

BRICS and Land Grabbing: Are South–South Relationships Any Different?

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“Buy land, they’re not making it anymore”

– Mark Twain –

Abstract

This Article looks critically at South–South relationships and at the idea that they represent a better alternative to North–South initiatives. It provides empirical data against the rhetoric that Brics are the representatives and interpreters of the long–standing aspirations of the South in global affairs, and try to challenge the image of the five paladins of the wretched of the earth who act against the Western hegemony. In particular, utilizing the case of foreign direct investments in land as the frame of reference, it looks at whether the Brics are involved in the current green rush, and how they are utilizing municipal and international law in order to access foreign land and foster their own economic interests. The conclusion, which is an invitation to further investigation, suggests that it is time to abandon the idea that Brics represent a homogeneous and coherent block of countries, and that, even more importantly, the expansion of capital via the extraction of peripheral natural resources is not a Northern a prerogative.

I. Introduction

Although different analyses have been formulated, the general approach to Brics’ relationships with the global South affirms that they are distinguishable from traditional Northern donors for several reasons. In particular, it is often claimed that intra–South cooperation does not attach policy conditionalities, provides assistance based on a win–win paradigm, and places

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its emphasis on how to ensure economic sustainability of the receiving country.¹ While China especially stresses the need to respect national sovereignty of the host country, all the Brics promote a development strategy based on equality, solidarity, mutual development and cooperation. These differences from traditional donors, it is said, contribute to a more effective cooperation, and to a better perception by local populations.

The present article, which slipperily proceeds on the line between the big picture and generalization, does not challenge the idea that some differences exist between the way in which traditional donors and Brics country conceive host countries' sovereignty and their independence when Official Development Aid is at stake. Rather, it focuses on foreign direct investments in land and concludes that, when access to this precious resources is at stake, the North-South divergence of approaches and positions toward Low Income Countries (LICs) countries converges more significantly than it might be thought. More specifically, I suggest that if we try to adopt a bottom-up perspective of international relationships, it becomes possible to move beyond the ODA's rhetoric of South-South relationships as an alternative paradigm, and to disclose consolidating relationships of power and strengthening hierarchies.

Applying this new perspective to the current 'global rush to the land', the Article aims at demonstrating the neutralizing and deceiving effect of normalized ideas, such as the alternative role played by the Brics or the concept of Brics as a unique and homogeneous entity. While these countries may share common financial index, they certainly do not adopt the same discourses and strategy for what concerns access to land, and also happen to be in positions of tensions that could easily degenerate in conflicts and deep fragmentation. However, standing in the place of the people is certainly useful to understand that, at the end of the day, it is not the source of the exploitation that matters, but that fact that it is happening.

In order to provide a synthetic but exhausting analysis that touches upon several aspects of the land-based relationships between the Brics and other Southern countries, this Article is organized as follows. Section I presents a broad overview of the ongoing phenomenon of accumulation and *foreignisation* of land,² with a specific interest in the role played by Brics'

1 Mwase N. and Y. Yongzheng, *Brics' Philosophies for Development and Their Implications for LICs*, IMF Working Paper, WP/12/74, March 2012

2 Annelies Zoomers, *Globalisation and the foreignisation of space: seven processes driving the current global land*

investors and the relationship between global causes, local impact, and the creation of globally relevant consequences. Section II and III offer a comparative approach to disclose the direct and indirect role that Brics governments are playing in enhancing and subsidizing land grabbing, mainly by issuing national laws and by constructing a system of bilateral relationships with the target countries. Finally, Section IV enters into the detail of some investment contracts concluded by Brics' investors and, adopting the 'neo-colonial' approach as a term of reference, underlines the symmetries in the use of law and sovereignty for shaping reality according to the needs of investors and source countries.

II. Foreign direct investments in land as land grabbing

Although land grabbing does not represent anything new in the history of mankind,³ the current 'rush to the land' is characterized by some peculiar features: it is happening at an unprecedented rapidity as a product of aggregate local and global forces; it has a direct impact on accessibility to land and water, which have now become scarce resources; it is undertaken in a world inhabited by more than 7 billion people, whose food security is everyday more at risk; it is almost never the consequence of wars or occupations, but it rather conducted taking within the boundaries of the existing legal framework. However, what is sure is that land grabbing as a globally relevant phenomenon is well rooted into local reality,⁴ and it is this local reality that has to be studied in order to fully grasp its effects.

Before a brief analysis of the extension, causes and impact of land grabbing, I consider appropriate to provide a definition, although I am that defining always implies exclusions and that it risks to freeze concepts and situations which are continuously evolving. With no intention to provide a full analysis of the phenomenon, I adopt a broad conception, which includes any significant case of large-acquisition of land, independently from the author and his economic objectives, which determine a concentration in the power over the land and a shift in

grab, 37 JOURNAL OF PEASANT STUDIES 429–447 (2010).

3 CHRIS HIGGINS, HISTORICAL ANALYSIS GREAT «LAND GRAB» 66 (2011), International Land Coalition, available from http://www.landcoalition.org/sites/default/files/publication/904/HUGGINS_History_web_11.03.11.pdf (last visited Apr 13, 2012).

4 Boaventura de Sousa Santos brilliantly affirms that 'it does not exist a global problem which is not rooted in a local reality' (Santos B.S., *Globalizations*, 23 THEORY, CULTURE & SOCIETY 393–399 (2006)).

the production means or in the use of the land itself.⁵

Differently for what may be thought, land grabbing is not a phenomenon that concerns exclusively foreign investors who want to produce food or energy crops and export them back to their own country, but rather a plurality of actors moved by numerous reasons and justified by different discourses. Whether the rush to land is nothing new in the history of humanity,⁶ the the current wave of land grabbing appears unique for its immediacy, scale, and multipolarity. Looking at where the investments come from, in fact, it immediately appears the lack of a central driving region, like in the case of previous land grabbing, but the coexistence of actors (public, private and mixed) both from the Global North, Gulf States, emerging countries and, in some cases, even from LICs themselves. On average, investors' countries have a GDP per capita four times higher than target countries, and this difference is even higher when we exclude countries that are both the origin and target of investment flows.⁷

Trying to provide some general data in order to have a clearer idea of the dynamic and extension of the problem, it has to be evidenced that it does not exist a solid dataset that gives a clear idea of the extension and distribution of the phenomenon (so much that the World Bank itself has to rely on reports issued by NGOs). Therefore, it must come with no surprise that a June 2011 study by the International Land Coalition suggested that land grabbing concerned around 80 million hectares, 64 percent of which are located in Africa,⁸ while the latest update by the same organization refers to more than 200 million hectares, i.e. eight times the size of Britain, or the entire North–West Europe.⁹ According to the most recent data collected by the Land Matrix Initiative and elaborated by Anseuuw et al. (ibid), 83–2 million of hectares of land in

5 For a more detailed definition, see Saturnino J. Borras et. al., *Land grabbing in Latin America and the Caribbean viewed from broader international perspectives*, A paper prepared for and presented at the Latin America and Caribbean seminar: 'Dinámicas en el mercado de la tierra en América Latina y el Caribe', 14-15 November, FAO Regional Office, Santiago, Chile (2011).

6 Liz Alden Wily, *Looking back to see forward: the legal niceties of land theft in land rushes*, 39 JOURNAL OF PEASANT STUDIES 751–775 (2012).

7 Anseuuw W., et al., *Transnational Land Deals for Agriculture in the Global South: Analytical Report based on the Land Matrix Database*, The Land Matrix Partnership, April 2012, p. 39.

8 Global Land Project (GLP), 2010, *Land Grab in Africa: emerging land system drivers in a teleconnected world*, The Global Land Project: http://www.globallandproject.org/Documents/GLP_report_01.pdf; Borras, S.M. Jr., R. Hall, I. Scoones, B. White and W. Wolford, 2011, *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, Journal of Peasant Studies, 38(2): 209-216.

9 Oxfam, *Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land*, 151 Oxfam Briefing Paper, Oxfam International, London, UK, 2011.

developing countries have certainly been targeted by investors, 56.2 million of which are located in Africa, 17.7 million in Asia and 7 million in Latin America.¹⁰ Moreover, the majority of reported acquisitions are concentrated in few countries

In this global tension toward the last available land, data show that Brics' investors increasingly play a crucial role – except Russia, which remains at the margin of the rush probably due to the amount of available land–, demonstrating that land grabbing is not only happening from the traditional core to the peripheries, but also transversally on the geopolitical map of the world. Interestingly enough, if we analyze the data gathered by the Spanish NGO Grain (2012) and by the Land Matrix, it is possible to put in evidence the creation of zones of interest for each country, with a predilection toward neighbor countries (especially in the case of Brazil, South Africa and China), and certain areas of the African continent depending on geographical proximity or linguistic ties. Even more interestingly, it appears clear the choice of Brics' investors to target Low Income Countries. As table 1 shows, Indian investors are particularly active in Indonesia, Malaysia and in the Eastern part of Africa (especially Ethiopia¹¹ and Kenya), while Brazilian interests are intra-regional, although they denote increasing interest over Portuguese speaking African countries and Asia.¹² Interestingly, South African capital have begun crossing the borders of Mozambique, Zambia¹³ and Swaziland,¹⁴ but also of the Democratic Republic of Congo,¹⁵ Angola, Benin, Congo and Ethiopia.¹⁶ Finally, according to the available data, China certainly represents the most active investor, with more than 5 million hectares of

10 For the moment, the Land Matrix Initiative has elaborated only half of the available data, because the other half has not been confirmed with a sufficient degree of certainty. Therefore the figures might be significantly higher. Moreover, the member of the Matrix (GIGA Institute, CDE, ILC, CIRAD and GIZ) have decided not to take into account operations of merge and acquisition (M&A), which are undoubtedly increasing all over the world.

11 According to the data collected by Grain, Indian corporations are involved in at least twelve agricultural projects in India, ranging between 3,000 to 311,000 hectares.

12 In its latest report, Grain has evidenced the presence of Brazilian investments in Argentina, Colombia, Ghana, Mozambique, Sudan and Australia, but there are evidences of large investments in Paraguay too. Source, Grain 2012. According to a recent analysis conducted by Rabobank, in fact, the Latin American country is seeking to expand within its immediate region (Rabobank International, *New Models of Farming in Argentina*, Rabobank Industry Note, 2011).

13 Cf Mulenga N., Foreign Farmers Undermine Food Security in Zambia, November 1st, 2012, available from <http://www.ipsnews.net/2012/11/foreign-farmers-undermine-food-security-in-zambia/>, last access November 11th, 2012.

14 Grain, 2012.

15 Cf Commercial farming in the Congo not for the faint-hearted, October 26th 2012, available at http://www.howwemadeitinafrica.com/commercial-farming-in-the-congo-not-for-the-faint-hearted/21576/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+HowWeMadeItInAfrica+%28How+We+Made+It+In+Africa%29, last access November 11th, 2012.

16 Source Land Matrix 2012. Last accessed November 11th, 2012.

land accessed in all the continents, with a stronger presence in Southern Asia,¹⁷ Oceania and South America, rather than in Africa.¹⁸

Country and Total Land	Total Land and Regional Areas	Target Countries
Brazil 28,000 ha ¹⁹	Eastern Africa 28,000 ha	Brazil; Mozambique, Ethiopia
India 1,924,50 9 ha	Central Africa: 15,000 ha Eastern Africa: 1,761,800 ha Northern Africa: 8,020 ha South East Asia: 139,689 ha	Cambodia, Indonesia, Lao, Philippines, India, Cameroon, Ethiopia, Madagascar, Mozambique, Sudan
China 1,140,68 3 ha	Central Africa: 10,000 ha Eastern Africa: 126,171 ha South America: 348,972 ha South-East Asia: 628,139 Western Africa: 26,000 ha	Cambodia, China, Sudan, Lao, Philippines, India, Bolivia, Peru, Argentina, Benin, Cameroon, Ethiopia, Mali, Democratic Republic of Congo,

17 Mainly in Indonesia, Laos, Philippines, Pakistan. Source, Grain 2012.

18 Chinese interests are significantly strong in Australia and New Zealand, where Grain (2012) has evidenced at least two agrobusiness projects, one financial and the acquisition of a local farming corporation. The largest agricultural Chinese public corporation, Beidahuang, had concluded a 320.000 ha investment agreement with the governor of the Rio Negro Region, in Argentina, which has been halted by judicial decree, and has also triggered a legislative proposal against foreign access to land.

19 Brazil is both a target and source countries. The Land Matrix does not report data concerning intra-regional and global land grabbing nationally and internationally conducted by Brazilian investors. In particular, Grain (2012) reports of investments in Argentina (7,000 ha), Australia (1,876 ha for livestock), Colombia (13,000 ha for agrobusiness), Ghana (5,000 ha for rice production), Sudan (100,000 ha for cotton production in cooperation with Agadi, a Sudanese state corporation). Moreover, the Land Matrix database reports of 255.000 ha of land acquired in Brazil. Finally, Brazil is involved together with Mozambique and Japan in the realization of the Pro-Savana agricultural project, a triangular project between the Republic of Mozambique, the Federal Republic of Brazil and Japan, for the development of large-scale agriculture in the Nacala Development Corridor, affecting 14 districts in the provinces of Niassa, Nampula and Zambezia, and covering an area of approximately 14 million hectares. (Cf Mozambique: Pro-Savana a Priority Programme – PM, available from <http://allafrica.com/stories/201204230099.html>, last access November 11th, 2012; Patel Raj, Pro-Savanna Anti Peasant, available from <http://rajpatel.org/2012/10/24/prosavana-antipeasant/>).

		Uganda, Zimbabwe
South Africa	Central Africa 340,000 ha	Colombia; Angola; Benin;
1,416,411 ha	Eastern Africa: 367,174 ha	Ethiopia, Democratic Republic of Congo, Mozambique;
	South America 55,794 ha	
	Western Africa 650,000 ha	Madagascar

Notes: Table elaborated by the author. Source: The Land Matrix database.²⁰

On the basis of the available data, it is possible to affirm that Brazilian, Indian, South African and Chinese investors have already obtained access, via lease or purchase, to million hectares located in other Southern countries, directly competing with Northern and Gulf countries for land and water resources. However, the object of this contribution is not only to provide the evidence that Brics' investors are participating to the global land rush, nor to underline their preference toward Low Income Countries, but rather to demonstrate the importance of the diplomatic and legislative strategies adopted by the governments of the Brics and their impact on target countries' sovereignty. As global players in need of economic expansion, energy and food, the emerging economies are enhancing and facilitating operations involving land abroad in a way which appears incoherent with the proclamations of sustainable development, cooperation, solidarity, and respect of foreign sovereignty. The similitude with the Northern rhetoric and goals appear blatantly evident.

Section III. Legally enhanced land grabbing: Municipal law as a source of incentives

Despite the general perception, land grabbing is seldom a simple bilateral relationship between investors and target states. Therefore, abandoning the temptation to point the finger against these two actors, we cannot lose sight with the fact that investments are undertaken with the object of satisfy the demand of a third party, and that in the majority of the circumstances the investors are embedded, incentivized and protected by the legal order produced by their own home country. In this optic, while Section IV will focus on the 'territorialization'²¹ of the

²⁰ Last access 11th November 2012.

²¹ P. Legrand, *On the singularity of Law*, 47 HARV. INT'L LJ 517 (2006).

narrative in host countries via the conclusion of investment agreements, this Section is dedicated to the study of how home countries employ their national and international legal tools to create the best environment for investments, modernization and the realization of the narrative.

In particular, through the analysis of municipal and international law, I want to show that the Brics are actively involved in a project finalized to the consolidation of the modern paradigm and to the enhancement of large-scale investments in land, both within their territory and abroad. Although not often taken into consideration, law is thus essential, not only because it can institute internal incentives for whoever aims at investing abroad, but also because on an international level it can coercively reduce the autonomy of source countries and subordinate their sovereignty to the rights and interests of the investors. In order to keep separated the unilateral legal actions of the Brics and the conclusion of international agreements, I will first focus on the use of national law as a source of incentive and then on how Brics are utilizing international legal tools in a way that is functional to the expansion of large-scale investments abroad.

In a recent papers dedicated to 'local rules and global economy', Dan Danielsen explores the growing significance and theoretical implications of 'local rules'—such as Chinese labour standards, US financial regulation and Swiss bank secrecy rules—in the global economy, with the aim to develop new and more complex notions of economic participation, political pluralism and distributive justice in the creation and operation of both the local and the international rules that comprise the global economic regulatory order.²²

Adopting a similar approach, that I have also proposed with regards to the current role of European Union in subsidizing land grabbing and human right violations,²³ I look here at the national legislations of the Brics to determine whether 'local rules' are such to have an impact on the acquisition and use of land outside national borders. Not surprisingly, the first conclusion is that the China, India and South Africa, countries that openly embrace the narrative of large-scale as a needed step toward modernization, have been adopting legal reforms that favor the

22 Dan Danielsen, *Local rules and a global economy: an economic policy perspective*, *Transnational Legal Theory*, Vol. 1, No. 1, pp. 49-115, March 2010.

23 Tomaso Ferrando, *Sovereignty and Land Grabbing: An Introspective Human Rights Approach*, forthcoming

delocalization of food and energy production. On the contrary, Brazil has decided to utilize its legislative autonomy to reduce access to Brazilian land by foreign investors, while the ongoing accumulation of Russian land is rather the consequence of the privatization that took place in the '90s.

a) Starting from the three countries which intervened on their municipal law in order to favor investments abroad in land, the Indian case appears extremely relevant. In 2010, in fact, it was instituted a Working Group on agricultural production chaired by Haryana chief minister B S Hooda, whose goal was to look at ways of boosting agriculture production in India. In accomplishing its task, the Hooda Committee (as it has been renamed) proposed a series of Recommendations, among which number 33 affirms that, like many other countries who have "shopped for land abroad for growing crops to meet consumption needs", Indian companies could also be encouraged to buy lands in other countries for producing pulses and edible oils, in particular in Argentina, Myanmar and ASEAN countries, and asks the government to facilitate land acquisitions by national investors. 'We should seriously consider these options,' the Hooda Committee says in earnest, 'for at least 2 million tonnes of pulses and 5 million tonnes of edible oil for 15–20 years.'²⁴

Following the recommendation of the Working Group, in the last two years the Indian Government has supported a plurality of legal initiatives to facilitate Indian agricultural companies in their overseas investments in Africa and elsewhere, including through support for conventional new greenfield foreign direct investments, merger and acquisition (M&A) and the purchase of existing firms; public–private partnerships (PPPs) and specific tariff reductions on agricultural goods imported to India;²⁵ the concession of preferred Lines of Credit (LoC) to partner governments, but also to financial institutions, through the Indian Export Import Bank (Exim Bank).²⁶ The intention of the government, clearly stated in its public announces, is to avoid direct investments in land abroad in order not to be considered a neo–colonizer, but to act

24 Quoted in Birak Patnaik, *The new shifting agriculture: Shopping for fields overseas*, Times of India, July 9, 2010 available from http://articles.timesofindia.indiatimes.com/2010-07-09/the-good-earth/28298253_1_food-crisis-land-acquisitions-tonnes-of-edible-oil.

25 For example, Ethiopian farm produce entering Indian markets is now taxed less than produce from India, according to Anand Seth, the deputy director general of the Federation of Indian Export Organisations. (Rowden, *supra* note 56.

26 *Id.* at 289.

as a facilitator 'if the private players show interest in this'.²⁷ In this optic, public law represents the preferred tools to generate the incentives needed by private investors to go abroad, and then import the products to India rather than placing them on the global market.

b) As for China, Lorenzo Cotula has recently noted how its case illustrates how the boundaries between 'state' and 'non-state' enterprises may be extremely fuzzy:²⁸ the involvement of the Chinese government in large-scale investments abroad appears, in fact, significantly more intrusive than that of India. Some of the corporations that are acquiring concession rights in Global South Countries, like COFCO (China National Cereals, Oils and Foodstuffs Import and Export Company) are state-owned, their senior staff appointed by the state, and their CEOs have ministerial level rank. Differently from its Asian neighbor, the Chinese government is not only sustaining the individual decision of Going Global by providing 'access to special credit lines, tax breaks, and possibly favourable interpretation of regulations and priority in allocation of key contracts',²⁹ but is also defining the strategy and selecting the target countries, or the target foreign corporations, for their investments.³⁰

c) In the case of South Africa, the role played by the Government in sustaining investments in land abroad seems equally relevant. However, given that the crops produced abroad by South African farmers are generally sold on the global market rather than imported back to the source country, the efforts undertaken by the African government primarily concern the international sphere and the diplomatic relations, rather than the creation of legal incentives to guarantee food security through productive delocalization. In any case, the Minister of Agriculture, Forestry and Fisheries, Tina Joemat-Pettersson, announced in 2010 a R6 billion fund for supporting South African farmers, half of which would be spent on projects beyond South Africa's borders.³¹ Moreover, despite the raising concerns about the negative impact of land grabbing, no

27 Pawar S., *Daal not enough? Grow them abroad*, The Telegraph, Calcutta, 5 December 2010

28 Lorenzo Cotula, *The international political economy of the global land rush: A critical appraisal of trends, scale, geography and drivers*, JOURNAL OF PEASANT STUDIES 1–32 (2012).

29 Cotula L., S. Vermeulen, R. Leonard and K. Keeley, *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, Rome/London: Food and Agriculture Organization of the UN (FAO)/International Fund for Agricultural Development (IFAD)/International Institute for Environment and Development (IIED) (2009).

30 *COFCO to raise capital to fund acquisitions of overseas sugar firms*, Global Times, 09 Mar 2012, Bloomberg News, *Cofco seeks acquisitions to 'balance' China's food demand*, Bloomberg, 21 Oct 2011; Dixon N., *Chinese move on Tully*, The Cairns Post, 20 Apr 2011.

31 Hall, supra note 75; *Farmers' Weekly*. 2010. 'SA, Zim not safe for investments.' 9 May 2010.

positive legal intervention has been made to require the respect of international standards by national investors undertaking projects abroad.

d) Moving to Brazil, it has to be noticed its two-headed approach toward large-scale investments: On one side, in fact, the Brazilian Parliament has been debating for almost one year the introduction of a new legislation to prohibit foreign ownership of Brazilian land,³² but on the other side the Government is pursuing a policy of land concentration and massive industrialization, both nationally and abroad, with specific attention to the production of agrofuels.³³ The fight against foreign ownership, already began in 2010, when limits on the area of land foreign companies can buy were imposed by a new interpretation of the existing law issued by the Brazilian attorney general's office,³⁴ does not appear to be accompanied by a coherent politics in favor of peasants and local realities, but rather the opposite. The economic growth of the Latin American country has been strongly dependent, in fact, on the expansion of arable land and pastures, which appear to have significantly impacted the environmental and social equilibrium of vast tracts of rain forest.

Since the beginning of the ethanol programme (ProAlcool) in the '70s, in fact, the government has been providing economic and legal support for increasing the area of sugarcane plantations and structuring the sugar-alcohol. More recently, decree n 85.297 of 2005 institutionalized the Biodiesel Program, introducing a Social Fuel Stamp which prioritizes the cultivation of castor bean plants (mamona) and palm trees (dende) over other crops, by guaranteeing tax breaks, fiscal benefits³⁵ and funding from the BNDES (Brazilian Bank of Economic and Social Development). Moreover, beginning in 2008, municipal law has been enacted to support the production of ethanol for export and internal consumption, recently

32 According to the Movimento Sim Terras, the project is currently facing a moment of impasse due to the different positions adopted by Beto Faro, who presented the bill, and Homero Pereira, who is president elected of the Agriculture Parliamentary Front (FPA). *the MST defende proibição da aquisição de terras por estrangeiros e pede mobilização contra retrocessos*, Movimento Sim Terras, 28 March 2012.

33 Franco et al., *supra* note Errore: sorgente del riferimento non trovata .

34 Stating the determinacy of the current campaign against foreign ownership, the new reading of Lei 7909 of 1971 has enabled a change of attitude towards foreign investors without the need to draft a new law. The change meant foreign-controlled companies were no longer considered Brazilian when headquartered in the country, a status they had previously enjoyed. Foreign company status means they must now adhere to tighter rules for land purchases. (Gomes F., *Brazil groups say farmland rules choke investment*, Reuters, 9 Mar 2012).

35 In particular, in the north and northeast of the country, companies that undertake these cultivations are exempted from the payment of the Private Company Employee Fund (PIS) and the Social Security Financing Contribution taxes (Cofins).

accompanied by the softening of the Law of Environmental Crimes, chronologically followed by the authorization for the construction of sugarcane factories in conservation areas and close to natural springs.³⁶ However, the raise of the internal pressure against deforestation is significantly moving the attention of the government and of the investors toward peripheral countries.

e) To conclude, the Russian case shows how investors and the Russian Federation are actively involved in internal projects of industrialization, without particular interest in land located beyond the borders. More specifically, the 2010 Food Security Doctrine considers that food security represents an issue of national security, and that priority has been given to large-scale projects of industrialized investment as the undiscussed method for increasing productivity and satisfying the needs of the Russian people. Moreover, legal reforms aimed at privatization and formalization of land titles have certainly been playing a crucial role in favoring the concentration and accumulation of power over the land. By issuing shares to former employees and granting the possibility to sell them, post-1991 reforms have overlooked economic asymmetry, and favored the sale of shares to richer farm managers and outside investors. As a result, the rural dwellers become landless workers on their former land, and an internal land grabbing is taking place.³⁷

Section IV. The bilateralization of international relations and the sovereign dilemma

Having provided a general overview of the use of municipal law to push national investors abroad, I want now to investigate how international law, intended as an overarching legal order that binds sovereign states, is used to create a global legal environment which favors land investments, 'ties the hands of the host countries' and progressively subordinates the communities and the environment to the needs of the capital and of source countries. In particular, I claim that the expansion of a system based on bilateral investment treaties is producing a shift in international relations from universalism to bilateralism, a condition in which the relations of power and economic asymmetries are stronger. In this situation, peripheral states create a fragmented community with a plurality of individual counterparts, are prevented

36 Franco et al., *supra* note __. National Institute for Space Research (INPE) and the Ministry of Environment (MMA).

37 Visser O. and N., Manonova, *supra* note 49.

from dialogue and cooperation, and therefore, as in the prisoner dilemma, more likely to adapt selfish and globally inefficient solutions.

The starting point of my reasoning is represented by the moment of decolonization, when the international community auto-recognized its members as legitimate sovereign over a specific territory and people, providing each one of them with equal power and independence within their boundaries, along with powers and obligations *vis-à-vis* the other members of the community. In particular, if we adopt a Third World Approaches to International Law,³⁸ we have to notice the attempt to preserve the colonial structure by the expansion of the European model of state as the unique term of reference of modernity and by the redefinition of economic and legal subordination into apparent equality, further reinforced by the creation of the Third World and the idea of development.³⁹

In this scenario, international law as the legal network among sovereign states provided the neutralization of existing asymmetries, but at the same time was used by Southern countries to formalize their position as opposed to that of the Global North. Between the 1960s and the 1970s, for example, the Hull Rule requiring prompt, adequate and effective compensation for expropriation was repealed as customary norm,⁴⁰ and the General Assembly of the United Nations issued three extremely important resolutions concerning the New International Economic Order⁴¹ and the notion of Permanent Sovereignty over Natural Resources.⁴²

These Resolutions not only represented an important substantive achievement, guaranteeing easier nationalizations and a higher level of freedom of economic action for the states, but gave a strong signal about the outcome that Southern States could obtain by means of cooperation. Thanks to their numerical superiority, they could shape the international legal

38 See e.g. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION*, (Antony Anghie et al. cur., 2004).

39 See ESCOBAR, *supra* note 66.

40 Andrew T Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 639–688 (1998); Michael S. Minor, *The Demise of Expropriation as an Instrument of LDC Policy, 1980-1992*, 25 *JOURNAL OF INTERNATIONAL BUSINESS STUDIES* 177–188 (1994).

41 G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9599 (1974), reprinted in 13 *I.L.M.* 715 (1974).

42 G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962), reprinted in 2 *I.L.M.* 223 (1963); G.A. Res 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N., Doc. A/9030 (1974), reprinted in 13 *I.L.M.* 238 (1974). See also Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 *A.B.A.J.* 463 (1953).

order to their own interests and needs, rather than accepting the vision and paradigm of the Global North. However, few years later the Global North, facing the risks of a concrete affirmation of a New International Economic Order based on the ideas and proposals of subaltern countries, and profiting of the end of the two-blocks Cold War, began pursuing a new strategy of North-South relationships, mainly based on massive lending, structural adjustment projects and the intensification of bilateral relationships.

a) International Law and the Bilateralization of international relations

From a legal point of view, in fact, the surge in Bilateral Investment Treaties (BITs) represents the codification of a transformation of states' relationships from the multilateralism of the origins to a more kaleidoscopic bilateralism which gives more relevance to the bargaining power of each party and generates at least two consequences that negatively impact on investments' recipient countries.

i) First of all, the proliferation of BITs triggers a race to the bottom in the prerogatives of recipient states. BITs represent, in fact, an incentive for the investors⁴³ who perceive their money less at risk after an international agreement has been concluded. Therefore, in a situation of reduced Official Development Aid, countries consider their conclusion as an opportunity to receive more investments, and rationally chose this strategy although it means to renounce to fundamental characteristics of their sovereignty, included the possibility to exercise their own jurisdiction for the resolution of investments' related controversies. Without communicating among each other and thinking about their own interest, the sovereign prisoners of their territorial cage always adopt the more rational and less efficient solution. On the contrary, in case the recipients were given the opportunity to communicate, as in the case of the three UNGA resolutions, the outcome would be different.

ii) Secondly, the conclusion of a BIT is likely to generate the phenomenon that Richard

43 Not surprisingly, the AgriSa official press release states that 'Agri SA is trying to make it safe for its members to expand their farming activities elsewhere in Africa in order to enjoy economies of scale and make use of the abundance of resources such as land, water and production incentives. Before becoming involved in any country, the content and enforceability of bilateral trade agreements and agreements relating to the protection of investments must be carefully scrutinised'. Kobus Visser, *Agricultural Policy for Rural Development and Food Security*, AgriSa E-Newsletter, September 16, 2010.

Baldwin has defined the 'domino effect of regionalism':⁴⁴ Whenever a country signs a BIT and puts itself in a position of legal advantage in the eyes of the investors, a domino effect is triggered, and non-signatories countries rush to enter into similar agreements in order to fill the gap with the neighbor. If the bilateralization of relationship determines a reduction of states' prerogatives, the domino effect has the potential to expand the regulatory race to the bottom to the neighbors, to the benefit of investors and source countries. By entering pro-investor clauses such as the most favored nation, the fair and equitable treatment, the full compensation for indirect expropriation, and arbitration clauses, and by creating a competition between neighbor states, which thus consider themselves as enemies rather than allies, countries reduce their possibility to adopt policies and laws to serve their national policy objectives, which may keep changing or evolving – without any restriction being imposed on this ability.⁴⁵

In this scenario, the international system based on the fragmentation among states, the reduction of Official Development Aid finalized to reinforce national economic and food sovereignty, and on the mobility of capital, entraps states in a prisoner dilemma and in a 'domino effect' which produce non-efficient solutions. Instead of moving to the top, regulatory competition inevitably tends to the bottom, with more protection for the investors and stronger constraints for sovereignty as expression of the community and its interests. The proliferation of BITs, therefore, appears as the codification of an asymmetrical world where investments are free to move, and take advantage of their mobility to force countries into a fierce competition whose outcome is a subordination of the collectivity to the interests and economic needs of the investor.

Numbers about the BITs' expansion appear eloquently clear, and the Brics are increasingly participating to this trend. Between 1959, the year the first Bilateral Investment Agreement signed between Germany and Pakistan in 1959,⁴⁶ and 1991, over 400 BITs were signed worldwide, so that more than ninety developing states and 'virtually every developed state' were

44 Richard Baldwin, *A Domino Theory of Regionalism*, No. 4465 NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER SERIES (1993), <http://www.nber.org/papers/w4465>.

45 Prabhash Ranjan, *Indian Investment Treaty Programme in light of Global Experiences*, 45 (7) Economic and Political Weekly (2010), 68-73.

46 UNCTAD, *World Investment Report 2006*, 26; Peterson L., 2009, *Human Rights and Bilateral Investment Treaties*, International Centre for Human Rights and Democracy Development, Montreal, Canada.

parties to at least one such treaty during this period.⁴⁷ Moving from the past to more recent days, we discover that more than 2600 bilateral investment treaties had been signed in mid-2008, and BIT-like provisions have also been written into a growing number of broader Free Trade Agreements (FTAs).⁴⁸ Focusing on South-South BITs, by 1990 they were only 44, to then become 653 by July 2004, or 28 per cent of the total number of BITs then signed.⁴⁹ Moreover, over the last few years the share of South-South BITs has ranged from 22 per cent to 30 per cent of the total number of new BITs signed annually, defining the boundaries of a clear political strategy of bilateralization of the South-South network.⁵⁰

In particular, I claim here that BITs are utilized by the states to create reinforced regional ties with target countries, based on subordination of sovereign prerogatives and freedom of exploitation. If it is true, a surge of BITs concluded between the Brics and LICs and the repetition of a strongly pro-investor content would represent two evidences of the fact that the South-South rhetoric differs from the facts on the ground. The next part of this Section will thus be dedicated to the study of bilateral relationships between the Brics and the LICs: The findings do confirm the assumptions at the basis of this Paper.

b) The Brics and the BITs

If we look at the official data provided by the UNDP, the Brics have clearly played a pivotal role in the recent construction of a BITs' based international legal order: Starting from China, the Asian dragon has increasingly utilized international law as an instrument to protect their investors abroad, starting from 1998. As an evidence, in 2007 alone China concluded four new BITs with developing and LICs countries (Costa Rica, Cuba, Republic of Korea, Cote d'Ivoire, Seychelles, Myanmar, Madagascar, Ethiopia), which amounts to about 60 per cent of the 120

47 Guzman, *supra*, p. 652.

48 UNCTAD, *Recent Developments in International Investment Agreements 2007-June 2008*, IIA Monitor, no. 2, 2008, available from www.unctad.org/en/docs/webdiaeia20081_en.pdf

49 UNCTAD, 2006, *South-South Investment agreements proliferating*. IIA Monitor No. 1 (2005) International Investment Agreements. New York: United Nations. Available from: http://www.unctad.org/en/docs/webiteiit20061_en.pdf

50 In 2005, 20 out of the 70 new BITs concluded were between developing countries. In 2006, 23 out of the 73 new BITs were concluded between developing countries (UNCTAD, *ibid*).

BITs that had been concluded before that date.⁵¹ And that happened mainly in Africa.⁵²

Moving to India, in 2005 it had already signed BITs with 81 countries, 31 one of which were with Southern counterparts, the majority of which in Asian and African.⁵³ More interestingly for our investigation, the growing interest of Indian investors toward African resources and markets has been certified by the surge in the number of Bilateral Investment Protection Agreements concluded with African countries from 1999 to 2010: today, India has already concluded treaties with Djibouti, Ethiopia, Ghana, Zimbabwe, the Democratic Republic of Congo, Senegal, and Mozambique.⁵⁴

South Africa too has been extremely active in signing BITs since the end of the apartheid, and it seems involved in a process of re-orienting its international relations according to the economic needs of its national investors. In an official 2009 review of the RSA's BITs, in fact, the Department of Trade and Industry stated that 'Given the sizable intra-Africa investments made by RSA companies, the RSA ought to assess how best such investments by its citizens may be safeguarded'. As a consequence of the intra-regional expansion of South African investments, the Government has adopted a politics of renewing existing BITs or signing new ones: as an evidence, in the last three years Agreements on the Promotion and Reciprocal Protection of Investment (plus related protocols) have been concluded with Angola, Cameroon, DRC, Gabon, Guinea, Ethiopia, Mauritania, Namibia, Sudan, Tanzania, Zambia and Zimbabwe.

Russia too has been adopting the strategy of the South-South bilateral relations, and has been expanding its horizons from South Asia to African and South American countries, such as

51 China is currently in FTA negotiations with Australia, Pakistan, the Southern Africa Customs Union, the Gulf Cooperation Council, Iceland, Norway, Switzerland and Taiwan. Further down the horizon there is talk of eventual negotiations with India, Mongolia and a possible three-way deal with Japan and Korea. Cf [bilaterals.org](http://www.bilaterals.org), <http://www.bilaterals.org/spip.php?rubrique118&lang=en>.

52 Malik M., 2010, *South-South, Bilateral Investment Treaties: The same old story?*, IV Annual Forum for Developing Country Investment Negotiators Background Papers New Delhi, October 27-29

53 Argentina, Bahrain, Djibouti, Egypt, Indonesia, Ghana, Republic of Korea, Kuwait, Lao People's Democratic Republic, Malaysia, Mauritius, Mongolia, Morocco, Oman, Philippines, Qatar, Sri Lanka, Sudan, Taiwan Province of China, Thailand, Turkey, Viet Nam, Yemen, Zimbabwe. See UNCTAD, 2005, *South-South Cooperation in International Investment Agreements*, UNCTAD Series on International Investment Policies for Development

54 Djibouti 19th May 2003; Ethiopia 5th July 2007; Ghana 5th August 2002; Zimbabwe 10th February 1999; Democratic Republic of Congo 13th April 2010; Senegal 3rd July 2008 in Dakar (then renewed on 17th October 2009); Mozambique 19th February 2009. Source: Ministry of Finance, India, http://finmin.nic.in/bipa/bipa_index.asp?pageid=3

Namibia on 2009⁵⁵ and Nicaragua on 2012.⁵⁶ In particular, the agreement recently concluded with the Namibian governments is the natural consequence of the idea that 'Africa is becoming one of the most attractive regions for Russian big business [and that h]ere, Russian large natural resources companies can secure a foothold relatively easily, thereby taking the first step to the globalization of their business. Africa is a real alternative to the haphazard extraction of natural resources in Russia, and it's a good opportunity for Russian machine builders who work with Russian natural resources companies'.⁵⁷

Concluding with Brazil, it is well known that the Latin America country has concluded very few investments-related treaties with other countries, and that the recent years have not witnessed, differently from what is happening to the other Brics, an inversion of this trend. Up to now, in fact, Brazil has concluded only eight BITs, three of which are with countries of the Global South.⁵⁸ However, it is equally known that Brazil has a long lasting tradition of utilizing diplomatic methods rather than legal measures, as demonstrated by the twenty-seven visits that former President Lula paid to African countries during his mandate. Attempting to block foreign investments at home, the Brazilian government is therefore economically and diplomatically sustaining its investors in foreign projects, mainly via the conclusion of bilateral protocols and commercial agreements aimed at increasing the production of agrofuels abroad and facilitate their commercialization on the global market.

For example, Brazil has concluded individual agreements with EU countries to reduce the duties to import agrofuels, and has recently supported the constitution of the \$2 bln Pro-Savana fund directed to the industrialization of 14 million hectares of land in the zone of Nacala, North of Mozambique.⁵⁹ The good diplomatic connections between Brazil and African countries, along with the extended agrofuels' know-how that Brazilian enterprises are exporting on the other side of the Atlantic Ocean, are therefore filling the gap left by the absence of Bilateral Investment

55 Source USA Investment Climate Statement – Namibia. Available from <http://www.state.gov/e/eb/rls/othr/ics/2011/157331.htm>

56 [Nicaragua and Russia Sign Bilateral Investment Treaty, February 05, 2012 available from http://www.24-7pressrelease.com](http://www.24-7pressrelease.com)

57 Russian Embassy in Ghana official webpage, available from http://www.ghana.mid.ru/for_272.html (last visited April 24th, 2012).

58 Venezuela in 1995; Chile in 1994; Paraguay in 1956.

59 AllAfrica, *Mozambique: Agreement on Nacala Fund*, available from <http://allafrica.com/stories/201207061132.html> (last visited September 7th, 2012).

Treaties, but certainly do not provide Brazilian investors with the same level of legal security that investors from other countries. For that reason, it can be expected an increase in the number of BITs concluded between Brazil and LICs during the coming years.⁶⁰

In conclusion, as the data presented and elaborated in Table 2 below demonstrate, the India, China and South Africa are currently involved in the construction of a South-South network of bilateral investment treaties which I claim to be foster their own economic expansion through the guarantee of a higher level of protection and security to their national investors. The strategy adopted appears very similar to that has been characterizing North-South relationships from the '90s, with the crystallization, via the bilateral agreement, of the existing economic asymmetries and the reduction of the political and legislative autonomy of recipient countries. Differently from the other three, Brazil is acting along diplomatic ways, while Russia seems to be more interested in industrializing the vast amount of land still cultivated by rural farmers.

	BITs with LICs	BITs and Investment s in LICs	Projects in non-LIC with BIT	Projects in LIC w/o BIT	Non-LIC non- BIT target
India	Djibouti, Ethiopia, Ghana, Lao People's Democratic Republic, Mongolia, Sudan, Viet Nam, Yemen, Zimbabwe, Djibouti, Ethiopia,	Ethiopia, Sudan, Mozambique, Cambodia.	Madagascar Cameroon,		Philippines

⁶⁰ The use of BIT as an economic incentive for investments in land abroad clearly emerges from the words of Willie Spies, the South African lawyer who has recently represented South African farmers who are trying to fight the loss of their Zimbabwean farms. Cf Bell Alex, SA government not liable in Zim land grab cases, 5th April 2011, available from <http://www.swradiofrica.com/news050411/sagov050411.htm>, last access 11th November 2012.

	Ghana, Zimbabwe, the Democratic Republic of Congo, Senegal, and Mozambique				
China	Benin, Bolivia, Cambodia, Cameroon, Ethiopia, Ivory Coast, Georgia, Ghana, Guyana, Laos, Madagascar, Myanmar, North Korea, Uganda, Viet Nam.	Benin, Bolivia, Cambodia, Cameroon, Ethiopia, Laos, Uganda	Argentina, Australia, Indonesia, Philippines, New Zealand	Mali, Zimbabwe, DRC	
South Africa	Angola, Cameroon, DRC, Guinea, Ethiopia, Madagascar, Mauritania, Sudan, Tanzania, Zambia, Zimbabwe	Angola, Ethiopia, Tanzania, Zambia, Zimbabwe	Benin		Colombia

Table 2: Brazil and Russia have been voluntarily excluded from this table

c) South-South BITs as a North-South copycat

Finally, there is another element which appears of a certain interest, consolidates the theory of strategic use of international law, and that emerges both from the analysis of the BITs' contents both from official statements of Brics' governments. Rather than acting as institutional and legal laboratories for testing new rules, and instead constructing a parallel network of

international bilateral agreements based on new principles and new relationships between investors and states, South–South BITs reproduce the same logic and, in some cases, the same wording.

As clearly evidenced in a 2009 notice of the Department of Trade & Industry referring to the ongoing review of Bilateral Investment Treaties entered into by the Republic of South Africa since 1994 to date, the

‘Existing international investment agreements are based on a 50–year–old model that remains focused on the interests of investors from developed countries. Major issues of concern for developing countries are not being addressed in the BIT negotiating processes. BITs extend far into developing countries’ policy space, imposing damaging binding investment rules with far–reaching consequences for sustainable development’.⁶¹

Similarly, the after 1998 China has entered a second phase of BITs, which is characterized by a deeper liberal approach toward foreign investments, which has been explained by Alex Berger as the demonstration of the shift from investment recipient to investment exporter. In particular, the author underlines how in this second phase of its BIT policy, China initiated a gradual shift towards stronger provisions for substantive and procedural foreign investment protection. Chinese BITs today entail almost all standard provisions found in mainstream European–country BITs.⁶²

In conclusion, the combination of political strategy and legal content that has just been described leads to the conclusion that the current raise in the number of South–South Bilateral Investment Treaties not only does not introduce any legal innovation compared to traditional North–South relationships, but willingly takes advantage of the domino effect and of the prisoners’ dilemma in order to consolidate their economic superiority over other Southern countries. Whether in the past the BITs emerged in order to create comparative advantages

61 Republic of South Africa DTI (Department of Trade and Industry), NOTICE 961 OF 2009, 3 NO.32386, July 7, 2009.

62 Berger A., *China’s new bilateral investment treaty programme: Substance, rational and implications for international investment law making*, Paper prepared for the American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 biennial conference “The Politics of International Economic Law: The Next Four Years”, Washington, D.C., November 14-15, 2008

within a homogeneous international legal order, in fact, a similar scenario is taking shape today with the conclusion of investment contracts. As the next Section will analyze, in a moment of history where more than 2600 BITs have been signed and create a entangled network of international law guaranteeing high protection to the investors, where budgets of transnational enterprises are often higher than those of national countries, these private agreements represent, in fact, the legal tool to impose new constraints over host countries and extract extra-profit, in particular far what concerns the management of public natural resources.

Section V. Sovereignty to access peripheral land: are the Brics any different?

As anticipated, the last part of this Article is dedicated to the analysis of some concrete cases where Brics' investors, private or public,⁶³ have concluded land-related investment contracts in other countries of the Global South. In particular, the attention is directed to the content of the contracts, in order to verify whether they do respect the autonomy and independence of host countries or, on the other side, sovereign becomes functional to the creation of a sub-system of law functional to the satisfaction of the economic and legal needs of the investors. The conclusion, that represented the assumption of this entire contribution, is that South-South investment contracts in land do replicate the same content of North-South agreements, and actively contribute to the translation of the dominant narrative into reality. In particular, the interaction between global and local, private and public, that takes place in the contract, forces host countries to renounce to essential elements of their permanent sovereignty over natural resources, to subordinate communal interests to those of the investors, and, in some circumstances, to accept legal scenarios which are incompatible with international obligations.

Relying on an international legal order constructed by the interaction between multilateral agreements and bilateral investment treaties, investment contracts bring together international and municipal law, along with the investors as legal persons and the state as exerciser of

⁶³ Brics are involved as provider of legal and economic incentives, but also as shareholders. According to Between 2004 and the beginning of 2008, in fact, 117 state-owned and public companies from Brazil, Russia, India, and China appeared for the first time on the Forbes Global 2000 list of the world's largest companies (measured by sales, profits, assets, and market value). (www.forbes.com).

legitimate coercive power. In a complete overriding of the traditional legal boundaries, the contract, which is privately concluded and not always ratified by the national authorities, is at the same time law of the parties and law of the nation, so that its content is binding for the entire population. Furthermore, thanks to the use of umbrella clauses or to the application of the theory of the 'international minimum standards' of international law, the respect of the contract is enforced by rules of international law, making it a violations of international law any breach of the contractual obligation.⁶⁴

In particular, the comparison of the different contracts analyzed evidences two main aspects of the contract that produce a legitimate subordination of public sovereignty to private interests: a) the legal interpretation of land status and the transfer of sovereignty over other natural resources, water in particular. As these same elements can be traced in contracts concluded by European or North American investors, it is possible to conclude that, independently from the source country, the legal background and the content of the contract are such to guarantee the prompt realization of the interests of the investors independently from the needs and rights of local people (and sometime from obligations arising from international law).

a) Land as void and available

One of the most striking elements contained in the contracts involving Brics' investors is represented by the use of sovereignty in order to define land as void and immediately disposable, particularly in the case of Sub Saharan Africa.⁶⁵ Although studies conducted on the availability of land and the voices of the people, tell us that it does not exist underutilized or void land in Sub-Saharan Africa, the exercise of sovereignty as control over public land legitimizes the production of a different vision of reality, that is codified and crystallized in the clauses of the contract. According to the majority of the African constitutions, in fact, non-titled land belongs to the public, the nation or the state, i.e. the institutionalized authority, which has the duty to manage

64 See Alvik I., 2011, *Contracting with Sovereignty. State Contracts and International Arbitration*, Hart Publishing, Oxford.

65 In the name of the people, the representatives of the states assume the obligation to 'hand over vacant possession of the land' or to 'ensure that such lands shall be free from Encumbrances at the date of handover of such lands in accordance which the Development Project'. Cf. Article 6.1 of the contract concluded between the Ethiopian government and Karaturi Agro Products Plc. (R. Rowden, *India's role in the new global farmland grab*, 29 ECONOMICS RESEARCH FOUNDATION AND GRAIN, ECONOMICS RESEARCH FOUNDATION AND GRAIN, (2011).

but can never fully dispose of it. The occupation of the land by people without any official title is thus admitted but not legally recognized, and the state has the legitimate power to dispose of its natural resources. Whenever it concludes an investment contract that defines occupied land as void and available, the state is therefore looking at the legal reality, leaving aside the evidences emerging from the ground: acting as the owner of the land, and, by maximizing its power and prerogatives, it crystallizes a functional legal reality, and has the coercive power to legitimately enforce it.

Rather than being respected and kept independent, sovereignty is thus subordinated to the needs of the investors, which require a void land with no encumbers, a reality re-defined according to the content of a private act. When this happen, whoever does not respect the new legal canon defined into the contract is immediately wiped out from the sphere of legality, and become illegal: Peasants who do not treat nature as an exploitable source, farmers who practice shifting cultivation, nomadic pastoralism or hunting and gathering,⁶⁶ suddenly become legally inexistent or, even worse, outlaws. Wearing the glasses of the investor and of modernity, and in open violation of what stated by the Inter American Court of Human Rights⁶⁷ and the African Commission on Human and People's Rights,⁶⁸ the state voluntarily misreads a system where 'il

66 In Ethiopia, for example, a statement issued by the Ministry of Foreign Affairs in January 2010 affirms that 'the Agricultural Investment Support Directorate "has identified more than 7 million acres available now for lease [and that] Ethiopia has 74 million hectares of land suitable for agriculture out of its total 115 million hectares, but less than 15 million hectares is currently in use agriculturally." FDRE Ministry of Foreign Affairs, "Politically motivated opposition to agricultural investment", *A Week in the Horn*, 22 January 2010. "http://www.mfa.gov.et/Press_Section/Week_Horn_Africa_January_22_2010.htm". See Stebek, E.N., 2012, *Between "Land Grabs" and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia's Normative Setting in Focus*, Mizan Law Review 5, 175–214.

67 For the IACHR, "protection of the right of indigenous peoples to their ancestral territory is an especially important matter, as its enjoyment involves not only protection of an economic [unit] but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land". See IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Yakye Axa v. Paraguay*. Cited in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(c); [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 124]; IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 129.

68 In her *Endorois Welfare Council v Kenya* finding of February 4th, 2010, the African Commission states that '(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.' African Commission, *Endorois Welfare Council v.*

n'est pas indispensable d'identifier le propriétaire individuel, ou même communal de la terre. La notion qu'une telle communauté a un droit de culture, de pêche, de chasse, etc... est immédiatement acceptable',⁶⁹ and imposes the new reality of the private agreement over its people.⁷⁰

From the moment when public land is contractually defined as void and empty, although effectively not so, the boundaries between legality and illegality are redefined in favor of the investor, who can further require the state to exercise its legitimate coercive power in order to obtain the enforcement of the contractual reality. In some other cases, as the investment agreement signed between Mali and China Light Industrial Corporation for Foreign Economic and Technical Cooperation (CLETC),⁷¹ the contract makes reference to the '*création de Titres Fonciers au nom de l'Etat avant leur attribution à la société*',⁷² as property rights did not exist on the land, and fully relying on the role of sovereignty as allocator of coercive powers.

The same cannot be said about investments concluded in other regions, like in the case of a recent Chinese investments in Argentina⁷³ or Russia,⁷⁴ where the main concern is not represented by the non-emptiness of public land considered as such, although evidence shows that land investments around 'flex crops' and other food sectors tend not to occur in 'available marginal lands' – i.e. marginal, under-utilized or un-used, empty or sparsely populated, geographically remote, and socio-politically and legally available lands. On the other hand, the same inconsistency between reality and legal reality in the case of Brazil, where the industrialization of non-titled Amazonian land in order to produce agrofuels is affecting the

Kenya, para. 209.

69 Noble B., 1965, *Mémoire sur quelques aspects du régime foncier au Sénégal, en Angleterre et en Gambie*, Annales africaines, p.235. Cf Cotula, 2009, p. 62; S.M. Borrás Jr & J. Franco, *Towards a broader view of the politics of global land grab: rethinking land issues, reframing resistance*, 1 INITIATIVES IN CRITICAL AGRARIAN STUDIES WORKING PAPER SERIES (2010).

70 For example, Article 6.6 of the Ethiopia-Karaturi contract seems to suggest the Government will provide police or military action against any resistance: 'The lessor [Government] shall ensure during the period of the lease, the lessee [Karaturi] shall enjoy peaceful and trouble free possession of the premises and it shall be provided adequate security, free of cost, for carrying out its entire activities in the said premises, against any riot, disturbance or any other turbulent time other than force majeure, *as and when requested by the Lessee* (emphasis added). (See Rowdem *ibid.*.)

71 It is a 50 years contract signed on June 22nd, 2009 concerning 20,000 hectares of land in the Office du Niger for agricultural development.

72 Article 3.2 of the Mali-CLETC contract.

73 One of the most controversial cases is represented by the already mentioned investment by the state corporation Beidahuang in the Rio Negro Region, which amounted to 320,000 hectares for the production of maize, soja and wheat.

74 The Heilongjiang Province has leased 426,667 hectares for agricultural purposes. Source Grain, 2012.

rights of indigenous communities, and intensifying social tensions between farmers and communities.⁷⁵

In conclusion, the investment contract concluded between states and investors allows a reinterpretation of reality according to the needs of the latter through the exercise of the prerogatives of the former, which is subsequently enforced by the possibility for the investor to trigger principles of international law in order to obtain the respect of the contract. In this way, sovereignty is exercised neither autonomously nor for the good of people, but legally constrained and subordinated to the narrative of modernity and the legal framework that enhances the needs of the investors. Millions of people have already been displaced or prevented from accessing their traditional land, and this is happening under the cover of a complex legal network formed by contract, municipal, international and investment law.

b) Transfer of sovereignty over natural resources: the case of water

A second element that exemplifies the subordination of host countries to the economic needs of the investors concerns the transfer of sovereignty over natural resources others than land. In particular, the conclusion of the contracts often determine the silent privatization of water, which is fundamental for intensive agricultural production, to the detriment of the of the people, their basic needs, and their agricultural potential.⁷⁶ In order to fully develop large-scale projects, in fact, investors have to rely on a huge inputs, included water, which is therefore diverted from its natural course and utilized for their production. Whenever agriculture of scale is adopted, water is crucial, and its diversion can seldom be achieved in a way that is entirely consistent within the needs and survival of small-scale peasantry. Interception, diversion or storage of water create downstream effects or may place demands on upstream land users, and investment contracts are the legal instrument that legitimizes the appropriation of water for industrial needs, the codification of a power asymmetry that can only goes to the detriment of people's fundamental rights.

⁷⁵ Anaya J., 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedom of indigenous people. Report on the situation of indigenous people in Brazil*, United Nations Human Rights Council. Available at <http://www2.ohchr.org/english/issues/indigenous/rappporteur/visits.htm>

⁷⁶ See Ferrando T., *The Silent Privatization of Water*, forthcoming.

Among the several examples that are available, Article 3 of the Karaturi Agro Products Plc. – India contract, titled “*Rights of the lessee*”, affirms that “The issues addressed include the rights of the lessee to develop the land, build infrastructure, *use water from rivers and ground water for irrigation*, administer the land personally or through agency, use mechanization that the lessee deems fit, and terminate the contract with at least six months of prior notice” (emphasis added),⁷⁷ while Article 3.2 (c) of the same contract states that “The provision states the *lessee’s rights* “to build infrastructure such as dams, water boreholes, power houses, irrigation system [...] at the *discretion of the lessee* upon consultation and submission of permit request with concerned offices subject to the type and size of the investment project *whenever it deems so appropriate.*” (emphasis added).⁷⁸

The inclusion of ‘water clauses’ in the investment contracts represents an essential relevant element from the point of view of the investors, but can inevitably exacerbate the struggle between the exercise of sovereignty in the contract and the national and international legal obligations that bind the use of sovereignty. In the same way as it is happening with investment contracts concluded by Gulf Countries⁷⁹ or European counterparts, investors from the South utilize the private tool of the contract in order to win the arbitrage against common interests and needs. Through the contract, priority of access to water is guaranteed in order to satisfy the economic needs of the investors and subordinate the interest and needs of the local population.

While this exercise of sovereignty might be consistent with municipal legislation, it appears inconsistent with the international obligations to protect and respect the right to life, health, and

77 Although Article 3.3 of the contract affirm that the lessee has the right to use “irrigation water from rivers or ground water respecting present and future environmental and water laws and regulations without any disturbance to the environment with prior permission from responsible federal and regional institutions”, it does not require the direct participation of local communities in the management and allocation of water, giving the state the full monopoly over this fundamental element of life.

78 The same disposition is contained in article 3 'Rights of the Lessee' concluded by the Ministry of Agriculture of FDRE with Hunan Dafengyuan Agriculture Co., Ltd, concerning the 40 years lease contract over 25,000 hectares for development of Sugar Cane plantation and sugar processing free of any other land rent.

79 In the Gambella region of Ethiopia, for example, indigenous people are being forced by the government to relinquish their ancestral lands in order to make way for a 10,000 hectare rice plantation operated by the Ethiopian government and Saudi Star Agricultural Development Plc. The rice plantation is situated along the Alwero river, which is also a key source of water for indigenous rural communities that practice fishing, pastoralism and shifting cultivation agriculture. (Mousseau F. and Sosnoff G., *Understanding Land Investment Deals in Africa Country Report: Ethiopia*, Oakland Institute, San Francisco, 2011).

water (as recognized by several countries in the world). However, an intervention of the state in favor of the right to water of its citizens and contrary to the economic interest of the population, could be condemned as a violation of the bilateral investment treaty, and open the doors to litigation and economic compensation. The legal defense of the investments that Brics and Northern countries provide via the conclusion of the BITs, is, therefore, a Damocles' sword that lies over the head of the host countries, and inevitably diminishes their sovereign prerogatives.

Finally, it is interesting to notice that the use of foreign water resources for satisfying internal needs has the double effect of depleting target countries' food security and to protect stressed freshwater resources at home. A case in this point is that of South Africa, which has a moderate water scarcity index of 0.25. If all the investment undertaken by South African investors abroad were implemented in South Africa, the domestic average agricultural water consumption per hectare would double, and the total agricultural water consumption would increase almost six folds (5.8), which a dramatic impact for the national population.⁸⁰ The legal and economic subsidization of projects abroad can be seen, therefore, as the delocalization of non-internalized externalities by the source state, which may be acting consistently with the idea of sustainability at home, but favors the behavior whose consequences will be suffered by the inhabitants of other countries, namely Low Income ones.

VI. Conclusion

The starting point of this Article is represented by the dominant narrative about the Brics' approach to development as defined in a recent Working Paper released by the IMF and entitled 'Brics' Philosophies for Development Financing and Their Implications for LIC'.⁸¹ Defining the approach of the Brics toward the global South as a horizontal relationship with development partners, the Working Paper recalls the G77 principles and affirms that South-South cooperation is based on equality, solidarity, mutual development and complementarity.⁸² In the light of that description, my intention has been to look whether the affirmation concerning the 'respect of national sovereignty' and the 'promotion of solidarity' are valid and applicable in the case of

80 Anseeuw et al., *supra* note 10.

81 Mwase N. and Yang Y., *supra* note 2.

82 For the South-South Cooperation principles see <http://www.g7.org/doc/Declaration2009.htm>.

large-scale investments in land, which represent an issue of mounting relevance on a global level, and that have been defined as 'land grabbing', 'neo-colonialism', 'modern imperialism', 'green rush', 'scramble for Africa', etc.

Comparing the North-South and South-South relationships concerning direct investments in land, it has been possible to affirm that investors original from Brazil, India, China and South Africa are increasingly accessing foreign land in order to satisfy internal and international demands. On the contrary, Russian investors do not appear involved in the ongoing scramble for land, but mainly implicated in internal accumulation and concentration of ownership. In the light of that, two sets of conclusions can be drawn.

First of all, it is possible to state that, when peripheral land is at stake, it is more appropriate to talk about the Bics rather than Brics, and to leave Russia outside. On the other hand, although many similarities can be traced among the four remaining countries, it is also the case that they are involved in the global land grabbing at different levels and with different strategies. However, if we look at the use of municipal and international law, it seems possible to affirm that their use by some of the Brics certainly play a crucial role in enhancing and favoring this current phenomenon, in a way which replicates the strategy adopted by Northern countries to access foreign resources.

In particular, the multiplication of South-South Bilateral Investment Treaties provides the investors with the possibility to trigger a mechanism of regulatory competition among the host countries, entrapping sovereigns in a prisoner dilemma that only a functional use of coercive power can solve. As in the case of North-South investments by hedge funds, pension funds, and agrobusiness, Bics-South relationships are based on investment contracts that emerge from asymmetrical positions, and codify and crystallize the legal order that best fits the interests of the investors. In this way, not only the communities and the environment are kept outside the framework, but it is public scrutiny as a whole to be excluded from the playground, although sovereignty as a public function is crucial.

More specifically, the contracts legally define land void on the basis of an exogenous and technologically oriented perspective which often conflicts with the principles pronounced by the Inter American Court of Human Rights and the African Commission on Human and Peoples'

Rights. Water is often attributed to the investors without limits in a way that subordinates local vital needs to those of the final consumers so that both host and source countries renounce to their prerogatives in favor of private accumulation.

Despite the 'no-land grabbing' rhetoric and inconsistently with the general assumptions about South-South horizontal cooperation, the Bics are certainly looking abroad for their economic expansion and the achievement of their food sovereignty at the expenses of land, natural resources and fiscal autonomy of foreign countries. In particular, and in way that appears inconsistent with the general proclamations and the IMF Report quoted above, instead of respecting national sovereignty and promoting solidarity they are utilizing international law and diplomatic powers in order to bind foreign governments in bilateral agreements which inherently favor the investors and reduce the scope for national autonomy.

In this scenario, and given the mounting importance of Brics' investments in land on a global scale, it becomes essential to reconsider the premises and assumptions of the South-South development discourse, and adopt a more critical approach capable of grasping the complexity of a multipolar world with a plurality of Souths. Trying to cope with a rapid growth in personal incomes, scarcity of land, and growing necessity of food and energy, the Bics are adopting the same aggressive strategy that European and core countries have been pursuing for hundreds of years. The simple South-South labeling risks to lose sight with these dynamics, and give leeway to further exploitation and subordination.

In addition, the study of the Brics' access to land has evidenced three intra-Brics situations that appear particularly interesting and will require further analysis. On one side, the global stage is witnessing an increase in the cases of intra-Brics cooperation for accessing land in third countries (as in the case of China and South Africa). On the basis of a win-win-win ideology that gives for assumed the positive impact for the target countries, in fact, technical and economic partnerships concluded between emerging countries give them the possibility to maximize their comparative advantages and to access land more easily and more rapidly. Secondly, as simplified by the mounting tensions around the numerous Chinese investments in Brazilian land, Brics can also attack each other's sovereignty over natural resources, a circumstance that might degenerate in the freezing of international relations and in diplomatic

deeper tensions. Finally, Brics can also be competitors for the same finite resource, a contingency that could potentially produce a race to the top in the quality and content of the investments, but that can more easily degenerate in an acceleration of the grabbing to the detriment of participation, information, and guarantees.

In conclusion, and conscious of the risk of generalization, it can be stated that Bics–South relationships, as much as the North led expansion of the global capitalistic system, are based on the functional use of national and international law to subordinate peripheral States’ autonomy and authority in order to satisfy the external interests and needs of their national investors and citizens. Passing from universalism to bilateralism, Southern countries create a system of international relations based on power dynamics and subordination, whose outcome is national selfishness and continuous deprivation of sovereign prerogatives. In this framework, there is a compelling need to redefine and rethink the unitarian notions of Brics and South: These are two deceiving concepts which appear intrinsically complex and diverse, which create the dangerous idea that South–South as an effective source of alternative models and different paradigms.

The case of land demonstrates that South–South relationships have to be studied deeper and more critically, and that the notion of Brics has to be fragmented in its pieces and tested on the ground. In order to do so, I propose here to re-centered the study of international relations, so to finally take people into account. If we adopt a bottom-up perspective of international and transnational relationships, in fact, we can obtain the double result to look at the consequences without caring about faces and names. Let’s take as an example the open letter that Obang Metho, Director of the Solidarity Movement for a New Ethiopia (SMNE), wrote to the People of India. He states that ‘the intent of my open letter is to expose the dark underside of these ‘deals’ with the hope of joining forces with those in India who demand justice and human rights for all … Will you help work within India to bring greater transparency and compliance with whatever protective laws and safeguards are in place in India? Will Indian individuals, social justice groups, the media, policy making groups, religious groups and all other stakeholders join us in our struggle for freedom from a dictatorial regime robbing us our future?’.⁸³

83 Cf Metho, 2011; Cited in Rick Rowden, *India’s role in the new global farmland grab*, 29 ECONOMICS RESEARCH FOUNDATION AND GRAIN, ECONOMICS RESEARCH FOUNDATION AND GRAIN.

It is a clear invitation to abandon the prejudices and deception created by the general rhetoric around the BRICS, and to create a bottom-to-bottom solidarity both in home and target countries. Going beyond national fragmentation and *cliches*, we finally disclose the power dynamics and the hierachical nature of what is too naively considered horizontal cooperation. And we realize that we all have a role to play.