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Patrick Dumberry

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Are BITs Representing the “New” Customary International Law in International Investment Law?

Patrick Dumberry*

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* Patrick Dumberry, Assistant Professor, University of Ottawa (Civil Law section), Canada. The author wishes to thank Dr. Chiara Giorgetti (White & Case LLP, Washington) and Me Erik Labelle-Eastaugh for their comments and suggestions on an earlier draft of this paper. This article reflects facts current as of January 2010.

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I. INTRODUCTION

The question of the existence of legal protection for foreign investors under customary international law (or “custom”) has always been controversial. As a result of this perceived lack of established customary principles, States concluded thousands of bilateral investment treaties in the 1990s for the promotion and the protection of investments (“BITs”). The number of BITs is now so overwhelming and their scope so comprehensive that a new debate has recently arisen in doctrine about the impact of these treaties on the existence of custom in the field of international investment law. It has been recently argued in doctrine that these BITs represent the “new” custom in this field. For some writers, the content of both custom and BITs is now simply just the same.

The first section of the paper examines the interaction between custom and BITs (II). We will then analyse in detail the proposition that BITs represent the “new” custom and offers a rebuttal (III). This paper will survey different arguments to support the view that contemporary custom *does not* correspond to the total sum of more than two thousand BITs. The content of these BITs and custom is clearly different. Although, taken together these treaties do not represent any “new” custom, this does not mean that they have a marginal impact on international investment law. On the contrary, BITs may play an important role in the consolidation and crystallisation of customary rules (IV). Finally, we will examine the remaining fundamental importance of determining the content of rules of custom in the field of international investment law in this era of BITs proliferation (V).

II. THE INTERACTION BETWEEN CUSTOM AND BITS

Custom is one of the sources of international law. Under Article 38(1)b of the Statute of the International Court of Justice (ICJ), “international custom” requires a “general practice” that is “accepted as law.”¹ The question of the treatment to be accorded to foreign investors under customary international law has been very contentious amongst

1. Art. 38, Statute of the I.C.J., reprinted in International Court of Justice, Charter of the United Nations, Statute and Rules of Court and other Documents 61 (No. 4 1978).

States for decades. The debate is summarised as follows by Judge Schwebel:

Capital-exporting States generally maintained that host States were bound under international law to treat foreign investment at least in accordance with the “minimum standard of international law;” and where the host State expropriated foreign property, it could lawfully do so only for a public purpose, without discrimination against foreign interests, and upon payment of prompt, adequate and effective compensation. Capital importing States maintained that host States were not in matters of the treatment and taking of foreign property bound under international law at all; that the minimum standard did not exist; and that States were bound to accord the foreign investor only national treatment, only what their domestic law provided or was revised to provide. The foreign investor whose property was taken was entitled to no more than the taking State’s law afforded.²

A compromise between these different approaches was eventually reached in 1962 with the adoption by the United Nations General Assembly of the *Resolution on Permanent Sovereignty over Natural Resources* affirming the right for host States to nationalise foreign owned property, but nevertheless requiring “appropriate compensation” in accordance with international law.³ The so-called “Hull formula” supported by developed States and providing for “prompt, adequate and effective” compensation in the event of expropriation was, however, rejected by developing States in 1974 with the adoption of the *Charter of Economic Rights and Duties of States* by the General Assembly.⁴ Under this “New International Economic Order” the requirement to provide “appropriate compensation” for expropriation still existed, but any related disputes (or “controversy”) had to be “settled under the domestic law of the nationalising State and by its tribunals” and not by an international tribunal under international law.⁵

This heated debate on the issue of compensation for expropriation illustrates that no broad international consensus emerged on the existing

2. S.M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3(2) *TRANSNAT’L DISP. MGMT.* 2 (2006).

3. G.A. Res. 1803 (XVII), 14 Dec. 1962.

4. G.A. Res. 3281 (XXIX), 12 Dec. 1974. The “Hull formula” was first articulated by the United States Secretary of State, Mr. Cordell Hull, in a letter to its Mexican counterpart in response to Mexico’s nationalisation of U.S. companies in 1936. Mr Hull argues that international law required “prompt, adequate and effective” compensation for the expropriation of foreign investments (*in* GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* ¶ 228 (v. 3, 1942).

5. G.A. Res. 3281 (XXIX), 12 Dec. 1974.

protection for foreign investors as a result of these persisting differences of approaches between developed and developing states. The absence of consensus consequently prevented the development and crystallisation of rules of customary international law in the field of international investment law. In the famous 1970 *Barcelona Traction* case, the ICJ drew the same conclusion:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.⁶

The 1990s were marked by a new era of globalisation whereby private foreign investments were (almost) universally deemed by States as an essential tool for their economic development.⁷ At the time, uncertainty still remained on the types of legal protections existing for foreign investors under custom. Not surprisingly, efforts by the OECD to negotiate a comprehensive Multilateral Agreement on Investment (“MAI”) in 1995 were unsuccessful.⁸ As explained by scholars, it is precisely because “customary law was deemed to be too amorphous and not be able to provide sufficient guidance and protection” to foreign investors that capital-exporting and developing States started to frenetically conclude *ad hoc* BITs.⁹ It is now estimated that over 2,500 such BITs have been concluded worldwide (the vast majority in the 1990s).¹⁰

6. *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J., 4, at 46-47 (5 February).

7. Thus, the 1992 World Bank GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT explained in its preamble that it “recognizes” that “a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular.”

8. OECD, *Negotiating Group on the Multilateral Agreement on Investment*, Draft Consolidated Text of 11 February 1998, DAF/MAI (98)7, pp. 58-64.

9. R. Dolzer & A. von Walter, *Fair and Equitable Treatment—Lines of Jurisprudence on Customary Law*, in INVESTMENT TREATY LAW, CURRENT ISSUES II 99 (F. Ortino ed., 2007).

10. According to UNCTAD, *Recent Developments in International Investment Agreements (2006-June 2007)*, 3 IIA MONITOR (2007), there were 2,573 treaties at the end of 2006. It should also be noted that States have also entered a limited number of multilateral investment agreements at the regional level. For instance, North American Free Trade Agreement [hereinafter NAFTA], Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993); Energy Charter Treaty, Apr. 16, 1998, 34 I.L.M. 373 (1995).

The substantive rules for the protection of foreign investments are found in these bilateral and multilateral investment treaties.¹¹ Such investment treaties regulate the treatment of foreign investors and their investments in the host State. Investment treaties typically contain detailed definitions of who qualifies as an “investor” and what constitutes a protected “investment.” They normally provide for equal treatment of domestic and foreign investors (the so-called “national treatment” and “most-favoured-nation treatment” clauses), a minimum standard of treatment to investors (the obligation for the host State to provide a “fair and equitable treatment”), compensation in case of expropriation of an investment by the host State and dispute-resolution by international arbitration. Of particular importance is the ability for foreign investors to resolve investment disputes by bringing claims *directly* against the States in which they invest.¹² This aspect has rightly been described as “one of the most important progressive developments in the procedure of international law of the 20th century.”¹³

As a result of these developments, the number of arbitration cases between investors and States is booming. There are currently some 290 known investor-State arbitration cases pending.¹⁴ In the last five years, an average of 40 new cases have been filed each year.¹⁵ These are dramatic figures considering that, in the first 30 years of the existence of the International Centre for the Settlement of Investment Disputes (“ICSID”), only one to two cases were registered each year.¹⁶

11. Protection is also often found in *contracts* entered into directly between foreign investors and States (or State-owned entities) or in the legislation of the host State of the investment.

12. Under these treaties, no longer is a foreign investor required to go before local courts or to have its claim “espoused” by its State of origin. Generally, however, an investor must opt between international arbitration or other venues under so-called “fork-in-the-road” provisions.

13. Schwebel, *supra* note 2, 2. It can be argued that as a result of these changes, corporations can be deemed as “subjects” of international law in the context of investor-State arbitration arising from BITs, *see*: Patrick Dumberry, *L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements*, 108(1) RGDI 103-122 (2004).

14. UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, 1 IIA MONITOR 1 (2008). It should be noted that there are also a number of investor-State disputes currently being settled by arbitration about which information is not publicly available (for instance, those arbitrations under the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules).

15. *Id.*, p. 1.

16. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1975, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention].

III. A REBUTTAL TO THE PROPOSITION THAT BITs REPRESENT THE “NEW” CUSTOM

Despite the early lack of consensus, it is undeniable that some principles of customary international law have emerged in the last decades in the field of international investment law. For instance, the obligation for the host State to provide foreign investors with the “minimum standard of treatment” is a custom norm.¹⁷ Similarly, the host State cannot expropriate a foreign investor’s investment unless four conditions are met: the taking must be for a public purpose, as provided by law, conducted in a non-discriminatory manner and with compensation in return.¹⁸

As a direct result of the emergence of these numerous BITs, the question arises as to the role and relevance of custom in contemporary international investment law. As explained by Schreuer and Dolzer, by the 1990s “the tide had turned” and capital-importing states were no longer opposed to the application of custom, but instead granted through BITs “more protection to foreign investment than traditional customary law did, now on the basis of treaties negotiated to attract additional foreign investment.”¹⁹ The controversial issue currently being debated in academia and amongst arbitrators deals with the impact that BITs have on the existence and the content of custom.²⁰ More specifically, do BITs represent the “new” custom in this field?

17. *Mondev International Ltd. v. United States*, Award, ¶ 121 (Oct. 11, 2002) (ICSID). See also L. REED, J. PAULSSON & N. BLACKABY, *A GUIDE TO ICSID ARBITRATION* 48 (2004); I. TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL FOREIGN INVESTMENT LAW*, 61-62 (2006); OECD, *Fair and Equitable Treatment Standard in International Investment Law*, 8 (2004).

18. *Generation Ukraine, Inc. v. Ukraine*, Award, ¶ 11.3 (Sept. 16, 2003) (ICSID) (“[i]t is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law”). See also OECD, “*Indirect Expropriation*” and *The “Right To Regulate” in International Investment Law*, 3 (2004); C. MACLACHLAN, L. SHORE & M. WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES*, 16 (2007).

19. C. SCHREUER & R. DOLZER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 16 (2008). The reasons why developing States adopted BITs *en masse* is explained in Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38(4) *VIJG JIL* 639-688 (1998).

20. In doctrine: Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law*, 98 *ASIL PROC.* 27-30 (2004); Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate: the Question of Whether BITs Influence Customary International Law Revisited*, 5 *JWI & T* 789-809 (2004); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 *COL JLT* 123-130 (2003); Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14(2) *NJILB* 327-375; Guzman, *supra* note 19; Abdullah Al Faruque, *Creating Customary International Law Through Bilateral Investment*

The position of Judge Schwebel, former president of the ICJ and a leading arbitrator in investor-State disputes, is a good starting point to examine the issue. He believes that “customary international law governing the treatment of foreign investment has been *reshaped* to embody the principles of law found in more than two thousand concordant bilateral investment treaties.”²¹ The *CME* Tribunal (in which Schwebel acted as an arbitrator) reached the same conclusion that BITS had “reshaped the body of customary international law.”²² Similarly, the *Mondev* Tribunal also held that the “content” of “current international law” was “*shaped* by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.”²³

There is no doubt that the content of contemporary custom is “shaped” (or “reshaped”) by these numerous BITS.²⁴ However, while it is certainly true that BITS will *influence* the development of customary international law, it is quite another thing to simply say that BITS now *represent* the *new* custom in international investment law. Yet, this is the position adopted by some writers. For instance, Laird endorses the view that “we have reached that point in the development of international investment law where we must seriously consider these instruments [i.e., BITS] as reflective of the development of *new* customary international law.”²⁵ What is that so-called “new” custom? Apparently, it simply consists of the more than 2,000 BITS entered into by States. This is the position of Schwebel for whom, “when BITS prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied

Treaties: A Critical Appraisal, 44 INDIAN J INT L 292 (2004); T. Gazzini, *The Role of Customary International Law in the Protection of Foreign Investment*, 8(5) JWIL & T 691 (2007); C. McLachlan, *Investment Treaties and General International Law*, 57(2) ICLQ 361-401 (2008); Cai Congyan, *International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules*, 7(3) CHINESE J. INT'L L., 659- 679 (1998).

21. Schwebel, *supra* note 20, at 27 (emphasis added).

22. *CME Czech Republic B.V. v. Czech Republic*, award, ¶ 498 (Mar. 14, 2003) (UNCITRAL).

23. *Mondev*, *supra* note 17, ¶ 125 (emphasis added). The Tribunal was interpreting NAFTA Article 1105.

24. See Gazzini, *supra* note 20, at 703.

25. Ian A. Laird, *A Community of Destiny—The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 95-96 (T. Weiler, ed. 2005) (emphasis added) (*see also* “A strong argument can now be made that sufficient constancy does exist in investment instruments and related jurisprudence, and that this particular area of international law has evolved to reflect a new and consistent state of international custom.”).

in the terms of some two thousand concordant BITs.”²⁶ This seems also to be the position of Lowenfeld: “*taken together*, the [BITs] are now evidence of customary international law, applicable even when a given situation or controversy is not explicitly governed by a treaty.”²⁷ In other words, for these writers the content of custom is now simply the *same* as that of BITs.

This paper argues, for the reasons set out below, that the better view is that custom in the field of international investment law *does not* correspond to the *total sum* of 2,500 BITs. We will first examine a few basic arguments against the proposition equalling custom and BITs (A) and then analyse its main weakness, i.e., that it does not meet the definition of customary international law (B).

A. *A Few Basic Arguments against the Proposition Equalling Custom and BITs*

1. The Quantity of BITs is not Relevant

The quest to identify customary rules of international investment law is undoubtedly a complicated exercise. As explained by the *Mondev* Tribunal, “[i]t is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties.”²⁸ What is clear, however, is that the identification of custom rules cannot simply be a “mechanical exercise based on mere quantitative consideration.”²⁹ Thus, not much can be deduced from the existence of numerous treaties on one subject matter. Clearly, no conclusion can be reached on the existence of any customary rule by simply adding up the number of treaties.³⁰ As explained by one writer, “the mere prevalence of similarly worded treaty language, however numerous, will not, without more, give rise to a binding obligation in custom.”³¹ The *ADF* Tribunal reached the same conclusion:

We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous

26. Schwebel, *supra* note 20, at 29-30.

27. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 584 (2nd ed. 2008) (emphasis added); Lowenfeld, *supra* note 20, at 123-130. See also F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *BRITISH YIL* 249 (1981).

28. *Mondev*, *supra* note 17, ¶ 111.

29. Gazzini, *supra* note 20, 704.

30. Al Faruque, *supra* note 20, at 300-301.

31. McLachlan, *supra* note 20, 400.

requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor, for instance, has not shown that such a requirement *has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant.*³²

2. BITS Cannot be Assessed as a Whole

Another troubling aspect of the proposition is that it is based on the assumption that these BITS can somehow be analysed *as a whole*. Clearly, the mass of BITS simply cannot be assessed globally as a single species. This is because these treaties greatly vary in form. The 10-pages older BIT entered into by Canada with Poland and Hungary in 1990-1991 simply cannot be compared to the much more comprehensive 104-pages BIT Canada concluded 15 years later with Peru.³³ Similarly, recent BITS entered into by Germany cannot be compared with earlier ones providing only for State-to-State dispute resolution mechanism (such as the BIT entered into with Malaysia in 1960)³⁴. Moreover, modern BITS also greatly vary in content (a point examined below). Logically, only *specific substantive obligations* (such as, for instance, the obligation to provide fair and equitable treatment) can be subject to an enquiry as to whether or not they have crystallised into a customary rule. This exercise simply cannot be undertaken *in abstracto* with respect to thousands of treaties *in toto*.

3. The Proposition is Circular

As mentioned above, for Schwebel when a BIT “prescribe[s] treating the foreign investor in accordance with customary international law” what this really means is “the standard of international law embodied in the terms of some two thousand concordant BITS.”³⁵ There is something oddly circular about the proposition. Thus, in order to find out the exact meaning of a customary rule as referred to in a BIT, one should simply look at the *all* BITS. Under this interpretation, one cannot

32. ADF Group Inc. v. United States, Award ¶ 183 (Jan. 9, 2003) (ICSID) (emphasis added).

33. Patrick Dumberry & Stephen L. Drymer, *Canada's Accession to the ICSID Convention and the 2006 Canada-Peru Bilateral Investment Treaty: New Protections and Opportunities for Investors*, in EL ARBITRAJE EN EL PERÚ Y EL MUNDO (C.A. Soto Coaguila ed. 2008).

34. Agreement Between the Federal Republic of Germany and the Federation of Malaya Concerning the Promotion and Reciprocal Protection of Investments, signed on 22 December 1960, entered into force on 06 July 1963, BGBI II 1962, 1064.

35. Schwebel, *supra* note 20, at 29-30.

help but wonder why BITs should refer to custom at all? In any event, such an across-the-board *renvoi* to thousands of treaties is not particularly helpful to practitioners and judges having to actually determine the content of custom.

B. BITs are Missing the Two Necessary Elements of Custom

The main weakness of the proposition equalling BITs to any such “new” custom is its basic failure to meet the definition of customary international law. Custom has two constitutive elements: a “constant and uniform” (but not necessarily unanimous) practice of States in their international relations and the belief that such practice is required by law (*opinio juris*).³⁶

This double requirement is one of the most well-established principles of international law. It has been recognized as such by several ICJ decisions.³⁷ For instance, in the *Continental Shelf* case, the Court stated that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”³⁸ The double requirement of custom also applies in the context of investor-State arbitration. For instance, the *UPS* Tribunal stated that “to establish a rule of customary international law, two requirements must be met: consistent state practice and an understanding that the practice is required by law.”³⁹ It is also noteworthy that this double requirement is expressly referred to in recent BITs entered into by the United States (based on the US Model BIT)⁴⁰ as well as some other agreements entered into by Australia.⁴¹

36. International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report, 8 (2000).

37. *Lotus Case* (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 9, at 18, 28; *Asylum Case* (Colombia v. Peru), 1950, I.C.J., 265, at 276-7 (June 13); *Right of Passage Case* (Portugal v. India), 1960, I.C.J. at 42-43 (Apr. 12); *North Sea Continental Shelf Case* (FR Germany v. Denmark), 1969 I.C.J., at 44 (Feb. 20).

38. *Continental Shelf Case* (Libya v. Malta), 1985 I.C.J., 13 at ¶ 27 (June 3).

39. *United Parcel Service v. Canada*, Dec. Jurisdiction, ¶ 84 (Nov. 22, 2002) (UNCITRAL).

40. See, for instance, the U.S.-Uruguay BIT (2005) and the U.S.-Rwanda BIT (2008). Annex A to the U.S. Model BIT expressly mentions that “The Parties confirm their shared understanding that ‘customary international law, generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation.’”

41. Chile-Australia Free Trade Agreement (“FTA”) (at Annex 10-A); U.S.-Australia FTA (at Annex 11-A).

1. There is no Consistent State Practice

According to Akehurst, “state practice covers any act or statement by a state from which views about customary law may be inferred.”⁴² International treaties are undoubtedly an example of State practice.⁴³ It has also long been recognised by the ICJ that nothing prevents (under certain specific circumstances) a treaty rule from developing into a customary international law rule.⁴⁴ This principle is in fact embodied in the *Vienna Convention on the Law of Treaties*.⁴⁵ In theory, BITs can therefore serve as evidence of the element of State practice required to establish the existence of a rule of customary international law.⁴⁶ This is, for instance, the conclusion reached by the Tribunal in the case of *Camuzzi v. Argentina* which refuted the claim that “lex specialis cannot be considered as leading to a rule of customary law” and held that “there is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met.”⁴⁷

At the same time, the recent work of the International Law Association (ILA) on customary international law shows that “[t]here is no *presumption* that a succession of similar treaty provisions gives rise to a new customary rule with the same content.”⁴⁸ Interestingly, the work

42. M. Akehurst, *Custom as a Source of International Law*, 47 BRITISH YIL 10 (1974-75).

43. ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 104 (1971) (“[A] treaty arguably is a clear record of a binding international commitment that constitutes the ‘practice of states’ and hence is as much a record of customary behavior as any other state act or restraint.”). See also I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (6th ed. 2003); RESTATEMENT OF THE LAW, THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102, comment I (1987).

44. North Sea Continental Shelf Cases, *supra* note 37, at ¶ 71, explains the phenomenon as follows: “. . . a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.”

45. Art. 38, Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 UNTS 331.

46. Hindelang, *supra* note 20, 793-795. For Gazzini, *supra* note 20, 701, what is required for BITs to generate customs is a “remarkably high number of similar treaties [that] have been concluded among a largely representative number of States.”

47. *Camuzzi International S.A. v. Argentina*, Dec. Jurisdiction ¶ 144 (May 11, 2005) (ICSID).

48. Principle no. 25 adopted by the ILA, *supra* note 36, at 47 (emphasis added).

of the ILA specifically addressed the question of the impact of BITs on custom and concluded as follows:

The question of the legal effect of a succession of similar treaties or treaty provisions arises particularly in relation to bilateral treaties, such as those dealing with extradition or investment protection. . . . [T]here seems to be no reason of principle why these agreements, however numerous, should be *presumed* to give rise to new rules of customary law or to constitute the State practice necessary for their emergence. . . . Some have argued that provisions of bilateral investment protection treaties (especially the arrangements about compensation or damages for expropriation) are declaratory of, or have come to constitute, customary law. But . . . there seems to be no special reason to *assume* that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties *outside the treaty framework*.⁴⁹

The first basic requirement of custom remains proof of consistent State practice. This is particularly true in the context of BITs where rapidly increasing State practice is a rather recent phenomenon which accelerated only in the 1990s. As explained by the ICJ in the *North Sea Continental Shelf* Case, State practice must be “both extensive and virtually uniform” where it is asserted that a rule of customary international law has emerged in a short period of time.⁵⁰ The undeniable reality is that BITs are very diverse in their content and scope. Taken together, these treaties are certainly not consistent enough to constitute the basis for any rule of customary international law. Indeed, this is the general position adopted by Canada in NAFTA arbitration proceedings:

Even amongst the BITs, no consistent practice can be found. The variation of terms, and specifically the differences in the scope and nature of access to international arbitration makes it impossible to find a consistent practice. Without such a consistent practice there can be no customary norm.⁵¹

This is also the position held by many authors in doctrine who have undertaken the analysis of BITs to determine whether *specific* substantive rights contained in these treaties represent custom.⁵² Those

49. *Id.*, at 47-48 (emphasis in the original).

50. *North Sea Continental Shelf Cases*, *supra* note 37, at ¶ 75.

51. “Canada’s Article 1128 Submission on Jurisdiction Concerning Loewen Corporate Restructuring” ¶18 (June 27, 2002), submitted in the case of *Loewen Group, Inc. and Raymond L. Loewen v. United States* (ICSID).

52. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT*, 206 (2nd ed. 2004) (“there is so much divergence in the standards in the [BITs] that it is premature to conclude that they give rise to any significant rule of international law”); Kishoian,

studies concluded that there is no consistent State practice on the following issues: the definition of investment,⁵³ the control of the entry of investment by the host State in its territory,⁵⁴ national treatment and the most favoured national treatment,⁵⁵ the standard of compensation as a result of measures of expropriation,⁵⁶ the criteria to determine the value of expropriated property,⁵⁷ and the repatriation of profits.⁵⁸ Another area where a lack of consistency of State practice has been observed by scholars concerns dispute settlement mechanisms and, in particular, the issues of amicable negotiations, the applicable procedural rules to the conduct of arbitration, the applicable law governing the dispute, and the exhaustion of local remedies before resorting to arbitration.⁵⁹

In the context of the present paper, it will suffice to provide a single illustration of the lack of consistency of BITs in one area: corporations' and shareholders' protection.⁶⁰

2. One Illustration: The Protection Offered to Corporations and Shareholders under BITs

As mentioned above, modern investment treaties typically define the term "investment" very broadly to encompass shares in corporations. The term "investor" is also usually defined in broad terms. There remain, however, some important inconsistencies between BITs with respect to how they specifically define "investor" and the nationality of corporations.⁶¹ This is important because nationality is the gateway to

supra note 20, 372-373 ("a close analysis of the various BITs (. . .) has revealed that there not sufficient consistency in the terms of the investment treaties to find in them support for any definite principles of customary international law"). See also: M. Mendelson, *The Runaway Train: the Continuous Nationality Rule from the Panevezys-Saldutiskis Railway Case to Loewen*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 141 (T. Weiler, ed. 2005); McLachlan, *supra* note 20, 393; Cai, *supra* note 20, ¶ 13.

53. Sornarajah, *Id.*, 220-227.

54. Kishoiyian, *supra* note 20, 343-346.

55. Al Faruque, *supra* note 20, 304-305.

56. *Id.*, 305-306; Sornarajah, *supra* note 52, 436, 441-443; Kishoiyian, *supra* note 20, 356-363. See also: M. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV. 352 (1992).

57. Al Faruque, *supra* note 20, 306.

58. *Id.*, at 306; Kishoiyian, *supra* note 20, 353-354.

59. Al Faruque, *supra* note 20, 307-310; Sornarajah, *supra* note 52, 250; Kishoiyian, *supra* note 20, 363-372.

60. See, Patrick Dumbergy, *The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule Of Customary International Law Crystallised?*, 18(3) MICHIGAN STATE JIL, 2010 (forthcoming)

61. Gazzini, *supra* note 20, 709. See also R. Dolzer & M. Stevens, *supra* note 61, at 34 ff.; Kishoiyian, *supra* note 20, at 346-353.

legal protection under an investment treaty.⁶² The scope of the definition of what is considered an “investor” under a BIT determines if a corporation and its shareholders receive any protection under that treaty.⁶³ In other words, the legal standing of a corporation or a shareholder and its access to arbitration always depends on whether or not it fits into the definition of “investor” under a specific treaty.

A recent study of BITs entered into by countries of the Americas highlights the great inconsistency in the definitions of corporate nationality.⁶⁴ Out of 40 BITs examined, the author found no less than five different definitions of “investor”: five treaties defined nationality of a corporation solely based on incorporation, 15 required incorporation plus the seat of management, nine required incorporation, seat of management *and* effective economic activities, 10 allowed claims based on incorporation plus the seat of management *or* economic activities, and finally, only one treaty required incorporation and control.⁶⁵ In other words, what is an “investor” under these BITs really depends on the exact wording of each treaty. Clearly, no general standard exists in the Americas.

The same is also true for the rest of the world. Some treaties require that a corporation be not only incorporated in a State party, but that its effective management (such as its headquarters) also be located there.⁶⁶ Other treaties further require that the corporation be controlled by nationals of the State of incorporation or have substantial business activities in that State.⁶⁷ At the other extreme, some BITs entered into by the Netherlands extend protection to legal entities not even incorporated in that country provided that they are controlled by Dutch

62. Anthony C. Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration* 20(2) ICSID REV.-FOREIGN INVESTMENT L.J. 357 (2005); Pia Acconci, *Determining the Internationally Relevant Link between a State and a Corporate Investor, Recent Trends concerning the Application of the ‘Genuine Link’ Test*, 5 JWT & I 139-175 (2004).

63. S.W. Schill, *The Multilateralization of International Investment Law: The Emergence of a Multilateral System of Investment Protection on the Basis of Bilateral Treaties* (June 26, 2008). Society of International Economic Law (SIEL) Inaugural Conference Paper, 2008; SIEL Online Proceedings Working Paper No. 18/08, at p. 14-15, available at SSRN: <http://ssrn.com/abstract=1151817>.

64. Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT’L L. 237-289 (2006) 272-273.

65. *Id.*

66. Several examples are discussed in Sinclair, *supra* note 62, at 374 ff. He refers specifically to the U.K.-Philippines BIT (1981) and the Italy-Libya BIT.

67. For instance, the United States Model BIT (2004); Canadian Model Foreign Investment Protection and Promotion Agreement (FIPA) (2004) [hereinafter Canada Model BIT].

nationals.⁶⁸ These are clear examples of State practice not consistent enough to form the basis of any customary rule.

In fact, completely different approaches are sometimes adopted by the *same country* depending on the treaty. A good illustration is Canada's position concerning special-purpose "holding" or "shell" corporations. Most BITs entered into by Canada provide that a corporation is considered "Canadian" under the treaty if it is "incorporated or duly constituted in accordance with applicable laws of Canada."⁶⁹ A holding corporation incorporated in Canada would therefore be covered under these treaties. However, other BITs require that a corporation also be "controlled" (either directly or indirectly) by Canadian nationals.⁷⁰ The same requirement is found in the Model BIT adopted by Canada, which requires that a corporation have "substantial business activities" in Canada to be considered Canadian.⁷¹ So-called "shell" corporations incorporated in Canada that do not meet these requirements are therefore not protected under these treaties. Other inconsistencies also exist in BITs entered into by Canada concerning protection to "indirect" shareholders.⁷²

In sum, the scope and extent of protection offered under BITs to corporations and shareholders greatly varies. Indeed, there is no general standard on the legal standing of corporation and their access to international arbitration. The existence of this procedural right ultimately depends on the exact wording of each treaty. No standardised solution exists in BITs. The variegated State practice is certainly not consistent enough to constitute the basis for any rule of custom.⁷³ It certainly does not fulfil the requirement as recently set out by the ILA

68. For instance, the Netherlands-Bulgaria BIT, discussed in Sinclair, *supra* note 62, 368.

69. See, for instance, the BIT entered into by Canada with Ecuador Hungary (1997).

70. See, for instance, the BITs entered into by Canada with Hungary (1993) and Costa Rica (1999).

71. Art. 18. The same rule is found in NAFTA at Art. 1113(2) and in the recent Canada-Peru BIT at Art. 18.

72. Most of Canada's BITs define "investment" as any kind of asset invested by a Canadian company in the territory of the other party "either directly, or indirectly through an investor of a *third State*" (emphasis added). However, an earlier BIT entered into with Poland in 1990 does not make explicit reference to "indirect" investments. Also, although the Canada-Hungary BIT does refer to "indirect participation," it does not explicitly refer to the possibility of such participation being made through a company incorporated in a *third State*. The issue of indirect claims is discussed in Markus Perkams, *Piercing the Corporate Veil in International Investment Agreements: the Issue of Indirect Shareholder Claims Reloaded*, in INTERNATIONAL INVESTMENT LAW IN CONTEXT 93-114 (A. Reinisch & C. Knahr, eds., 2008).

73. Sornarajah, *supra* note 52, 232; Kishoiyian, *supra* note 20, 352; Gazzini, *supra* note 20, 707-710.

whereby “[f]or State practice to create a rule of customary law, it must be virtually uniform.”⁷⁴

3. BITs Lack any *Opinio Juris*

As explained by the ICJ in *North Sea Continental Shelf*, “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁷⁵ As explained by Schachter, “the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law” because “[t]o sustain such a claim of custom one would have to show that apart from the treaty itself, the rules in the clauses *are considered obligatory*.”⁷⁶

The requirement of the element of *opinio juris* has been repeatedly reiterated by arbitral tribunals deciding investor-State disputes.⁷⁷ States taking part in arbitration proceedings have also adopted the same position. The *Mondev* Tribunal explains that all three NAFTA parties rejected in no uncertain terms the *Pope* Tribunal’s reasoning equating custom with BITs without even mentioning the *opinio juris* requirement:

In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in *Pope & Talbot* which find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the *Pope & Talbot* Tribunal to consider a necessary element of the establishment of a rule of customary international law, namely *opinio juris*. These States appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for “fair and equitable” treatment of foreign investment.⁷⁸

74. ILA, *supra* note 36, at 21 (Principle no. 13).

75. *North Sea Continental Shelf*, *supra* note 37, ¶ 77.

76. Oscar Schachter, *Compensation for Expropriation*, 78 ASIL 126 (1984) (emphasis added). See also McLachlan, *supra* note 20, 393, 400.

77. *UPS*, *supra* note 39, ¶ 84.

78. *Mondev*, *supra* note 17, ¶ 110. The Tribunal also referred to the U.S. position that Tribunal in *Pope & Talbot Inc. v. Canada, Award Damages* (May 31, 2002) (UNCITRAL), had “erred in its automatic equation of customary international law with the content of BITs, without regard to any question of *opinio juris*” (¶ 106). In the context of the *Loewen* case, *supra* note 51, Mexico made the following observation: “The [Pope] Tribunal did not refer to the essential additional requirement of *opinio juris*. In Mexico’s respectful view, the *Pope & Talbot* Tribunal’s failure to observe basic principles of treaty interpretation and its treatment of proving the existence of a

There is certainly no evidence of any *opinio juris* by States entering into BITs.⁷⁹ As the *UPS* Tribunal stated “[w]hile BITs are large in number, their coverage is limited . . . and in terms of *opinio juris* there is no indication that they reflect a general sense of obligation.”⁸⁰ In fact, the evidence suggests that the decision of States to enter into BITs is solely based on their (perceived) economic interest.

Thus, Guzman explains that developing States that have long rejected the so-called Hull formula on compensation for expropriation have nevertheless signed hundreds of BITs containing provisions similar to the formula (and which, at any rate, offer greater legal protection to foreign investors than under custom).⁸¹ For him, these States sign BITs to have “an advantage in the competition for foreign investment.”⁸² A similar conclusion was reached in a recent study which explains “the diffusion of BITs” based on the “competitive economic pressures among developing countries to capture a share of foreign investment.”⁸³ Clearly, developing states sign BITs to attract foreign investments.

As explained by one writer, “a BIT between a developed and a developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future.”⁸⁴ Guzman convincingly concludes that it is “simply not possible to explain the paradoxical behaviour of [less developed countries] toward foreign investment based on a view that BITs reflect *opinio juris*” as these BITs “do not reflect a sense of legal obligation but are rather the

customary international law rule does not commend its Awards to this Tribunal. Its Awards have been wrongly decided and should be disregarded.” (“Mexico’s Article 1128 Submission Concerning Loewen Corporate Restructuring” ¶ 39-40 (July 2, 2002)). See also Canada’s position in the same *Loewen* case: “the *Pope & Talbot* Tribunal referred to no *opinio juris* surrounding these agreements and appeared unaware that such a sense of legal obligation is required before a customary norm can be found. The *Pope & Talbot* Tribunal failed to establish the fundamental pre-conditions to the creation of customary obligations had been met. Therefore, Canada submits that the *Pope and Talbot* Tribunal’s conclusions with respect to the status of BITs as crystallizations of customary law should not be followed.” (Canada’s Submission, *supra* note 51, ¶ 25-26).

79. Al Faruque, *supra* note 20, 310; McLachlan, *supra* note 20, 393; Cai, *supra* note 20, ¶ 14.

80. *UPS*, *supra* note 39, ¶ 97. The same Tribunal also added that that “the failure of efforts to establish a multilateral agreement on investment provides further evidence of that lack of a sense of obligation.”

81. Guzman, *supra* note 20, at 640.

82. *Id.*, at 687.

83. Z. Elkins, A.T. Guzman & B.A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60(4) INT. ORG. 811-846 (2006).

84. J.W. Salacuse, *The Treatification of International Investment Law: a Victory of Form Over Life? A Crossroads Crossed?* 3(3) TRANSNAT’L DISP. MGMT. 7 (2006) (emphasis in the original). See also J.W. Salacuse & N.P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARVARD ILJ 67 (2005).

result of countries using the international tools at their disposal to pursue their economic interests.”⁸⁵ The contrary position of Hindelang, who affirms the existence of an *opinio juris* solely based on the “common interests of States,” has clearly no foundation at international law.⁸⁶ It should be noted that other writers have also argued that the uneven bargaining strength of the parties negotiating a BIT show the lack of any *opinio juris* by developing States⁸⁷ and that BITs often serve political and ideological purposes for some developed States, such as, for instance, the promotion of capitalism, liberalism and democracy.⁸⁸

Ultimately, BITs are the result of trade-offs and mutual concessions between States. Their content depends on the political and economic bargaining power of each party to the negotiations.⁸⁹ BITs are the result of a compromise between conflicting interests; they are not entered into by States based on any perceived legal obligation.

C. *States Reject the Proposition that BITs Represent Custom*

As explained by the *Glamis Gold* Tribunal, statements made by States in arbitration proceedings can represent State practice.⁹⁰ The

85. Guzman, *supra* note 20, 687.

86. Hindelang, *supra* note 20, at 806: “the states have left us today with a network of more than 2,300 BITs—a broad statement that almost the whole community of States views foreign investment favourably and its protection by international law not only desirable but necessary. Can this, however, also be viewed as a statement in favour of common principles embodies in customary international law? The answer is almost certainly yes.” See also at 808: “[t]here is a real ‘interest of States’ in a set of basic principles on foreign investment in customary international law. Sovereignty must step back. Due to the fact that it is not possible to see any convincing ‘interest’ in the preservation of sovereignty, but a real interest in a set of basic principles on foreign investment embodies in custom, *opinio juris* can be derived in the case of BITs.”

87. Al Faruque, *supra* note 20, at 310, 315, arguing that the “unequal bargaining strength especially manifested in BITs between developed and developing countries, diminishes the developing country’s autonomy to give consent to BIT considerably.”

88. *Id.*, at 315. He refers to the BIT program of the United States in Eastern Europe and ex-USSR. He also indicates that “developing countries sometimes use BIT free to pursue a variety of economic nationalist and populist policies prompted by special political consideration.” See also Cai, *supra* note 20, ¶ 14: “the appropriate justification to deny the existence of *opinio juris* from some developing countries in BIT is that in many cases these countries conclude BITs either as the result of undue pressure from developed countries or as a result of their aspiration for international legitimacy during economic or political transformation” (he adds, however, at ¶ 20, that this argument is no longer valid when a developing states becomes capital exporting).

89. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 303 (1991). See also Kishoiyian, *supra* note 20, at 333.

90. *Glamis Gold, Ltd. v. United States*, Award ¶ 602 (June 8, 2009) (UNCITRAL): “The evidence of such ‘concordant practice’ undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings.” The Tribunal added that “in the NAFTA context, there is the addition of Article 1128

proposition that customary law is coterminous with BITs has been explicitly rejected by States.⁹¹ This is clearly the case in the context of NAFTA arbitration.⁹² For instance, in the context of the *Loewen* case, Mexico (a third party to the proceedings) made the following comments:

Mexico is particularly concerned about the suggestion that the fact that the mere existence of some 1800 BITs in the world means that [sic] somehow that the corpus of these treaties creates customary international law obligations. The fact that States may agree to the same or similar obligations through different treaties involving different parties, or even the same obligations through multilateral treaties is not sufficient on its own to build customary international law.⁹³

[i]t is impossible to infer from the existence of a large number of BITs alone that any particular provision therein represents a rule of customary international law merely by reason of its commonality.⁹⁴

The same position was also adopted by the United States and by Canada, in the *Loewen* case,⁹⁵ the *Glamis* case,⁹⁶ and the more recent *Chemtura* case.⁹⁷

IV. BITS CONTRIBUTE TO THE CONSOLIDATION AND THE CRYSTALLISATION OF CUSTOMARY RULES

The previous section has shown that BITs do not represent any “new” customary international law. In other words, the content of custom and the thousands of BITs are simply not the same. This is, indeed, the prevailing view in doctrine.⁹⁸ The logical conclusion must

submissions through which the State Parties can express directly their views on and interpretations of the provisions of the NAFTA.”

91. As just mentioned, this opposition by all three NAFTA States is clearly explained by the Tribunal in *Mondev*, *supra* note 17, at 110.

92. NB: In 2008-2009, the present author worked for the Trade Law Bureau at Canada’s Department of Foreign Affairs and International Trade and was personally involved as counsel for Canada in NAFTA Chapter 11 cases.

93. Mexico’s Submission, *supra* note 78, ¶ 33, in the *Loewen* case, *supra* note 51.

94. *Id.*, ¶ 39.

95. “U.S. Response to Canada and Mexico’s Article 1128 Submissions” at 3 (July 19, 2002) (“no rule of customary international law relevant to this NAFTA proceeding is established by the various bilateral investment agreements between States not parties to the NAFTA”).

96. “United States’ Rejoinder Memorial” at 142 ff. (Mar 15, 2007) in the context of *Glamis Gold*, *supra* note 90.

97. “Canada’s Counter-Memorial” ¶ 269-273 (Oct. 20, 2008), in *Chemtura Corporation v. Canada*, (UNCITRAL).

98. Al Faruque, *supra* note 20, 293; Guzman, *supra* note 20, 684-685; Somarajah, *supra* note 52, 158-159, 206, 213.

therefore be that BITs only create *lex specialis* rules solely applicable between the countries which are party to these BITs.⁹⁹ In the recent *ADM* case, the Tribunal stated that the substantive obligations contained in a multilateral investment treaty (Section A of NAFTA Chapter 11) “offers a form of *lex specialis* to supplement the under-developed standards of customary international law relating to the treatment of aliens and property.”¹⁰⁰ Yet, this answer is not entirely satisfactory as it wrongly excludes the role that these treaties might play in the development of custom.

In doctrine, some writers now speak of the emergence of a “common law of investment protection, with a substantially shared understanding of its general tenets.”¹⁰¹ For them, “the very iterative process of the formulation and conclusion of investment treaties, and the vindication of the rights contained in these treaties in arbitration, is producing a set of general international principles about the meaning of the common substantive clauses, and indeed the larger operation of the system of investment arbitration.”¹⁰² This “common law of investment protection” is, of course, *not* the same as custom per se. But at the same time, it is also not entirely detached from the phenomenon of customary international law. As explained by *Mondev* Tribunal, “such a body of concordant practice [i.e. BITs] will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.”¹⁰³

In the present author’s view, there is undoubtedly a certain convergence or “cross-fertilisation” between this emerging body of law and customary international law.¹⁰⁴ In other words, it seems obvious that these numerous BITs will *influence* customary international law. This observation can, however, only be the starting point of the analysis. Thus, for Gazzini, “the crux of the matter is to understand the consequences of such an influence in terms of creation and development of customary international law.”¹⁰⁵ This paper argues that the impact of BITs on customary international law is twofold.

99. Sornarajah, *supra* note 52, 158-159, 206; Kishoiyian, *supra* note 20, 329; B. Legum, *Dallas Workshop 2001: Commentary Scene III: ICSID Proceedings in the Absence of a Bilateral Investment Treaty* 18(3) ARB. INT. 306; Al Faruque, *supra* note 20, 316.

100. Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico, Award ¶ 117 (Nov. 21, 2007) (ICSID).

101. McLachlan, *supra* note 18, 18-21. *Contra*: M.C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT’L ECON. L. 79 (2006).

102. McLachlan, *supra* note 18, 20.

103. *Mondev*, *supra* note 17, ¶ 117.

104. McLachlan, *supra* note 18, 394-395.

105. Gazzini, *supra* note 20, 703.

First, some of the standards of protection systematically contained in BITS will certainly contribute to the consolidation of *already existing* rules of custom in international investment law.¹⁰⁶ This process is known in international law as “codification” whereby a certain treaty provision codifies an existing rule of custom.¹⁰⁷ In the *Generation Ukraine* case, the Tribunal noted that “[i]t is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law.”¹⁰⁸ Another example of codification is the recent case of *OEPC v. Ecuador* where the Tribunal came to the conclusion that the content of the obligation to provide fair and equitable treatment to investors under the US-Ecuador BIT was the same as that required under customary international law.¹⁰⁹

In that context, the content of both custom and a treaty provision is identical and both can continue to exist in parallel. It has long been recognized by the ICJ that a rule of customary international law can indeed co-exist at the same time in parallel to a treaty rule.¹¹⁰ In the future, it may be that a custom rule will further develop and, therefore, have a content that is different from the treaty provision. In the event of a conflict as to the content of the rule, “there is general authority for the view that a BIT can be considered as a *lex specialis* whose provisions will prevail over rules of customary international law.”¹¹¹

Second, the “common law of investment protection” resulting from BITS will also contribute to the *crystallisation of new rules* of customary

106. *Id.*, 703, 714.

107. R. Baxter, *Treaties and Custom*, 129 REC. COURS 82 (1970-71).

108. *Generation Ukraine*, *supra* note 18, ¶ 11.3.

109. *Occidental Petroleum Corp. & Occidental Exploration and Production Co. v. Ecuador*, (ICSID) Award ¶ 189, 190 (July 1, 2004): “The issue that arises is whether the fair and equitable treatment mandated by the Treaty is a more demanding standard than that prescribed by customary international law. The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment. To this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above.” The same reasoning was also adopted by the Tribunal in *CMS Gas Transmission Co. v. Argentina*, Award ¶ 282-284 (May 12, 2005) (ICSID). These two decisions have been strongly criticised in doctrine: T. Kill, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106(5) MICHIGAN LR 853 (2008); G. VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 89 (2007). For a more recent statement on this point: *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Award ¶ 592 (July 24, 2008) (ICSID).

110. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), 1986 I.C.J. ¶ 175 (June 27).

111. *ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, Award, ¶ 481 (Oct. 2, 2006), (ICSID).

international law *in the future*. By their very nature, customary rules evolve over time. Several investor-State arbitration tribunals have recognised this phenomenon.¹¹² The ICJ has also long-recognised the possibility for treaties to assist in the crystallisation of new custom.¹¹³ The recent work of the ILA explains that this is also possible in the context of a succession of similar bilateral treaties:

It is difficult to imagine that, in normal circumstances, “crystallization” as described above could be accomplished by the drafting and conclusion of a single *bilateral* treaty. So far as concerns a *succession* of bilateral treaties, again there is certainly no presumption that they will have assisted in the crystallization of an emerging norm. But it is possible that in certain circumstances this could be the case, for instance where the bilateral treaties are the means of adding precision to a general customary norm.¹¹⁴

The repetitive enunciation of some of the standards of protection existing under BITs may be the starting point of State practice which will eventually become custom. A treaty provision may, indeed, provide the impulse for the formation of new custom.¹¹⁵ In the words of one writer, numerous BITs providing for very similarly drafted standards of protection will “consolidate a lowest common denominator of protection of foreign investment” and “these treaties may be evidence of State practice and provide a formidable impulse to the development of customary international law.”¹¹⁶

112. ADF, *supra* note 32, ¶ 179, stating that custom is “constantly in a process of development.” See also UPS, *supra* note 39, ¶ 84 (“the obligations imposed by customary international law may and do evolve”); Mondev, *supra* note 17, ¶ 117 (“It would be surprising if this practice [the numerous BITs] and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.”); Pope & Talbot, *supra* note 78, ¶ 59 (“it is a facet of international law that customary international law evolves through state practice”).

113. North Sea Continental Shelf Cases, *supra* note 37, ¶ 63. See also Fisheries Jurisdiction case (United Kingdom v. Iceland), 1974 I.C.J., 3 at ¶ 51-52 (June 25); Continental Shelf case (Tunisia v. Libya), 1982 I.C.J., 18 at ¶ 24 (Feb. 24).

114. ILA, *supra* note 36, at 50 (emphasis in the original). See also Principle no. 26: “Multilateral treaties can assist in the ‘crystallization’ of emerging rules of customary international law. But there is no presumption that they do.” (at 49).

115. *Id.*, 46, Principle no. 24: “Multilateral treaties can provide the impulse or model for the formation of new customary rules through State practice. In other words, they can be the historic (‘material’) source of a customary rule. However, there is no presumption that they do so.”

116. Gazzini, *supra* note 20, 704. See also Kishoiyian, *supra* note 20, 374 (“It is important to note that there are some principles that are common to almost all the BITs and thus by and large evince the practice of States. Effectively, there is utility to the BITs in this regard in formulating legal principles that may become customary intentional law. Whereas there may not be agreement on some of these principles at the international level, the BITs contribute incrementally to the crystallisation of customary international

V. THE REMAINING FUNDAMENTAL IMPORTANCE OF CUSTOM IN INTERNATIONAL INVESTMENT LAW

A recent paper by the OECD on expropriation stated that as a result of the growing number of BITS providing for a comprehensive set of protections to foreign investors the debate about the legal protection existing under customary law had now become irrelevant:

Two decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and measuring of expropriated value. The divergent views of the developed and developing countries raised issues regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have *largely deprived that debate of practical significance for foreign investors*.¹¹⁷

This paper argues, on the contrary, that the question of the formation and the evolution of customary law in international investment law is very much still significant.¹¹⁸ As explained by the Iran-U.S. 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.”¹¹⁹ These reasons, and others, will now be briefly examined.¹²⁰

A. Custom is the Applicable Legal Regime in the Absence of any BIT

However numerous BITS may be, it remains that they certainly do not cover the whole spectrum of possible bilateral treaty relationship between states. According to one writer, BITS in fact only cover some

law which ultimately may be distilled into treaty law.”). According to Sornarajah, *supra* note 52, 206, it is “possible that, if there is a concordance of standards in these [BITS], such standards on which there is consistent agreement evidenced by such treaties could become international law.” He also believes that “it may be claimed that the treaties stabilise practices that have existed and contribute to the creation of customary principles in the areas in the future.” However, he argues that “there is so much divergence in the standards in [BITS] that it is premature to conclude that they give rise to any significant rule of international law.”

117. OECD, *supra* note 18, at 2 (emphasis added).

118. C. Schreuer & R. Dolzer, *supra* note 19, 16-17, asking rhetorically the question whether “the elucidation of the state of customary law is no longer a central concern of academic commentators” and concluding that “the issue certainly remains alive.”

119. *Amoco*, *supra* note 77, ¶ 112.

120. The issue is examined in details by Gazzini, *supra* note 21, 691.

13 percent of the total bilateral relationship between States worldwide.¹²¹ For instance, Canada entered into BITs with only 23 countries.¹²²

Since a BIT is only binding on the parties to the treaty and not on third parties,¹²³ the limited worldwide geographical scope of BITs necessarily results in gaps in the legal protection to foreign investments.¹²⁴ Thus, a foreign investor originating from a State which has not entered into a BIT with the State where the investment is made will not be given the legal protection which would have otherwise been typically offered under such treaty.¹²⁵ Custom, however, applies to *all States*, including those which have not entered into any BITs. Customary rules can therefore be invoked by *any foreign investor* irrespective of whether its State of origin has entered into a BIT with the country where it makes its investment. This is the first reason why the determination of the content of custom remains so fundamental, even in this age of BIT proliferation.

B. Many BITs Make Explicit Reference to Custom

Another reason for the remaining importance of custom is that several BITs make explicit reference to the application of “customary international law.”¹²⁶ An arbitral tribunal must necessarily determine the content of a custom rule when faced with a specific provision, like the one found in the recent Canada-Peru BIT, which indicates that the standard of treatment to be accorded to an investor is that existing under “customary international law,” including the fair and equitable treatment and full protection and security.¹²⁷ The Model BIT adopted by Canada and Norway contains a very similar clause.¹²⁸ The U.S. Model BIT and recent treaties entered into by the United States also contain a similar clause as well as other explicit references to custom.¹²⁹ Several other

121. *Id.*

122. In addition, Canada is also a party to NAFTA, *supra* note 10.

123. Art. 34, Vienna Convention on the Law of Treaties, *supra* note 45.

124. C. Schreuer & R. Dolzer, *supra* note 19, 17.

125. That does not mean, however, that such investor will have no legal protection whatsoever. The investor will still be able to rely on contractual rights as well as those existing under the legislation of the host State.

126. McLachlan, *supra* note 21, 399.

127. Article 5(1) of the Canada-Peru BIT provides that “each party shall accord to covered investments treatment *in accordance with the customary international law minimum standard of treatment of aliens*, including fair and equitable treatment and full protection and security.” (emphasis added).

128. Art. 5, Norway Model BIT; Art. 5, Canada Model BIT.

129. Art. 5(1), US Model BIT (2004). Annex A to the Model BIT further provides that “customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.” Similarly, Annex B to the US Model BIT indicates that Article 6 on

treaties entered into by other States also contain similar language referring to custom.¹³⁰

Similarly, custom is also essential when it is referred to in an official note of interpretation of a treaty provision. One example is the meaning of NAFTA Article 1105 as specified by NAFTA Free Trade Commission's Notes of Interpretation.¹³¹ To those treaties should also be added others where reference is made to the application of general rules and principles of international law used as an analogy to custom.¹³² The importance of custom is also undeniable in the context of a tribunal being required to *interpret* treaty provisions in accordance with customary international law.¹³³

Finally, there is another situation where a tribunal would have to take into account the content of custom. Many BITs entered into by the Netherlands provide for the application of custom whenever it leads to a more favourable treatment than the one existing under the treaty.¹³⁴ This

expropriation "is intended to reflect customary international law concerning the obligation of States with respect to expropriation." Explicit references to custom are also found in recent FTA entered into by the United States with Australia (2004), Central America (CAFTA, 2004), Chile (2003), Morocco (2004) and Singapore (2003, see the side letter of 6 May 2003). *See also* the most recent BITs entered by the United States with Uruguay (2005) and Rwanda (2008).

130. For instance, the Belgium/Luxembourg-Peru BIT (Art. 3); Korea-Singapore FTA (Art. 10.5); Chile-Australia FTA (Art. 10.5); Mexico-Czech Rep. BIT (Protocol); Australia-Mexico BIT (Protocol).

131. Although Article 1105(1) simply refers to "treatment in accordance with international law," the Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA FTC (July 31, 2001), indicate that this provision "prescribes the *customary international law* minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." (emphasis added). *See also* Canada-Chile FTA (1997), Art. G-05 and the subsequent "Notes of Interpretation of Certain Chapter G Provisions" by the CCFTA Free Trade Commission, Oct. 31, 2002).

132. For instance, Guatemala-Czech Rep. BIT (Art. 2(2)) refers to "treatment less favorable than that required by international law."

133. For instance, Korea-Singapore FTA (art. 20.2(5): "The Parties and the arbitral panel appointed under this Chapter shall interpret and apply the provisions of this Agreement in the light of the objectives of this Agreement and in accordance with customary rules of public international law").

134. For instance, Art. 3(5) of the Netherlands-Czech Rep. BIT: "If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement." Similarly drafted provisions are also found in many other BITs entered into by the Netherlands.

specific feature is also contained in the Model BIT adopted by India,¹³⁵ as well as several BITs entered into by Switzerland.¹³⁶

C. Custom has a Gap-Filling Role

Another area showing the importance to determine the content of customary international law is filling gaps in treaties. Thus, whenever a BIT is silent on a particular legal issue, the answer will be found in customary international law.¹³⁷ Thus, custom “operates in a residual way.”¹³⁸ Several tribunals have resorted to custom to fill gaps. For instance, faced with a BIT which “did not deal with the legal elements necessary for the legitimate invocation of a state of necessity,” the *Sempra* Tribunal held that “rule governing such questions will thus be found under customary law.”¹³⁹ Similarly, the *ADC* Tribunal concluded that since the BIT did not “contain any *lex specialis* rules” governing “the issue of the standard for assessing damages in the case of an unlawful expropriation,” it was “required to apply the default standard contained in customary international law in the present case.”¹⁴⁰ For instance, since BITs are typically silent on the rules of attribution of conduct to a State, Tribunals frequently refer to the International Law Commission’s Articles on State Responsibility as a codification of customary international law on the matter.¹⁴¹

Far from being obsolete, the question of the content of customary international law remains of fundamental importance.

135. Art. 13.

136. *See, inter alia*, the BITs entered into with Venezuela (art. 11), Tanzania, (art. 11), Namibia (art. 8.1), India (art. 12), Mozambique (Art. 11), Serbia-Montenegro (art. 10), Philippines (Art. 10), Oman (Art. 10.1), Mongolia, (art. 10.1), Mauritius (art. 11(1)), Libya (art. 10), Jordan (art. 11), Guatemala (art. 10, United Arab Emirates (art. 11), Lebanon (art. 9) (the list is not exhaustive).

137. McLachlan, *supra* note 21, 400; Gazzini, *supra* note 21, 711; Cai, *supra* note 20 ¶ 32.

138. ADM, *supra* note 100, ¶ 110: “Chapter 11 of the NAFTA constitutes *lex specialis* in respect to its express content, but customary international law continues to govern all matters not covered by Chapter 11.”

139. *Sempra Energy International v. Argentina*, Award ¶ 378 (Sept. 28, 2007) (ICSID). *See also* *Loewen Group, Inc. and Raymond L. Loewen v. United States*, Award ¶ 226 (June 26, 2003) (ICSID): “There is no language in those articles [NAFTA Articles 1116 and 1117], or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.”

140. ADC, *supra* note 111, ¶ 483. *See also* ADM, *supra* note 100, ¶ 122.

141. *Noble Ventures, Inc. v. Romania*, Award ¶ 69 (Oct. 12, 2005) (ICSID): “[w]hile those Draft Articles are not binding, they are widely regarded as a codification of customary international law.” *See also* *Biwater*, *supra* note 109, ¶ 773-774 (majority).

VI. CONCLUSION

The conclusions of this paper can be summarised as follows.

1. The question of the treatment to be accorded to foreign investors under customary international law has long been contentious between developed and developing states. As a result, no broad international consensus emerged as to the existing basic legal protections for foreign investors. Consequently, States have entered into BITs, containing comprehensive protection for foreign investors, precisely because of the lack of development of relevant custom rules in the field of the international investment law.

2. What is the impact of these 2,500 BITs on the development of customary international law in this area? Some authors argue that these BITs represent the “new” customary international law and that their content is basically the same.

3. This paper rejects this proposition. The main reason for rejecting it is based on the fact that BITs are missing the two necessary elements of customary international law. First, these BITs do not represent any consistent State practice. For instance, the inconsistency of State practice is undeniable with respect to the definition of corporate nationality under these BITs. Second, BITs also lack any *opinio juris*. States sign BITs clearly not out of a sense of legal obligation, but for economic motive, i.e. to attract foreign investments and to offer protection to their investors doing business abroad.

4. It nevertheless remains that BITs will necessarily influence customary international law. Thus, BITs will contribute to the consolidation of *already existing* custom rules. BITs will also contribute to the *crystallisation of new rules* of customary international law *in the future*.

5. In this age of BITs proliferation, the determination of the content of customary rules of international investment law remains of fundamental importance. Thus, custom is the applicable legal regime between a foreign investor and the host State in the absence of any BIT. The content of custom remains also essential in cases where BITs make explicit reference to custom. Finally, custom has a gap-filling role whenever a BIT is silent on a particular legal issue.

