

GOVERNING THROUGH CUSTOMARY  
INTERNATIONAL LAW?\*

*¿GOBERNANDO A TRAVÉS DE LA  
COSTUMBRE INTERNACIONAL?*

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## ABSTRACT

This article analyzes how the international law on foreign investment can bring radical changes in the positivist paradigm which has prevailed so far regarding the formation of customary international law. These changes are of particular importance not only from a theoretical perspective, but they also become more relevant when the international law on foreign investment is considered as a structure of global governance which has deep repercussions over the administrative practices of states and the way they choose how to regulate their relations with their citizens. Therefore the article aims to make an assessment on the legitimacy problems inherent in the paradigm's change of the formation of customary international law and the correlative legitimacy problems that arise on the domestic administrative practices sphere.

**Keywords author:** International Law on Foreign Investment, Global Governance, Customary Law.

**Key words plus:** Derecho Consuetudinario, Derecho Internacional, inversiones extranjeras, legislación, globalización.

## RESUMEN

*Este artículo analiza cómo el Derecho Internacional de la Inversión Extranjera puede impulsar cambios radicales en el proceso a través del cual la costumbre se cristaliza como fuente de Derecho Internacional. Estos cambios importan no solo desde una perspectiva teórica, sino qué, se tornan mucho más relevantes cuando esta rama específica del Derecho Internacional se entiende no solo como un régimen legal sino también como una estructura de gobernanza global que tiene profundas repercusiones sobre las prácticas administrativas de los Estados y la forma en que éstos eligen regular las relaciones con sus ciudadanos. De esta forma el artículo pretende hacer una valoración sobre los problemas de legitimidad inherentes, no solo sobre los procesos de formación de la costumbre internacional, sino también sobre las prácticas administrativas nacionales.*

**Palabras clave autor:** *Derecho Internacional de la Inversión Extranjera, Gobernanza Global, Costumbre Internacional.*

**Palabras clave descriptor:** *Customary law, international law, investments, Foreign, Legislation, globalization.*

## SUMARIO

INTRODUCTION I. THE BASICS OF THE INTERNATIONAL LAW OF FOREIGN INVESTMENT II. OPENING THE DOORS FOR CORPORATIONS IN THE FORMATION OF CUSTOMARY LAW III. INVESTMENT TRIBUNALS AS A STRUCTURE OF GLOBAL GOVERNANCE IV. LEGITIMACY CONCERNS REGARDING THE FORMATION OF CUSTOMARY LAW ON THE LAW OF FOREIGN INVESTMENT A. The role of Corporations in the formation of customary law B. The ad hoc nature of Investment Tribunals- CONCLUSIONS

## INTRODUCTION

The international law on foreign investment is an important growing discipline in the realm of international law<sup>1</sup> It also presents certain features on its structures, institutions and substance that make it particularly different from other fields of international law. These unique characteristics may pose a challenge on the traditional paradigm of the formation of customary international law albeit raising significant questions regarding its legitimacy and effects. The possible existence of a set of customary norms in the field of the international law on foreign investment matters not only as a theoretical question related to the formation of customary law and the role that actors different from states may play on it<sup>2</sup>, but becomes more relevant when one understands this field of international law not only as a dispute settlement mechanism, but as Kingsbury and Schill argue, a structure of global governance<sup>3</sup>.

This article has two different purposes: the first is to show and explain how the positivist paradigm that considers states as the only actors capable of forming customary law could be challenged by allowing foreign investors –a.k.a Corporations– to enter the customary-law-making process. The second purpose is to point out some concerns regarding the legitimacy of a hypothetical –but not too far stretched– scenario in which an investment tribunal declares the existence of a customary norm and the possible effects this would have on the margin of appreciation that states have regarding the design and implementation of their domestic policies.

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1 See, R. McCorquodale, *The Individual and the International Legal System*. International Law 319 Malcolm Evans Ed., Oxford University Press, Oxford. (2006).

2 On other ways in which Corporations might play a role on the International Law Making Process See Lowe, Vaughan. *Corporations as International Actors and International Law Makers*. Italian Y.B. Int'l L. No. 14, 2004.

3 See, Kingsbury, Benedict and Schill, Stephan W. *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* NYU School of Law. Public Law Research Paper No. 09-46, September 2, 2009. Available in: <http://ssrn.com/abstract=1466980>

Part I will be an introduction to the very basics of international law on foreign investment. Part II will show how—at least in theory—corporations could play a role on the customary-law-making process posing a challenge to the traditional way in which customary law has been formed under public international law. Part III will explain Kingsbury’s argument about how the work done by the arbiters of the international investment tribunals is part of a structure of global governance which has wider effects that transcend the parties involved in the dispute and that sets standards regarding state’s administrative practices. Part IV will point out some concerns regarding the legitimacy of a decision which declares the existence of a customary norm on the field of international law on foreign investment taking into account particular features of the structure of the investment tribunals and Kingsbury’s and Schill’s argument which considers them as a structure of global governance.

## I. THE BASICS OF THE INTERNATIONAL LAW OF FOREIGN INVESTMENT

International law on foreign investment can be interpreted as a response to two different but coexisting interests framed on an era where free flow of goods, persons, services and capital is part of everyday life: the protection of the investments made by the private investors from capital exporting countries, and on the other hand, the requirement of the capital importing countries to retain control of certain key areas of their industries whenever they consider it necessary for public interest<sup>4</sup>.

International investment treaties can be bilateral or multilateral. They are concluded by states and are regulated by international law<sup>5</sup>. Their main purpose is to promote investment

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4 Loibl Gerhard, *International Economic Law*, in *International Law*, P. 708. Michael Evans, Ed., Oxford University Press, Oxford. (2006).

5 Article 42 of the International Center for Settlement of Investment Disputes (ICSID Convention) reads “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on

between the states that conclude it. Both states party to the treaty are at the same time “host state” –that is when they are receiving a foreign investment– and “home state” –that is when the foreign investor has its office registered on its territory and it is making an investment on the other state party to the treaty–. In this sense, all states party to an investment treaty have the same set of obligations. Therefore in some cases they will be considered as host state and in others home state. Although, it is very probable that on a treaty signed by a developed country and a third world or developing country, the host state in almost all the cases will be the third world country.

Each treaty contains different dispositions and the definition of “investment” can differ between them. Therefore the protection granted to it and the rights and obligations of the states that become party to a treaty differs from one treaty to another<sup>6</sup>. Although treaties between states may diverge on specific ways, a common set of obligations might be identifiable amongst the majority of them.

Generally the host state –the state that is receiving the foreign investment– is required to grant a certain standard of treatment to all foreign investors who have their office registered in one of the states party to the investment treaty. This standard of treatment comprises a national standard of treatment –this means that the foreign investment will receive the same treatment that domestic investment receives–, a fair and equitable treatment and a most-favored-nation treatment (same concept as in GATT, General Agreement on Tariffs and Trade). Host states are also normally required to allow the repatriation of profits in the

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the conflict of laws) and such rules of international law as may be applicable.”The IC-SID Convention is a procedural Convention that sets up the procedure for settlement of disputes through arbitration, this means that it does not contain substantive rules about the obligations of the parties, but only rules regarding procedural and formal aspects when a dispute is going to be solved thru an investment tribunal. Although International Organizations can also conclude treaties there are not Investment treaties between an International Organization and a State.

6 For an overview of the definition of investment see, Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*. P. 7-18. Cambridge University Press, Cambridge (2003)

home state of the foreign investor<sup>7</sup>. Although nationalizations of foreign property are now permitted when the host state pursues a public purpose and does it on a non-discriminatory basis host states must pay compensation to the foreign investor<sup>8</sup>. Nowadays most investment treaties contain a clause related to the resolution of disputes. Usually this clause allows the foreign investor to initiate proceedings before an ICSID tribunal when both states are parties to the ICSID Convention or to the Uncitral Convention on rules of arbitration<sup>9</sup>.

But who is in reality the “foreign investor”? This is the novelty on the international law on foreign investment. Foreign investors are most of the times corporations that have its offices registered on one of the states party to the investment treaty –in this case the home state–. So under the law of foreign investment a private party –for example a corporation– has the right to pursue claims under an international treaty celebrated between states<sup>10</sup>. Under these circumstances in case there is an alleged breach of the treaty it is not necessary for the home state –the state where the corporation that is making a foreign investment has its office registered– to bring the legal claim against the host state –the state that receives the foreign investment– as occurred on the *Barcelona Traction Case*<sup>11</sup> or in the *ELSI Case*<sup>12</sup> both of them

7 Supra fn 3, P. 233-236; see also Supra fn 3 P. 711.

8 While some states, particularly capital exporting States have argued in favor of a “prompt, adequate and effective compensation” which would require the full payment of the asset that was taken over, developing countries have argued in favor of an “appropriate compensation” in which the payment of the compensation would take into account other factors such as the profits made by the investor and the duration of the time in which the investor profited. See Supra fn 3, P. 241.

9 As Loibl observes “ICSID is not a tribunal itself, but rather a framework within which arbitration and conciliation can occur” P. 713 Supra fn. 3. Article 25 of the ICSID Convention reads “The jurisdiction of the Centre shall extend to any legal dispute arising out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the disputes consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

10 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*. P. 119. The International Center for Settlement of Investment Disputes, Martinus Nijhoff Publishers, The Hague. (1995).

11 *Barcelona Traction, Light and Power Company, Limited (Belgium V. Spain)*, Second Phase, Judgment, 1970 ICJ Reports 3; See also Supra fn 2 P. 23.

12 *Elektronica Sicula SpA (ELSI) (USA v. Italy)*, ICJ Reports, 1989, p. 15.

before the International Court of Justice. As McCorquodale rightly states “In international economic law, as with human rights law, it is the State that enables the individual to bring a claim either by ratifying the relevant treaty and/or through a contract agreed specifically by the State with the individual”<sup>13</sup>. This special feature present only on this field of international law might entitle individuals, or more specifically, corporations to participate in the formation of customary norms.

## II. OPENING THE DOORS FOR CORPORATIONS IN THE FORMATION OF CUSTOMARY LAW

Article 38 of the Statute of the International Court of Justice lists the sources of international law. In view of Boyle and Chinkin this article

*assumes States to be the primary actors in international law-making and gives no indication of the ways in which non-state entities impact upon this function. Although States enter into binding agreements with non-state entities, treaties are defined as legal agreements between States, or between States and international organizations or international organizations inter se; state practice and opinio juris are the constitutive elements of customary international law; general principles of law are gleaned from the domestic legal system of States. In the traditional schema of sources the contribution of non-state actors is recognised only with respect to the subsidiary sources: the writings of publicists<sup>14</sup>.*

Under this positivist approach states are the main actors on international law and any international norm would require state’s consent –explicitly or implicitly– in order to come into existence. Although being a theory amongst others, the positivist view gained important support from the Permanent Court of International Justice in the *Lotus Case* where it stated “the rules of law binding upon States [...] emanate from their own free will

<sup>13</sup> Supra fn. 1, P. 320

<sup>14</sup> Boyle Alan and Chinkin Christine, *The Making of International Law*. P. 41. Oxford University Press, Oxford, (2007).



[R]estrictions upon the independence of States cannot therefore be presumed”<sup>15</sup>.

In this sense when a judge from an international court or tribunal must find out if there exists a customary law granting a right or imposing a duty to the parties in dispute it exclusively focus on the “established, widespread and consistent practice on the part of *States*; and a psychological element known as *opinio iuris*”<sup>16</sup> (Emphasis added).

Although applicable to all the different fields of international law, custom develops in a particular way in the international law on foreign investment. Even though treaties are signed by states the material practice that arises from the movements of investments in the states that are party to the treaty normally takes place not between two states, but between the host state and a corporation or a private party from the home state. The relation between the two sovereign states ends once they conclude the treaty; afterwards each State will deal individually with its foreign investors. As Loibl observes

*ICSID has been used to solve a growing number of investment disputes [...] This has helped to depolitize conflicts between capital exporting and capital importing countries since the home State of the foreign investor is no longer drawn directly into the dispute, and it is left to the investor and the host country to settle their differences by judicial means*<sup>17</sup>.

If the daily practice and flow of investment is not between states but between a host state and a foreign investor the established, widespread and consistent practice and *opinio iuris* must also be seek in the foreign investor. This scenario is not too far stretched. In fact Thomas Walde’s Separate Opinion in the International Thunderbird Gaming v. Mexico judgment under NAFTA treaty considers this option plausible:

15 The Lotus Case (France v. Turkey) 1927 PCIJ ser. A no. 10 (judgment of 7 september) at 18.

16 Hugh Thirlway, *The Sources of International Law*. P. 122. Malcom Evans, Ed., Oxford University Press, Oxford. (2006).

17 *Supra* Fn. 3 P. 714

*While individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected. A deviation from well and firmly established jurisprudence requires an extensively reasoned justification. This approach will help to avoid the wide divergences that characterize some investment arbitral awards – not subject to a common and unifying appeals' authority. Otherwise, there is the risk of discrediting the health of the system of international investment arbitration which has been set up as one of the major new tools in improving good governance in the global economy. But it also is also mandated by the reference to applicable rules of international Law (Art. 1131 NAFTA) and thereby Art. 38 of the Statute of the International Court of Justice: An increasingly continuous, uncontested and consistent modern arbitral jurisprudence is part of the authoritative source of international law embodied in "judicial decisions" (Art. 38 (1) (d)) and will develop, with an even greater legally binding effect, into "international custom (Art. 38 (1) (b)), in particular as an arbitral jurisprudence defines in a contemporary treaty and factual context the "general principles of law" (Art. 38 (1)(d))<sup>18</sup>.*

It is clear that the jurisprudence that Walde is referring to is the jurisprudence that stems from cases that involve a dispute between foreign investors –a.k.a Corporations– and a state. Therefore, the customary norm to be found by the investment tribunal would be one based on the practice and *opinio iuris* of both the host state and the corporation or foreign investor. In this same line Lowe observes:

If, for example in the course of US-Mexican claims concerning the treatment of the property of foreign nationals, claims are put forward and accepted by States, we say that the process –to the extent that it reflects an international consensus, at least– generates customary international law. Why should we not say so if the claim is made or accepted in the course of dealings between companies and States?<sup>19</sup>

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18 Separate Opinion by Thomas Walde, P. 16 *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL/NAFTA), Award of 26 Jan. 2006

19 *Supra* fn. 2 P. 24

### III. INVESTMENT TRIBUNALS AS A STRUCTURE OF GLOBAL GOVERNANCE

On their paper “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law”<sup>20</sup> Kingsbury and Schill use a basic premise which holds that Investor-State arbitration is not only a dispute settlement mechanism, but also “a form of global governance that involves the exercise of power by arbitral tribunals in the global administrative space”<sup>21</sup>. In their view, although these tribunals do not have a precedential authority, in deciding a case they might set up standards that may influence not only the future conduct of the respondent state directly involved in the case, but also the conduct of other states which might adequate their administrative practices to the standards set up by the tribunal and the legal reasoning of future investment tribunals dealing with a similar case. In this sense, the responsibility that lies on the arbiters goes beyond the effects that affect the parties involved in the case

Investor-State arbitral tribunals implement broadly phrased international standards set out in very similar terms in many investment treaties, and concretize and expand or restrict their meaning and reach through interpretation, so that they increasingly define for the majority of states of the world standards of good governance and of the rule of law that are enforceable against them by foreign investors. [...] The standards thus reinforced or created by arbitral tribunals reflect general principles for the exercise of public power that are applicable not only to state conduct, but likely will be applied over time, *mutatis mutandis*, to the activities of arbitral tribunals themselves. Investor-State arbitration is thus developing into a form of global governance<sup>22</sup>.

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20 *Supra* fn. 3 P. 1

21 *Ibid.* P. 1

22 *Ibid.* P. 1

In few words, what Kingsbury and Schill argue is that although their explicit purpose is simply to decide each case on an individual basis, reality is that investment tribunals end up working as public policy reviewers which create global standards that might be applicable to all countries limiting the margin of appreciation that each state has regarding the treatment they give to foreign investment<sup>23</sup>.

#### IV. LEGITIMACY CONCERNS REGARDING THE FORMATION OF CUSTOMARY LAW ON THE LAW OF FOREIGN INVESTMENT

Taking as a premise the argument held by Kingsbury and Schill, one could think about an hypothetical decision in which an investment tribunal declares that the payment of a compensation for a nationalization of a foreign investment must be prompt, adequate and effective is a customary norm (leaving aside the other thesis argued by capital importing countries which holds that compensation must be “appropriate” which would mean that the payment of the compensation would take into account other factors such as the profits made by the investor and the duration of the time in which the investor profited). Because the decision would impact the future of all cases and also the administrative practices of states diminishing their margin of appreciation as Kingsbury and Schill argue it is very possible that this decision would be object of multiple critics regarding its legitimacy at least in two aspects relevant on the law of foreign investment: 1) the role of corporations in the formation of the custom; and 2) the ad hoc nature of the tribunals.

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23 Of course Kingsbury's and Schill's argument is not limited to that observation. They suggest using certain principles from the Global Administrative Law discipline in order to satisfy the demands of legitimacy posed over the decisions of the investment tribunals. Particularly, they suggest the use of the proportionality test.

*A. The role of Corporations in the formation of customary law*

As explained above the formation of a customary norm in the field of international investment law would require both the material practice and *opinio iuris* of the host state and the foreign investor. Because corporations are legal entities which main –and possibly only– end is to make profit and because their employees and directors are not publicly accountable before civil society but only before their shareholders for the way in which they manage the assets of the corporation, there are clear reasons to fear the way in which they may influence the formation of laws that will have effects over a larger constituency. On the contrary the heads of state or legislators are held accountable for their actions before civil society through democratic elections or by other means established on the law of each country. As Sornarajah observes:

*Multinational Corporations also wields significant power to shape the law on foreign investment to their advantage. Quite apart from wielding influence on their home states to ensure foreign investment protection. They are also able independently to influence the making of legal norms. Their role is an illustration of the fact that private power can be used to formulate norms with claims to be principles of international law” and in regards to the accountability of their actions in international law he fairly stresses “The charge that the law purposefully hides the role of the multinational corporations, yet vests rights in them, but avoids the issue of their responsibility, is one that is difficult to avoid”<sup>24</sup>.*

Opening the doors to the international law making process to non-state actors has always been a problematic and hotly debated topic. The entrance of NGO’s –a non state actor with a more “friendly” and in certain degree “noble” reputation in civil society than corporations– into the international law making process has been not exempt from critiques due to some features also shared or even more accented on corporations. As Chinkin and Boyle observe:

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24 Supra Fn 5. P. 66-69

*Nevertheless caution is required against assuming the democratization of international law-making through NGO participation. [...] Some of the areas of concern are the following. NGO's are often non-democratic, self-appointed, may consist of only a handful of people and determine their own agendas with an evangelical or elitist zeal. Their internal decision-making processes may not be transparent and are often concealed within a deluge of information. NGO's do not have to address the full range of options that must be considered by state elites but can limit themselves to their own, often limited or even single issue, concerns<sup>25</sup>.*

It could be argued that powerful states have been reluctant to accept NGO's into the international law making process since some of their claims clash with the interests of world superpowers as was the case with the United States in the International Criminal Court statute or China and Russia on the Landmines Convention<sup>26</sup>, but that they could be more enthusiastic about letting corporations become a customary law maker since most of the big corporations are on the north hemisphere and most of foreign investment goes north-south so in this sense, at least at first glance, one could think that the interests of powerful states coincide with the interests of big corporations.

Nonetheless as Sornarajah highlights:

*The old distinction between capital-importing and capital exporting countries was also becoming diffused. Europe and the United States are now among the largest recipients of foreign investments. [...] One feature of the law is that developed states are undergoing experiences that were in the past confined to developing states. The UK and Canada changed petroleum contracts by legislation on the ground that these had become disadvantageous to state interests. The United States has legislation controlling the influx of foreign investments which raise national security concerns. [...] The extent of the litigation brought under the investments provisions of NAFTA have subjected the developed states to the same experience of having to defend regulatory policies before foreign tribunals that developing countries have been subjected too.*

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25 P. 58- 59

26 See Supra Fn 14 P. 96

Under these circumstances is then possible to say that corporation's interests will not necessarily match powerful state's interests, therefore it would be feasible to assume that that states would want to remain as the unique customary-law-makers.

### *B. The ad hoc nature of Investment Tribunals*

All investment disputes arising from bilateral or multilateral investment treaties are solved through ad hoc tribunals usually conformed by three arbiters chosen by the parties<sup>27</sup>. Although there is no precedent rule on the law of foreign investment if a tribunal declares the existence of a customary law on the discipline, all future tribunals would have to apply the norm since it would be a source of international law recognized in article 38 of the International Court of Justice Statute.

Deciding what is and what is not a customary rule is a complicated task for any court. As Kammerhofer points out, there are many reasons why there exists so much uncertainty about what constitutes customary law:

*there is considerable disagreement among international lawyers as to the scope and formation of customary law [...] Sometimes law cannot be concretized in a sufficient manner to make it work in practice. This 'ino-perationalizability' of certain formulae which scholars happen to generally agree on can be seen clearly in the case of the quantity of state practice needed to constitute a behavioural regularity sufficient to constitute the material element. [...] Very often, uncertainties simply refer us to hierarchically higher —legal theoretical— questions. The difficulty of arguing for or against the relevance of acts and statements as state practice, for example, results from the unsolved question of the nature of state practice<sup>28</sup>.*

Solving all the problems present in the formation of customary law is a highly difficult task. Nonetheless, it could be argued that the existence of a single and permanent court with judges

27 See i.e ICSID Convention Art. 37, and NAFTA Chapter 11 rules

28 Kammerhofer, Jörg. Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems. *European Journal of International Law*, Vol. 15 3, 2004.

elected by all the countries that granted jurisdiction to it might raise less legitimacy concerns than ad hoc tribunals as the ones that operate on international law on foreign investment. As Bower points out

*[...] creative lawmaking by unrepresentative tribunals seems undemocratic and almost certain to yield unpedigreed outcomes. [...] Ad hoc tribunals based on the commercial arbitration model also create legitimacy concerns due to their perceived failure to conform to historical practice and to incorporate fundamental values of the governed community<sup>29</sup>.*

As was mentioned before, the ad hoc tribunal decision and its effects would not be considered illegitimate for the parties involved in the dispute since the investment tribunals do not use—at least formally—any judicial precedent; nonetheless, if an ad hoc tribunal declares the existence of a customary norm the decision would affect all other states, including states that receive foreign investment but are not party to any investment treaty. In this case the foreign investor could argue the existence of a customary norm that grants him a specific right—which finds its legal basis not on a treaty but just on the practice and *opinio iuris* of some states—and could bring its case to the International Court of Justice with the help of his home country as was done on the Barcelona Traction Case and in the ELSI Case.

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29 Bower, Charles. Structure, Legitimacy and Nafta's Investment Chapter. *Vand. J. Transnat'l L.* 38, 2003.



## V. CONCLUSIONS

As has been explained throughout this essay the unique features of the international law on foreign investment may open a path for changing the paradigm under which customary law has been understood and created since international law inception. To look for the existence of a customary norm in the practices that occur between a foreign investor and a state is not only a relevant theoretical question concerning the sources of international law. As Kingsbury and Schill argue, the decisions of investment tribunals are part of a structure of global governance. By setting standards of treatment for foreign investors, investment tribunals are shaping the administrative practices of states. They are telling them how they must behave, how might they react to certain events. Administrative decisions which in principle could be regarded as an autonomous expression of the sovereignty of states are being dictated now by international ad hoc investment tribunals.

Declaring the existence of a customary norm in this specific of international law field might be a decision subject to many critiques regarding its legitimacy and future legal effects. However to argue that this customary norm will prescribe the future conduct of all states in the field of foreign investment and that state's administrative practice will have to be in absolutely accordance with it unless a new customary norm emerges raises the most complex and problematic issue of the legitimacy of a global governance exercised by unaccountable actors.

Whether global or national, the purpose and exercise of government is to respond to different problems in different times and ways. Government requires flexibility in the means it uses to fulfill its aims; it might also require some freedom for establishing priorities amongst the ends it seeks to achieve. Also, the means a government uses are carefully observed whether by the public opinion or by a formal institution which decides the "legality" or simply the practical convenience of the decision adopted by the government. Governments try to conceal different conflicting in-

terests in order to reach a fair and workable solution. How much of these requirements can be satisfy by declaring the existence of a customary norm with all the consequences stated above? Will States have any margin of appreciation to design and apply their public policies if there is a customary norm obliging them to act on a specific way on such a sensible topic such as foreign investment? Who determines if the standard set, or the obligation contained on the customary rule is “fair”? Is there any technical justification besides the decision of the tribunal? Can the words “government” –which resembles constant activity, change and quick response– and “immutability” –which resembles custom, tradition and affection for the old– coexist? Can there be global governance sustained on customary law?

As was explained above the work of investment tribunals is by itself flawed by some legitimacy deficits inherent to its structure, and as Kingsbury and Schill argue, this tribunals require some tools or mechanisms –such as the use of the proportionality test as a principle of Global Administrative Law– to justify their decision. Some of these mechanisms might help to guarantee the legal outcomes of their work, but probably will not suffice to justify the decrease of the margin of appreciation of states by declaring the existence of a customary norm.

It seems then that the formation of a customary law on the law on foreign investment is a process that might be best to keep exclusively on the hands of states so the norms will be backed up not only by the legitimacy that derives from the free will of the states – although there has always been critics to how customary law is created and enforced against states which have not expressed their will – but also by the purity of their pedigree as keeping them as far as possible from the interests of private actors which are not accountable to the civil society.

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- International Thunderbird Gaming Corporation v. The United Mexican States, Separate Opinion by Thomas Walde, UNCITRAL/NAFTA, 2006.
- The Lotus Case, (France v. Turkey) Permanent Court of International Justice, 1927.

## CONVENTIONS AND TREATIES

Convention on the Settlement of Investment Disputes between States and Nationals of Other State.

North American Free Trade Agreement.