UNIVERSITY OF AMSTERDAM

# INTERNATIONAL CUSTOMARY INVESTMENT LAW: STORY OF A PARADOX

Jean d'Aspremont

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# INTERNATIONAL CUSTOMARY INVESTMENT LAW: STORY OF A PARADOX

*Jean d'Aspremont*[*]

## Abstract

*This chapter zeroes in on customary international law and examines the role played by this specific source of law in the development of international investment law. After a few considerations on the early phase of development of an international investment protection regime and the search for a customary international protection of aliens, this chapter shows how the maturation of investment protection has been achieved through treatification and a move away from customary law. It then turns to the paradox of the theory of the sources of investment law and demonstrates how the completion of treatification through bilateral investment treaties (hereafter BITs) has generated a return to customary international. It subsequently ventures into a few general critical remarks about the rebirth of customary international law from the standpoint of the theory of the sources of international law.*

## Keywords

Investment law – theory of the sources of international law – customary law – treatification – systemic integration of international law – precedents – *jurisprudence constante* – international minimum standard – *stare decisis* – fair and equitable treatment – expropriation – standards of compensation – denial of justice – due process – lacunae-filling effect – harmonious interpretation – predictability of judicial reasoning – legitimacy of investment tribunals

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## Introduction: sources of investment law and the battle for the regulation of the global flux of capital

If international law is the continuation of the battle of politics with more civilized means[1], nowhere is such a finding more glaringly obvious than in international investment law. Indeed, international investment law constitutes the stage of the pitted confrontation between liberal and communitarian approaches to the world economy. The former, usually embraced – albeit not necessarily – by capital-exporting States favoring a market-based system where investment, property rights and the rule of law are respected[2] comes to view with the latter traditionally spearheaded – but not automatically – by capital-importing States geared towards economic decolonization and the preservation of societal self-determination.[3] Put more simply, investment law is the shared surface upon which (and investment tribunals the arena where) the conflict about the level of protection we grant to foreign capital and hence how we conceive (and organize) the flux of capitals in a globalized economy is fought. This displacement of the abiding ideological wrangles in the area of investment protection result from the more general decision by world's actors – conscious and less conscious –to legalize certain aspects of world politics in the 20th century.[4] Such legalization has been of various degrees[5] and some areas have been more affected than others.[6] The protection of

[1] This has been one of the lessons learnt from the last decades of international critical thinking. See e.g. M. Koskenniemi, "What is International Law For?" in M. Evans, *International Law* (OUP, Oxford, 2nd ed. 2006) 57, p. 77.

[2] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 6.

[3] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 7; S. Schwebel, "The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law", 3 *Transnational Dispute Management* 2 (2006).

[4] See K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, "The Concept of Legalization", 54 *International Organization* (2000), 401-419.

[5] A. Spain, 'Integration Matters: Rethinking the Architecture of International Dispute Resolution' 32 *University of Pennsylvania Journal of International Law* 1 (2010) See the tables provided by K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, "The Concept of Legalization", 54 *International Organization* (2000), 401-419, esp. p. 416.

[6] For an overview, see A. Schneider, "Not Quite a World without Trials: Why International Dispute Resolution is Increasingly Judicialized", *Marquette University Law School Legal Studies Research Paper Series, Research Paper* No. 06-30.

investment is certainly one of these areas where this legalization has been the most flourishing and has grown very elaborated – going as far as laying down systematic judicialization.

That investment law provides an umbrella under which the ideological battle for the regulation of the global flux of capital is very much truistic. The banality of such a finding should nonetheless not obfuscate the intricateness of the political dynamics at play behind the highly legalized regime of investment protection. Unearthing the forces infusing the application of rules of investment protection by judicial actors surely constitutes a fascinating – albeit daunting – endeavor. It is not certain, however, that it is to the decipherment of these political dynamics that international lawyers should, in the view of the author of this chapter, devote their attention and – limited – expertise. To the international lawyer, more interesting are scholarly doctrines and theories by which the legal regime of investment protection is being shaped, irrespective of the substantive ideological agenda behind their use *in concreto*.

Among the instruments through which investment protection is being developed and shaped, the doctrine of sources occupies the central stage. Indeed, the doctrine of the sources of investment law is conducive to the ascertainment of the rules of the global investment protection regime. The doctrine of sources is also the linchpin of any adjudicatory exercise of public authority and the formation of a perception of immanent intelligibility and neutrality in the reasoning of international investment tribunals, short of which the investment enforcement system would lack the legitimacy and authority necessary to its viability. It is even reasonable to argue that, the doctrine of sources is the central piece of the legalization of the investment protection regime. In the absence thereof, legalization – and hence judicialization – would be irremediably compromised.

Whilst central to the viability of the international investment protection regime, the doctrine of sources of investment law has – somewhat paradoxically – been the object of limited attention and theoretical reflection in the literature.[7] Indeed, investments lawyers have perpetuated the doctrine elaborated in the mainstream theories of public international

[7] See the literature mentioned in section 3.1 and 3.2 below.

law which they have mechanically and uncritically transposed to the protection of investment. As a result, the scholarship on international investment law has remained bereft of theoretical reflection on the sources of investment law. In that sense, the volume in which this chapter inserts itself has the potential to allay the current dearth of theoretical reflection on the matter.

There probably are a string of different reasons explaining the tepidness of investment lawyers to investigate the theoretical foundations of their doctrine of sources. Investment lawyers, mostly all practitioners as a matter of fact, have hardly felt the need thereof. 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. Whatever its origins, this anti-theory posture of investment lawyers may explain why the doctrine of sources has been, at times, deemed an issue of secondary importance in investment law. Following suit on the ambition of this volume, this chapter is premised on the idea 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. Indeed, it is argued that the multiplication of bilateral investment treaties (hereafter BITs) and the highly judicialized character of the investment protection regime make it now essential that investment law rests on solid bases in terms of sources. As was said, this is both essential in terms of the ascertainment of the rules of investment protection as well as the authority and legitimacy of international investment tribunal. This can also be conducive to more consistency in judicial practice.

This chapter zeroes in on customary international law and examines the role played by customary international law in the development of primary rules of international investment law. This chapter does not discuss the role played by international customary law in the creation, interpretation and development of systemic (secondary) rules applied by investment law-applying authorities.[8]

[8] For some insights on this question, see R. Hofmann and C. J. Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*? (Nomos 2011).

After a few considerations on the early phase of development of international investment law and the search for a customary international protection of aliens (1), this chapter shows how the maturation of investment protection has been achieved through treatification and a move away from customary law (2). It then turns to the paradox of the theory of the sources of investment law and demonstrates how the completion of treatification through BITs generated a new return to customary international (3). It subsequently ventures into a few general critical remarks about customary international law from the standpoint of the theory of the sources of international law (4). After such general considerations, it expounds on the limits and perils of the theory of international customary investment law (5) and envisages alternative routes for the multilateralization of the investment protection regime (6). The chapter ends with a few remarks on the central challenge of the theory of the sources of investment law and the need to preserve the authority and efficacy of the investment protection regime short of customary international law (7).

## 1. The early phase of development of international investment law: the search for a customary international protection of aliens

The first rules protective of foreign investment and which were ascertained by experts and international lawyers as customary international law have been those protecting aliens abroad (1.1.) as well as those prescribing standards of compensation (1.2).[9]

### 1.1. Origins: the protection of aliens abroad

It is commonly argued in the literature that the investment protection regime finds its roots in the international protection of aliens abroad[10], the application of which gave rise to international litigation which – as is well-

[9] For a general historical overview of the development of investment protection, see A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 1-73.

[10] H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden, A.W. Sijthoff, 1949); E. Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Pub, 1915).

known – proved instrumental in the elaboration of a mechanism of State responsibility[11], first seen in the form of diplomatic protection. The protection of aliens found in international law allegedly took the form of an 'international minimum standard'[12] to which aliens abroad were purportedly entitled. It will not come as a surprise that, at that time, aliens falling under such protection were first and foremost investors.[13] It is true that these rules on the protection of aliens were not limited to the protection of their property against unlawful expropriation but also enshrined standards for the treatment of aliens regarding their life and security as well.[14] Yet, they also benefited investors and provided some elementary protection to the international flux of capitals.

Whilst it is commonly argued that the international minimum standards came to constitute, in the late 19th century and early 20th century, a customary international rule also benefiting foreign investment, the content of the protection so offered to aliens remained in limbo and the object of incommensurable controversy, thereby putting into question the customary status commonly attributed to that rule. Indeed, capital-importing States opposed any international standard that would depart from the treatment reserved to nationals. The opposition of capital-importing States to the idea of an international minimum standard found its expression in the – famous –so-called *Calvo Doctrine* according to which no State should be required to offer more protection to foreign investors that that offered to its own nationals: as long as there was no discrimination against foreign-investor, or infringement of any international legal rule.[15] Proponents of this

[11] See gen. the first report Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/96, *Yearbook of the International Law Commission*, 1956, vol. II.

[12] See also E. Borchard, "The Minimum Standard of Treatment of Aliens" 38 *Michigan Law Review* (1940) 445; see also A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 11-13.

[13] C. Leben, "La Théorie du contrat d'Etat et l'évolution du droit international des investissements", 302 *Collected Courses* (2003), p. 126.

[14] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 25; H. Roth, *The Minimum Standard of International Law Applied to Aliens*, (Leiden, A.W. Sijthoff, 1949), p. 127; E. Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Pub, 1915).

[15] See A. V. Freeman, "Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 *AJIL* 131; see also W. D. Verwey and N. J. Schrijver, "The Taking of Foreign Property Under International Law: A New Legal Perspective" 15

national treatment were bolstered by the Russian revolution and the decrees of nationalization adopted by the Bolchevik governments which drew no distinction between Russian nationals and foreign-owned property. Although that instrument never entered into force, an expression of that position is also found in the famous 1933 Convention on the Rights and Duties of States signed at the Seventh Pan-American Conference (the so-called Montevideo Convention).[16]At the other end of the spectrum, capital-exporting States contended national treatment was deemed insufficient. To them, the treatment that a State would reserve to its own citizens could be far lower than that generally expected by capital-exporting States.[17] This controversy as to the content of the international minimum standard came to a head in the framework of the League of Nations' codification enterprise which, in 1930, failed in codifying the law on responsibility for treatment of aliens.

The grave divergences as to the content of the protection to which aliens abroad were entitled did not seem sufficient to thwart the belief of a customary protection of aliens abroad, including of foreign investor. In fact, notwithstanding the profound disagreements between capital-exporting States and capital-importing States international investment lawyers never balked at affirming the customary character of the international minimum standards which foreign investors were entitled to as all aliens abroad. The unchartered waters in which the elementary protection of foreign capital through the international minimum standard was left never constituted, in the eyes of investment lawyers, an obstacle to the affirmation of a customary international minimum standard. In the absence of any prospect to regulate foreign investment through conventions between capital-exporting and capital-importing State, customary international law was elevated into the natural medium by virtue of which protection of capital would be elaborated. Customary international law was not only considered

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*Netherlands Yearbook of International Law* (1984) 3-96; A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 13-14.

[16] See article 9 of the Convention on the Rights and Duties of States signed at the Seventh Pan-American Conference (Montevideo Convention, 1933) 70 *AJIL* 445 (1970).

[17] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008, 7-11. On the reasons for offering a better treatment to non-nationals, see ECHR, *James & Others v. UK*, Judgement of 21 February 1986, para. 63.

the natural source of the law of investment protection. It was also seen as being able to withstand the wide-ranging dissonance echoed in the world stage as to which protection foreign investors ought to be offered.

The history of development of investment protection is thus also the story of the development of a *divergence-proof customary regime* resting on an extremely minimalistic threshold of convergence in terms of practice and *opinio juris*. But, in the pre-1945 history of investment law, there is more than a conception of custom that falls short of a converging general practice and *opinio juris*. The reconstructions of the investment protection of that time under the banner of customary international law also betrays a conception of *indeterminacy-proof customary law*, the idea that some indeterminate standards can grow into a customary rule. The best illustration thereof probably lies in the finding of the famous 1926 *Neer* case, which constitutes the expression of customary international law.[18] It is accordingly fair to say that the conception of sources of international investment law that emerges from the pre-1945 era of investment protection thus bespeaks a very permissive and loose concept of customary law.

### 1.2. The development of standards of compensation

Interestingly, the same discrepancy between the practice and the scholarly invention of a customary international law of investment protection repeated itself in connection to the development of standards of compensations. Indeed, standards of compensation were elaborated under the name of customary international law. In particular, it is well-known that investment lawyers were prompt to see in the so-called Hull formula[19] an expression of customary international law. The counter-balancing Mexican position –reasserting the traditional position of capital-importing States that

[18] "The treatment of an alien, in order to constitute, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency". V. L. F. H. Neer and P. E. Neer, United States v. Mexico, Opinion, October 15, 1926, UNRIAA, vol. IV, pp. 61-62.

[19] See the 1938 exchange of notes between the US Secretary of State, Cordell Hull and the Mexican Minister of Foreign Affairs in connection to the expropriation of agrarian land and oil fields owned by American citizens in Mexico in the 1920s and 1930s, reproduced in Hackworth, *Digest of International Law*, vol. III, pp. 655 et seq (1942).

the only treatment an alien was entitled to was the treatment reserved to nationals and according to which the aggrieved investor can only claim national treatment before national courts – was not deemed a serious impediment to the existence of such a customary rule. Under the name of customary international law, the views of capital-exporting State were thus said to have prevailed in the pre-1945 world order[20], irrespective of the absence of any acquiescence by capital-importing States.[21]

It did not come as a surprise that the distrust in the international community as to the standards of treatment afforded to foreign investment persisted after the Second World War. Even though Resolution 1803 on the Permanent Sovereignty over Natural Resources of 14 December 1962[22] can be read as a tentative compromise between the positions of capital-exporting and capital importing countries by not excluding "appropriate compensation" [23], UN General Assembly Resolution 1301 of 1 May 1974

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[20] See e.g. S. Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – the Question of Whether BITS Influence Customary International Law Revisited", 5 *Journal of World Investment & Trade (2004)* 789.

[21] For some doubts on the customary character of customary international law before the Second World War, see P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 76. According to Juillard, the only protection that could have existed in customary international law was the protection of goods and not of capitals. For a similar challenge to the prevailing idea that the pre-1945 practice manifested the existence of customary rules in terms of a standard of compensation, see S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 28 (S. Schill talks about the "shaky foundations of the standards of customary international law with regard to the protection of aliens and their property"). It is interesting to note that the arbitral tribunal in *CME Czech Republic BV v. Czech Republic* also seemed to recognize that the Hull formula never secured consensus until the last decades of the 20th century. See *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 497.

[22] 2 ILM 223 (1963). See gen. S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 37-38; see S. Schwebel, "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources", 49 *American Bar Association Journal* 463 (1963); K. Gess "Permanent Sovereignty over Natural Resources", 13 *ICLQ* 398 (1964). Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), p. 21-23; R. Dolzer, "Permanent Sovereignty over Natural Resources and Economic Decolonization", 7 *Human Rights Law Journal* 217 (1986).

[23] "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State

on the Declaration on the Establishment of the New International Economic Order[24] incontrovertibly backed away from the idea of an obligation to provide compensation for the expropriation of foreigners and did away with the obligation to pay compensation[25], a position that was later repeated by General Assembly Resolution 3281 of 12 December 1974 on the Charter of Economic Rights and Duties of States.[26]

It is not at all unreasonable to claim that there was a very strong opposition that lingered in the 1960s and 1970s to developing (and socialist countries continued to bar) the emergence of a minimal consensus necessary for a customary international regime of protection of investment. And even if there could have been customary international rules back then, the uncompromising 1974 UN General Assembly resolutions must be read as having ditched the little customary international law existing at that time. It is surely not the very evasive and non-normative 1962 resolution that could be said to contain the seeds of a customary international investment protection regime.[27]

However, despite the very strong anti-customary signals, the pre-1945 story repeated itself after the Second World War. Customary international law

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taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication".

[24] See J. Bhagwati, *The New International Economic Order* (MIT Press, Cambridge, 1978); J. Hart, *The New International Economic Order* (New York, St. Martin's Press, 1983); T. Walde, "A Requiem for the New International Economic Order", in Gerhard Hafner et al. (eds.) *Liber Amicorum Ignaz-Seidl Hohenveldern*, (Kluwer Law International, 1988) p. 771; Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), 23-27; C. Broer and J. Tepe, "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law", 9 *The International Lawyer* (1975) 295.

[25] A/RES/S-6/3201.

[26] See gen. A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 31-33.

[27] P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 78 et seq.; M. Porterfield, "An International Common Law of Investor Rights?" 27 *University of Pennsylvania Journal of International Economic Law* (2006) 79; C. H. Brower, "Structure, Legitimacy, and NAFTA´s Investment Chapter", 36 *Vanderbilt Journal of Transnational Law* 37 (2003), p. 66.

kept the same luster among international investment lawyers, and particularly among arbitral tribunals which gave very little weight to these UN GA resolutions defiant of the Western capital-protective vision.[28] Only the International Court of Justice in the *Barcelona Traction*[29] case and the arbitrator in the *Texaco v. Libya*[30] award remained lucid and clear-sighted about the State of the law of investment protection in the post-1945 period.

## 2. The maturation of investment protection: treatification and the move away from customary protection

The end of the 1980s and the beginning of the 1990s can be seen as a milestone in the development of international investment law. Following the ground-breaking 1985 award in the *Southern Pacific Properties (Middle East) Limited v. Egypt*[31] case and the 1990 award in the *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*[32], recourse to adjudication in the area of investment protection on the basis of clauses providing investor-State arbitration with unqualified State consent increased. This growing resort to adjudication in investment law gave more existence to the treaty regime already in place while simultaneously prodding States towards a greater treatification. In that sense, the beginning of treatification cannot be

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[28]For an overview of the practice of arbitral tribunal of that time, see S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 38; P. Norton, "A Law of the Future or a Law of the Past?" 85 *AJIL* 474 (1991).

[29] ICJ, *Barcelona Traction Lights and Power Co., Ltd* (Belgium v. Spain), 5 February, 1970 ICJ Rep. 4, para. 46-47 ("Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the 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 law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject").

[30] *Texaco Overseas Petroleum Co v Libya*, Award 29 January 1977, 53 ILR 389 and 17 ILM 3 (1978) para. 85-87.

[31] Decision on Jurisdiction, 27 November 1985, 3 ICSID Rep 112.

[32] Final Award 27 June 1990.

formally traced as a post-1990 phenomenon. It is however in the 1990s that it proved to be more tangible and consequential.

The following sections describe the early stage of the treatification of investment protection (2.1.) whilst also recalling the few mishaps that accompanied it, especially in its multilateral expression, which led to the development of the investment protection regime by virtue of bilateral treaties (2.2.).

### 2.1. The move away from customary international law and early treatification

Despite international investment lawyers perpetuating the myth of a customary international law protection of investment, international actors and policy-makers grew wary of the inconclusiveness and indefiniteness of the foreign investment protection regime. First, the absence of consensus on the world plane as to the type and level of investment protection spawned a lot of uncertainty and undermined the authority of the international regime of investment protection. Second, the standards that had allegedly emerged fell short of providing sufficient substantive guidance and were beset by lack of normativity[33] – a finding which in itself traditionally sufficed to bars the emergence of customary international law[34]. At best, the standards offered, provided that there were any, were growingly deemed too minimalistic, especially since interferences with property rights have grown more intricate and indirect. [35] All-in-all, the customary international law of investment protection which investment lawyers strove to devise before the 1st World War gradually proved incapable of meeting the needs of the multinational companies and the business sector [36]. The evasive, minimalistic character as well as the uncertain normative status of the international investment protection regime existing at the time may not be

[33] R. Dolzer and A. von Walter, "Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law", in: F. Ortino, L. Liberti, A. Sheppard, H. Warner (eds.), *Investment Treaty Law: Current Issues*, vol. II (London, BIICL, 2007), p. 99; S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 28.
[34] Cfr infra 5.1.
[35] A. van Aaken, "Perils of Success? The Case of International Investment Protection", 9 *European Business Organization Law Review*, 1-27, p. 5.
[36] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 24, p. 28.

the only reasons why international actors and policy-makers initiated a move away from customary international law. It does not seem unreasonable to mention that, as a result of decolonization and the correlative universalization of the multilateral policy-making fora, capital-exporting States realized that they were losing control of the formation of customary international law[37]. If there had been no consensus on the exact standards of protection that ought to be offered to foreign investors, there was at least, in the second half of the 20th century, an emerging consensus at the international level, especially on the side of capital-exporting States over the need to establish a protection framework on treaty law[38].

It is true that attempts to establish a multilateral regime of investment protection were not unheard. The investment provisions in the unsuccessful Havana Charter in 1948[39] or the born dead 1967 OECD Draft Convention on the Protection of Foreign Property[40] already bespoke a desire for treatification. More successful had been the limited multilateralization of the procedural framework of enforcement mechanisms achieved with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[41] as well as establishment of a multilateral insurance framework for foreign investment projects[42] by virtue of the Convention Establishing the Multilateral Investment Guarantee Agency of 11 October 1985[43]. The pre-1990 period also

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[37] P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 84.

[38] B. Kishoiyian, "The Utility of Bilateral Investment Treaties in the formulation of Customary International law", 14 *Journal of International Law and Business*, 1994, 327, p. 372-373; S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 61; R. Dolzer and A. von Walter, "Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law", in: F. Ortino, L. Liberti, A. Sheppard, H. Warner (eds.), *Investment Treaty Law: Current Issues*, vol. II (London, BIICL, 2007), p. 99.

[39] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), 32-35; A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 19-20.

[40] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), 35-40; A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 33-34.

[41] 575 UNTS 159.

[42] See M. D. Rowat, "Multilateral Approaches to Improving the Investment Climate of Developing Countries", 33 *Harvard International Law Journal* 103 (1992).

[43] 1508 UNTS 99.

witnessed the conclusion – sometimes systematic as illustrated by the practice of the United States until 1966 – of Treaties of friendship, commerce and navigation aimed at establishing commercial and political relations between the contracting States, including rules on the protection against expropriation, full protection and security, and fair and equitable treatment.[44] The scope and the degree of this push for multilateral substantive rules of investment protection, however, clearly surpassed the post-Second World War treatification. Never had the need for a move away from customary international law ever been felt so acutely.

## 2.2. The failure of multilateral law-making and the proliferation of BITs

Despite a growing consensus on the necessity to move away from customary international law and treatification of investment protection turning into a priority into the agenda of many actors, the persistence of ideological rifts – albeit in a somewhat readjusted configuration – in the international society about the level of protection to be granted to the movements of capital continued to impede the quest for the establishment of a multilateral regime of protection. Indeed, the 1990s led to the rapid failure of introducing investment protection into the GATT/WTO[45] quickly followed by the failure of the OECD Multilateral Agreement on Investment (MAI)[46].

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[44] It must be noted that the Treaties of FCN concluded by the United States were generally more protective of investment than average FCN Treaties. See gen. K. J. Vandevelde, "US Bilateral Investment Treaties: The Second Wave", 14 *Michigan Journal of International Law* 621 (1993); K. J. Vandevelde, "A Brief History of International Investment Agreements", 12 *UC Davis Journal of International Law and Policy* 157 (2005); S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 29-30; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, OUP, 2008), 17; P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 111 et seq.

[45] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), 50-53 and 58-60; Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), 37-39.

[46] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 53-58; Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), 39-41

It is an uncontested fact that the repetitive failures to multilateralize investment protection triggered a general move toward bilateral treatification.[47] Confronted with the impossibility to put in place a multilateral investment protection regime, States pursued that objective through another channels and engaged in an all-out conclusion of BITs. The era of modern BITs was famously ignited by Germany thanks to an agreement with Pakistan.[48] But it was in the 1990s that the multiplication of BITs took an unbridled step. The conclusion of BITs was not a phenomenon restricted to capital-exporting States. Even developing countries started to conclude BITs among themselves.[49] There is indeed little doubt that bilateral treaties were meant to pursue the same objective as the endeavors to create a multilateral framework of investment protection. And that network was judicialized with the more systematic inclusion of provisions for investor-State arbitration.[50] The multilateratization through BITs was clearly on the agenda.[51] It is accordingly no surprise than in a few

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[47] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 24; E. Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement", 34 *Brooklyn Journal of International law* 303 (2008-2009)); A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 41-44.

[48] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, OUP, 2008) p. 18; A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 42.

[49] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), 362 ff; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, OUP, 2008), p. 16

[50] It has been reported that the first BIT that expressly incorporates provisions for investor-state arbitration is the 1968 BIT concluded between Indonesia and the Netherlands. The 1969 BIT between Chad and Italy appears to be the first one providing for investor-state arbitration with unqualified state consent. See A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (Kluwer Law International, 2009), 44-45. The validity of such unilateral arbitration clause was upheld on the famous 1985 award in the case *Southern Pacific Properties (Middle East) Limited v. Egypt (Decision on Jurisdiction, 27 November 1985)* 3 ICSID Rep 112. In the = *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka* (Final Award 27 June 1990), the arbitral tribunal established under an investor-state arbitration provision of the 1980 Sri Lanka-United Kingdom BIT issued the first ICSID award based on such an arbitration clause.

[51] On the BITs practice of the US, see e.g. K. J. Vandevelde, "US Bilateral Investment Treaties: The Second Wave", 14 *Michigan Journal of International Law* 621 (1993) p. 625.

decades BITs mushroomed and came to create a ubiquitous web of bilateral conventional relations for the protection of investment.[52]

Experts have convincingly shown that there is no fundamental contradiction between the pursuit of the practice of BITs and multilateralization[53] and that BITs can be seen as the real building blocks of a multilateral international legal regime on the protection of investment[54]. Indeed, the Most-Favored-Nation (hereafter MFN) clauses included in all BITs multilateralized substantive investment protection and participated to the creation of a uniform regime for the protection of investment.[55] As a result, it is not an exaggeration to claim that, by the turn of the century, and by virtue of the several thousands of BITs, a fully-fledged multilateral regime of investment protection had been built. In that sense, BITs came to constitute another path to the multilateralization of investment law.[56]

### 3. The completion of treatification and the ensuing return to customary international law

With a few thousand BITs in place and a systematization of the incorporation of provisions for investor-State arbitration[57], States and other international actors put in place a mutually-referring web of substantive rules for the protection of foreign capital. Following the multilateralization of investment protection through a web of BITs, one could accept that customary international law be further put at bay. In other words, it could have been reasonably anticipated that the BITs-based treatification of investment protection would come as tolling the knell for the need for (and

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[52] A. van Aaken, "Perils of Success? The Case of International Investment Protection", 9 *European Business Organization Law Review*, 1-27, p. 9 et seq.
[53] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 63.
[54] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 64.
[55] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 366.
[56] For a challenge of that idea, see P. Muchlinski, "Corporations and the Uses of Law: International Investment Arbitration as a 'Multilateral Legal Order'", *Onati Socio-Legal Series*, v. 1, n. 4 (2011).
[57] For a useful stocktaking, see UNCTAD, "Bilateral-Investment Treaties 1995-2006: Trends in Investment Rulemaking", UNCTAD/ITE/IIT/2006/5 (2007).

the interest in) customary international law in international investment protection.[58] With a few thousand BITs in force, the quest for customary international law that had dominated the century seemed doomed to become anachronistic and solely of academic interest.[59]

Yet, it is the exact opposite which occurred. As soon as treatification of investment protection neared completion, the need felt by investment lawyers for a return to customary law abruptly came back to the fore. It is as if the proliferation of BITs spawned a new crave for customary international law. Said differently, the story of the sources of investment law in last quarter of the 20th century is the ironical story of treatification, originally conceived as a move a way to custom, generating its antithesis, that is, a return to custom.[60]

It is this new return to customary international law that ensue the proliferation of BITs in the last decades of the 20th century that the following paragraph will now seek to depict (3.1.). It will be followed by a brief overview of the rules that have traditionally been elevated to customary international law (3.2.) as well as a sketch of the mains reasons having prodded experts and scholars to embrace this quest for the

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[58] See OECD, Indirect Expropriation and The Right to Regulate in International Investment Law (2004) at 2 (arguing that the proliferation of treaties has largely deprived the debate about customary international law of significance for foreign investor). In the same sense, S. Schill, Multilateralizing "Investment Treaties Through Most-Favored-Nations Clauses" 27 *Berkeley J. Int'l L.* 496-569 (2009)); See also E. Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement" 34 *Brooklyn Journal of International law* 303 (2008-2009).

[59] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, OUP, 2008), p. 16.

[60] Some of the proponents of this return to customary investment law acknowledge that this is not without irony. See e.g. P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010) 675, p. 676 ("[t]he 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"); See also J. Alvarez, "A BIT on Custom, 42 *NYU Journal of International Law and Politics* (2009) 17, p. 74.

customary status of the basic rules of the investment protection regime (3.3.).

### 3.1. Mushrooming of BITs and the revival of customary investment law: story of a paradox

It must be acknowledged from the start that a few BITs make express reference to customary international law when determining the applicable law.[61] It also happens that the BITs make reference to customary international law for interpretative purposes[62]. Yet, these references to customary international law remain extremely limited and do not suffice to explain the return to customary international law. The return to customary international law in the theory of the sources of investment law manifested itself differently, in particular through the idea that it is not conceivable that so many BITs were concluded enshrining very similar standards of protection without elevating these standards to customary rules of investment law. This is why the return to custom primarily materializes in the attribution of custom-generative effects to the few thousands of BITs in place.[63] This customary international law generated by BITs has, in turn, been seen as complementing (and uniformizing the interpretation of) BITs themselves[64].

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[61] See e.g. The famous Canada-Peru BIT, article 5(1) or the Model BIT adopted by Norway (article 5) or Canada (article 5) US Model Bit (article 5.1) (2004). For other examples, see P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 698-699.

[62] See the Korea-Singapore FTA, article 20.2(5).

[63] T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 701-704. It is true that often share a lot of common substantive features (P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 679 and p. 695-696; A. van Aaken, "Perils of Success? The Case of International Investment Protection", 9 *European Business Organization Law Review*, 1-27, p. 6.

[64] T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 710); S. Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – the Question of Whether BITS Influence Customary International Law Revisited", 5 *Journal of World Investment & Trade* (2004) 789; See also *Amoco Int. Finance Corp v. Islamic Republic of Iran et al, Iran-US.CT.*, 14 July 1987, 83 ILR (1990) 500, para. 112. On the idea of lacunae, see also

This custom-generative effect attributed to BITs has enjoyed very strong support in the literature[65]. Needless to say, however, that there have been significant differences between its supporters. Among them, some have been careful not endorsing a holistic approach to custom and preferred a rule-by-rule approach.[66] Although the elation provoked by this return to custom has primarily been felt in the literature, the case-law similarly shows some – albeit more limited – attachment to that idea[67], as is illustrated by the famous awards in *CME v. Czech Republic*[68] and *Mondev v. United States*[69]. Unsurprisingly, counsels involved in such proceedings also commonly resort to the argument of customary investment law, neither of

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P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 697. On the Idea of `Cross-fertilization´ see also P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 694.

[65] S. Schwebel, "Investor-State Dispute and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law", 98 *ASIL Proceedings*, 2004 p. 27 and 29-30; I. A. Larid, "A Community of Destiny – The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims", in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005), 95-96; S. Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – the Question of Whether BITS Influence Customary International Law Revisited", 5 *Journal of World Investment & Trade* (2004) 789; A. F. Lowenfeld, International Economic Law, 2d ed. (OUP, 2008), p. 584; A. Lowenfeld, "Investment Agreements and International Law", 42 *Columbia Journal of Transnational Law* 123 (2003); J. Alvarez, "A BIT on Custom", 42 *NYU Journal of International Law and Politics* (2009) 17; E. Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement", 34 *Brooklyn Journal of International law* 303 (2008-2009), esp. 341-345.

[66] P. Dumberry, "Are Bits Representing the ´New´ Customary International Law in International Investment Law?", 28 *Penn State International Law Review* (2010)675, see also T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 704.

[67] In *Tecnicas v. Mexico*, the tribunal resorted to customary international law to clarify the concept of indirect expropriation. See *Técnicas Medioambientales Tecmed, S.A. v Mexico*, 29 May 2003, ICSID, para. 116.

[68] *CME v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 497-498 (The BITS have made full compensation a rule of customary international law. There have `reshaped´ customary international law. It is no coincidence that Judge Schwebel acted in arbitrator).

[69] *Mondev v. United States*, para. 117-125 (Interpreting article 1105, it argued that BITs have contributed to the customary character of FET.

the party represented in arbitral proceedings – be it the investor or the host State – demonstrating a greater inclination to do so than the other.[70]

It is important to highlight, however, that this embrace of customary international investment law has not secured unanimity among investment lawyers. Among many critics[71], Professor Sornarajah, for instance, famously defended that "it would be difficult to show that there was free consent on the part of all the developing States to the creation of any customary international law".[72] This specific objection is maybe not as cogent as it may seem, simply because it is a fact that developing countries nowadays conclude BITs among them. Sornarajah also contended that if there were customary international law, developing States would constitute persistent objectors[73], an argument that was raised in the 2007 case of *BG Group v. Argentina*[74]. In the same vein, Cai Congyan contended that almost all Chinese internationalists have rejected the idea that BITs now constitute customary international law.[75] More controversial is probably the argument

[70] I owe this argument to interesting exchanges with Hege Elisabeth Kjos. This use of customary international law by counsel is a phenomenon which I have further examined elsewhere and which I have attributed to the need of creative argumentation. See J. d'Aspremont, *Formalism and the Sources of International Law* (OUP, 2011), especially chapter 5.

[71] B. Kishoiyian, "The Utility of Bilateral Investment Treaties in the formulation of Customary International law", 14 *Journal of International Law and Business* (1994), 327. Cai Congyan, "International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules" 7 *Chinese Journal of International Law* (2008), 659-679; P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 130; P. Muchlinski, "Policy Issues", in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008), p. 17.

[72] M. Sornarajah, *The International Law on Foreign Investment* (CUP, 2004), p. 213.

[73] M. Sornarajah, *The International Law on Foreign Investment* (CUP, 2004), p. 213. For a rejection of that argument, see P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010) 379-400.

[74] *BG Group v. Argentina*, UNCITRAL, Award, 24 December 2007) or in the NAFTA Chapter 11 Grand River Enterprises Six Nations Ltd et al v. United States (Counter-memorial of the United States, December 22, 2008, at 129)

[75] Cai Congyan, "International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules" 7 *Chinese Journal of International Law* (2008), 659-679, p. 664.

of Andrew Guzman according to which there simply cannot be any *opinio juris* but solely a pursuit of legal interest.[76]

A few investment arbitral tribunals have also expressed some reservations, as is exemplified by *Generation Ukraine Inc* v. *Ukraine* [77], *United Parcel Service v. Canada*[78], *ADF Group Inc v. United States*[79] or *Sempra Energy International v. Argentine Republic.* [80] Some misgivings have also occasionally been voiced by States in their submissions in international judicial proceedings.[81] Yet, these objections or reservations have not been sufficient to frustrate the overarching sympathy enjoyed by customary international law and the theory of the sources of international investment law has remained dominated by a faith in the existence and usefulness of a solid body of customary investment law.

### 3.2. Candidates for customary status in investment law

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[76] T. Guzman "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", 38 *Virginia Journal of International Law* 639-688 (1998), p. 687. See the criticism of that approach by Cai Congyan, "International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules" 7 *Chinese Journal of International Law* (2008), 659-679, p. 665. For another criticism of Guzman, see J. Alvarez, "A BIT on Custom", 42 *NYU Journal of International Law and Politics* (2009) 17, p. 39 et seq. See also the objections of S. Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – the Question of Whether BITS Influence Customary International Law Revisited", 5 *Journal of World Investment & Trade* (2004) 789.

[77] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9. Award, 16 September 2003, 44 ILM 404 (2005), para. 11.3 ("It 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").

[78] *United Parcel Service v. Canada*, para. 97 (rejecting that BITs have generated customary international law).

[79] *ADF Group Inc v. United States*, Award, 9 January 2003, ICSID, para. 183.

[80] ICSID Case No. ARB/02/16, Decision on Annulment of 29 June 2010, paras. 186-209; see also *CMS Gas Transmission Company v. Argentia* , ICSID Case No. ARB 01/08, Decision on Annulment of 25 September 2007, paras. 129-135.

[81] See the Statement by Mexico, Mexico's Article 1128 Submission Concerning *Loewen Corporate Restructuring*, 2 July 2002, in the *Loewen* case, para. 39; US Response to Canada and Mexico's Article 1128 Submission, Loewen case, 19 July 2002, para. 3; United States' Rejoinder Memorial in the *Glamis Gold* case, para. 142 et seq.; Canada's Counter-Memorial, 20 October 2008, *Chemtura Corporation v. Canada* (UNCITRAL), para. 269-273.

If one takes a rule-by-rule approach and refrains from mechanically equating BITs with customary international law [82], the question of identifying those rules of the international investment protection regime that qualify for customary status turns very thorny and delicate. The following paragraphs briefly mention a few of the usual suspects which have been discussed in the literature.

*a) International minimum standard:* The Calvo Doctrine, the Russian Revolution and the Mexican objection have not been deemed sufficient to have barred the emergence of customary minimum standard [83] and international investment tribunals have, in the great majority, considered that the international minimum standard, as expressed by the *Neer* formula, constitutes customary international law[84], although its evolutive character has occasionally been recognized as in the *Pope and Talbot Inc. v. Canada*[85] or *ADF Group v. United States*.[86]

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[82] P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010) 675, see also T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 704.

[83] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford, OUP, 2008), p. 13; S. Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – the Question of Whether BITS Influence Customary International Law Revisited", 5 *Journal of World Investment & Trade* (2004) 789. See also P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010), p. 384; P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 680; L. Reed, J. Paulson and N. Blackaby, *A Guide to ICSID Arbitration* (Kluwer Law International, 2004), p. 48; I. Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (OUP, 2006), p. 61-62.

[84] *Mondev International Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, 42 ILM 85 (2003), para. 121; *Waste Management v. Mexico*, ICSID Case No.ARB(AF)/00/3, Final Award, 30 April 2004, 43 ILM 967 (2004), para. 91; *Glamis Gold Ltd v. United States*, Award, 8 June 2009, UNCITRAL, para. 626-627. See Free Trade Commission, *Note of Interpretation of Certain Chapter 11 Provisions of July 31, 2001*; OECD, Fair and Equitable Treatment Standard in International Investment Law, *Working Papers on International Investment*, No. 2004/3 (2004), 8.

[85] *Pope and Talbot Inc. v. Canada*, 31 May 2002, paras 59 et s.

[86] *ADF Group v. United States*, ICSID No. ARB(AF)/00/1, Award, 9 January 2003, para. 173.

*b) Fair and equitable treatment:* Never has the question of the state of customary international law been more controversial than in connection with fair and equitable treatment. Despite its extremely low normative density – recognized in the *Saluka Investments BV v. The Czech Republic*[87]- it has been argued that the fair and equitable treatment constitutes customary international law.[88] Yet, the questions quickly arose whether the content thereof ought to be informed by the international minimum standard. This was the view famously defended by the Free Trade Commission in its interpretation of Article 1105 of the NAFTA.[89]

*c) Protection against (and conditions for) expropriation:* The protection against expropriation as well as some of the conditions under which expropriation is admissible are often deemed to constitute customary international law both in the literature[90] and the case-law[91]. That position was also endorsed by the OECD.[92]

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[87] *Saluka Investments BV v. The Czech Republic*, Partial Award, UNCITRAL, 17 March 2006, paras. 282-284 ("such general standards represents principles that cannot be reduced to precise statements of rules.... [They] are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law").

[88] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), p. 63; S. Schwebel, "Investor-State Dispute and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law", 98 *ASIL Proceedings*, 2004 p. 27-30; I. Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (OUP, 2006), 74 et seq.; P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010), p. 384; T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 704.

[89] For a criticism of the Free Trade Commission interpretation, see *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, para 61; See also the criticism by Jennings, Second Opinion, *Methanex v. United States*, 6 September 2001, For the opposite view that IMS and FET are autonomous parameters see T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 699.

[90] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), p. 74; C. Maclachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2007), 16

[91] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9. Award, 16 September 2003, 44 ILM 404 (2005), para. 11.3 ("It is plain that several of the BIT standards, and the

*d) Standards of compensation:* The question whether the abovementioned Hull formula constitutes customary international law has attracted much attention in the international legal scholarship.[93] The exact standard of compensation remaining subject to variations as was recognized by the arbitral tribunal in *CME Czech Republic BV v. Czech Republic*[94]. That does not seem however to suffice to bar accession of that norm to customary status.

*e) Denial of Justice:* It has sometimes been argued that the denial of justice was prohibited by customary international law.[95] The question remains extremely controversial.

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prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law"). The insights provided by the International Court of the Justice on the concept of arbitrariness in its judgment in the famous *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* are sometimes presented as shedding light on the concept as it is understood in customary international law. It is argued here that it is far from certain that the Court elaborated on anything else that the meaning of that notion under the FCN treaty between Italy and the United States. See ICJ, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 20 July 1989, ICJ Rep. 1989, esp. paras. 120-130. For remarks on this case, see F. A. Mann, "Foreign Investment in the International Court of Justice: the ELSI Case", 86 *American Journal of International Law* (1992) 92; S. D. Murphy, "The ELSI Case: An Investment Dispute at the International Court of Justice", 16 *Yale Journal of International Law* (1991) 391; K. J. Hamrock, "The ELSI Case: Toward an International Definition of 'Arbitrary Conduct'", 27 *Texas International Law Journal* (1992) 837.

[92] OECD, Indirect Expropriation and the Right to Regulate in International Investment Law, 2004, p. 3

[93] See Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), p. 80; T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 714; P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010), p. 314.

[94] *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 497.

[95] OECD, Fair and Equitable Treatment Standard in International Investment Law, *Working Papers on International Investment*, No. 2004/3 (2004), 40; J. Paulsson, *Denial of Justice in International Law* (CUP, 2005), 59-67; P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010), p. 384.

*f) Due Process:* Due Process has also been included in the candidates for customary status. Like for the prohibition of denial of justice – with which it partly overlaps – its customary status is the object of much controversy.[96] Even more contested is the legal standing of shareholders before Arbitral Tribunals[97].

### 3.3. Customary international investment law: perceived benefits

Needless to say that the success of the return to customary international law in the theory of the sources of investment law is the direct upshot of the perceived benefits that are attributed to customary international law. Indeed, customary international law is often seen as providing a "comfort zone" within which legal problems are toned down or alleviated. The following paragraphs intend to provide a brief overview of the benefits of customary international law. The perceived convenience of customary law will be critically evaluated in the following section.

The effects which customary law and treaty law – whose existence side-by-side is not mutually exclusive – can bear upon each other are well known. They were the very object of the discussion in the famous *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case before the International Court of Justice.[98] It is of no avail to repeat it all here. It suffices to say that it is uncontested that treaty law can codify existing customary international law and endowing it with the formalistic virtues that it is usually lacking. By the same token,

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[96] Dissenting opinion of Judge Asente, *Asian Agriculture Products Ltd (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 4 ICSID Report 242 (1997); OECD, Fair and Equitable Treatment Standard in International Investment Law, *Working Papers on International Investment*, No. 2004/3 (2004), 40. See also P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010), p. 385.

[97] For a rejection see P. Dumberry, "The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallized?" 18 *Michigan Journal of International Law* (2010) 353.

[98] This was the crux in the decision of the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), 27 June 1986, ICJ Rep 1986, paras 174 ff.

treaty law can also be conducive to the formation of customary rules. Conversely, customary international law is said to provide an interpretative yardsticks for the interpretation of conventional law in which it originates. This is what can be called the "reverberating effect" of customary international law.[99]

In the particular context of investment protection, customary international law bears the same effects. Yet, in connection to the regime of investment protection, these effects are credited with the following specific advantages:

*a) Lacunae-filling effect:* Customary international law is primarily said to be a lacunae-filling instrument for BITs which are sometimes too hastily drafted and leaves too many questions unanswered.[100] This is also the position defended by the arbitral tribunal in *Amoco Int. Finance Corp v. Islamic Republic of Iran*[101]. This is a clear manifestation of the reverberating effect of customary international law on treaty law. This lacunae-filling effect is not without paradox as it presupposes that the primary norm (treaty) can be streamlined or substantiated by the norm derived from it (custom).

*b) Interpretation-harmonizing effect:* In the context of investment protection, customary international law is also often understood as providing a uniform platform of interpretation for all the individual BITs when subjected to interpretations by arbitral tribunals applying them. In that sense, customary international law is seen as instrumental in the converging interpretations of each individual BIT by each individual arbitral tribunal applying one of them.[102]

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[99] This has proved controversial. See the famous dissenting opinion Jennings appended to the decision of the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), 27 June 1986, ICJ Rep 1986, 528, esp. 529-534.

[100] T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 710; On the idea of lacunae, see also P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 697. He also defends the Idea of "Cross-fertilization", Ibid., p. 694.

[101] See also *Amoco Int. Finance Corp v. Islamic Republic of Iran et al*, Iran-US.CT., 14 July 1987, 83 ILR (1990) 500, para. 112.

[102] T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 710. For a thought-

*c) Denunciation-annihilating effect:* Confronted with the denunciation of BITs by some capital-importing countries –as exemplified by the case of Ecuador[103] - investment lawyers may be tempted to see in customary international law a barrier protecting the investment protection regime from completely unraveling, for the State terminating the BITS it has contracted would remain bound by the existing customary investment protection regime.

*d) Multilateralizing effect*: The abovementioned idea that BITs have laid down the backbone of a multilateral international legal regime of investment protection[104], has not convinced everyone.[105] Indeed, numerous experts still believe that the investment protection regime achieved by virtue of BITs cannot be of a truly multilateral character, for BITs are treaties of a purely contractual nature.[106] Customary international law, in this sense, is the only tool that allows a multilateralization of a regime which otherwise would solely be of a contractual character. It constitutes the only realistic route to ensure a true multilateralization of the investment protection regime.

*e) Legitimizing and formalizing the* de facto *stare decisis and jurisprudence constante:* Probably, the paramount advantage of customary international law is the adjudicative neutrality and immanent intelligibility which it

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provoking and well-informed attempt to formalize the interpretative role of customary international law, see M. Paparinskis, "Investment Treaty Interpretation and Customary Invesment Law: Preliminary Remarks" in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) (forthcoming).

[103] On Ecuador denunciation of its BITs, see S. D Franck, "Occidental Exploration and Production Co. v. Republic of Ecuador", 99 *American Journal of International Law* (2005), p. 675; Comp. with Bolivia submission of a notice of withdrawal from ICSID Convention on 2 May 2007 (see article 71 of the ICSID Convention). On this issue, see gen. A. Tzanakopoulos, "Denunciation of the ICSID Convention under the General International Law of Treaties", in Hofmann, Rainer and Tams, Christian (eds.), *International Investment Law and General International Law: from Clinical Isolation to Systemic Integration* (Nomos, Baden Baden), 2011, pp. 75–93.

[104] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 64.

[105] See P. Muchlinski, "Corporations and the Uses of Law: International Investment Arbitration as a 'Multilateral Legal Order', *Onati Socio-Legal Series*, v. 1, n. 4 (2011).

[106] I owe this argument to insightful discussions with Dr. Catherine Brölmann.

provides to mutually referring decisions of arbitral tribunals. That tendency is undeniable and is discussed below[107] as well as in other chapters of this volume.[108] So construed, customary international law helps formalize the *jurisprudence constante* of international tribunals. [109] More precisely, customary international law endows the *de facto stare decisis* and *jurisprudence constante* witnessed in the practice of international arbitral tribunals with greater legitimacy and authority and helps shroud the practice of precedents in a source-based rationality, thereby providing the impression of a minimized choice in law-application and maximized predictability.[110]

## 4. Customary international law: general remarks

In this section, I venture into a few critical remarks about the mainstream theory of customary international law where the theory of custom is often geared toward a formalization of the making of unwritten rules (4.1.). Some general considerations on the various motives of the success of the theory of customary international law are also formulated (4.2.).[111]

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[107] Cfr infra 5.2 and 6.

[108] See the chapter of E. de Brabandere in this volume.

[109] On this type of formalism see e.g. C. C. Goetsch, "The Future of Legal Formalism", 24 *American Journal of Legal History* (1980) 221. See also E. J. Weinrib, "Legal Formalism", in D. Patterson (eds.) *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers Ltd, Oxford, 1999) 332-342. See also the remarks of O. Corten, *Méthodologie du droit international public* (Editions de l'Université de Bruxelles, Brussels 2009) at 57 et seq. E. J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law", 97 *Yale Law Journal* (1988) 949-1016; S.V. Scott, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics", 5 *EJIL* (1994) 313-325, esp. p. 322. See also the remarks of Koskenniemi, "What is International Law For?" in M. Evans (ed.), *International Law*, 2d ed. (OUP, 2006) 57, at 69.

[110] Customary international law is advocated as one of the ways to formalize jurisprudence constance by M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald, A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals*, (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835., p. 20-26 (talking about 'the most persuasive model for conceptualizing the developments [of jurisprudence constante]'. See also A. K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", *UC Davis Legal Studies Research Paper* No. 158, p. 278.

[111] This section is informed by my earlier work. See J. d'Aspremont, *Formalism and the Sources of International Law* (OUP, 2011).

### 4.1. General observations about the pipedream of formal unwritten law

As a source of international law, customary international law encapsulates these rules which are ascertained short of any written instrument. The conceptualization of customary international law in mainstream scholarship has always rested on non-formal ascertainment.[112] Indeed, in the mainstream theory of the sources of international law, the ascertainment of customary international law is considered *process-based*.[113] More specifically, according to traditional views, customary international rules are identified on the basis of a *bottom-up crystallization process* that necessitates a concurring and constant behaviour of a significant amount of States accompanied by their belief (or intent) that such a process correspond with an obligatory command of international law.[114] The possible contradictions associated with this widespread two element-conceptualization of customary international law are well-known.[115] It is not necessary to revert to it here. It seems more important to emphasize here that neither the behaviour of States nor their beliefs can be captured or identified by formal criteria.[116] As a result, ascertainment of customary

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[112] On the discussion about customary international law in the League of Nations' Committee of Jurists during the drafting of the Statute of the PCIJ, see P. Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale" 90 Revue générale de droit international public (1986) 5-126, at pp. 18-32. See also T. Skouteris, *The Notion of Progress in International Law Discourse* (Asser Press 2010).

[113] For a classical example, see Dailler and Pellet, *Droit international Public,* 6th Ed., (LGDJ, 1999) p. 318 et seq. On the various conceptualizations of customary international law as a process, see the remarks of R. Kolb, "Selected Problems in the Theory of Customary International Law", 50 *Netherlands International Law Review* 119 (2003) 119-150.

[114] On the emergence of the subjective element in the theory of custom in the 19th century, see P. Guggenheim, "Contribution à l'Histoire des Sources du Droit des Gens", 94 *Collected Courses* (1958), 1-84, pp. 36-59. A. D'Amato, *The Concept of Custom in International Law* (Cornell university Press, NY, 1971), pp. 44-50.

[115] See the famous contradiction highlighted by Sørensen, "Principes de droit international public", 101 *Collected Courses* (1960-III), 1-254 at 50. In the same sense, see D'Amato, *The Concept of Custom in International Law* (Cornell University Press, New York), 1971, at 7. On this paradox, see the comments of R. Kolb, "Selected Problems in the Theory of Customary International Law", 50 *Netherlands International Law Review* 119 (2003) at 137 et seq. See also

[116] In the same vein, M. Koskenniemi, *From Apology to Utopia* (Cambridge, New York, 2005) p. 388. See also S. Zamora, "Is There Customary International Economic Law?", 32

international law does not hinge on any standardized pedigree. Like other process-based models of law-identification, custom-identification eschews formal ascertainment and follows a fundamentally non-formal ascertainment pattern.[117] This is why custom-identification has often been deemed an "art"[118] and why some authors have been loathed to qualify customary law as a proper "source" of international law.[119]

The non-formal character of the ascertainment of customary international law has generated some severe predicaments which are very illustrative of the difficulties associated with the non-formal character of law-ascertainment. [120] Not only does the non-formal nature of custom-ascertainment, as has been demonstrated by scholars affiliated with deconstructivism and critical legal studies,[121] bring about a constant move

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*German Yearbook of International Law* (1989) 9, at 38; For a classical example of the difficulty to capture the practice, see ICJ, Case concerning the *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, ICJ Rep. 2009, para. 141. The particular difficulty to establish practice of abstention, see PCIJ, *Lotus*, Series A, No. 10 (1927), p. 28 or ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. (1986) para. 188 et seq.

[117] M. H. Mendelson, "The Formation of Customary International Law", 272 *Collected Courses* (1998), 159-410, at 172; G. Buzzini, "La Théorie des sources face au droit international général", 106 *Revue générale de droit international public* (2002) 581; this also is what leads R. Kolb to contend that article 38 does not lay down an entirely formal system of sources. See R. Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public : Théorie et Philosophie du droit international Law* (Brussels, Bruylant, 2003), at 51.

[118] M. W. Janis, *An Introduction to International Law*, (Boston, 1993, 2d ed.) at p. 44.

[119] See the discussion in H. Thirlway, *International Customary Law and Codification* (Sijthoff, Leiden, 1972) 25-30. See also the remarks by Condorelli, 'Custom', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff, The Hague, 1991) 179-211 at 186.

[120] See B. Stern, "La Coutume au Coeur du droit international, quelques réflexions", in Daniel Bardonnet (ed.), *Mélanges Reuter: le droit international : unité et diversité,* (Paris, Pedone, 1981) 479, at 479. See also G. Abi-Saab, "La Coutume dans tous ses Etats", in *Essays in honor of Roberto Ago*, vol. I, (Milano: A. Giuffrè, 1987) at 58; J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", 15 *EJIL* 523-553 or A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford, Oxford University Press, 2008), at 51 and 70 et seq.

[121] This has been insightfully demonstrated by M. Koskenniemi: M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP Cambridge 2005) pp. 388-473, especially, pp. 437-438 (He argues that the doctrine of custom is indeterminate

in law-ascertainment between State conduct (*apologism*) and normative beliefs (*utopianism*), but above all, the process-based elements of custom has failed to provide a reliable yardstick to distinguish between law and non-law.[122] The non-formal character of custom-ascertainment accordingly condemns such rules to being dangerously indeterminate, at least as long as they have not been certified by a law-applying authority.[123] During that period of uncertainty, customary international rules *often lack normative character* and, hence, their authority is gravely enfeebled.

The uncertainty inherent in the non-formal nature of custom-ascertainment has hardly been alleviated by international judicial practice, for the latter has been unable to offset the absence of formal law-ascertainment criteria by a consistent and intelligible reading of the custom-making process.[124] Obviously, codification, because it lays down customary international law in a written document which is often subsequently endowed with a legal character, is the most effective manner in which the downsides of non-formal custom-ascertainment can be averted. This is the very reason why international lawyers and law-makers have long striven to codify customary international law. Yet, as practice has demonstrated, codification of

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because of its circular character which stems from it assumption of behaviour as evidence of *opinio juris* and the latter as evidence of the custom-making behavior).

[122] P.-M. Dupuy, "Théorie des sources et coutume en droit international contemporain" in *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (Fundación de Cultura Universitaria, Montevideo 1994) 51, at p. 61. See also the very radical criticism by P. Kelly, "The Twilight of Customary International Law", 40 *Virginia Journal Int'l L.* 449 (2000); See S. Zamora, "Is There Customary International Economic Law?", 32 *German Yearbook of International Law* (1989) 9, at 38.

[123] This indeterminacy and the correlative leeway of judges have led some scholars to call for an abandonment of custom as a source of customary international law. See N. C. H. Dunbar, "The Myth of Customary International Law", 8 *Australian Yearbook of International Law* (1983) 1. See also the remarks of D. Carreau, *Droit International*, 8th ed. (Pedone, 2004), at 263; For a criticism of this position, see contra J. Tasioulas, "Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox'', 26 *Australian Yearbook of International Law* (2007) 199.

[124] Comp. ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. (1986) para. 188 et seq. and *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Reports 1969, para. 42 et seq.

customary international law, whether undertaken by private groups or public authorities,[125] has often proved unachievable.[126]

In the absence of formal law-ascertainment criteria only the evidence of such a rule can be subject to formalism.[127] Seen in this light, the theory of customary international law can be said to be nothing more than a formal "programme for evidence".[128] Such formalization of the evidence of custom elevates the two constitutive elements of customs into two evidentiary indicators which the law-applying authority is called upon to verify *in concreto*. That means that, when applying customary international law, the authority in question must preliminarily prove its existence through a two-step formal process which will be reflected in its decision. Such a formalization of the evidence of custom – which probably corresponds more closely with the conceptualization of customary international law

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[125] On the retreat of private initiatives in the codification of customary international law, see gen. N. Onuf, "Global Law-Making and Legal Thought", in N. Onuf (eds), *Law-Making in the Global Community*, (Carolina Academic Press, Durham, 1982) 1, at 22.

[126] On codification in general see M. Sahovic, "Le rôle et les méthodes de la codification et du développement progressif du droit international", in *Le Droit international 2*, (IHEI, Pedone, 1982) 71-126; M. Diez de Velasco Vallejo, "Législation et codification dans le droit international actuel", *Essays in honor of Roberto Ago*, vol. I, (Milano: A. Giuffrè, 1987) pp. 247-259; J. Sette-Camara, "The ILC Discourse and Method", in *International law at the time of its codification : essays in honour of Roberto Ago* (Giuffré, Milan, 1987) pp. 467-502; P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th ed, (L.G.D.J., 2009), 367 et seq.

[127] This also is the opinion of J.-A. Barberis, "La Coutume est-elle une source de droit international?" in *Mélanges en hommage à Michel Virally: Le droit international au service de la paix, de la justice et du développement* (Paris, Pedone, 1991), 43-52 at 44 et 50-51. P.-M. Dupuy, "Théorie des sources et coutume en droit international contemporain" in *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (Fundación de Cultura Universitaria, Montevideo 1994) 51, at 54 ; See also I. Brownlie, *Principles of Public International Law* 6th ed (OUP, Oxford), at 8 (for whom, after all, it only is a question of proof). See also B. Stern, "La Coutume au coeur du droit international, quelques réflexions", in Daniel Bardonnet (ed.), *Mélanges Reuter: le droit international : unité et diversité,* (Paris, Pedone, 1981) 479-499, at 483; B. Cheng also construes usage as only evidential. See B. Cheng, "On the Nature and Sources of International Law", in B. Cheng (eds.), International Law: Teaching and Practice (Stevens, London, 1982) 203, at 223. See also A. Pellet, "Cours Général: Le droit international entre souveraineté et communauté internationale – La formation du droit international", *Anuário Brasileiro de Direito Internacional*, vol. II, 2007, 12-75 at 63 et seq.

[128] M. Bos, *A Methodology of International Law*, (T.M.C. Asser Instituut, Amsterdam/New York/Oxford, 1984), at 224.

enshrined in Article 38 of the Statute of the International Court of Justice[129] – thus rests on the presupposition of a (general or regime-specific) secondary rule imposing obligations on international law-applying authorities as to how they must prove the existence of customary rules.[130] However, the endeavours to compensate non-formal law-ascertainment by formal evidentiary process[131] has done little to offset the indeterminacy inherent in the non-formal character of custom-ascertainment. International legal scholars themselves have been divided as to the parity existing between these two evidentiary elements.[132] Moreover, the evidentiary practice of judicial bodies has provided little consistency,[133] seesawing between the psychological[134] and the material elements which have granted fluctuating importance.[135]

### 4.2. The comfort zone of customary international law: general considerations

If customary international law has always proved so popular among international lawyers, it is for the comfort zone that it can generate. The comfort zone which customary international law allows primarily derives from the pedigree which it can endow norms with (a) as well as the

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[129] In the same vein see, S. Sur, "La Coutume internationale", *Juris-Classeur*, Fascicule 13, 1989 p. 15. See also A. Pellet, "Article 38", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, (OUP, 2002,) 677, at 749.

[130] In the same vein, see J. Raz, *Authority of Law* (Clarendon Press, Oxford, 1983) p. 96.

[131] For a similar distinction between ascertainment of customary rules and evidence of customary rules, see P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th ed, (L.G.D.J., 2009), p. 364 et seq.

[132] Part of the debate between the traditional custom and the new custom can also be interpreted along these lines. See the account made by A. E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" 95 *AJIL* 757 (2001).

[133] See the remarks and criticisms of A. D'Amato, "Trashing Customary International Law", 81 *AJIL* 1987, 101 at pp. 102-103; T. Frank, "Some observations on the ICJ's Procedural and Substantive Innovations", 81 *AJIL*, 1987, 161-121 at pp. 118-119; J. Verhoeven, "Le droit, le juge et la violence. Les arrêts Nicaragua c. Etats-Unis", 91 *Revue générale de droit international public* (1987) 1159-1239 at p. 1209; A. Pellet, "Article 38", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice* (OUP, 2002), 677 at 760.

[134] See also ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. (1986).

[135] ICJ, *North Sea Continental Shelf*, ICJ Rep. 3 (1969) pp. 35, 42-43, para. 53-73-75.

immanent rationality with which it shrouds adjudicatory reasoning (b). It also proves very convenient for States as it often offers them an easy way out in situations where non-compliance is the only politically viable option (c). A few words must be said about each of these perceived virtues of customary law.

*a) Ready-made pedigree of rules*

In the mainstream conception of international law, a norm is a rule of law to the extent that it can be ascertained through its pedigree.[136] It is through elaborate theory of the sources that pedigrees of international rules have been defined. This means that the pedigree will usually be found in the sources of international law. Compared to other sources of international law, customary law has the advantage of providing ready-made pedigree for rules. There is no need to ground the rule in a formal instrument whose legal nature needs to be established. If the rules cannot be found in a treaty, customary international law offers the best alternative pedigree of the rule. In that sense, if it not enshrined in a treaty, customary law constitutes the fall-back option in terms of law-ascertainment. In that sense, customary law constitutes a source of convenience to which one will resort where the pedigree of a norm is uncertain.

*b) Immanent rationality and predictability of judicial reasoning*

There is another – equally fundamental – reason why international lawyers are always prompt to take refuge in customary international law. International lawyers always feel uneasy with the law-making by international tribunals. Contrary to domestic tribunals, international tribunals operate without the oversight of any central judicial body. This means that, once jurisdiction has been established, those tribunals will operate without much oversight and will be exerting a large power of appreciation. If unbridled, this power of appreciation can go as far as elevating judges into law-making authorities. The advantage of custom is precisely that it allegedly endows the exercise of discretion by judges with some rationality by providing a pedigree to the rules applied by judges. It contributes to the emergence of a sense of greater adjudicative neutrality in

[136] See gen. J. d'Aspremont, *Formalism and the Sources of International Law* (OUP, 2011).

international legal argumentation and international legal adjudication and simultaneously assuages the obsession of international lawyers – especially those educated in the European continental tradition – with apprehending and constraining the leeway of arbitrators. Such a sentiment of immanent rationality is fundamentally conducive to the legitimacy of international tribunals as well as that of their decisions. It simultaneously conveys a sentiment of predictability in adjudication, thereby further comforting international actors and enhancing their faith in the regulatory system provided by international law.

*c) Easy escape route for non-compliance*

Customary international law can eventually be the trump card for situations where non-compliance has become the only option. In cases where a State deems it in its interest to flout a rule rather than to abide by it, it can make use of the hazy contours of customary law to convince other actors that its behavior did not contradict any positive rule of international law.[137] In that sense, customary international law reduces the cost of non-compliance, as it gives States the possibility to contest or challenge the existence of any legal constrain *in casu*.

## 5. Limits and perils of the theory of international customary investment law

In this section, I argue that, in the context of investment protection, the comfort zone offered by customary international law is however short-lived and more limited than what is often believed. Indeed, focusing on international investment law, I contend that the source of convenience offered by customary international law is not without a cost and some conceptual inconsistencies. In particular, I seek to lay bare the internal deficiencies of the theory of customary investment law and the way in which the traditional theory of customary international law has been distorted when applied to investment law (5.1.). Then I intend to take a step back and reflect, with some distance, on the perils which this turn to customary international law brings about (5.2.).

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[137] In the same vein, see G. M. Danilenko, *Law-Making in the International Community* (Dordrecht, Martinus Nijhoff, 1993), p. 16-17. See also J. Hathaway, "American Defender of Democratic Legitimacy" 11 *EJIL* (2000) 121, p. 128-129.

### 5.1. Conceptual deficiencies of the theory of customary investment law

Three main conceptual deficiencies beset the mainstream theory of customary investment law. I briefly discuss each of them here.

*a) Building custom on non-normative standards*

In the mainstream theory of the sources of investment law, custom has been ground in quicksand. Indeed, most authors sympathetic to the idea of customary investment law have failed to realize that many prescriptions which they claim to be customary rules are not sufficiently normative to have the potential to crystallize in customary international law[138]. A wide number of directives or standards which are deemed to have crystalized in customary international law – as is illustrated by the minimum standard of treatment – are highly imprecise and vague.[139] This is particularly astounding as scholars defending the use of customary international law have always professed to embrace a traditional conception of customary law. Yet, many of them seem to have neglected the basic foundations of the theory of custom as it has been devised and supplemented by the International Court of Justice and in particular the requirement of normative character of the standard whose customary status is invoked. It is well-known that, in the *North Sea Continental Shelf case*, the Court assessed the customary character of the equidistance principle enshrined in Article 6 of the 1958 Convention on the Continental Shelf. On this occasion it asserted that the norm at stake had first to be of a "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". The Court drew on the idea that any conventional rule must contain a directive for it be able to one day crystallize into a customary international rule. Taking mainly into account the profound indeterminacy of the concept of 'special circumstances' which determines the qualification to the equidistance principle, the Court deemed that the principle of equidistance

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[138] In the same sense, see P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 131.

[139] M. Porterfield, "An International Common Law of Investor Rights?" 27 *University of Pennsylvania Journal of International Economic Law* (2006) 79; C. H. Brower, "Structure, Legitimacy, and NAFTA´s Investment Chapter", 36 *Vanderbilt Journal of Transnational Law* 37 (2003), p. 66.

enshrined in the 1958 Convention was not normative. Because the principle of equidistance did not provide for a given behavior to be adopted by the parties, the Court concluded that it could not crystallize or generate a rule of customary international law.[140] Likewise, in the famous *Asylum* case, the Court asserted that "(t)he facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy … and in the officia1 views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions…, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law...". [141]

I am of the opinion that many candidates for customary status in investment law which have been mentioned above[142] do not provide for clear standards of behavior and suffer from strong normative weakness. They fail to meet the minimum threshold in terms of normative content that is necessary for such norms to possibly constitute (or give rise to) a customary rule. In the eyes of many authors, this, however, has not seemed to bar their qualification for customary status.

*b) Conflating practice and opinio juris*

The conceptual deficiencies of the mainstream theory of customary investment law are not limited to custom resting on clay feet. It is not only that authors hastily throw themselves in the arms of custom despite the very weak normative content of the standards concerned. It is also that they misapply the existing mainstream theory, associating BITs with State practice.[143] The norms enshrined in BITs as such cannot themselves be

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[140] ICJ Rec. 1969, para 72. For a analysis of this aspect of the case, see J. d'Aspremont, "Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice", *Belgian Review of International Law* (2003), 496-520, p. 518. See also, A. Boyle and C. Chinkin, *The Making of International Law, Series Foundations of. Public International Law* (OUP, 2007), at 221.

[141] Asylum (Colombia/Peru), 20 November 1950, ICJ Rep 1950, para. 277.

[142] Cfr supra 3.2.

[143] See e.g. P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 685.

practice. It is only the behavior to which they lead which could be practice *sensu stricto*. However, as is well-known, the practice spawned by a convention often comes with a deficient *opinio juris*.[144] Such a confusion is also rife in general theory of customary international law and the practice of international tribunals.[145] These conflations between practice and *opinio juris* further weaken the theory of customary investment law.

*c) Attributing customary status to architectural, institutional and technical norms*

As is especially exemplified by the claim that customary international law prescribes legal standing for shareholders before international tribunals[146], international investment lawyers do not balk at attributing customary status to standards which are of architectural, institutional or technical nature, i.e. those standards whose existence is dependent on there being a machinery. Again, this is not unheard of in the general theory of the sources of international law.[147] Yet, it is interesting to note that the same inclination to endow technical, architectural or institutional norms with customary status is similarly witnessed in the theory of the sources of investment law, thereby further undermining the theory of customary investment law.

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For an example of association of declaration of States with State practice, see *Glamis Gold Ltd v. United States*, Award, 8 June 2009, UNCITRAL, para. 602.

[144] R.R. Baxter, "Treaties and Custom", 129 Collected Courses (1970), at 64.

[145] A good illustration of that confusion is the methodology used by the ICRC in its study on customary international law. See the critique of A. Boyle and C. Chinkin *The Making of International Law* (OUP, Oxford, 2007), p. 36. See also the critique expressed by J. B. Bellinger and W. J. Haynes, "A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study", (2007) 46 *ILM* 514, also available at http://www.defenselink.mil/home/pdf/Customary_International_Humanitiarian_Law.pdf; See the reaction of J.-M Henckaerts, "Customary international humanitarian law – a response to US comments", 89 *International Review of the Red Cross* 473 (2007).

[146] On this debate, see P. Dumberry, "The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallized?" 18 *Michigan Journal of International Law* (2010) 353.

[147] See Ethiopia-Erytrea Claims Commission, Partial award, Prisoners of War, Ethiopia's Claim 4, 1st July 2003, § 52. See the remarks of P. d'Argent and J. d'Aspremont, "La Commission des réclamations Erythrée – Ethiopie: un premier bilan", 54 *Annuaire français de droit international* (2008) 347-396.

## 5.2. The cost of customary investment law

Despite all its benefits, resorting to customary investment international law is not without hazards. I only mention here the fallout of the use of customary international law which is relevant for international investment law. Mention is made of the cost of customary investment law in terms of the authority of law (a), the rule of law in investment protection (b) and the legitimacy of international investment tribunals (c). It is also argued here that the resort to customary international law can reinforce the perception of an imperialistic agenda behind investment law (d).

*a) Enfeebling the normativity and authority of international investment law*

As was explained above, customary investment law comes with a high price in terms of normative character investment rules. [148] Indeed, in the absence of these elementary formal standards of identification[149], actors are less able to anticipate – and thus adapt to – the effects (or lack thereof) produced by the rule in question.[150] Likewise, law-applying authorities are at pain to evidence the applicable law to the cases submitted to them, which in turn will further diminish the ability of actors to anticipate the effects (or

[148] On the problems of ascertainment and normativity of customary international law, see Mario Prost, *Unitas multiplex - Les unités du droit international et la politique de la fragmentation*, McGill University, Montreal, 2008, p. 154, available at http://digitool.library.mcgill.ca/; P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th ed, (L.G.D.J., 2009), p. 349: T. Guzman, "Saving Customary International Law" 27 *Michigan Journal of International Law* 115 (2005), esp. 157-59. On the normative deficiencies of custom, see the remarks of A. Somek, "Defective Law", *University of Iowa Legal Studies Research Paper* No. 10-33 (2010) available at http://www.ssrn.org/abstract=1678156.

[149] In the same vein, see H.L.A. Hart, *The Concept of Law*, (OUP, Oxford, 1997, 2nd ed.), p. 124. Hart borrows from J.L. Austin the speech-act theory and the claims of the latter regarding the performative function of language, a notion that can be understood in Hart's view by recognizing that "given a background of rules or conventions which provide that if a person says certain words then certain other rules shall be brought into operation, this determines the function, or in a broad sense, the meaning of the words in question". See H.L.A. Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence", repr. in *Hart's collected Essays in Jurisprudence and Philosophy* (Oxford, Clarendon, 1983) 265, 274-6.

[150] This was a concern expressed by the arbitrators in *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2 June 2010, para. 100.

lack thereof) of the rule concerned. As a matter of consequence, customary rules fall short of generating any change in the behaviour of its addressees[151], thereby generating greater difficulty to distinguish between law and non-law, debilitating the normative character of international legal rules. Preserving the normativity of investment law is not only of doctrinal importance as it fundamentally bears upon the ability of international law to fulfil most of the functions assigned to it.[152] Indeed, many of the functions that can be assigned to international law[153] - and to investment law in particular – presuppose that it retains sufficient meaning to be capable of instructing the actors subjected to it. Moreover normativity ought to be supported if international investment law is to retain some *authority*.[154]

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[151] J. Hathaway, "American Defender of Democratic Legitimacy" 11 *EJIL* (2000) 121, p. 128-129.

[152] D. Lefkowitz, 'The Sources of International Law: Some Philosophical Reflections', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP, Oxford, 2010) 187, p. 195. For a review of some of the most important functions that international law can play, see D. M. Johnston, "Functionalism in the Theory of International Law", 26 *Canadian Yearbook of International Law* (1988) 3, esp. p. 25.

[153] In that sense my argument also departs from that of Prosper Weil (see P. Weil, "Towards Relative Normativity in International Law" 77 *American Journal of International Law* (1983), 413, esp. 420-421) and bears some limited resemblance with that of M. Koskenniemi (M. Koskenniemi, "What is International Law For?", in M. Evans (ed.) *International Law* (OUP Oxford 2006 2nd ed.) 57, p. 57. For a rebutal of the idea that Koskenniemi expresses a total disinterest for the question of the functions of international law, see J. Beckett, "Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL" 16 *EJIL* 213 (2005).

[154] In the same sense, G. M. Danilenko, *Law-Making in the International Community* (Dordrecht, Martinus Nijhoff, 1993), p. 21. Although he phrased it in terms of effectiveness, A. Orakhelashvili seems to be of the same opinion. See A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford, Oxford University Press, 2008) p. 51. S. Besson is more reserved as to the impact of sources of international law on the authority of international legal rules – a debate she phrases in terms of 'normativity'. She however recognizes that validity – a debate she phrases in terms of 'legality' – is an important part of the legitimacy of international law. See S. Besson, 'Theorizing the Sources of International Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP, Oxford, 2010) 163, p. 174 and 180. Although contending that formal law-identification is insufficient to ensure the authority of international law, J. Brunnée and S. J. Toope argues that the distinction between law and non-law is fundamental to preserve it. See J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (CUP, Cambridge, 2010), p. 46.

Leaving aside the formalization brought about by the codification of custom, only the institutionalization of the custom-making process allows the preservation of the normative character of customary international law. Such an institutionalization of customary international law would probably entail the recognition of a rule-making role bestowed upon judges whose functions are classically exclusively evidentiary,[155] thereby elevating international – and to a lesser extent domestic[156] – judges into a law-making organ of the international community.[157] While international lawyers are usually ready to recognize the role of international courts and tribunals in the progressive development of primary rules of international law, the idea that Courts and Tribunals are expressly endowed with custom-making power is not yet accepted.[158] This is why customary investment law, unless it undergoes a radical formalization in the form of necessary written

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[155] On the custom-generating role of courts, see generally, N. Onuf, "Global Law-Making and Legal Thought", in N. Onuf (eds), *Law-Making in the Global Community*, (Carolina Academic Press, Durham, 1982) 1, p. 21-22.

[156] See however the argument of R. Falk according to which domestic courts are in a better position to ascertain customary law for they can more authoritatively capture State practice. See R. Falk, *The Role of Domestic Courts in the International Legal Order*, (Syracuse, Syracuse University Press, 1964) pp. 19-20.

[157] See Kelsen, in Ch. Leben, *Hans Kelsen, Ecrits français de droit international* (PUF, Paris, 2001), p. 77. See also the recognition of that law-making role by Lyndel V. Prott, *The Latent Power of Culture and the International Judge* (Abingdon, Professional Books, 1979), p. 77-78.

[158] This is one of the reasons why Kelsen rejected the subjective element in the theory of customary law, for he contended that *opinio juris* is a fiction to disguise law-creating powers of judges. See Kelsen, "Théorie du droit international coutumier", *Revue générale de la théorie du droit,* (1939) 253-74. For another classical rejection of the law-making power of international judges, see G. Fitzmaurice, "Judicial Innovation – Its Uses and Its Perils" in R. Y. Jennings (ed.) *Essays in Honour of Lord McNair* (London Stevens,1965) 24 or G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rules of Law", 92 *Collected Courses* (1957 II) 1-227; See also D. Akande, "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court" 68 *British Yearbook of International Law* 165 (1997), p. 213-215. See *contra* the famous position of H. Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford, 1933), 319-320. On the more specific question of law-making by International Criminal Tribunals, see S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP, 2011) and in particular the contribution of F. Raimondo, "General Principles of Law, Judicial Creativity and the Development of International Criminal Law", in S. Darcy & J. Powderly (Eds.), *Judicial Creativity at the International Criminal Tribunals* (New York, OUP), p. 45-59.

commitments,[159] will long continue to constitute one of best illustrations of the cost associated with non-formal law-ascertainment in terms of the normative character of the rules concerned.[160]

*b) Impairing the international rule of law in investment law*

It is contended here that customary investment law does not come without impairing the sustainability of the rule of law in the legal system concerned.[161] It can be argued that customary investment law does away with one of the indispensable conditions for ensuring that the framework within which rules are ascertained through formal procedure lives up to the rule of law.[162] Indeed, for law to be a substitute to unbridled arbitrary power – especially in the context of investment protection- clear law-ascertaining criteria are required.[163] This is not the case of customary investment law.

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[159] A radical formalization has been put forward by D'Amato through the concept of *articulation* which ought to replace the two-element doctrine by an objective validator that will usually take the form of a written statement. While D'Amato's approach undoubtedly offers a useful model to formalize custom-ascertainment, it has failed to generate consensus. See e.g. the criticisms of that understanding in H. Thirlway, *International Customary Law and Codification* (Sijthoff, Leiden, 1972) pp. 51-54; some measured support for D'Amato's theories is provided by N. Onuf, "Global Law-Making and Legal Thought", in N. Onuf (eds), *Law-Making in the Global Community*, (Carolina Academic Press, Durham, 1982) 1, at 18.

[160] On the normative deficiencies of custom, see the remarks of A. Somek, "Defective Law", *University of Iowa Legal Studies Research Paper* No. 10-33 (2010) available at http://www.ssrn.org/abstract=1678156.

[161] On the Rule of Law in international law, see gen. Société française pour le droit international, *L'Etat de droit en droit international: Colloque de Bruxelles* (Paris, Pedone, 2007). On the various meanings of the rule of law in the context of international law, see A. Nollkaemper, "The Internationalized Rule of Law", 1 *Hague Journal on the Rule of Law* (2009) 74-78.

[162] This point is irrespective of who is entitled to the rule of law. See the argument of J. Waldron according to whom States are not entitled to the rule of law. J. Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?", *NYU Public Law and Legal Theory Research Paper Series*, 09-01 (2009), p. 2. See the reaction of A. Somek, "Defective Law", *University of Iowa Legal Studies Research Paper* No. 10-33 (2010), p. 5.

[163] N. Onuf, "The Constitution of International Society", 5 *EJIL* (1995) 1-19, esp. p. 13; F. Schauer, "Formalism", 97 *Yale Law Journal* (1998) 509; A. L. Paulus, "International Law After Postmodernism", 14 *LJIL* (2001) 748; B. Cheng, "On the Nature and Sources of International Law", in B. Cheng (eds.), *International Law: Teaching and Practice* (Stevens, London, 1982) 203, p. 206; D. Lefkowitz, "The Sources of International Law: Some Philosophical Reflections", in S. Besson and J. Tasioulas (eds), *The Philosophy of*

Customary investment law permits a high degree of subjectivity in the identification of the applicable law[164], thereby allowing addressees of rules to more easily manipulate the rules.[165]

*c) Impairing the legitimacy of adjudicatory powers of courts and tribunals*

It is commonplace that States and other international actors are not ready to entrust international investment with express law-making powers.[166] Yet, the use of customary international law does precisely that. Indeed, customary international law helps perpetuate the illusion of the strictly cognitivistic task of judges. It should therefore not be a surprise to note that States have grown more wary about the powers of international investment tribunals. Indeed, more BITs and FTAs enshrine provisions that retain the ultimate competence for interpretation for States like in the NAFTA regime. The same is true with WTO (see article IX(2) of the WTO Agreement.[167] And it is no coincidence that the US changed its model BITs to make it more precise, for this can also be understood as a way to restrict the leeway of judges.[168] The foregoing shows why the return to customary international law can be detrimental to the acceptance of the public authority exercised by international investment tribunals. In other words, it could usher in a retreat from judicialization of investment protection. In this context, it is thus not surprising that some authors have tried to formalize the use of customary international law and endow it with the trappings of some immanently rational judicial process.[169] Whether such attempts have been sufficient is yet to be evaluated.

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*International Law* (OUP, 2010) 187, p. 195; See also the introductory remarks of H. Charlesworth, "Human Rights and the Rule of Law After Conflict", in P. Cane (ed), *The Hart-Fuller Debate Fifty Years On*, Hart, 2010, 43, p. 44.

[164] See gen. J. Raz, "The Rule of Law and its Virtue", in J. Raz (ed.), *The Authority of Law – Essays on Law and Morality* (Clarendon Press, 1979) 210, pp. 215-216.

[165] In the same vein, see G. M. Danilenko, *Law-Making in the International Community* (Dordrecht, Martinus Nijhoff, 1993), p. 16-17. See also J. Hathaway, "American Defender of Democratic Legitimacy" 11 *EJIL* (2000) 121, p. 128-129.

[166] See supra note 158.

[167] On this issue, see A. van Aaken, "Perils of Success? The Case of International Investment Protection", 9 *European Business Organization Law Review* (2008), 1-27, p. 22.

[168] Ibid., p. 25.

[169] See e.g. M. Paparinskis, "Investment Treaty Interpretation and Customary Invesment Law: Preliminary Remarks" in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) (forthcoming).

*d) Reinforcing the perception of an imperialistic agenda behind investment law*

Although this may not be generally perceived, the resort to customary investment law – and especially to those allegedly customary standards developed in the first half of the 20th century – can be associated with a new – veiled – form of economic colonization. First because it brings about the generalization of standards developed by the lawyers, politicians and economics of capital-exporting countries and their application to capital-importing countries. Customary international law can thus spawn an idea among developing States of a new capital-exporting States' hegemony[170]. Second, customary international law may also be felt like a necessary legal framework for the market to function and freely allow the flux of capital. In that sense, it could be seen by those that are at the left end of the political spectrum as exclusively serving the global market forces, for the global market needs uniform standards.[171] Albeit partly ill-founded and surely overblown, these perceptions are inevitable consequences of the return to customary investment law.

## 6. Alternative routes for the multilateralization and uniformization of the investment protection regime?

As has been explained above[172], the return to customary investment law has proved particularly enticing for investment lawyers for its lacunae-filling effect, interpretation-harmonizing effect, denunciation-annihilating effect, multilateralizing effect and, above all its ability in legitimizing and formalizing the de facto *stare decisis* and *jurisprudence constante*. Leaving aside the solution which it allegedly offers to denunciation of investment protection treaties, it is argued here that the other benefits associated with customary investment law could be well secured without necessary going

[170] Cai Congyan, "International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules" 7 *Chinese Journal of International Law* (2008), 659-679, p. 673.
[171] This was an argument heard during the negotiations about the MAI, for instance among NGOs. See e.g. L'Observatoire de la Mondialisation, "Lumière sur l'AMI : le test de Dracula", *L'Esprit Frappeur* (1998), 77 p.
[172] Cfr. supra 4.2.

down the road of customary law. The same outcome could be achieved through simpler mechanisms.[173] Mention is made here of two of them in particular: the principle of systemic integration (6.1.) and the doctrine of precedent (6.2.).

### 6.1. Article 31.3(c) and the principle of systemic integration

The principles of interpretation of international treaties contained in the Vienna Convention on the Law of Treaties provide for an interpretation of treaties that takes into account "any relevant rules of international law applicable in relations between the parties".[174] When the provision was included in the Vienna Convention on the Law of Treaties, it echoed the previous teaching of some scholars[175] as well as the position of the *Institut de droit international*[176]. It also furthered the somewhat redundant and circular definition of the concept of treaty provided by the Vienna Convention on the Law of Treaties[177]. The principle of systemic integration enshrined in the Vienna Convention is premised on the *fiction* that, despite international lawmaking being fragmented and decentralized, any new rule has been made with the awareness of other existing rules. In that sense, the principle of systemic integration presupposes the formal unity of the legal system[178]. The principle of systemic integration prescribes that a treaty be interpreted by reference to its "normative environment" which includes all

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[173] In the same vein, see S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 372, 373.
[174] Article 31(3)(c).
[175] A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 466; See also P. Verzijl, "Georges Pinson case" (1927-8) AD No. 292, cited by C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", 54 *International and Comparative Law Quarterly* 279 (2005), at 279.
[176] *Annuaire de l'Institut de droit international*, 1956, 364-5. See also http://www.idi-iil.org/.
[177] Art. 2(1) (a).
[178] See P. Sands, "Treaty, Custom and the Cross-Fertilization of International Law", 1 *Yale Human Rights and Development Law Journal* 85 (1998), at 95; see also Combacau et S. Sur, *Droit international public*, 5th ed., Paris, Montchrestien, at 175. On the unity of the legal system, see generally H. Kelsen, "Les Rapport de système entre le droit interne et le droit international", "Les rapports de système entre le droit interne et le droit international public", 14 *Collected Courses* (1926-IV) at 264 (who argues that the unity of the system rests on the same principle of validity on which all the constitutive elements of the system rest). Comp. P.-M. Dupuy, "L'unité de l'ordre juridique international, Cours général de droit international public", 297 *Collected Course* (2002) 9-490.

sources of international law. That means that when several norms bear on a single issue they should, to the greatest extent possible, be interpreted so as to give rise to a single set of compatible obligations. Its application is undoubtedly delicate. It presupposes that the status of the "normative environment" of the norm be clarified, and, in particular, that the status rule to which it is referred be established. It is only after the scope and the applicability of this other rule of international law is defined that it can be taken into account in the interpretation of the rule being interpreted.[179]

Whatever these difficulties[180], it is argued here that the principle of systemic integration enshrined in article 31.3(c) of the Vienna Convention on the law of treaties already provides judges with a sweeping power to harmonize without unnecessary and costly inroads in the murky theory of customary investment law.[181] It is less certain, however, that it allows and justifies the common resort to precedents by international investment.[182]

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[179] The difficulty in applying the principle of systemic integration has been magnified by international judges themselves. It is particularly important to note that the use of that principle that was made by the International Court of Justice has not helped clarify what "taken into account" really means. In what probably constitutes one of the most questionable decisions of the International Law Court of Justice from the standpoint of legal logic, the principle of systemic integration was expressly relied upon by the Court for the very first time in its decision in the *Oil Platform* case. On that occasion, the Court resorted to article 31 (3) (c) to apply general rules of international law, including rules pertaining to the use of force, to examine whether the measures taken by the United States were necessary under the Treaty of Navigation and Commerce on the basis of which the Court had jurisdiction. In that particular case, the principle of systemic integration allowed the Court to extend its jurisdiction *ratione materiae* in order to judge the behavior of the United States in the light of rules for which the Court, strictly speaking, had no jurisdiction. See ICJ, *Oil Platform*, decision of 6 November 2003, ICJ Reports, 2003, para. 78. The more reasonable use of article 31 (3) (c) in the case *Djibouti v. France* has done little to expunge this suspect use of that provision in the *Oil Platform* case. See ICJ Reports, 1999, para. 113-114

[180] I have examined them in further details in J. d'Aspremont, "Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order", in A. Nollkaemper and O. K. Fauchald (eds.), *Unity or Fragmentation of International Law: The Role of International and National Tribunals*, (Hart Publishing, 2011).

[181] A. van Aaken, "Perils of Success? The Case of International Investment Protection", 9 *European Business Organization Law Review* (2008), 1-27, p. 18.

[182] M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald, A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals*, (Hart

## 6.2. The normative value of precedents (*jurisprudence constante*)

It is uncontested both in the literature[183] and the case-law[184] that there is no formal rule of *stare decisis* before international adjudicatory bodies[185], especially when they belong to separate sub-system like in international investment law. The absence of *stare decisis* is all but inevitable. Indeed, each tribunal is only granted with the power to adjudicate within the closed order created by the BIT concerned. The absence of *stare decisis*, in that sense, simply is the consequence of the divide between the sub-legal order created by each BIT.

It is well-known, however, that the formal absence of *stare decisis* in the international investment protection system has not barred the emergence of a *de facto stare decisis* and *jurisprudence constante* in the practice of international investment tribunals.[186] Indeed, an accretion of decisions which refer to and rely on one another and rely is witnessed in the case-law and the practice of international investment tribunals shows a much

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Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835, p. 12-15; see also Y. Radi, "Realizing Human Rights in Investment Treaty Arbitration from the Inside: a Perspective from Within the International Investment Law 'Toolbox'" (on file with the author).

[183] See more particularly the chapter of E. de Brabandere in this volume; see also the remarks by A. K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", *UC Davis Legal Studies Research Paper No. 158*, p. 265; for an overview see C. Schreuer and M. Weiniger, "A Doctrine of Precedent?" in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford, OUP, 2008), at 1189 ff.

[184] North American Free Trade Commission, US-Can-Mex, Art. 1136, 17 December 1992, 32 ILM 605 (1993). See also the famous rejection of *stare decisis* in *AES Corp v. Argentina*, ICSID, Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 30. See also *Chevron Corporations (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, 30 March 2010, para. 163; RosInvestCo *UK Ltd. v Federation of Russia,* SCC V 079/2005, Award on Jurisdiction, November 2008, paras 49, 136-137; *Wintershall Aktiengesellschaft v Argentina,* ICSID Case no ARB/04/14, Award, December 8, 2008, paras 178-184, 194; *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on jurisdiction, 12 July 2006.

[185] See also Article 53 (1) of the ICSID Convention: "The award shall be binding on the parties" which is traditionally construed as a rejection of *stare decisis*.

[186] On that question in general, see M. Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996).

generalized use of *jurisprudence constante* and cross-references.[187] Examples are aplenty and very few tribunals have ventured to rule out the relevance of other tribunals' decisions[188] which incrementally gained persuasive authority through subsequent references by other tribunals. In particular, case law of investment tribunals is most often used by others for interpretative purposes.[189] It is true that the relevance of previous decisions by other tribunals is often assumed but rarely demonstrated.[190]Likewise, some tribunals follow the precedents by others out of a sense of alleged duty[191] whilst other do so discretionarily.[192] It is also noteworthy that this

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[187] See C. Shreuer: "In actual fact, tribunal in investment disputes, including ICSID tribunals, rely on previous decisions of other tribunals whenever they can" (See C. Shreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", 3 *Transnational Dispute Management* (2006), p. 14; M. Paparinskis talks about "Implicit premise of the mutual normative relevance of all the arbitral pronouncement" (See M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald, A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals* (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835 p. 4); S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), Chapter VII.C.; see also G. Kaufmann-Kholer, "Arbitral Precedent: Dream, Necessity or Excuse", 23 *Arbitration international* (2007), 368. See also the remarks of E. de Brabandere in his chapter in this volume.

[188] See e.g. *SGS Société Générale de Surveillance v. Republic of the Philippines. ICSID* Case N° ARB/02/6, and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, at para. 97; see also the reservations expressed by Brigitte Stern in the case *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2 June 2010, para. 100.

[189] See the comprehensive study of ICSID decisions of Ole Kristian Fauchald: Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals – an Empirical Analysis", 19 *EJIL* (2008) 301-364, p. 335.

[190] M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald, A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals* (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835, p. 11.

[191] Such a duty to follow precedents is sometimes espoused in the case-law: *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, para 67; *Victor Pey Casado and President Allende Foundation v Republic of Chile,* ICSID Case no ARB/98/2, Award, May 8, 2008, para 119.

[192] For traditional examples of *jurisprudence constante* short of any duty to follow precedents, see *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to

cross-reliance between tribunal is not completely harmonious and is subject to variations[193], as is illustrated by the fluctuating endorsement of the famous *Maffezini* jurisprudence and the inclusion of dispute settlement mechanisms in the scope of the MFN clause[194]. However, notwithstanding the varying and fluctuating motives behind this practice of the tribunal inclination to cite one another[195], the development of a *jurisprudence constante* in the case-law of arbitral tribunal is undeniable and constitutes a remarkable feature of the contemporary investment protection regime.

This use of precedent by international investment tribunals has already been the object of wide-ranging empirical and systemic studies[196] and it would be of no avail to expound on it here. It suffices here to point out that legal scholars have felt a need not to leave this practice non-systematized and non-regulated. This is why attempts to formalize and systematize this tendency of investment arbitrators to refer to one another have been

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Jurisdiction, January 29, 2004, para 97; *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, paras. 30-32; *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award of 31 March 1986; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 72.

[193] See also the chapter by E. de Brabandere in this volume.

[194] see E. Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement", 34 *Brooklyn Journal of International Law* 303 (2008-2009), 329-334. For examples of tribunals following the Maffezini principle, see, *Siemens A.G. v. Argentine Republic*, ICSID, No. ARB/-2/8, Decision On Jurisdiction, 3 August 2003; *Camuzzi International SA v. Argentine Republic*, ICSID, No. ARB/03/7, 11 May 2005, *Gas Natural SDG S.A. v. Argentine Republic*, ICSID No. ARB/03/10, 17 June 2005. For a rejection of this understanding of the scope of the MFN clause, see *Salani Costruttori SpA v. Hashemite Kingdom of Jordan*, ICSID, No. ARB 02/13, 29 November 2004; *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID, No. ARB/03/24, 8 February 2005.

[195] Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration", 30 *Fordham International Law Journal* (2006) 356; G. Kaufmann-Kholer, "Arbitral Precedent: Dream, Necessity or Excuse", 23 *Arbitration international* (2007), 368. See also the remarks of E. de Brabandere in his chapter in this volume.

[196] For an empirical overview of the use of *stare decisis* in the case-law of ICSID arbitral tribunal, see Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals – an Empirical Analysis", 19 *EJIL* 2008 301-364, esp. 333 et seq. (arguing that there is a tendency among ICSID tribunals to contribute to a homogenous development of the methodology of international law). For another empirical study of precedents in investment arbitration, see J.P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence", 24 *Journal of International Arbitration* (2007) 129.

undertaken by scholars.[197] Customary international law has been precisely one of this conceptual tools to endow the *jurisprudence constante* with some rationality and generate predictability. In that sense, customary international law is seen as helping shroud the practice of precedents in a source-based rationality, thereby providing the impression of a minimized choice in law-application and maximized predictability.[198]

The argument which I wish to make here is that the resort to customary international investment law is superfluous. I argue that the phenomenon of cross-referencing between investment tribunal does not need to be justified nor explained by a detour to customary investment law. *Jurisprudence constante* is a self-explanatory and self-sufficient phenomenon. It does not need to be "authorized" or "validated" by any secondary rule of the international investment system, and especially not by the theory of the sources of investment law. This tendency of investment tribunals to rely on another is not different from the informal and factual influence of international law in domestic law or regional law in international law.[199] The similarity with the cross-fertilization found between separate regimes is not entirely surprising. Whatever the regime of which a judge is an agent, there is a natural loyalty among judges who inevitably rely among one

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[197] see e.g. M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald, A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals* (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835; A. K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", *UC Davis Legal Studies Research Paper No. 158*, p. 273 et seq.

[198] Customary international law is advocated as one of the ways to formalize jurisprudence constance by M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules", in O.K. Fauchald and A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals*, (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835., p. 20-26 (talking about 'the most persuasive model for conceptualizing the developments [of jurisprudence constante]'. See also A. K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", *UC Davis Legal Studies Research Paper* No. 158, p. 278).

[199] see J. d'Aspremont, "Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order", in A. Nollkaemper and O. K. Fauchald (eds.), *Unity or Fragmentation of International Law: The Role of International and National Tribunals*, (Hart Publishing, 2011) (forthcoming), available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401019.

another across the boundaries of the legal system where they are instituted. This judicial fraternity is the result of the constant and abiding quest by judges for the preservation of the authority of their pronouncement. It is a self-explanatory fact which is not in need of external validation.

If one still feels the necessity to explain and validate the practice of *jurisprudence constante*, the multilateral character of the investment protection regime provides, in my view, a sufficient basis. In that sense, I concur with Stephen Schill for whom such a *jurisprudence constante* can be satisfactorily explained by the multilateralization of investment law.[200] If we understand international investment law as a system based on uniform standards and rationales – a feature certainly reinforced by virtues of MFN clauses, the cross-referencing by tribunals is an inextricable factual phenomenon which ought not to be apprehended through the lens of customary international law.[201]

In the light of the foregoing, I contend that the resort to customary international law to explain and validate *jurisprudence constante* is first an entirely vain endeavor. Besides being pointless, it is also, as was argued above[202], highly conceptually deficient and brings about severe distortions of the theory of customary international law. And, last but not least, constructions informed by customary international law come at a price in terms of normativity and authority of investment law as well as legitimacy of investment tribunals.

## 7. Concluding remarks: preserving the authority and efficacy of the investment protection regime short of customary international law

Judicialization of investment protection has been one of the greatest achievements of the investment protection regime over the last decades.

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[200] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 26; For a criticism of this position, see M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald and A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals* (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835, p. 26-27.

[201] S. Schill, *The Multilateralization of International Investment Law* (Cambridge, CUP, 2009), p. 372

[202] Cfr supra 5.

That success, however, remains contingent on several societal parameters. In particular, the current system's success and viability is deeply dependent on the preservation of the considerable powers conferred upon investment tribunals, which are themselves dependent on their ability to preserve their authority. The preservation of the authority of arbitral tribunals is what makes the question of the theory of the sources of investment law so cardinal. In other words, the crux of the theory of the sources of investment law is precisely the preservation of the legitimacy of cross-referencing practice of investment tribunals.[203] Theories of sources are necessarily conducive to ensuring the legitimacy and authority of judicial decisions.

It is against this backdrop that this chapter has challenged the idea that customary international law constitutes the adequate route when it comes to ensuring validity and legitimacy of *jurisprudence constante* as well as the harmonization of investment law. Preserving the authority of the judge – and hence the authority of the entire investment protection architecture, is better assured by virtue of a multilateralization through BITs than on the basis of illusive and judge-made customary standards of protection.

This – somewhat provocative – finding is surely not without shedding some light on another irony permeating the whole theory of customary law. Indeed, it does not seem unreasonable to claim that the general theory of customary international law necessarily calls for the existence of a judicial mechanism able to ascertain rules of a customary character.[204] Short of such judicial machinery, customary international law is bound to remain a galactic creation deprived of authority and beset by indeterminacy. At the same time, as this chapter has shown in the particular context of investment protection, customary international law has the potential to undermine the authority of those judicial authorities effectively applying it. In that sense, customary international law, when being part of the applicable law of

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[203] A. K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", *UC Davis Legal Studies Research Paper* No. 158, p. 274; M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules" in O.K. Fauchald and A. Nollkaemper (eds), *Unity or Fragmentation of International Law: the Role of International and Nationals Tribunals* (Hart Publishing, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835, p. 31.

[204] This is one of the argument I have made in J. d'Aspremont, *Formalism and the Sources of International Law* (OUP, 2011), especially chapter 7.

judicial bodies, corrupts the very institution which it needs to rely on to constitute a viable source of law. This theoretical irony surely contributes to further unearth the – well-known and oft-discussed – inconsistencies of the theory of customary international law. This few concluding remarks surely are not the place to engage with such uncontested flaws. Yet, nowhere are they more glaring than in the theory of the sources of investment law.