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978-1-107-13852-0 - The Formation and Identification of Rules of Customary International Law in International Investment Law

Patrick Dumberry

Excerpt

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Introduction

I.1 The scope of this book

Rules of customary international law are binding on all States. They gradually develop over time based on the uniform and consistent practice of a large number of representative States, which have the conviction (or the belief) that such practice is required by law (*opinio juris*). The general aim of this book is to provide a comprehensive analysis of the phenomenon of custom in the context of international investment law (also known as investor-State arbitration).¹ No book on international investment law has ever focused specifically on custom. In fact, only a limited number of books and articles have been published on the fundamental question of the sources of international investment law.² As noted by d'Aspremont, 'the scholarship on international investment law has

¹ Throughout this book the terms 'international investment law', 'investor-State arbitration' or 'investment arbitration' will be used interchangeably. Similarly, I have decided to use different expressions to refer to the same concept of 'custom': 'customary international law', 'customary law'. These terms will be used interchangeably in this book.

² T. Gazzini and E. de Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (Leiden; Boston: Martinus Nijhoff, 2012); Patrick Juillard, 'L'évolution des sources du droit des investissements', *Rec. des Cours*, 250 (1994), pp. 9–216; M. Hirsch, 'Sources of International Investment Law', ILA Study Group on the Role of Soft Law Instruments in International Investment Law (2011) (also in Andrea K. Bjorklund and August Reinisch [eds.], *International Investment Law and Soft Law* [Elgar, 2012]); Martins Paparinskis, 'Investment Protection Law and Sources of Law: A Critical Look', *ASIL Proc.*, 103 (2009), pp. 76–79; C.J. Tams, 'The Sources of International Investment Law', in T. Gazzini and E. de Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (Leiden; Boston: Martinus Nijhoff, 2012), pp. 319–332; F. Grisel, 'The Sources of Foreign Investment Law', in: Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*, (Oxford: Oxford University Press, 2014). See also, more generally, S. Zamora, 'Is there Customary International Economic Law?', *German YIL* 32 (1989), pp. 9–52; Claire Crepet Daigremont, 'Les sources du droit international des investissements', in C. Leben (ed.) *Droit international des investissements et l'arbitrage transnational* (Paris: Pedone, 2015).

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remained bereft of theoretical reflection on the sources of investment law'.³ He believes 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' so that this field of law 'rests on solid bases in terms of sources'.⁴ He is right.⁵

But why should one enquire about customary rules in today's international investment law when foreign investors, in fact, obtain sufficient protection under the numerous investment treaties that have been entered into by States in recent decades? As noted by one writer, 'for all practical purposes, treaties have become the fundamental sources of international law in the area of foreign investment'.⁶ The basic reasons for the remaining importance of custom have been identified by the Iran–US Claims Tribunal in the *Amoco* case: 'the rules of customary law may be useful in order to fill in possible *lacunae* of the treaty, to ascertain the meaning of undefined terms in the text or, more generally, to aid the interpretation and implementation of its provision'.⁷

The first reason for the continuing importance of custom in today's investment arbitration is because these rules represent the applicable legal regime of protection in the absence of any BIT. However numerous BITs have become, they still do not cover the whole spectrum of possible bilateral treaty relationships between States. This necessarily results in gaps in the legal protection of foreign investments. Therefore, a foreign investor originating from a State that has not entered into a BIT with the

³ Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox', in T. Gazzini and E. de Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (Leiden; Boston: Martinus Nijhoff, 2012), p. 8, further explaining that 'Any investigation in the foundations of the sources of investment law may have seemed overly arcane to such practitioners, to whom the doctrine of sources of investment law may seem to work properly and an invitation to explore its theoretical foundations a purely academic whim'.

⁴ *Id.*

⁵ See also, the same assessment made in 1989 by Zamora, 'Is there Customary International Economic Law?', pp. 10–11, in the field of international economic law.

⁶ Jeswald W. Salacuse, 'The Treatification of International Investment Law: a Victory of Form Over Life? A Crossroads Crossed?' *TDM* 3(3) (2006), p. 5. See also: ILA, 'Sources of International Investment Law', report by M. Hirsch, ILA Study Group on the Role of Soft Law Instruments in International Investment Law (2011), p. 7; Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention; A Commentary* (2nd edn., Cambridge: Cambridge University Press, 2009), p. 605 ('The large and rapidly growing number of BITs and multilateral treaties dealing with investment makes them the most important source of international law for ICSID tribunals'); Grisel, 'The Sources of Foreign Investment Law', p. 219.

⁷ *Amoco Int'l Fin. Corp. v. Iran*, Iran-US CT, 14 July 1987, in *ILR* 83 (1990), para. 112.

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State where the investment is made will not be given the legal protection which would have otherwise been typically offered under such a treaty. Customary rules will apply to that investor. So, even in light of the proliferation of BITs, these rules continue to play an important role in investment protection. Another fundamental reason for the remaining importance of custom is the fact that several BITs make explicit reference to the application of ‘customary international law’. An arbitral tribunal must necessarily determine the content of a customary rule when faced with such a specific provision. While the number of investment treaties expressly referring to custom is rapidly increasing, it remains that such reference is still only found in a small *minority* of treaties. Custom also plays a gap-filling role whenever a treaty, a contract or domestic legislation is silent on a given issue. Tribunals have had to frequently apply customary rules as the ultimate reservoir of investment protection norms. In any event, I will argue in this book that arbitral tribunals should *always* take into account relevant rules of customary international law.

Specifically, this book addresses the question of the *formation* and the *identification* of rules of customary international law in the field of international investment law. The International Law Association (ILA), in the more general context of public international law, examined this question in 2000.⁸ More recently, 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.⁹ In his First Report (of 2013), ILC Special Rapporteur Wood indicated that the objective of the ILC’s work on this question was to ‘offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases’.¹⁰ He further added that ‘the terms “formation” and “evidence” were intended to indicate that, in order to determine whether a rule of customary international law exists,

⁸ International Law Association, ‘Statement of Principles Applicable to the Formation of General Customary International Law’, Final Report of the Committee on the Formation of Customary Law, Conference Report London (2000).

⁹ Report of the International Law Commission on the work of its sixty-fourth session, 7 May to 1 June and 2 July to 3 August 2012, UN Doc. A/67/10, 2012, chp.VIII, paras. 156–202, p. 108.

¹⁰ International Law Commission, ‘First Report on Formation and Evidence of Customary International Law’, by Michael Wood, Special Rapporteur, Sixty-fifth session, Geneva, 6 May–7 June and 8 July–9 August 2013, UN doc. A/CN.4/663, 17 May 2013, at p. 6 [hereinafter referred to as ILC, First Report, 2013].

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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 The ILC later decided to change and simplify the title of the topic to 'The Identification of Customary International Law', with the general goal remaining the same.¹² The ILC Special Rapporteur Wood published three reports from 2013 to 2015.¹³ The ILC Drafting Committee adopted its 'Draft conclusions' in 2015.¹⁴

The aim of this book is to provide the different actors involved in investor-State arbitration (arbitral tribunals, investors, States) as well as other stakeholders (international organizations, NGOs, civil society) with the first sets of comprehensive guidelines regarding the formation and identification of rules of customary international law in the field of international investment law. It is important to highlight from the outset the type of issues that will *not* be specifically addressed in this book. In general, my goal is not to examine whether any specific rule contained in investment treaties should (or should not) be considered as custom. In other words, the present book does not contain a 'shopping list' of *all existing* customary rules in investment arbitration. Yet, I will explain that these rules *do exist*. Thus, the principle of the 'minimum standard of treatment' (MST) and the general prohibition against expropriation without compensation will be analysed in this context at Chapter 2. I also decided to use throughout this book the example of the fair and equitable treatment (FET) standard found in numerous investment

¹¹ *Id.*

¹² International Law Commission, 'Second Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-sixth session, Geneva, 5 May-6 June and 7 July-8 August 2014, A/CN.4/672, p. 2 [hereinafter referred to as ILC, Second Report, 2014]. The abandonment by the ILC of the term 'evidence' in favour of 'identification' has been praised by some insofar as 'proof of customary law is not a matter of fact' and thus 'the term "evidence" is inapposite': James Crawford, 'The Identification and Development of Customary International Law', ILA British Branch Conference (2014), p. 3.

¹³ ILC, First Report, 2013; ILC, Second Report, 2014; International Law Commission, 'Third Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-seventh session, Geneva, 4 May-5 June and 6 July-7 August 2014, A/CN.4/682 [hereinafter referred to as ILC, Third Report, 2015].

¹⁴ International Law Commission, 'Text of the Draft Conclusions Provisionally adopted by the Drafting Committee, Sixty-seventh session, Geneva, 4 May-5 June and 6 July-7 August 2014, 14 July 2015, A/CN.4/L.869 [hereinafter referred to as ILC, Draft Conclusions, 2015].

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treaties as an illustration of the strict conditions under which a treaty-based norm can transform into a customary rule.¹⁵

Another important point to mention is that my book does not address the question of how provisions in investment treaties can (or should) be *interpreted* with the use of rule of custom. Thus, it does not specifically examine the question of the proper application of Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, whereby a tribunal shall take into account, together with the context of the treaty, ‘any relevant rules of international law applicable in the relations between the parties’, which includes any ‘relevant’ rules of customary international law.¹⁶ This issue will only be briefly addressed in Chapter 5.¹⁷

The goal of this book is to provide guidance to those faced with a claim that a standard of protection is a rule of custom. In the words of ILC Special Rapporteur Wood, it is ‘a practical guide for assisting practitioners in the task of identifying customary international law’.¹⁸ This book will provide the essential tools to allow different actors to identify customary rules based on the essential requirements for the formation and the identification of custom. In this sense, this book is following in the footsteps of the work of the ILC. In his First Report, Special Rapporteur Wood thus mentioned that ‘[t]he topic is not concerned with determining the substance of particular rules’; instead it is aimed at providing

¹⁵ It should be noted in 2011, the ILC inscribed the subject of ‘fair and equitable treatment’ in its long-term work plan: Report of the ILC, 63d Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, para. 362, U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10 (2011), para. 365. At Annex D it is indicated that the ILC will examine a number of questions, including whether the FET standard now represents customary international law. The question is examined in J. Harrison, ‘The International Law Commission and the Development of International Investment Law’, *Geo. Wash. Int’l L. Rev.* 45 (2013), p. 439. The question is further examined in Patrick Dumberry, ‘Has the Fair and Equitable Treatment Standard become a Rule of Customary international Law? An Empirical Study of the Practice of States (forthcoming, 2016).

¹⁶ On this question, see M. Paparinskis, ‘Investment Treaty Interpretation and Customary Investment Law, Preliminary Remarks’, in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011); E. Milano, ‘The Investment Arbitration between Italy and Cuba: The Application of Customary International Law under Scrutiny’, *Law & Prac Int’l Cts & Tribunals* 11 (2012), pp. 499–524. Suffice it to note that Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’, *EJIL* 19 (2008), p. 310, in his study of decisions rendered by tribunals between 1998 and 2006, concluded that ‘tribunals used customary international law as a separate legal basis in 34 of the 98 decisions’. He further indicated that customary law was discussed in relation to a broad range of jurisdictional, procedural and substantive issues as well as questions dealing with secondary rules of international law.

¹⁷ See, discussion in Chapter 5, Section 5.2.3. ¹⁸ ILC, Third Report, 2015, p. 2.

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‘guidance on how to identify a rule of customary international law at a given moment, not to address the question of which particular rules have achieved such status’.¹⁹

No wide-range study has ever been conducted on this topic. It is true that a number of articles have been published in recent years regarding customary rules in investor-State arbitration.²⁰ Yet, most of them have only addressed one specific issue: whether the content of the rules contained in bilateral investment treaties for the protection and promotion of investments (BITs) can be said to have ‘transformed’ into ‘new’ customary international law (this question will be fully examined in Chapter 3²¹). It is also not uncommon for scholars to proclaim that one rule or another found in these BITs is of customary nature. Yet, typically they do so without providing much analysis as to why this is the case. They rarely examine in much detail the basic elements that are necessary for the formation of customary rules. With a few exceptions, they almost never go through the exercise of actually examining the practice of States and their *opinio juris* (i.e. the belief of States that such practice is *required by law*). The present book will critically assess the claim by some writers that the FET standard is of customary nature and highlight the flawed methodology they have used.²²

In any event, the existing literature typically does not systematically and thoroughly investigate the important preliminary question of what

¹⁹ ILC, First Report, 2013, p. 9. See also: ILC, Second Report, 2014, p. 5.

²⁰ Stephen M. Schwebel, ‘Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law’, *ASIL Proc.*, 98 (2004), pp. 27–30; Steffen Hindelang, ‘Bilateral Investment Treaties, Custom and a Healthy Investment Climate – The Question of whether BITs Influence Customary International Law Revisited’, *J. World Invest. & Trade*, 5 (2004), pp. 789–809; Andreas F. Lowenfeld, ‘Investment Agreements and International Law’, *Columbia JTL* 42 (2003), pp. 127–130; Bernard Kishoiyian, ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’, *Northwestern J. Int’l L.* 14(2) (1993), pp. 327–375; Cai Congyan, ‘International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules’, *Chinese JIL* 7 (2008), pp. 659–679; Abdullah Al Faruque, ‘Creating Customary International Law through Bilateral Investment Treaties: a Critical Appraisal’, *Indian J Int’l L* 44 (2004), p. 295; Tarcisio Gazzini, ‘The Role of Customary International Law in the Field of Foreign Investment’, *J. World Invest. & Trade*, 8 (2007), p. 692; d’Aspremont, ‘International Customary Investment Law’; José Enrique Alvarez, ‘A BIT on Custom’, *N.Y.U. J. Int’l L. & Pol.* 42 (2009), p. 17.

²¹ See, Chapter 3, Section 3.3.3.2.2. On this issue: P. Dumberry, ‘Are BITs Representing the “New” Customary International Law in International Investment Law?’, *Penn State ILR* 28(4) (2010), pp. 675–701.

²² See, discussion in Chapter 3, Sections 3.2.4 and 3.3.3.2.1.3.

are the different types of manifestations (or evidence) of State practice relevant in the context of the creation of customary rules in the specific field of investor-State arbitration. These shortcomings are no doubt the result of the typical space constraint that scholars face when publishing articles in law journals. Such an investigation can indeed only be properly undertaken in the format of a book. In fact, the question as to whether one standard of investment protection should (or should not) be considered as a customary rule can, in my view, only be fully addressed once a number of *preliminary* questions have been tackled. These basic questions, which will be explored in this book, include the following:

- What is the nature of custom and how is it created?
- Does the creation of custom require both State practice and *opinio juris* in the field of investor-State arbitration?
- Does the practice of non-State actors matter for the formation of customary rules?
- Does State practice need to be uniform, consistent, extensive and representative during a certain period of time for a customary rule to emerge in the field of investor-State arbitration?
- What are the manifestations of State practice (in other words, where can one concretely find such practice)?
- Can rules contained in BITs transform into customary rules, and if so, under which circumstances and conditions? Should these numerous BITs, taken together, be considered as the ‘new’ custom?
- Can statements made by States be considered as relevant evidence of State practice? What are the types of statements that matter in the field of investor-State arbitration and which ones are less relevant? How much weight should actually be given to these different types of statements?
- What is the role of arbitral awards (if any) in the formation and development of customary rules?
- Does the internal practice of States (i.e. the conduct of the executive, legislative and the judiciary branches of a government) play any meaningful role as evidence of State practice? What about the practice of States within international organizations?
- Is it really necessary to demonstrate States’ *opinio juris* to prove the existence of a customary rule in the field of investor-State arbitration? Where does one find such *opinio juris* anyway? Do States have any *opinio juris* when signing BITs or when including certain types of protection in these instruments?

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Another fundamental question, addressed in Chapter 5 of this book, is determining what is the actual role and relevance of customary rules in an era significantly marked by the phenomenon of ‘treatification’, whereby investment protections are overwhelmingly found in treaties. In other words, what practical purpose do these rules serve for the different actors involved in arbitration proceedings?

Although my book and the work of the ILC both address the same issue of the formation and identification of custom, they are in fact complementary to each other because of their different scope. In his First Report, Special Rapporteur Wood mentioned a long list of the range of materials that would be consulted in the course of the Commission’s work on the topic,²³ including a brief reference to ‘tribunals in the field of investment protection’.²⁴ The Second Report refers to a few arbitration awards.²⁵ However, the focus of the ILC’s work is clearly on general international law, not on investment arbitration.

There is another reason why the present book is complementary to the work of the ILC. ILC Special Rapporteur Wood noted in his Second Report the importance of determining whether ‘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’.²⁶ He specifically referred to the fields of international human rights law, international criminal law and international humanitarian law. Investor-State arbitration is absent from the list.

This book will show that there are indeed a number of specific elements which are noteworthy regarding the formation and evidence of customary international law in the field of international investment law. For instance, some of the most important elements of State practice under general international law only have a limited practical impact in investment arbitration. Conversely, I will show that some manifestations of State practice (such as specific types of statements by States) have a unique importance in this field compared to their limited prevalence and

²³ ILC, First Report, 2013, p. 19. ²⁴ *Id.*, p. 36.

²⁵ See, for instance, *Mondev International Ltd. v. United States*, ICSID No. ARB(AF)/99/2, Award, 2 October 2002 (referred to in: ILC, Second Report, 2014, pp. 34, 53); *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005 (referred to in: *Id.*, p. 54); *United Parcel Service of America Inc v. Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002 (referred to in: *Id.*, p. 48).

²⁶ ILC, Second Report, 2014, pp. 7–8. See also: ILC, Third Report, 2015, p. 7.

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I.1 THE SCOPE OF THIS BOOK

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usefulness in general public international law. In sum, this book will explain that the *identification* of the different manifestations of State practice necessary for the formation of custom is *not* the same in investor-State arbitration as in international law. The other question of whether or not a different approach to the *creation* and *formation* of custom in investment arbitration exists is controversial. A number of writers have indeed claimed in recent years that the traditional requirements of uniform, consistent and representative State practice should be relaxed, or applied differently, in investment arbitration. Some scholars also believe that the traditional requirement of *opinio juris* should be applied differently in this field of law. Some of them have actually come up with their own theories as to the meaning and relevance of the *opinio juris* requirement. This book will examine in detail whether these approaches are sound.

In sum, this book is the natural continuation of the ILC's work insofar as its general tenets are applied specifically to one area of international law. In fact, one writer has recently suggested that the ILC should undertake the analysis of the identification of relevant State practice and *opinio juris* in the field of international investment law.²⁷ The aim of this book is precisely to undertake such an analysis.

Finally, a few words should be dedicated to methodology. The present author has comprehensively surveyed a significant number of articles and books dealing with customary international law in general. I have also surveyed all major textbooks on investor-State arbitration as well as relevant legal journals to find and read (almost) everything that has ever been written (in English or French) on the phenomenon of custom in international investment law and, more generally, on the sources of law in that field. Importantly, my investigation has *not* been limited to

²⁷ Harrison, 'The International Law Commission', p. 439 ('given the fact that tribunals are increasingly faced with having to identify and apply rules of customary international law in relation to the protection of foreign investors, there would appear to be an urgent need for action on this point. Moreover, despite many statements about the evolution of customary international law, particularly in relation to the minimum standard of treatment, there has been little substantive and comprehensive analysis of state practice and *opinio juris* in this area'), see also at p. 440 ('The ILC could make a substantial contribution to this question by identifying relevant state practice and *opinio juris*. Not only can it assist tribunals in identifying relevant material evidence of customary international law, but the ILC can also suggest, in accordance with the understanding of codification discussed above, how to fill gaps in a manner that may contribute to the development of law in this area').

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scholarly work. This is an important point. In a recent posting on *EJIL Talks*, Roberts made the following comment:

Even when people say that they are finding custom, they are usually relying on short cuts, such as referring to case law that says something is custom, General Assembly resolutions that declare something to be custom, or academic articles that opine that something is custom. Almost no one actually “finds” custom. Instead, arbitrators, academics and counsel typically refer to other sources that supposedly have already “found” custom.²⁸

This book is an attempt to (at least partially) address some of these legitimate criticisms. Thus, I have not simply reviewed the work of international law scholars to find out what *they believe* are the relevant types of evidence of State practice for the formation of customary rules. My book investigates numerous awards as well as a number of different government sources to concretely determine which manifestations of State practice are specifically relevant in the field of international investment law. In other words, this book is the first attempt to actually ‘find’ ‘real life’ examples of such relevant State practice and also to explain how they can concretely influence the creation of customary rules in investor-State arbitration. I will also provide several examples of specific situations showing States’ *opinio juris*. The following is a (non-exhaustive) list of the different types of material that I have used to find concrete examples of State practice and *opinio juris* relevant to the creation of custom in the field of international investment law:

- Websites specializing in investment arbitration, including ‘Investment Claims’, ‘Investor-State LawGuide’, ‘Kluwer Arbitration’, ‘Investment Law Digest’ (International Investment Law Centre Cologne), ‘Investment Treaty Arbitration ‘Investment Treaty News’ and ‘NAFTA Claims’;
- Websites of a number of international organizations (ICSID, UNCITRAL, ILC) and other groups (e.g. ILA);
- Official websites of a number of States where case law can be found;
- Sections on State practice of more than 15 national yearbooks of international law (e.g. *Canadian Yearbook of International Law*) published in English and French;

²⁸ A. Roberts, ‘Custom, Public Law and the Human Rights Analogy’, *EJIL Talks*, 14 August 2013.