Rules of customary international law provide basic legal protections to foreign investors doing business abroad. These rules remain of fundamental importance today despite the growing number of investment treaties containing substantive investment protection. In this book Patrick Dumberry provides a comprehensive analysis of the phenomenon of custom in the field of international investment law. He analyses two fundamental questions: how customary rules are created in this field and how they can be identified. The book examines the types of manifestation of State practice which should be considered as relevant evidence for the formation of customary rules and to what extent they are different from those existing under general international law. The book also analyses the concept of States’ *opinio juris* in investment arbitration. Offering guidance to actors called upon to apply customary rules in concrete cases, this book will be of significant importance to those involved in investment arbitration.

Patrick Dumberry is an associate professor at the University of Ottawa, Faculty of Law (Civil Law Section), Canada.
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Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflict rules are frequently dealt with by substantive harmonization of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to ‘foreign affairs’, and to the implementation of international norms, are a focus of attention.

The series welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

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A list of books in the series can be found at the end of this volume.
THE FORMATION AND IDENTIFICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW

PATRICK DUMBERRY
Associate professor at the University of Ottawa
Faculty of Law (Civil Law Section), Canada
À mes enfants Ophélie et Florent
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FOREWORD

MICHAEL WOOD

Customary international law remains the bedrock of international law. Its merits and demerits as compared with that other great source of the law, treaties, have often been discussed. It used to be thought in some quarters that custom would cease to be important as treaties multiplied. In recent years, a number of writers have expressed the view that custom had become irrelevant in modern international law. But that was never a realistic view. As noted by Dinstein, ‘every once in a while, custom has a tendency to leap to the fore even within special fields of international law where it seemed to have ceded primacy to treaties long ago, thereby reminding the international legal profession that it is not just barely alive but is still pulsating with some intensity’. Even when whole areas of international law are codified in widely accepted international conventions, customary international law continues to play a vital role, as can be seen from the recent case-law of international and national courts and tribunals.

This book addresses the question of customary international law in the specific field of international investment law, and does so in a largely practical manner. It should be of great assistance to all those practising in this field, but it is equally of interest to those looking more generally at the formation and identification of rules of customary international law. As noted by d’Aspremont, ‘the scholarship on international investment law has remained bereft of theoretical reflection on the sources of investment

1 Barrister, 20 Essex Street, London; Member of the International Law Commission and Special Rapporteur for the topic ‘Identification of customary international law’.


law’. He says that ‘international investment law has now reached a stage of its development where the doctrine of sources can no longer be left in limbo and needs to be critically explored’ in order for this field of law to ‘rest on solid bases in terms of sources’. This is the aim of the present book.

One of the most notable features of international investment law is the overwhelming importance of treaties. Thus, more than 3,000 treaties containing provisions on investment protection have been signed by States. Treaties have become the dominant source of international law in this area. Why should one bother then with custom in this context? In my First Report as the International Law Commission (ILC) Special Rapporteur, I explained the basic reasons why custom remains important in contemporary international law:

Even in fields where there are widely accepted ‘codification’ conventions, the rules of customary international law continue to govern questions not regulated by the conventions and continue to apply in relations with and between non-parties. Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation.

The present book shows that this is the case in the field of international investment law. Customary rules remain important in contemporary international investment law despite the fact that existing investment protection rules are now overwhelmingly found in bilateral and multilateral treaties.

This book concerns the formation and the identification of rules of customary international law. The International Law Association (ILA) examined this question in 2000 (focusing on the issue of formation), in the context of public international law as a whole. More recently, the ILC...
decided in 2012 to include the topic ‘Formation and Evidence of Customary International Law’ in its programme of work.\(^8\) As ILC Special Rapporteur, I have so far produced three reports (2013, 2014 and 2015).\(^9\) These have been debated by the Commission, and the Drafting Committee has provisionally adopted a set of 16 draft conclusions.\(^10\) It is expected that the Commission itself will consider these draft conclusions, together with commentaries, at its session in 2016.

Why is it important to study the methodology for the determination of rules of customary international law? In the First Report, I noted that ‘in order to determine whether a rule of customary international law exists, it is necessary to consider both the requirements for the formation of a rule of customary international law, and the types of evidence that establish the fulfilment of those requirements’.\(^11\) In other words, the basic questions at the centre of any analysis regarding the existence of a customary norm are (1) how these rules are actually created and (2) how they can be identified. The present book provides a first attempt to answer these fundamental questions in the field of investment arbitration. The book will provide all those involved in investor-State arbitration (arbitrators, investors, States) guidance for assessing the validity and soundness of claims regarding the customary status of any given rule.

This book is in many ways complementary to the work of the ILC on the topic ‘Identification of customary international law’. In the Second Report, I raised the question whether ‘there are different approaches to the formation and evidence of customary international law in different

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\(^8\) The Commission later changed the title of the topic to ‘Identification of customary international law’, since it was felt that to enter directly into questions of formation would lead the Commission into areas beyond the intended scope of the topic, which is what Article 38.1(d) of the ICJ Statute refers to as the ‘determination’ of rules of law.


fields of international law’ and ‘to what degree, different weight may be
given to different materials depending on the field in question’.12 This
book undertakes an analysis of this question in respect of international
investment law. It considers whether the elements evidencing State
practice in international investment law are different from those in
other fields of international law. It shows that there may indeed be a
number of noteworthy matters that may be peculiar to the formation and
evidence of customary international law in international investment law.

On the one hand, the basic approach to the formation of customary
rules in the field of international investment law is the same as the basic
approach in other fields. Thus, the existence of any customary rule in
international investment law requires evidence of both State practice and
opinio juris. On the other hand, the author’s conclusion is that some
aspects related to the identification of customary rules are in fact differ-
ent. Thus, some elements of practice have had a much more limited role
in the field of investment arbitration compared to their role elsewhere.
Also, the types of statements that are considered as evidence of State
practice in this field are not always the same as those in other areas of
international law. In fact, some statements examined in this book have a
unique importance to the field of investment arbitration.

This is an important book that is likely to have a significant impact on
existing scholarship regarding customary international law. It will have a
long-lasting influence in the field of international investment law.

Sir Michael Wood
London,
October 2015

Why write a book on custom? To this day I can still remember one of my first international law classes at the Université de Montréal in 1993 when Professor Jacques-Yvan Morin explained the mysterious way that customary rules emerge. He brilliantly told us that these rules emerge in the same way that footsteps through a field eventually transform into a pathway followed by all. It was only many years later that I discovered that the analogy was actually introduced by Professor Cobbett and later refined by Professor de Visscher:

On a pu comparer la lente constitution de la coutume internationale à la formation graduelle d’un chemin à travers un terrain vague. À l’origine on y relève des pistes multiples et incertaines, à peine visibles au sol. Puis, la majorité des usagers, pour quelque raison d’utilité commune, adopte un même parcours; un sentier unique se dégage qui, à son tour, fait place à un chemin reconnu désormais comme la seule voie régulière, sans que l’on puisse dire à quel moment précis cette dernière transformation s’est accomplie.1

Ever since these early law school days I have remained fascinated by the phenomenon of the formation of customary rules. Back then, however, it never crossed my mind that some 20 years later I would actually write a book on the topic.

The idea of writing a book on custom emerged from my own experience as a lawyer. Before becoming a professor at the University of Ottawa in 2009, I practised law for about ten years in the field of international arbitration in Geneva (at Lalive and at Lenz & Steahelin), in Montreal (at Ogilvy Renault, now known as Norton Rose Fulbright) and in Ottawa (at Canada’s Ministry of Foreign Affairs and International Trade, ‘Trade Law Bureau’). For the first time, in the context of these arbitration


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proceedings, I had to concretely apply the theoretical concept of customary international law that I had learned in law school to real facts in real cases. This is when I truly discovered the multifaceted complexity of the principle. At the time, I desperately looked for scholarly works examining the application of custom in the specific field of international investment law. No such work existed.

The situation is not entirely different today. No book on international investment law has ever specifically focused on custom. In fact, only a limited number of books and articles have been published on the more general issue regarding the sources of international investment law. While a number of articles have examined some aspects of the phenomenon of custom in investment arbitration, none have systematically and thoroughly investigated the important preliminary issue of identifying the different types of relevant manifestations (or evidence) of State practice and opinio juris.


In 2011, when I started thinking about these questions I realized that even before examining the question of which specific rules of custom should be recognized in investment arbitration, one should first consider two very basic preliminary questions: (1) how these customary rules are actually created, and (2) how they can be identified. No comprehensive study has analysed these fundamental questions in the field of investment arbitration. The objective of this book is to fill this void.

My belief in the contemporary relevance of these questions was reinforced by the fact that the International Law Commission (ILC) decided in 2012 to include the topic of the ‘Formation and Evidence of Customary International Law’ in its programme of work and appointed Sir Michael Wood as its Special Rapporteur. While I was writing this book, the ILC Special Rapporteur published his first (2013⁴), second (2014⁵), and third (2015⁶) reports. The ILC Drafting Committee adopted its draft conclusions in 2015.⁷ As noted by ILC Special Rapporteur Wood, ‘in order to determine whether a rule of customary international law exists, it is necessary to consider both the requirements for the formation of a rule of customary international law, and the types of evidence that establish the fulfilment of those requirements’.⁸ In his Second Report, ILC Special Rapporteur Wood also noted the importance of determining whether or not ‘there are different approaches to the formation and evidence of customary international law in different fields of international law’ and ‘to what degree, different weight may be given to different materials depending on the field in question’.⁹ The purpose of this book is to

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provide the answer to these questions in the field of investment arbitration.

Specifically, this book aims to offer guidance to actors on how to identify rules of customary international law in the field of investor-State arbitration. It will therefore provide arbitrators with indispensable (yet currently scarcely available) tools to enhance their ability to solve disputes between foreign investors and States. Above all, this book intends to show that customary rules remain fundamentally important in contemporary international investment law despite the fact that existing investment protection rules are now overwhelmingly found in bilateral and multilateral investment treaties.

Patrick Dumberry
Montreal
May 2015
ACKNOWLEDGMENTS

This book is the result of more than three years of research. I would like to thank the Faculty of Law (Civil Law Section) of the University of Ottawa, my colleagues and members of the administrative staff (including Martine Saint-Louis and Lorraine DeVanthey) for their support throughout the years. I am grateful to the Government of Canada for having provided me with generous funding through the ‘Standard Research Grants Program’ of the Social Sciences and Humanities Research Council of Canada (SSHRC) to complete this work. I am especially indebted to several bright and talented students from the University of Ottawa who have assisted me over the last three years with research and editing. Their assistance was invaluable to the completion of this book. I want to sincerely thank Lila Amara, Micha Benjamin, Eugénie Bouras, Melissa Tara Bramson, Sébastien Cusson, Noushin Dewan, Gabrielle Dumas-Aubin, Evelyne Gauvin, Alexandre Genest, Christine Georgaklis, Constantina Georgaklis, Amélie B. Goudreau, Alexandra Hébert, Emily Kissel, Geneviève Martin-Lafleur, Jonathan Nadler, Franck Marvel Ngandui, Ivana Nenadic, Shunghyo Kim, Isaac Benjamin Martin, Lou Janssen Dangzalan, Marilynn Rubayika, Laura Miles, Lara Hammound and Rouba Wehbe. All of them have done an amazing job.

Special thanks go to Sir Michael Wood for having written the foreword to this book. Sir Michael was the principal Legal Adviser to the United Kingdom Foreign and Commonwealth Office between 1999 and 2006. He was also appointed as the International Law Commission’s Special Rapporteur on the ‘Identification of Customary International Law’.

Many thanks to all the people at Cambridge University Press (Elizabeth Spicer, Karthik Orukaimani, Mary Bongiovi, Emma Collison, Fleur Jones) for their patience and support in the revision process for the publication of this book.

Most importantly, I would like to dedicate this book to my parents and my children. I would like to first express my gratitude to my parents for their unconditional support throughout my life. I also wish to thank my
beautiful, funny and bright young children, Ophélie and Florent. Your love and affection have given me the strength to write this book during a rather turbulent period of my personal life. I hope that one day you will read this book and fully understand the extent to which this whole odyssey would have simply been impossible (and really pointless) without your constant love and support. My daughter (who is now 7 years old) once told me 'Daddy, I personally don't really care what your books are all about, what I am happy about is that you like to write them so much'. That is exactly the kind of support that I needed when I wrote this book. Florent (now 5 years old), I promise you that one day I will write an international law book involving Pirates and (less likely) Ninja Turtles!

Patrick Dumberry
Montreal
May 2015
ABBREVIATIONS

ABAJ: American Bar Association Journal
AFDI: Annuaire français de droit international
AJIL: American Journal of International Law
Alabama L.Rev: Alabama Law Review
American University ILR: American University International Law Review
American University LR: American University Law Review
Arb. Int’l: Arbitration International
Arbitration & ADR: Arbitration & Alternative Dispute Resolution
ASA Bull.: Bulletin of the Association Suisse de l’Arbitrage
ASDI: Annuaire Suisse de droit international
ASIL Proc.: American Society of International Law Proceedings
Australian YIL: Australian Yearbook of International Law
Austrian RIEL: Austrian Review of International & European Law
BITs: Bilateral investment treaties
British IICL: British Institute of International and Comparative Law
British YIL: British Yearbook of International Law
Brook. J. Int’l L: Brooklyn Journal of International Law
Brooklyn L.R: Brooklyn Law Review
Cal. L. Rev: California Law Review
Cal. W.Int’l J: California Western International Law Journal
Cambridge J Int’l Comp L: Cambridge Journal of International and Comparative Law
Canadian YIL: Canadian Yearbook of International Law
Chicago L.Rev: Chicago Law Review
Chinese IIL: Chinese Journal of International Law
Columbia JTL: Columbia Journal of Transnational Law
Duke J Comp & IL: Duke Journal of Comparative & International Law
EJIL: European Journal of International Law
EJIL Talks!: European Journal of International Law: Talks!
FET: Fair and equitable treatment

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<td>Free Trade Agreement</td>
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LIST OF ABBREVIATIONS


ILC, Memorandum, 2013
International Law Commission, 'Formation and Evidence of Customary International Law, Elements in the Previous Work of the ILC that Could be Particularly Relevant to the Topic', Memorandum by the Secretariat, Sixty-fifth session Geneva, 5 May-7 June and 8 July-9 August 2013, UN doc. A/CN.4/659, p. 17

ILC, Third Report, 2015

ILC, Articles on State Responsibility
Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, 26 July 2001

ILC, Commentaries

ILM
International Legal Materials

ILR
International Legal Reports

Ind. J. Global Legal Stud
Indiana Journal of Global Legal Studies

Indian J Int'l L
Indian Journal of International Law

Int'l L
International Lawyer

Int Rev Red Cross
International Review of the Red Cross

Israel L Rev
Israel Law Review

Italian YIL
Italian Yearbook of International Law

J. Int'l Arb.
Journal of International Arbitration

J. Int Disp Settl
Journal of International Dispute Settlement

J. Int'l Econ. L
Journal of International Economic Law

J. World Invest. & Trade
Journal of World Investment & Trade

J. World Trade
Journal of World Trade

Journal CEPMLP

J.P.L.
Journal of Public Law

Law and Business Review of the Americas

Law & Pol'y Int'l Bus
Law and Policy in International Business
LIST OF ABBREVIATIONS

Law & Prac Int’l Cts & Tribunals
Leiden J. Int’l L.
Max Planck Yrbk. UNL
McGill LJ
Mealey’s Int’l Arb. Rep
Melbourne JIL
Michigan JIL
Michigan State JIL
Michigan LR
Minnesota JIL
MFN
MST
NAFTA
N.Y.U. J. Int’l L. & Pol
Nordic JIL
North Carolina JIL & Comm Reg
Northwestern J. Int’l L. & Bus
Netherlands ILR
NYBIL
OECD
OJLS
P.C.I.J.
Penn State ILR
Rec. des cours
RBDI
RGDIP
RQDI
Santa Clara J. Int’l L
Singapore YB Int’l L
Sri Lanka J. Int’l L
SSRN
Stanford JIL
Suffolk Transnat’l L. Rev.
Sw. J. Int’l L.
TDM
Texas ILJ

Law and Practice of International Courts and Tribunals
Leiden Journal of International Law
Max Planck Yearbook of United Nations Law
McGill Law Journal
Mealey’s International Arbitration Report
Melbourne Journal of International Law
Michigan Journal of International Law
Michigan State Journal of International Law
Michigan Law Review
Minnesota Journal of International Law
Most-Favored-Nation
Minimum standard of treatment
North American Free Trade Agreement
New York University Journal of International Law and Politics
Nordic Journal of International Law
North Carolina Journal of International Law & Commercial Regulation
Northwestern Journal of International Law & Business
Netherlands International Law Review
Netherlands Yearbook of International Law
Organisation for Economic Co-operation and Development
Oxford Journal of Legal Studies
Permanent Court of International Justice
Penn State International Law Review
Collected Courses of the Hague Academy of International Law
Revue belge de droit international
Revue générale de droit international public
Revue québécoise de droit international
Santa Clara Journal of International Law
Singapore Yearbook of International Law
Sri Lanka Journal of International Law
Social Science Research Network
Stanford Journal of International Law
Suffolk Transnational Law Review
Southwestern Journal of International Law
Transnational Dispute Management Journal
Texas International Law Journal
### List of Abbreviations

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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td><strong>U. Cin. L. Rev</strong></td>
<td>University of Cincinnati Law Review</td>
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<tr>
<td><strong>U.N.</strong></td>
<td>United Nations</td>
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<tr>
<td><strong>UNCTAD</strong></td>
<td>United Nations Conference on Trade and Development</td>
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<td><strong>UNTS</strong></td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td><strong>UNRIAA</strong></td>
<td>United Nations Reports of International Arbitral Awards</td>
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<tr>
<td><strong>U. Pa. J. Int’l Econ. L.</strong></td>
<td>University of Pennsylvania International Economic Law</td>
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<tr>
<td><strong>Univ. Pennsylvania LR</strong></td>
<td>Univ. Pennsylvania Law Review</td>
</tr>
<tr>
<td><strong>UCLA L. Rev</strong></td>
<td>UCLA Law Review</td>
</tr>
<tr>
<td><strong>US</strong></td>
<td>United States</td>
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<tr>
<td><strong>Vand. J. Transnat’l L.</strong></td>
<td>Vanderbilt Journal Transnational Law</td>
</tr>
<tr>
<td><strong>Virginia JIL</strong></td>
<td>Virginia Journal of International Law</td>
</tr>
<tr>
<td><strong>Washington L.R.</strong></td>
<td>Washington Law Review</td>
</tr>
<tr>
<td><strong>W. Arb &amp; Med Rev</strong></td>
<td>World Arbitration and Mediation Review</td>
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<tr>
<td><strong>Yale Human Rights &amp; Dev.</strong></td>
<td>Yale Human Rights &amp; Development Law Journal</td>
</tr>
<tr>
<td><strong>Yale JIL</strong></td>
<td>Yale Journal of International Law</td>
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<tr>
<td><strong>Yale LJ</strong></td>
<td>Yale Law Journal</td>
</tr>
<tr>
<td><strong>Yb Int’l Invest. L. &amp; Pol.</strong></td>
<td>Yearbook of International Investment Law and Policy</td>
</tr>
<tr>
<td><strong>Yearbook ILC</strong></td>
<td>Yearbook of the International Law Commission</td>
</tr>
<tr>
<td><strong>ZaöRV</strong></td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</td>
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