much on the side of history to reach the full potential of an approach to international law's past that is more social sciences oriented; however, such an approach does promise much more insight into how international law operates in practice. In that sense, *Balance of Power and Norm Hierarchy* is a valuable example of a disciplinary merger still in its infancy.

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Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge, United Kingdom: Cambridge University Press 2016, 496 pp, ISBN 9781107138520
doi:10.1017/S0922156517000115

The question of the formation and identification of customary international law has captured the imagination of scholars and decision-makers alike. Almost a century after its inclusion in the Statute of the Permanent Court of International Justice and despite the proliferation of international treaties as the preferred method for creating international law, custom continues to be the centre of debates. In 2012, the International Law Commission (ILC) placed the topic of the formation and evidence of custom on its programme of work and has since generated four reports, including a set of draft conclusions. The Sixth Committee debates of the ILC Draft Conclusions and the comments received by Governments highlight the continuing relevance of custom in modern international law, but also the veil of uncertainty surrounding its formation and identification. While this topic continues to generate numerous monographs and articles in general international law, its study in the area of investment law has been much less prolific. Indeed, Dumberry's contribution is the first monograph on the topic, filling a gap in the literature and providing a much-needed academic discourse on a topic tackled in a cursory manner by the majority of investment arbitral tribunals. As observed by d'Aspremont, 'investment law has now reached a stage of its development where the doctrine of sources can no longer be left in a limbo and needs to be critically explored'.[1]

At first glance, it would appear that investment law is dominated by treaties, given the web of over 4,000 bilateral and multilateral economic agreements setting out the standards of investment protection and giving a right to recourse before an international arbitral tribunal. However, there are issues central to the resolution of all investment disputes that continue to be governed by customary international law, including the rules on interpreting investment treaties, the law on state responsibility triggered in case of a violation, as well as the basic tenets of state sovereignty. The

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[1] J. 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* (2012), 5, at 8.

continuing, if not growing, importance of custom in investment law is evidenced in the recent debates concerning the power of states to regulate to protect the public interest even where this might negatively affect investor interests. As confirmed by the distinguished tribunal in *Philip Morris* v. *Uruguay*, this so-called 'police powers' doctrine has evolved into a rule of custom which ought to be taken into account when interpreting the provisions of the applicable bilateral investment treaty (BIT), even in the absence of express language to this effect.[2] Accordingly, the study of custom in the area of investment is both timely and pertinent.

Dumberry's monograph aims 'to provide a comprehensive analysis of the phenomenon of custom in the context of international investment law',[3] focusing on the questions of how custom is created and how it is to be identified. In essence, this focus corresponds to the Second Report of the ILC Special Rapporteur on Custom, which identified but left open the questions as to whether, 'there are different approaches to the formation and evidence of customary international law in different fields of international law' and 'to what degree different weight may be given to different materials depending on the field in question'.[4] To answer these questions, Dumberry assesses a considerable amount of quantitative data, including BITs, model BITs, domestic laws, letters of submittal, investment claims and arbitral awards. He successfully demonstrates that, 'the *identification* of the different manifestations of State practice necessary for the formation of custom is *not* the same in investor-State arbitration as in international law'.[5] The return to and study of the actual sources evidencing state practice and *opinio juris* is one of the great strengths of the book, which manages to resist the temptation of using shortcuts 'to other sources that supposedly have already "found" custom'.[6]

The book is organized into five substantive parts. They all begin with a review of the key debates on sources in international law before applying and assessing them in the specific area of investment law. While methodologically sound, this approach entails some repetition of well-known international law debates without adding much new analytical discourse to them. The originality of the book lies in applying the well-established tenets of international law to the specific field of investment and the drawing of comparisons and contrasts between the two.

The first part of the monograph revisits the concept of custom in general international law, recalling the key scholarly debates and endorsing the 'traditional' approach regarding the 'double-requirement' of state practice and *opinio juris*. It affirms the relevance of the double-requirement in investment law by reference to the pleadings of states and the awards of the arbitral tribunals in investment arbitrations, as well as to BITs. After surveying numerous arbitral awards, Dumberry raises the justified criticism that, '[i]nvestment tribunals have generally failed in their task

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2 *Philip Morris Brands Sarl et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 290–301.

3 P. Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016), 1.

4 ILC Special Rapporteur Sir Michael Wood, Second Report on Identification of Customary International Law (2014), UN Doc. A/CN.4/672, at 11, 14.

5 Dumberry, *supra* note 3, at 9.

6 A. Roberts, 'Custom, Public Law and Human Rights Analogy', *EJIL:Talk!*, 14 August 2013, available at www.ejiltalk.org/custom-public-law-and-the-human-rights-analogy.

https://doi.org/10.1017/S0922156517000115 Published online by Cambridge University Press

of properly revealing the existence of customary rules',[7] relying heavily on the findings of other investment tribunals and scholars rather than directly assessing the constituent elements of custom.

The second part analyzes the continued relevance of custom against the background of the 'treatification' of investment law. To this end, Dumberry traces the origins and development of two core standards of investment protection: the minimum standard of treatment and the prohibition against expropriation without compensation. The author concludes that both standards are now firmly embedded in custom in light of the state practice displayed in pleadings and BITs, as well as the *opinio juris* expressed in letters of submittal and in the acts of international organizations, including the OECD, the UN and UNCTAD. While it is true that the pleadings of states should be assessed with caution when treated as evidence of state practice, Dumberry's approach seems to be in line with that adopted by the ILC in its report on the Identification of Customary International Law.[8] The treatment of BITs as evidence of state practice, however, is more problematic. It is the conduct of states in connection with treaties, such as their negotiation, conclusion and implementation that may qualify as practice, rather than the treaties themselves.[9] As cautioned by the ICJ, the fact that BITs commonly include very similar provisions is not evidence of custom as 'it could equally show the contrary'.[10]

The third part is probably the most important contribution of the book to the field. It assesses the specific manifestations of state practice in investment law, using as case study the status of the fair and equitable treatment standard (FET). The author tackles the key questions regarding the conditions under which provisions of BITs can transform into custom and the weight to be given to the conduct of the different branches of the state, especially when they conflict with each other. Dumberry also looks at the evidentiary value of the various statements of states, including pleadings, non-disputing party interventions, joint interpretative declarations, letters of submittal to the legislature and model BITs, placing special emphasis on the acts of the executive as representative of state practice. He argues convincingly that all evidence of state practice should be assessed in light of its internal uniformity, consistency and, somewhat controversially, the self-interest of the state. Dumberry rightly discounts the relevance of investor practice and of arbitral awards as direct evidence of the formation of custom. With respect to state practice in relation to FET, the author observes that, 'while the practice of States of including FET clauses in their BITs is general, widespread and representative, it remains that it is not uniform and consistent'.[11] This, coupled with the absence of FET in a number of domestic laws, leads the author to conclude that the numerous references to FET in BITs have

7 Dumberry, *supra* note 3, at 47.
8 'Identification of Customary International Law', Report of the ILC 68th session (2016), UN Doc. A/71/10, at 92, para. 5.
9 Ibid.
10 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, [2007] ICJ Rep. 582, at 615, para. 90.
11 Dumberry, *supra* note 3, at 185.

https://doi.org/10.1017/S0922156517000115 Published online by Cambridge University Press

not generated custom and, more generally, that the thousands of BITs taken together are not capable of crystallizing 'new' custom in investment law.

Part four, which is significantly shorter than the previous part, studies the identification of *opinio juris*, acknowledging that, so far, this element of custom 'has only played a minimal role' in investment arbitration.[12] Dumberry argues that *opinio juris* is the critical ingredient for the transformation of common BIT provisions into custom, emphasizing its absence in relation to the FET standard. As to the evidence of *opinio juris* in the area of investment, the author identifies pleadings, letters of submittal to the legislature, as well as the practice of national courts as relevant formulae in BITs clarifying the shared understanding of the parties. The author is justified in discounting the web of BITs as direct evidence of *opinio juris*, given the lack of consistency in their content and scope.[13] He also argues that economic self-interest is the main reason why states enter into BITs, rather than any sense of legal obligation.

The final part presents an overall evaluation of the role of custom in the increasingly 'treatified' area of investment law. Not surprisingly, the author advocates for the continued, if not increasing, relevance of custom based on its applicability in the absence of a BIT, the express references to custom in some BITs, its importance as an interpretative tool and finally, its gap-filling role. Dumberry goes too far, however, in suggesting that customary rules should apply to all investment disputes, be they under BITs, state contracts or domestic laws, irrespective of the choice of applicable law therein.[14] He also argues without sufficient theoretical justification that the concept of persistent objector has no place in investment law due to the danger of undermining the coherence of the system and having minimum standards of investment protection in all states and at all times. However, these extra-legal policy considerations are hardly sufficient to displace an otherwise well-established doctrine of general international law in respect of custom.

In conclusion, the monograph mostly succeeds in its goal to provide 'the essential tools that are necessary for stakeholders to assess any claim of the existence of a customary rule' in the field of investment.[15] Its conclusions on the specific manifestations of custom in investment law are, on the whole, well supported by the systematic analysis of a significant amount of evidence of both state practice and *opinio juris*, although some aspects of the methodology used can be open to challenge. Finally, the theoretical engagement with the interplay between the multitude of investment treaties and custom makes a valuable contribution not only to the scholarship in investment law, but also more generally to the theory of sources in general international law.

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[12] Ibid., at 293.
[13] Ibid., at 334.
[14] Ibid., at 373–82.
[15] Ibid., at 410.

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https://doi.org/10.1017/S0922156517000115 Published online by Cambridge University Press