

FOREWORD

MICHAEL WOOD¹

Customary international law remains the bedrock of international law. Its merits and demerits as compared with that other great source of the law, treaties, have often been discussed. It used to be thought in some quarters that custom would cease to be important as treaties multiplied. In recent years, a number of writers have expressed the view that custom had become irrelevant in modern international law² But that was never a realistic view. As noted by Dinstein, ‘every once in a while, custom has a tendency to leap to the fore even within special fields of international law where it seemed to have ceded primacy to treaties long ago, thereby reminding the international legal profession that it is not just barely alive but is still pulsating with some intensity’.³ Even when whole areas of international law are codified in widely accepted international conventions, customary international law continues to play a vital role, as can be seen from the recent case-law of international and national courts and tribunals.

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

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

² See, *inter alia*: N.C.H. Dunbar, ‘The Myth of Customary International Law’, *Australian YIL* 8 (1983), p. 1; J. Patrick Kelly, ‘The Twilight of Customary International Law’, *Virginia JIL* 40 (2000), p. 449; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

³ Y. Dinstein, ‘The Interaction between Customary International Law and Treaties’, *Rec. des cours* 322 (2006), p. 262.

law'.⁴ He says that 'international investment law has now reached a stage of its development where the doctrine of sources can no longer be left in limbo and needs to be critically explored' in order for this field of law to 'rest on solid bases in terms of sources'.⁵ This is the aim of the present book.

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

Even in fields where there are widely accepted 'codification' conventions, the rules of customary international law continue to govern questions not regulated by the conventions and continue to apply in relations with and between non-parties. Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation.⁶

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

This book concerns the *formation* and the *identification* of rules of customary international law. The International Law Association (ILA) examined this question in 2000 (focusing on the issue of formation), in the context of public international law as a whole.⁷ More recently, the ILC

⁴ Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox', in T. Gazzini and E. de Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations* (Leiden; Boston: Martinus Nijhoff, 2012), p. 8.

⁵ *Id.*

⁶ International Law Commission, 'First Report on Formation and Evidence of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-fifth session, Geneva, 6 May-7 June and 8 July-9 August 2013, UN doc. A/CN.4/663, 17 May 2013, p. 20 [hereinafter referred to as ILC, First Report, 2013], p. 15. See also O. Sender and M. Wood, 'Custom's Bright Future: The Continuing Importance of Customary International Law', in C.A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press, forthcoming 2016).

⁷ International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law', Final Report of the Committee on the Formation of Customary Law, Conference Report London (2000).

decided in 2012 to include the topic 'Formation and Evidence of Customary International Law' in its programme of work.⁸ As ILC Special Rapporteur, I have so far produced three reports (2013, 2014 and 2015).⁹ These have been debated by the Commission, and the Drafting Committee has provisionally adopted a set of 16 draft conclusions.¹⁰ It is expected that the Commission itself will consider these draft conclusions, together with commentaries, at its session in 2016.

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

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

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

⁹ ILC, First Report, 2013; International Law Commission, 'Second Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-sixth session, Geneva, 5 May–6 June and 7 July–8 August 2014, A/CN.4/672, p. 13 [hereinafter referred to as ILC, Second Report, 2014]; International Law Commission, 'Third Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2014, A/CN.4/682 [hereinafter referred to as ILC, Third Report, 2015].

¹⁰ International Law Commission, 'Text of the Draft Conclusions Provisionally adopted by the Drafting Committee, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2014, 14 July 2015, A/CN.4/L.869 [hereinafter referred to as ILC, Draft Conclusions, 2015]. See also the 2014 and 2015 reports of the Chairman of the Drafting Committee, available on the Commission's website <http://legal.un.org/ilc/>.

¹¹ ILC, First Report, 2013, p. 6.

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

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

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

Sir Michael Wood
London,
October 2015

¹² ILC, Second Report, 2014, pp. 7–8. See also: ILC, Third Report, 2015, p. 7.