, the BRICS remains a sui generis or non-formal forum of international cooperation. Its members are driven by the desire to bargain together and change international reality directly and without the formalism and institutional hinderances of an international organization.⁴⁰

3. An introspective analysis on the BRICS’ legal dimension

The BRICS never truly attempted to define themselves from a legal perspective. Since, at no time, they have adopted a charter or a treaty, we do not find any official and coherent definition of BRICS in a legal sense. There are very few references in the BRICS declarations as to the legal aspects and prospects of the group, and the wording used on this wise has always been vague and open to interpretation. Such scattering mentions of constitutional BRICS define it as a ‘platform for dialogue and cooperation’,⁴¹ a ‘strategic partnership’,⁴² and again as a ‘forum’⁴³ leaving the strictly

⁴⁰ A. Thomashausen, ‘Is BRICS becoming an international organization?’ (2018) <<https://www.iol.co.za/news/is-brics-becoming-an-international-organisation-16291598?msclkid=004e5fafa7a911ecb8fae7ba9369477>> accessed April 2022.

⁴¹ BRICS, ‘New Delhi Declaration’, New Delhi, India, 2012, point 2; BRICS, ‘Sanya Declaration’, Sanya, China, 2011, point 6.

⁴² BRICS, ‘Ufa Declaration’, Ufa, Russia, 2015, point 1; BRICS, ‘Johannesburg Declaration’, Johannesburg, South Africa, 2018, point 5; BRICS, ‘Xiamen Declaration’, Xiamen, China, 2017, point 5.

⁴³ BRICS ‘Sanya Declaration’, Sanya, China, 2011, point 2.

legal margins of the group out of the discussion. More than providing a legal foundation, such definitions specify the mission of the BRICS and its general design.

A more complete description of a future legal understanding of BRICS can be found in the 2013 Durban declaration, where it is stated that: ‘We [the BRICS] aim at progressively developing into a full-fledged mechanism of current and long-term coordination on a wide range of key issues of the world economy and politics (...)’.⁴⁴ The characterization given here is still rather abstract. Doubts remain as to what, such full-fledged mechanism of coordination is supposed to mean, and how should this translate into practice. The wording of the sentence seems to suggest the aiming at an evolution of the BRICS experiment. One may interpret it, once more, as an open door to the establishment of an organization. We can read in this light the following idea of establishing a virtual secretariat, or the institutionalization of the inter-ministerial level of cooperation, and again the establishment of the NDB and CRA, together with the expansion of the areas of cooperation among BRICS. However, this remains merely an assumption. As already stressed in the previous paragraph, presently, the BRICS countries do not seem to have any interest to engage in a proper organization. They have always refrained to do so, supposedly on purpose. Certainly, what we can read in the quotation just above, is the willingness of the BRICS to increasingly commit to the cooperation and to strengthen their economic and political coordination one step after the other or better, one summit after the other.

What just said comes as no surprise. In the mind of its creators, BRICS was intended to be a loose mechanism of international cooperation, characterized by informality and flexibility of both instruments and intents. Only a flexible approach would have enabled the group to encompass their differences and fix shared aims without resorting to binding and well-established legal means of international cooperation, but using more ‘delicate’ tools and diplomatic mechanisms, which would have allowed them to achieve their goals with less financial and other costs.⁴⁵ As Gvosdeve writes: ‘One of the advantages of the BRICS process is that it remains a loose association of states with somewhat disparate interests, so no effort is made to force a common

⁴⁴ BRICS ‘Durban, Declaration’, Durban, South Africa, 2013, point 2.

⁴⁵ T. Luzina, E. Dudareva, E. Akhmetshin, V. Yankovskaya, Y. Berdova, G. Emaletdinova, ‘The International and Legal Framework for Transregionalization of Trade and Economic Cooperation of the BRICS Countries’ (2018) 21 (3) European Research Studies Journal 166.

position when the BRICS states cannot agree on one. But these states have also found a way to disagree on some key issues (...) without torpedoing the entire enterprise'.⁴⁶

This strategic cooperation style characterized by adaptability was particularly important for the creation and preservation of the group, through which member states work to find those areas where they are likeliest to find a common ground. Such a flexibility entails a process of negotiation and accommodation rather than rigidly following a prior agreed-upon template, and it allows for greater agility in the formulation and implementation of their joint commitments, especially during the initial phases.⁴⁷ Indeed, the group's cooperation is not built on hard law measures or on the renunciation, even partial, of their prerogatives. Rather, BRICS member countries play a significant role within it; they continue to be strong and centralized countries whose power and authority is clearly reaffirmed through BRICS. Conversely, the increased activity of the BRICS countries on the global stage automatically increases the influence of the countries that participate in this union.⁴⁸ The fact that decisions, joint statements, or ministerial meetings are taken by the highest level of the national governments, results in a strong affirmation of the role of the single state,⁴⁹ which never disappears and is always well recalled.⁵⁰ Also, the sharing of juridical and constitutional instruments is not characterized by a rigid

⁴⁶ N. Gvosdev, 'The Realist Prism: What the U.S. Can Learn From the BRICS' (2012) *World Politics Review* <<https://www.worldpoliticsreview.com/articles/12087/the-realist-prism-what-the-u-s-can-learn-from-the-brics>> accessed April 2022.

⁴⁷ Abdenur, Folly (n.28).

⁴⁸ K. Alexander, Y. Dovbush, T. Nikolaevich, 'International legal and Economic Aspects of Interaction of the BRICS countries and the Organization of Economic Cooperation and Development in Modern Conditions' (2020) 3 *European Journal of Law and Political Sciences* 7.

⁴⁹ Formici (n.14).

⁵⁰ It is worth noting how the BRICS never refer to the countries that are part of the group as "member states" or "member countries". They are generally referred to as "BRICS countries". This represents a relevant hint in the analysis of BRICS' self-understanding. The language used is simple and detached from the traditional and legal one. "Member states" or "member countries" are expressions commonly used to refer to States that are parties to an organization or to a Convention and which are, consequently, legally bound to that organization or convention. This reminds of a formalized, legally bonding group. The avoidance of using such terms, may thus derive from the underlying idea on which BRICS is based: a flexible and informal structure that comes with no costs in terms of legal commitment.

structure of institutions, depositories of members' sovereignty, but by what could be defined as a 'flow', a 'transfer', an 'informal dialogue'.⁵¹

It is evident that the bond that links the BRICS states together is different from the bond between the EU member-states, to make an example. The BRICS is a constitutional non-homogeneous group,⁵² which can be regarded as a peculiar element that differentiates it from the 'common constitutional traditions' formations such as the EU. Indeed, the BRICS lacks the classical logic behind the coming together of states: they do not share traditions, common history, culture, or values. What they share is objectives, political and economic ones. Paradoxically, their lack of constitutional homogeneity becomes a strong global competitive advantage because it does not produce the costs of structural adjustment required by any process of integration. But the BRICS have another global competitive advantage: they activate an economic cooperation without any clause of conditionality.⁵³ Unlike formal institutions, there is no attempt to negotiate nor to impose binding rules or codes of conduct nor there is any strict follow-up mechanism for the implementation of common policies.⁵⁴ As already mentioned, there are convergences that affect each country legal system. But, if the EU requires new member states wishing to enter the organization to strongly review their constitutional and legal systems, the BRICS group has been using what may be described as soft policy transfer.⁵⁵

In view of a legal definition, it is worth pointing out that the BRICS has not set up a radical group whose goal is to revolutionize or overturn global governance⁵⁶. It aims at the creation of long-term cooperation plans to tackle common challenges with gradual and joint processes. In other words, the BRICS states do not want to work

⁵¹ Carducci (n.32).

⁵² M. Carducci, A. S. Bruno, 'The BRICS Countries between Justice and Economy' (2014) 2 *Sociology and Anthropology* 46.

⁵³ Ibid; M. Bodenstein, H.W. Ursprung, 'Political Yardstick Competition, Economic Integration, and Constitutional Choice' (2001) Working Paper in Federation Independent Institute No. 37, 1.

⁵⁴ This feature distinguishes the BRICS declarations from other summit's communiqués.

⁵⁵ Scaffardi (n.6).

⁵⁶ Ibid.

against the international organizations but act within them and to produce a change in such global institutions “from the inside”. As a matter of fact, the BRICS repeatedly affirmed their support to the UN and the Bretton Woods institutions together with the G20, to which they always acknowledge an important role in their declarations. In parallel with this activity, they have created two financial institutions that still are not supposed to challenge the current ones but complement the existing efforts of multilateral and regional financial institutions for global growth and development.⁵⁷ Indeed, the NDB and the CRA were created to support initiatives, to consolidate economic relations within BRICS states, ‘to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging market economies and developing economies(...)’.⁵⁸ The Bank shall also cooperate with international organizations and other financial entities and provide technical assistance for projects. In a nutshell, the new Bank would fill the gaps that the old ones could not cover. Rather than serving the BRICS interests only, these financial institutions were meant to satisfy the needs of the emerging and less developing countries as well. By using less stringent criteria for the issuing of loans, the Bank was supposed to meet the financial demands of those countries in need of infrastructure and other investments, without having to comply with intrusive conditionality requirements as it happened with the IMF and World Bank. Yet, these instruments exemplify the evolution of BRICS’ global governance functions and its capability to build something together as a group,⁵⁹ regardless the legality of their cooperation. This could be regarded as a clear example of how, sometimes, the substance goes beyond the form. The legal definition of BRICS may be blurry and malleable but, on many occasions, it proved to be capable of getting things done.

Notwithstanding such successful achievements, some other times, such a lack of homogeneity within the group had bad repercussions on the accomplishment of political goals, as for example, in 2012, during the discussions about the presidency of the World Bank, when BRICS members failed to unite and campaign for the

⁵⁷ BRICS ‘Fortaleza Declaration’, Fortaleza, Brazil, 2014.

⁵⁸ Idib BRICS, ‘Fortaleza Declaration’ point 11.

⁵⁹ J. Kirton, ‘Explaining the BRICS Summit Solid, Strengthening Success’ (2015) 10 *International Organisations Research Journal* 9.

Nigerian or Colombian candidates, which consequently paved the way to the appointment of the American nominee.⁶⁰ The group has not been able to reach its goal because of the absence of a coherent and cohesive cooperation for the enhancement of common interests at the UN level.⁶¹

We can conclude that the BRICS do not simply continuously forget about laying the legal basis of their cooperation. On the opposite, what we have understood as a dark side of BRICS, seems to be a conscious and informed choice that perfectly goes along with the initial idea and operation style of such group. As mentioned, the BRICS need flexibility and adaptability to work out. A strict legal commitment would have bound them to the pursuit of specific goals, depriving them with the possibility to change the missions and scopes of the group to adjust to their changing needs, and to do so in the easiest way, without having to renegotiate the terms of their cooperation every time. Moreover, the BRICS is based on the consensus of its member countries, which is reiterated during the summits. Thanks to the loose basis they equipped the group with, the BRICS countries always retain the choice not to renew their consent and detach from the group whenever this is not convenient to them anymore. This is also the result of such a heterogeneous composition of the group. It is indeed not too unlikely that tensions or incompatibility within its members arise, given a certain set of objectives. Therefore, not giving a legal basis to their formation, and by not legally binding them to the group, the BRICS countries have essentially kept an “emergency door” to use whenever they wish to leave the group, as the cost of staying gets higher or the group ceases to be considered advantageous and beneficial. It may come a time when the democracies of the group, for example, no longer desire to be associated with the other two authoritative dictatorial regimes. At the same time, such a legal oversight allows the BRICS to remove a member state under certain circumstances, similarly to what happened with the exclusion of Russia from the G8 after the Crimea events.

⁶⁰ M. R. Freire, ‘Political Dynamics within the BRICS in the context of multilayered global governance’, in J. Kirton and M. Larionova (eds) *BRICS and Global Governance* (1st edition, Routledge 2018)

⁶¹ B. Hooijmaaijers, S. Keukeleire, ‘Voting Cohesion of the BRICS Countries in the UN General Assembly, 2006–2014: A BRICS Too Far?’ (2016) 22 *Global Governance* 389; G. Toloraya, R. Chukov, ‘BRICS to be Considered?’ (2016) 11 *International Organizations Research Journal* 97.

4. Definitions' review and conclusive thoughts

Since there is no official definition of BRICS, scholars and academics who study it tend to give a different definition of the group, depending on the perspective they have adopted, and under which lens they have studied such an atypical subject. Being a sui generis formation, developed on many different areas and levels of cooperation, and having both an internal and an external dimension, -each pursuing different aims- the definition of BRICS may change. The literature abounds with examples.

Those who have privileged the observation of the internal dimension of BRICS - which thus primarily looks at the intra-BRICS cooperation- defined it as a 'legal network',⁶² or as a 'platform of dialogue and cooperation'. This latter expression is also frequently used by the BRICS themselves. Words such as 'platform' and 'network' are excellent to explain the way these five countries cooperate with each other. They evoke a clear image of a venue where it is possible to work in conjunction and share projects and solutions; where the 'nets' among the disparate countries involved are built through legal borrowings, soft policy transfers, exchange of best practices and know-how and with the creation of soft forms of cooperation, such as think-tanks and forums. From this point of view, the internal dimension of the BRICS results in a clear, varied, and coherent system of cooperation. Scholars as Carducci, Bruno, Scaffardi -the firsts who brough forward the idea of the BRICS as a 'legal network'- have the merit to straighten how the cooperation among the BRICS occurs, especially under a legal and juridical perspective. Carducci and Bruno dig deeper their analysis of juridical BRICS as a 'not equal' phenomenon based on a multiple interstate dynamic and characterize it as a 'hybrid' subject that results as an effect of the fuzzy logic⁶³ practiced in comparative law to understand how very different complex

⁶² Carducci (n.32); Scaffardi (n.6).

⁶³ To learn more about the use of the fuzzy logic see S. Baldin, 'Riflessioni sull'uso consapevole della logica fuzzy nelle classificazioni fra epistemologia del diritto comparato e interdisciplinarietà' (2012) 10 *Revista General de Derecho Público Comparado*.

systems can live together through serial similarities, further asserting how the future of the global institutionalism is probably marked by such forms of ‘hybridism’.⁶⁴

The BRICS phenomenon can also be described by stressing the external purpose of the group. Under this perspective, the BRICS has been defined in many ways. For starters, it has been qualified as a ‘cross-continental pressure group’⁶⁵ or as a ‘platform that allow[s] for the pursuit of principles of world order’,⁶⁶ which aims at obtaining a stronger and more influential voice in the global arena, rather than being an exclusive model, opposing and contrasting the Western one. Other scholars defined it as a ‘coalition of convenience’,⁶⁷ which is generally framed as ‘temporary alliance or partnering of groups to achieve a common purpose or to engage in joint activities’.⁶⁸ Its purpose is to confer legitimacy to individual states’ pursuit of multipolarity and share global responsibilities.

Using an institutionalist approach, Abdenur and Folly referred to the BRICS as a ‘platform of convenience’. To these authors, the BRICS created a normative platform able to influence the rulemaking process in global development. And again, in their analysis, Larionova et al., include the G7, G8, G20, and the BRICS all in the same category and define them as ‘Plurilateral Summit Institutions’,⁶⁹ thus giving significance to the key role such groups may play in affecting global governance. The BRICS has also been described as an ‘informal international organization’ because its members have an explicitly shared expectation about its purpose and participate in

⁶⁴ M. Carducci, A. S. Bruno, ‘The Brics Countries between Justice and Economy Methodological Challenges on Constitutional Comparison’ (2014) 2 *Sociology and Anthropology* 46, 53.

⁶⁵ M. Emerson, ‘Do the BRICS Make a Bloc?’ (2012) CEPS Commentary.

⁶⁶ C. de Coning, T. Mandrup, L. Odgaard, ‘Conclusion: Coexistence in between World Order and National Interest’ in C. de Coning, T. Mandrup, L. Odgaard (eds) *The BRICS and Coexistence. An Alternative Vision of World Order*, (1st edition, Routledge 2014).

⁶⁷ Papa (n.12) 23. See also S. E. Kreps, *Coalitions of Convenience: United States Military Interventions after the Cold War* (Oxford University Press 2011).

⁶⁸ Papa *ibid.*

⁶⁹ M. V. Larionova, M. Rakhmangulov, A. Sakharov, A. Shelepov, and V. Nagornov, ‘Global Risk Governance and G20, G8, and BRICS Capabilities’ in M. V. Larionova, J. Kirton (eds) *The G8–G20 Relationship in Global Governance* (1st edition, Rutledge 2015).

regular meetings, but not have an independent secretariat, headquarters, or permanent staff.⁷⁰

There is not just a single definition that is the correct one. In an ultimate analysis, the BRICS seems to remind of a Rorschach picture. Being so blurry but adaptable, it is open to different interpretations, and eventually, everyone sees something different in it. The BRICS countries themselves have different understanding of it and may 'use' the group for different purposes. Russia probably sees BRICS as a geopolitical counterweight to the eastward expansion of the Atlantic system, whereas China most likely participates in the forum because it recognizes BRICS as an important vehicle for fashioning governance systems in which its political influence is commensurate to its growing economic heft.⁷¹

Agreeably, the most indicative legal definition we can attribute to the BRICS is the one suggested by the international law, ascribing the BRICS the qualification of informal international quasi-organization. Such a definition is capable of describing the reform and innovation-oriented character of the BRICS, its primarily function as dialogue forum and cooperation platform, as well as its institutionalizing tendencies in the forms of the NDB and CRA, and yet indicating the lack of the traditional elements that may properly qualify it as an international organization. In such manner the non-binding and flexible character of the group is preserved as well.

The brief review conducted just above, which arises from the necessity to legally classify the BRICS phenomenon, makes it clear how the search for a proper definition is highly affected by a determination of the activities and actions of the group, their objectives and impact in the international scenario, which eventually result in different and diverse descriptions of this five-country grouping.

Furthermore, as it was pointed out by Formici, 'a study of BRICS represents a task not only for political but also law scholars: understanding this phenomenon from the

⁷⁰ Papa (n.12). See also F. Vabulas, D. Snidal, 'Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the spectrum of Intergovernmental Arrangements' (2013) 8 *Review of International Organizations* 193.

⁷¹ S. Saran, 'The next ten years of BRICS - will the relationship last?' (2017) *Information Bulletin of the BRICS Trade Union Forum* <https://tufbrics.org/tilda/en/page17607_15.html> accessed April 2022

legal angle is crucial since the group is reforming and reshaping the law as well.⁷² The BRICS proved to be an imitable model and an exemplar alternative to the hard EU regional structure, and in fact, the BRICS model has been reproduced by other regional players.⁷³ The persistence of the BRICS acronym, indeed, inspired the formulation of other groups, such as the N-11 (“Next Eleven” refers to the eleven most promising developing economies after the BRICS); the CEMENT (Countries in Emerging Markets Excluded by New Terminology); and, more recently, MINT (Mexico, Indonesia, Nigeria and Turkey).⁷⁴ These States understood the positive impact that informal dialogue and cooperation could have globally, without giving up part of their sovereignty in certain fields (as happened in the EU) and without starting a process of ‘homogenization’ of their constitutional and economic structures.

In the end, what we have characterized as a dark side of the BRICS responds to their need to adopt a cooperation model that allows them to establish relations and pursue common goals. The darkness we see is more related to the fact that such an original cooperation is not recognized by international law, and scholars as well struggle to find an agreeable definition, because in fact, the BRICS is many things all at once. But what we perceived as a dark side, certainly is not to the BRICS countries, which seem to be quite satisfied with the uncertain status on which they founded their partnership, regardless of the disappointing outcomes they experienced on some occasions.

The research would benefit from further studies of BRICS, especially from a legal perspective. A real and comprehensive view allows us to properly study such an original form of cooperation characterised by strengths and weaknesses,⁷⁵ which proved to be a source of inspiration to other formations, making a great contribution to the development of international relations and international law, thus forcing us to rethink the way we approach and study international cooperation in this new Era characterized by informality.

⁷² Formici (n.14)

⁷³ Carducci, Bruno (n.62)

⁷⁴ D’Amico (n.13)

⁷⁵ But then again, what kind of international cooperation is not equally characterized by strengths and weaknesses?

