The Strange Vitality of Custom in the International Protection of Contracts, Property and Commerce

Chin Leng Lim, University of Hong Kong
Large parts of the international economic order remain governed by “soft laws,” with the more notable exception of international trade and investment regulation.¹ But because the trade and investment areas have been the result of treaty lawmaking, the role of custom has become concealed under a patchwork of treaty rules. Out of sight, custom is not only out of mind, but its utility is scorned. In other areas, such as the immunity of states from commercial claims, a combination of treaty, custom, and national laws has filled the gap in public international law regulation. By shifting attention from lawmaking to international economic law’s “adjudicative aspects,” this chapter intends to, first, defend custom’s continued importance in international economic law, particularly in the arbitral interpretation of investment treaty clauses, that is, in the protection of property and contracts.² In contrast, custom’s potential role in respect of trade-related treaty clauses is still largely unrealized.³ The chapter proceeds to discuss how questions about foreign sovereign immunity to commercial claims has been the result of minute domestic lawmaking, which in turn fashions detailed customary rules that are fleshed out in even greater detail by domestic courts. These illustrations from the trade, investment, and commercial spheres illustrate some of the ways in which custom continues to be useful, whether or not custom is as fully utilized – as in the trade area – as it should be.

¹ This is also true in the field of international monetary cooperation, see C. L. Lim, “‘The Law Works Itself Pure’: The Fragmented Disciplines of Trade and Monetary Cooperation, and the Chinese Currency Problem,” in INTERNATIONAL ECONOMIC LAW AFTER THE GLOBAL CRISIS: A TALE OF FRAGMENTED DISCIPLINES (C. L. Lim & Bryan Mercurio eds., 2015).

² There is some comfort to be drawn from the fact that the chapter does not tread entirely new ground. International investment lawyers especially have paid particularly close attention to the fact that the investment law field may not be reducible to the workings of investment treaties, viewed in clinical isolation from general international law. See, especially, José E. Alvarez, “A BIT on Custom,” 42 NYU J. INT’L L & POL’Y 17, 76 (2009) (drawing on Andreas Lowenfeld’s earlier work).

³ See Tomer Broude, “Nothing to Declare: The Silence of Custom in International Trade Law” (manuscript, on file).
Second, this chapter responds to current criticisms of custom’s supposed deficiencies in making new international law, particularly in global economic regulation. It argues, against the grain of the current literature, that (i) custom is at least as susceptible as treaties to detailed customization in design, (ii) like treaties, customary lawmaking can also be formed through complex tradeoffs (and that custom is not simply achieved through “in-kind” reciprocity), and, finally, (iii) custom’s lack of predictability is overstated. My contention is that custom is more useful than we might think in making new laws because the same diplomatic, organizational, and institutionalized methods that are used today to make and remake treaty laws also create custom and that these methods address many of the weaknesses that are usually attributed, in the abstract, to customary lawmaking. As with the “adjudicative” context mentioned earlier in which tribunals resort to custom in order to interpret and apply treaties, which this chapter calls the “weak intertwination” of custom and treaty, an equally complex interrelationship between treaty and custom in the lawmaking or “legislative” realm bears witness to the ways in which modern methods of multilateral treaty making can help to address some of the weaknesses found in customary lawmaking, including its lack of careful advance negotiation, lack of detail, democratic deficits, and legitimacy problems. This chapter calls the intertwination of customary lawmaking in modern, multilateral treaty and similar negotiations “strong intertwination” for want of a better term, in order to distinguish it from the application of customary rules by tribunals in the interpretation of treaty rules.

In short, increased treaty lawmaking and the increased institutionalization of international law create a greater, not lesser, role for custom in modern international economic law and regulation. As the chapter will explain, modern developments have led to, among other things: investment treaties that incorporate customary rules; tribunals that resort to custom, even where there is no such express treaty mention or incorporation; a “systemic-integrationist” need on the part of tribunals to mark out the boundaries of treaty regimes from previous customary international law rules; and the organizationally co-embedded and intertwined nature of treaty and customary international lawmaking.

SOME TRADITIONAL NORMS IN INTERNATIONAL ECONOMIC LAW, AND THEIR INTERRELATIONSHIPS WITH MODERN TREATY RULES

Norms of nondiscrimination form a golden thread that runs through the fabric of international economic law, and they have long been present in both the

---

international trade and investment law fields. Lord McNair, for example, cited the British law officers for how they had favored the unconditional “most favored nation” (MFN) clause in commercial treaties, while John Jackson once described the MFN norm as Europe’s “common commercial law” in the nineteenth century. But these were commercial treaty clauses, and in no other field was the replacement of customary law by treaty rules – in this case, bilateral treaty rules – more celebrated than in the international investment law field.

In international investment law, a customary minimum standard of treatment (MST) norm had originated in nineteenth-century classical writings and the early twentieth-century jurisprudence. That norm became fiercely contested during the latter half of the twentieth century and in the twenty-first century, precisely because states and their legal advisors knew custom’s role in international economic law to be of critical and functional importance. Beginning with Germany’s 1959 bilateral investment treaty (BIT) with Pakistan, European nations, subsequently the United States, and finally the Asian states, too, turned to BITs because debates over the content of customary international law protection of foreign investment had descended into deep contestation throughout the 1960s through the 1980s. It became easy to forget the lurking, constant presence of custom, which is now beginning to reassert itself in new and surprising ways.

In more recent times, in S.D. Myers v. Government of Canada, for example, the North American Free Trade Agreement (NAFTA) tribunal in that case famously cited Dr. F. A. Mann’s view that the fair and equitable treatment (FET) standard is in fact the most basic expression of the nondiscrimination rule in the international investment law field, and that in that field at least it even underpins both the ideas of MFN treatment and National Treatment. Some readers may recall that Mann himself believed this rule to be, unlike in the trade or commercial-treaty sphere, customary in nature. Mann had claimed that a plethora of bilateral treaties containing key rules such as the FET and full protection and security (FPS) rules had themselves formed customary international law. He pointed to the similarity in the nature, content, and structure of the various examples of BIT clauses, based among other things on the blueprint of the 1959 Abs/Shawcross Draft. In an early defense of the interrelationship between treaty and customary international

---

9 Mann, supra note 8, at 249. For a recent articulation of this view, see Patrick Dumberry, “Are BITs Representing the ‘New’ Customary International Law in International Investment Law?” 29 Penn. St. Int’l L. Rev. 675 (2010).
economic law rules, states, according to Mann, cannot seriously claim in good faith that their widespread participation in treaties containing a particular rule actually denies that rule’s existence as custom.\textsuperscript{11}

Today, the interrelationship of treaty and custom in the field of international investment law is a point of increasing, not decreasing, importance. We see a recurring need for treaty interpretation to turn to preexisting and constantly evolving customary rules. In fact, there are various ways by which the interpretation of a treaty rule might have to refer to the customary MST norm in international investment law, and there is now an extensive literature on the subject. This debate has a real, practical significance for the international law protection of property and contractual rights.\textsuperscript{12} Even critics of Dr. Mann admit that “far from being obsolete, the question of the content of customary international law remains of fundamental importance” in international investment law.\textsuperscript{13}

\textbf{INTERTWINED CUSTOMARY AND TREATY PROTECTION OF PROPERTY AND CONTRACTUAL RIGHTS: THE PRACTICE OF INVESTMENT TRIBUNALS}

Disputes over the standard of customary protection of alien property had formed the basis of the modern international law of state responsibility, and of international investment law. But if there is any field in which custom has since been widely considered to have fallen into “obsolescence,” to use Joel Trachtman’s term, it is in the field of the protection of foreign-owned property.

The modern story of controversy over custom’s role in property protection is so well known that it needs, if at all, to be mentioned only briefly. The Russian Revolution led to uncompensated expropriations, and Mexico underwent a revolution and adopted the Latin American Calvo doctrine. These upheavals foreshadowed a century of intense challenges to the classical, Western view of the international law protection of alien property. Initially, the effects were slow to be

\textsuperscript{11} Another example of the “intertwining” of treaty and custom was \textit{Texaco v. Libya}, in which the arbitrator famously took the view that state participation in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) had contributed to a minimum international customary standard of compensation for expropriation. \textit{Texaco Overseas Petroleum et al v. Libyan Arab Republic,} 17 I.L.M. 1, para. 89 (1978). Doctrine also tells us that a treaty may have codified preexisting custom, crystallized an emerging customary rule, or even influenced the subsequent adoption of a new customary rule. See \textit{North Sea Continental Shelf Cases (FRG v. Denmark, FRG v. Netherlands)}, 1969 ICJ Rep. 3, para. 71; \textit{Nicaragua v. U.S. (Merits)}, 1986 ICJ Rep. 14, paras. 175–78.

\textsuperscript{12} See, e.g., Margaret Clare Ryan, “\textit{Glamis Gold, Ltd. v. The United States} and the Fair and Equitable Treatment Standard,” 56 \textit{McGill L.J.} 919 (2011).

\textsuperscript{13} See Dumberry, supra note 9, at 700 (giving the examples of tribunals filling in treaty gaps in applying the customary law defense of necessity, customary rules on calculating damages, and the customary international law rules of state responsibility).
felt in the handling of international claims. In arbitral and judicial practice, the award in the 1922 *Norwegian Shipowners’ Arbitration* had continued to apply the standard of “just compensation.” Likewise, in the 1926 *Chorzow Factory* judgment, the PCIJ ruled that reparations must, so far as possible, wipe out all the consequences of the illegal act. The famous *Lena Goldfields* arbitration in 1930 also upheld the classical view, and in the 1933 *de Sabla* claim, concerning the expropriation of a country estate in Panama, the U.S.-Panama General Claims Commission ruled that nonpayment of compensation or inadequate compensation was a violation of international law. Then there took place the famous exchange of correspondence in the late 1930s between the Mexican minister of foreign affairs and Secretary of State Hull, which led to the restatement by Secretary Hull of the classical formula that expropriations required for their lawfulness the payment of “prompt, effective and adequate” compensation.

Besides an attempt at multilateral treaty regulation in the Havana Charter, the debate subsequently came to a head during a period that roughly coincided with the UN decolonization era, when the USSR and third-world states had attempted to use the UN General Assembly to rewrite global economic rules. Initially, there was compromise. General Assembly Resolution 1803, in 1962, had earlier rejected a Soviet proposal that would have precluded international law’s application. The United States’s view that international contracts “shall” be honored was also upheld. However, paragraph four of the resolution went on to provide for the exhaustion of local remedies as a precondition to making an international claim, while at the same time allowing access to international tribunals if the sovereign and “other parties concerned” agreed to international arbitration. Resolution 1803 also provided for “appropriate” compensation to be paid for the taking of alien property. As we know, Resolution 1803’s delicate diplomatic balance did not hold. In 1974, with the passing of General Assembly Resolution 3281, third-world states had attempted to further revise the standard for the international protection of property rights by seeking the application of national standards of protection by

---

14 PCA, 13 October 1922.
18 Art. 11(1)(b).
their own national courts. Whether Resolution 3281 reflected a change in the customary international law standard of property protection became the central question in the Texaco arbitration in 1977. The reality, however, as the late Professor Lowenfeld had explained, was that, between 1945 and 1970, assertions of right under international law were avoided in practice. By 1964, in Banco Nacional de Cuba v. Sabbatino, the U.S. Supreme Court, by 8-1, ruled that there was substantial disagreement over the customary international law rule. Instead, bilateral treaty rules came to replace debate over the precise content of customary rules.

The debate over the continued relevance of customary international law took a new turn, beginning with the 1990s, when the NAFTA – in Article 1105 – linked the FET and FPS treaty standards with the international, customary MST norm. Custom had re-emerged to assert itself in a new treaty-dominated era by intertwining itself with treaty-making. But before all that, there was the emergence of another, intermediate device for the protection of property rights – the garden-variety investment contract, foreshadowing a circuitous route for the maintenance of the classical standard of protection.

In the midst of a search for an alternative to vague custom, there had been a contemporaneous debate concerning the “internationalization” of concession agreements in the extractive industries. Such contracts would ordinarily have been considered mere domestic law-based contracts. First-echelon writers such as Lord McNair and Alfred Verdross mounted an attack against this view, Verdross being particularly remembered for his defense of “quasi-international” contracts in the Athens meeting of the Institut de Droit in 1979. But it was McNair who – in the 1957 British Yearbook of International Law – had popularized the idea that concession contracts were governed by the general principles of law recognized by civilized nations (i.e., by international law). Arthur von Mehren pitched in with an article in the Harvard Law Review along similar lines. These were theoretical attempts to adapt the device of contract to the protection of investors’ property rights under the rubric of international or transnational law. But these were merely invocations of the “low order sources” of international law. Eventually, there were efforts to

---

20 Lowenfeld, supra note 17, at 496–93.
21 Supra note 11.
22 Lowenfeld, supra note 17, at 483–85.
ground the legal validity of such contracts in custom instead – that is, a “higher” source of international law – through, as we have seen, paragraph eight of General Assembly Resolution 1803. Paragraph eight encapsulates, as noted, the U.S. proposal that foreign investment agreements “shall be observed in good faith” but was, at the same time, intended to reflect the general consent of states.

Subsequently, however, the Abs-Shawcross Draft went on to conceive of treaty protection of contracts in the form of so-called umbrella clauses. Starting with Germany’s 1959 bilateral investment treaty (BITs) with Pakistan, the preferred solution was to replace customary international law regulation altogether, and it appeared that BITs would and have done so in relation to the protection of both investors’ contractual and property rights. In short, custom was widely perceived to have been an ineffectual lawmaking tool and as a source of behavioral rules. Contracts were “better,” and eventually these contracts were themselves sought to be “internationalized” either through general principles of international law or custom and, eventually, by way of treaty umbrella clauses.

Thus, in the case of both the international law protection of property, and of contracts, treaty rules came to be the preferred source of protection either on their own or in combination with international investment contracts. Hermann Abs had originally envisaged a multilateral treaty – a global magna carta – for the international law protection of foreign investment. Eventually, we saw a proliferation of BITs and, in more recent times, investment chapters in FTAs. Nonetheless, customary international law technique and reasoning found a renewed role amidst the new treaty landscape.

There are, broadly, two scenarios. First, the challenge of designing the FET norm and the MST norm in international investment law caused states such as the parties to the NAFTA to fall back upon customary norms to supply the content of the intended treaty rule. Today, there are BITs and FTA investment treaty chapters such as NAFTA chapter 11, the 2004 Canadian and 2012 U.S. Model BITs, and the France-Argentina BIT, which state the relevant FET or Minimum Standard of Treatment (MST) rule in such a way, by referring to the customary rule. In effect, the treaty rule results in a renvoi. Second, even where the treaty clause is unlike the

28 The origin of the idea may be traced even earlier to Elihu Lauterpacht’s advice to the Anglo-Iraninan Oil Company in connection with the dispute over Iranian nationalization, and to his subsequent, similar advice predating the Abs-Shawcross Draft, as well as to Art. IV(4) of the Abs-Doelle Draft, which was a precursor to the Abs-Shawcross Draft; see, e.g., Thomas Walde, “The ‘Umbrella’ (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases,” 1 TRANSNAT’L DISP. MANAGEMENT 1, 32 (2004).

first situation, and is silent on custom, tribunals have read the treaty rules in light of custom’s requirements.

An illustration of the first situation mentioned is NAFTA Article 1105(1): “Each party grants to investors of another Party, treatment in accordance with international law, including fair and equitable treatment and full protection and security.” In the NAFTA Free Trade Commission’s (FTC’s) Interpretation in 2001, which resulted from the NAFTA parties’ alarm at the expansive interpretation given by tribunals to Article 1105(1), the FTC sought to clarify the scope of the FET and FPS standards in that clause by stating that Article 1105(1) prescribes the MST rule as it had evolved as a customary rule, and that the references to FET and FPS therefore do not provide protection “in addition to or beyond that” of the customary MST rule.

There followed allegations that the NAFTA parties had amended NAFTA in light of recent tribunal awards. In any case, several tribunals subsequently challenged or circumvented the FTC’s ruling. Mondev v. USA is one such case, in which the tribunal ruled that the relevant customary international law standard was that in existence no earlier than the date NAFTA came into force. The apparent intention underlying that view was that the NAFTA FTC was therefore referring to a contemporary and highly developed international law standard that had been, and continued to be, shaped by more than 2,000 BITs – in other words, the customary, and therefore also the treaty standard that referred to it, had been evolving upward. Likewise, in ADF v. USA, the tribunal ruled that the customary standard is constantly in the process of development.

Jason Yackee has argued that international investment law is therefore “embedded” in international custom. He argues, however, that because investment law “privileges its articulation” by nonstate actors (tribunals and international law scholars whose awards and writings constitute evidence of custom), scholars who appear as counsel and serve as arbitrators “are among the most important articulators of international custom,” and that the awards themselves have a de facto precedential value. Through such evidence of custom, custom itself as a lawmaking device is not

---

31 ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002.
32 Ibid., para. 125
33 ICSID Case No. ARB(AF)/00/1, Final Award, 9 Jan. 2003.
only alive but has become the principal formal source used for shaping the content of international investment law.\(^{35}\)

Turning to the second situation, what if, unlike the “qualified” NAFTA treaty clause in Article 1105(1), there is no reference at all in the treaty to “international law” – that is, to customary international law? Some commentators balk at the prospect of applying the Mondev tribunal’s view in such cases.\(^{36}\) But in Siemens v. Argentina, the tribunal did precisely that. It held that there was “no reference to international law or to a minimum standard,” but that “in applying the Treaty, the Tribunal is bound to find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used.”\(^{37}\) This passage recalls Ian Brownlie’s point that the plain meaning of some words we use even in everyday language find their meaning in the law.\(^{38}\) Some treaty words find their plain meaning in customary international law – such treaty rules, albeit not “embedded” in, are inseparable from custom.

Recourse to custom in cases such as Siemens may be analyzed under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). That clause states that:

3. There shall be taken into account, together with the context:

\[\ldots\]

(c) any relevant rules of international law applicable in the relations between the parties.

Thus, in Saluka Investments BV v. Czech Republic,\(^{39}\) the tribunal applied Article 31(3)(c) and referred to the customary rules of state responsibility in interpreting the meaning of the word “deprivation” in the treaty.

Furthermore, Article 31(3)(c) may be the only available tool to reconcile problems concerning the systemic interrelationship between treaty and customary norms,\(^{40}\) a


\(^{37}\) ICSID Case No ARB/02/08, Award, 6 Feb 2007, para 291. Contra Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 155 (concerning a claim brought under the Spain-Mexico BIT for the nonrenewal of a landfill license, where the tribunal had ruled that the treaty clause in the Spain-Mexico BIT was autonomous).


\(^{39}\) UNCITRAL Partial Award, 17 March 2006, paras. 254–94.

view that has been adopted by the International Law Commission (ILC). One recent argument by Martins Paparinskis is that, ideally, custom’s role under Article 31(3)(c) should be akin to that played by the context of the treaty – that is, where no treaty reference to a customary rule, relevant customary rules should only serve to “contextualize” the treaty rule. On this view, custom only plays a subordinate, confirmatory role.

But in Saluka, the tribunal concluded that the treaty rule governing expropriation incorporated or “imported” the customary law definition of “deprivation.” According to the ILC, treaty rules do employ terms the meaning of which are also defined by customary international law, even though “special regimes” might reflect lex specialis rules. But, according to Paparinskis, the customary rule can only serve to clarify the meaning of the treaty rule by comparing and contrasting the treaty rule with the customary rule. It cannot be used to limit the treaty rule, or to support a conflicting meaning.

The two views are nonetheless consistent in cases of “silence” on the part of the treaty. The true question – as Paparinskis views it – is the customary rule’s proper “weight” once it is admitted. In some cases custom may simply be inadmissible, but in others, where it is admissible, its weight would vary from case to case. There appears to be some support for this flexible view in tribunal pronouncements, dealing with a variety of treaty formulations that fall short of express importation of a customary rule.

In a series of arbitrations involving the scope of Argentina’s non-precluded measures clauses in its BITs, a number of tribunals concluded that the treaty

---

43 See also Article 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).
44 Supra note 39, at para. 254.
45 Supra note 41, at 12, 15.
46 Paparinskis, supra note 42, at 89.
47 Paparinskis, supra note 42, at 89.
48 Sempra v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007, para 302 (stating that much may still depend upon which rule is clearer or more specific); Azurix v. Argentina, ICSID Case No. ARB/03/12, Award, 14 July 2006, para. 361 (which, in fact, involved an express treaty reference to “international law,” stating that the treaty’s reference to international law makes no difference because the meaning of FET and FPS is substantially similar to the treaty standard, whereas the intent of such treaty language is to ensure that the treaty standard does not fall below – i.e., conflict with – the treaty standard); Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/27/3, Award, 20 August 2006, para. 7.4.7 (where the tribunal construed a treaty reference to “principles of international law” did not simply refer to the customary MST norm).
clauses were to be limited in their scope by the narrower customary international law defense of necessity, because they were inseparable from it.\footnote{49} However, such rulings, which imposed more stringent customary international law requirements, have not survived annulment and criticism under ICSID’s annulment procedure. In \textit{Sempra v. Argentina}, for example, the earlier ruling of the tribunal was annulled.\footnote{50} The annulment committee held that the treaty clause did not require that the Argentinian policy response need have presented the only available option in order to be justified. The annulment committee therefore allowed the treaty clause to operate autonomously.\footnote{51} In all these examples, the success of third-party dispute settlement – which features no more strongly than in the organizationally based, institutionalized domains of international economic law – appears to correlate with the evermore imaginative application of customary international law in the new treaty contexts. A simple explanation for this may be that our treaty regimes are not as self-contained as we would think, and there is no reason for a tribunal or court to limit its resort to all the sources of international law, notwithstanding current views about the functional inutility of custom as a lawmaking tool.\footnote{52}

PROTECTING COMMERCIAL EXPECTATIONS:
THE RESTRICTIVE IMMUNITY DOCTRINE

States themselves have also engaged in detailed, highly intricate customary international economic law creation, through their legislatures and domestic courts, in the legal enforcement of contractual and property rights. The restrictive doctrine of immunity – according to which a sovereign that behaves like a merchant is treated as such – is customary international law. It is fashioned not only by treaty lawmaking

\footnote{49} Under the customary law view, in order to invoke necessity, the state’s actions that form the basis for claiming necessity as a defense must have been the only available course of action which that state could have taken. The disputes concerned Argentina’s pesoization or pesofication policy as a response to the Argentine crisis. See \textit{CMS Gas Transmission Co v. Argentina}, ICSID Case No. ARB/01/8, Award, 12 May 2008, paras. 354–55; \textit{Enron Corp. v. Argentina}, ICSID Case No. ARB/01/5, Award, 22 May 2007, paras. 395, 306, 308, and particularly 333; \textit{Sempra v. Argentina}, 2007, ICSID Case No. ARB/02/16, Award, 28 September 200, paras. 376–77.

\footnote{50} \textit{Sempra v. Argentina}, 2007, ICSID Case No. ARB/02/16, Annulment Proceeding, 29 June 2010, para. 208.

\footnote{51} The Annullment Committee in \textit{Enron Corp. v. Argentina} (ICSID Case No. ARB/01/3, Annulment Proceeding, 30 July 2010) reached the same result on the basis that the customary standard had not been correctly applied in the first place, on which the tribunal’s conclusion that Art. XI of the treaty did not apply had rested; paras. 378, 405; see, further, Daniel R. Kalderimis, “Investment Treaties and Public Goods,” in \textit{Multilateralism and Regionalism in Global Economic Governance: Trade, Investment and Finance} 149 (J. Nakagawa ed., 2012), and more generally, 147–49.

(e.g., the European Convention on State Immunity), but also by domestic, often democratically enacted, legislation as well as domestic judicial decisions.\footnote{Lori Fisler Damrosch, “Changing the International Law of Sovereign Immunity Through National Decisions,” 44 \textit{VAND. J. TRANSN’L L.} 1185 (2011).} Various national laws are framed with such a high level of precision and detail that the differences between national laws are differences of very fine detail. Professor Damrosch, for example, has argued that changes in national law inject a progressive element into \textit{customary} law-creation.\footnote{Damrosch, supra note 53, at 1192–96.}

Here lies an example of how custom – as evidence of a general practice accepted as law – copes with the need for individual tailoring or close customization, a characteristic that – as we shall later see – is sometimes denied by custom’s critics. Indeed, custom is so highly susceptible to detailed customization that, in the example of state immunity, not only is there a secondary level of detailed differences between national legislation and regional treaties that subscribe to the restrictive doctrine, there is also a primary level of differentiation between many Western, industrialized states that adopt that doctrine and others, such as China, which do not. The exact details of such differences are often fleshed out in the close reasoning of national courts.\footnote{See, e.g., \textit{Republic of Argentina v. NML Capital, Ltd.}, 134 S. Ct. 2250 (2014) in the United States; and the Hong Kong Court of Appeal’s ruling (later reversed on appeal) in \textit{FG Hemisphere Associates LLC v. Democratic Republic of Congo} [2010] 2 HKLRD 66.}

This example shows that custom’s continued salience lies not just in the adjudicative contexts of international economic law, but also in some areas of international economic law where custom continues to be the predominant source of international law. It also responds to the sweeping charge that custom’s vagueness makes it obsolete, particularly in fields such as the international economic field. The state immunity example also demonstrates that detailed rules may result not only from direct cooperation, but also functional need.\footnote{David J. Bederman, “Acquiescence, Objection and the Death of Customary International Law,” 21 \textit{DUKE J. COMP. \\& INT’L L.} 31, 40 (2010).}

\begin{center}
\textbf{INTEGRATING PREEXISTING CUSTOM WITH INTERNATIONAL ECONOMIC TREATY REGIMES}
\end{center}

A third and final illustration of custom’s role in international economic law, which is distinct from the adjudicative and legislative illustrations described, lies in a “systemic” need to integrate existing customary rules with treaty regimes that have encroached upon the space previously occupied by custom.
This is a systemic issue. Where significant portions of international economic law have been treaty based, they have sometimes conveyed the impression of being perfectly self-contained. This may be the result of the very high level of specificity of the treaty rules in question. But true self-containment has only been a polite fiction where tribunals have the mandate to apply the full range of international law sources. Because specific customary rules that preexist the creation of treaty regimes may have simply been replaced, or impinged upon, by new treaty rules in a less than systemically integrated fashion, the relationship between treaty and custom may not have been fully worked out. The problem has come to the fore especially with increased rulemaking and adjudication, and the growth of global administrative regulation.\(^57\)

Recall Article 31(3)(c) of the VCLT, which, according to Philippe Sands, “appears to be the only tool available”\(^58\) with “a potentially generic application” in resolving such issues of imperfect systemic integration.\(^59\) This has been the experience of commentators on the General Agreement on Tariffs and Trade-World Trade Organisation (GATT-WTO) system who question whether the requirement of the Sanitary and Phyto-Sanitary Measures (SPS) Agreement that SPS measures must be taken on the basis of a risk assessment allows for the operation of a customary precautionary principle.\(^60\) Such a role for custom has never been accepted by WTO panels and the appellate body. However, in the recent Rare Earths case as well as in the earlier Raw Materials case, concerning China’s WTO obligation not to impose duties and other restrictions on various exports,\(^61\) China argued that notwithstanding its GATT-WTO obligations, it possesses a customary right to permanent sovereignty over natural resources. The existence of such a customary right was not denied by the relevant panels in those cases. Instead, the panels considered that China had curtailed its sovereign rights by its subsequent treaty commitments regarding the imposition of export restrictions.\(^62\) These examples recall similar attempts to resort to a

\(^{57}\) Sands, supra note 40, at 85.

\(^{58}\) Contra US-Gasoline, in which the appellate body hung the need to interpret the treaty rules of the GATT against the broader framework of international law on the preamble to the WTO agreement.

\(^{59}\) Sands, supra note 40, at 87.


\(^{62}\) The applicability of that customary doctrine alongside WTO treaty obligations was acknowledged by the panels in the earlier Raw Materials case, although China’s argument was ultimately rejected under a proper interpretation of China’s treaty commitments; see WT/DS394/R, WT/DS395/R, WT/DS/398/R, 5 July 2011, paras. 6.35, 7.157, 7.265, 7.356, 7.381–87.383, 7.407. The appellate body does not appear to have responded to these arguments explicitly. See, also, Sonia E. Rolland, “China-Raw Materials: WTO Rules on Chinese Natural resources Export Dispute,” 16:21 ASIL INSIGHTS (Jun. 19,
preexisting customary MST norm in the interpretation and application of FET treaty clauses in the investment field, and – as with the Beef Hormones case in trade law – where commentators on international investment law have also asked if investment treaties should take a customary precautionary principle into account.\(^{63}\)

The WTO appellate body has thus far resisted the application of the precautionary principle, and in the case of investment law, there remains only stern debate about how investment norms might accommodate non-investment (e.g., environmental) norms without the need for treaty revision. Such issues exist nonetheless, and will continue to arise, regarding the precise interrelation between trade and investment treaties and preexisting customary rules. They include questions about the relationship of treaty trade rules with customary rules of both a trade and “non-trade” nature, and about the relationship between investment treaty rules and both investment and “non-investment”-related customary rules. Such questions reflect the dynamic needs of global international governance where treaty regimes are imperfect because they are and will always be incomprehensive. As for why WTO panels and the appellate body have been slow to employ custom,\(^{64}\) part of that explanation lies in the way the WTO Dispute Settlement Understanding frames the relevant legal sources for the settlement of trade disputes.\(^{65}\) Another part of the explanation lies in the fact that what investment tribunals and trade panels do has been disjointed because of the fragmentation of the subfields of international economic law.\(^{66}\) A further part of that explanation may have to do with how trade dispute settlement grew out of a diplomatic process, where trade diplomats traditionally stuck to the express rules of the GATT text.\(^{67}\) The restrictive

---


\(^{64}\) See Tomer Broude, Nothing to Declare: The Silence of Custom in International Trade Law (manuscript, on file).

\(^{65}\) WTO Dispute Settlement Understanding (DSU), art. 3(2), which refers only to the WTO’s “covered agreements” and the “customary rules of interpretation of public international law.” See further Joost Pauwelyn, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 460 et seq. (2003); Henry Gao & C. L. Lim, “Saving the WTO from the Risk of Irrelevance,” 11 JO INT’L ECON L. 899, 911 et seq. (2008).


approach taken by trade dispute settlement panels toward the sources of international law has long been remarked upon, and may yet change.

It is hard to imagine custom simply falling away as a source of international law. Some of the criticisms in this volume have relied only on inquiries into fact and function. Perhaps the question is framed too narrowly as a simple factual question by asking if tribunals have actually acknowledged custom’s relevance; for example, in the WTO dispute settlement context.\textsuperscript{68} That approach risks saying that if custom’s function has not been acknowledged in a particular tribunal’s practice by now, it therefore has no function at all. At the same time, the “obsolescence of custom” theory is a product of legal pragmatism. It lies at the opposite end of the jurisprudential spectrum and tends to ignore the increasing significance of doctrinal debates over the role of custom in international adjudication and third-party settlement.\textsuperscript{69}

I now turn to Joel Trachtman’s recent restatement of the “obsolescence” theory.\textsuperscript{70}

\textbf{THE OBsolescence THEORY AND “INTERTWINATION”}

According to Trachtman:\textsuperscript{71}

\begin{enumerate}
\item Custom operates \textit{ex post}, and cannot be made in a tightly coordinated manner in advance of events.\textsuperscript{72}
\item Custom is vague and it cannot be made with sufficient detail. That would require, as Wolfgang Friedmann had once put it, “more articulate and specific instruments of lawmaking.”\textsuperscript{73}
\end{enumerate}

\begin{footnotes}
\item See Tomer Broude, \textit{Nothing to Declare: The Silence of Custom in International Trade Law} (manuscript, on file).
\item There is, admittedly, also a prescriptive element in advocating greater resort to custom in adjudicating disputes under treaty-based regimes. For example, Sands has argued that the investment tribunal in \textit{Compania del Desarrollo de Santa Elena SA v. Republic of Costa Rica} ought to have taken environmental principles into account when determining full and fair market value. See Sands, “Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law”, OECD Global Forum on International Investment, 27–28 March 2008, at 9.
\item Trachtman, “The Growing Obsolescence of Customary International Law” (in this volume).
\item See Trachtman, \textit{Reports of the Death of Treaty Are Premature}, supra note 4; Trachtman, The Growing Obsolescence of Customary International Law” (in this volume).
\end{footnotes}
Chin Leng Lim

(3) Custom results from “in-kind reciprocity” and cannot be made with sufficiently heterogeneous tradeoffs between states. 74
(4) Custom lacks bespoke organizational support. 75

In the present volume, Trachtman advances a number of additional arguments about how custom lacks both democratic legitimacy (i.e., legislative oversight) and norm legitimacy – which he defines as the absence of support from consenting states and the old problem of “auto interpretation.”

What the obsolescence theory understates is the fact that customary lawmaking and treaty lawmaking are so intertwined today that the rise of modern treaty lawmaking (which is said to signal the death of custom) is itself helping to overcome custom’s traditional weaknesses. Where state practice today – particularly in the international economic field – occurs against a backdrop of treaties, treaty making, and treaty application by adjudicative bodies, it has become more difficult to distinguish purely customary features that might support claims of custom’s efficiency in accomplishing what states want. The features of customary and treaty lawmaking are now common where the making and application of customary and treaty rules have become intertwined and practically – though not doctrinally – identical processes, as Professor Alvarez has explained. 76 Oversight by national parliaments of treaty negotiations therefore also becomes oversight of a parallel, intertwined customary lawmaking process. At the same time, the interpretation of resultant treaty rules has required institutionalized bodies and tribunals in the international economic law field to address the content of parallel customary rules. 77

Let us first address advanced coordination. Trachtman’s scenario largely assumes non-intertwined treaty and customary lawmaking. His is a study primarily of custom as such. He poses the example of achieving a carbon emissions reduction rule. According to Trachtman, in such a scenario, the treaty negotiators sit eyeball to eyeball, negotiating simultaneously: “Each state’s best outcome is to abstain from agreement, while others form a stable coalition that will generate the relevant public good. The second-best outcome is to adhere while others adhere. The worst outcome is if no state adheres.” 78

There are, Trachtman explains, two Nash equilibria: “Object when others adhere, and adhere when others object.” According to Trachtman, treaties can get around this chicken-game-type coordination problem by having treaty-signing conferences,

75 See further McGinnis, supra note 74, at 249, 265.
77 And thus auto-interpretation of customary rules has also been kept in check.
for example, where each state signs simultaneously with the others. In contrast, custom does not form in that manner. Although the sight of others veering away from an emergent rule may be a call to action, and mirrors the chicken game in the treaty context, it is harder to imagine why the first state would have borne the cost of initiating the practice in the first place.  

Trachtman’s example is largely about providing global public goods, and their associated costs, although his general point is a broader one. Professors Goldsmith and Posner have explained the broader point in the following way, which is that custom requires “the information and monitoring structures needed to overcome a multilateral prisoners’ dilemma.” In the treaty context, this is achieved “through formal negotiation and specification of what counts as cooperation.” States then solve collective action problems by being able to monitor and punish errant conduct, relying on information usually unavailable in the contexts of customary law formation.  

Nonetheless, parallel customary lawmaking could mirror the moves made in the multilateral treaty-making context, parasitically overcoming the first-mover and chicken-game problems. It may be objected that there is no perfect temporal coincidence since the point at which custom forms is unclear. While that may be true, Goldsmith and Posner acknowledge that the multilateral treaty-making context or some similar “high profile international event” – one thinks of a General Assembly debate – “might supply a focal point that would be the basis for multilateral coordination.” Moreover, one might add that the moment at which states might consciously seek to influence the content of parallel custom is at least clear to them and to their legal advisors.  

In short, the very fact that a multilateral lawmaking conference can generate both treaty rules and evidence of customary rules, or may crystallize customary rules, makes it difficult to draw easy distinctions between primitive customary law formation and sophisticated treaty making. This was Friedrich Kratochwil’s insight, which predated the latest behavioral line of attack on custom, where

---

80 Goldsmith & Posner, Limits of International Law, supra note 72, at 35–38.
81 Goldsmith & Posner, Limits of International Law, supra note 72, at 86.
82 Goldsmith & Posner, Limits of International Law, supra note 72, at 38.
83 Take NAFTA chapter 11 as an example, in which the FET and FPS rules were equated with the MST standard. Its confirmation that the treaty rule granting FET and FPS adheres to the MST standard was a fudge, but it was also a conscious accomplishment. In the NAFTA example, at least one tribunal has ruled expressly that the specific parallel customary rule that the NAFTA parties claimed to exist was that formed no earlier than when NAFTA came into force. Mondev v. USA, ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002, para. 125.
he sought to defend custom against similar claims about its obsolescence at the time. 85

Another assumption the obsolescence theory makes is that states engaged in making new customary rules do not “converse,” and therefore do not engage in any prior coordinated action that could lay the groundwork for sophisticated lawmaking. This assumption was long ago questioned by the English scholar Bin Cheng, who instead saw customary lawmaking as, potentially, a “conscious, open and deliberate” process. 86 According to Cheng, states can “discuss” customary international law formation and, if that is so, customary international lawmaking need not be the result of the mechanical and unintelligent operation of a hidden, unconscious machine. It is interesting in this regard to observe, as will be discussed, that Professors Helfer and Wuerth, as with Professor Kelly, similarly attribute custom’s shortcomings to this alleged “uncommunicative” or “inarticulate” aspect of customary law formation. But as Alvarez has also observed, in a similar vein to Cheng, intertwined treaty and customary lawmaking in “universalistic fora” means that customary lawmaking, too, “is as much an outcome of a conscious, result-oriented negotiation process.” 87

Finally, in contrast to Trachtman’s example about providing public goods, we can think of other examples of customary lawmaking such as the Truman Proclamation, where the United States claimed a new right (to the seabed and subsoil resources of its continental shelf), and other states duly followed suit over time because it was straightforwardly in their interests to do so.

Trachtman’s second criticism is that custom lacks specificity. 88 He frames its practical consequence largely as a rule predictability issue – treaties are simply a better guide to conduct ex ante, and provide greater predictability when contemplating litigation. 89 Customary norms reflect more general and therefore vague standards. This general juxtaposition of the perceived nature of treaty and customary rules is problematic. Much ought to depend on the content of the rule itself, and its circumstances. Admittedly, the treaty text may be more readily available, and the exact formulation of the treaty rule is at least stated in an authoritative way by virtue of its location in the treaty text. But neither of these factors means that a treaty rule is always more detailed or clearer. In the case where the treaty rule in a treaty text incorporates a customary rule in order to supply the content of the

87 Alvarez, INTERNATIONAL ORGANIZATIONS, supra note 76, at 388.
88 The most well-known statement of the problem is probably FRIEDMANN, CHANGING STRUCTURE, supra note 73, at 122–23.
treaty rule, custom’s lack of clarity would be precisely the same as that in the treaty. This is shown in the many NAFTA cases in which the content of the customary minimum standard of treatment has been controversial in the various attempts to interpret NAFTA Article 1105. But in case it might be thought that this rather proves Trachtman’s point – that recourse to custom has had a negative effect on treaty clarity – cases in which the FET clause in BITS do not incorporate custom have arguably been even less clear. In yet other – “systemic” – cases, it is because it is unclear in the first place that a treaty rule actually applies autonomously of preexisting customary rules that account must be taken of preexisting customary rules in the interpretation of the scope and application of the treaty rule itself (under Article 31(3)(c) of the VCLT).

Helfer and Wuerth have argued that custom’s vagueness and generality are because custom “is produced through a decentralized, largely non-negotiated process.” Compared to treaties and some soft law norms, custom – being largely non-negotiated – “does not provide rules that can be tailored such as those dealing with exit, conditional acceptance, monitoring or compliance.” We have seen this criticism before. It ignores the detailed and highly convergent manner in which states have approached the doctrine of restrictive foreign state immunity. It also underestimates the extent to which custom is no longer capable of being addressed in isolation from its complex interaction with treaty rules and organizational settings. And it fails to take account of the fact, as Bin Cheng had observed, that custom may still be created through conscious, deliberate discussion between states.

In his third criticism, Joel Trachtman argues that customary lawmaking depends upon “in kind” forms of barter or reciprocity, presumably because customary law formation is seen to consist of repeated state practice in comparison with “bargained for” treaties, whereas treaty lawmaking allows for more complex and diverse trade-offs – for example, carbon emissions reductions can be traded for a lowering of computer tariffs. This criticism, however, should not be overgeneralized.

Returning to the example of the Truman Proclamation, there, a unilateral act eventually led the great preponderance of states to adopt the United States’s position. While it took two multilateral conferences to finally establish the rule, the Third United Nations Conference on the Law of the Sea (UNCLOS III) is a famous
example of the use of the “package deal” approach and codified new custom. The continental shelf regime was, for all appearances, a product of simple, in-kind barter. But there was “diverse performance reciprocity,” as Trachtman calls it, in other areas of ocean regulation. The diverse interests of coastal states and global powers were accommodated by trading a twelve-mile territorial sea for rights of transit passage — that is, a case of “simple diverse performance reciprocity” at play. Complex diverse performance reciprocity is shown instead in the international economic law field; specifically, in the creation of the Exclusive Economic Zone (EEZ) regime. In the case of the EEZ, humanity’s interest in conservation, the need of coastal states for an abundant, affordable source of protein, the interests of nations with distant fishing fleets, and the interests of landlocked and geographically disadvantaged states were all reconciled. It is true that a treaty conference was needed, but it is also true that a new customary regime was created and the old order of the oceans perished into history.94

Trachtman acknowledges that it does not even take a treaty conference to do all of that. Similar trade-offs occurred in the drafting of resolutions of General Assembly Resolution 1803, to use our previous example, in which the doctrine of permanent sovereignty was traded for the binding nature of international contracts, while the exhaustion of local remedies was traded off acceptance of the binding nature of agreements to arbitrate or adjudicate disputes.95

True, it took a treaty conference to do what UNCLOS did, and General Assembly resolutions are neither treaty nor custom of themselves. The contention here is, simply, that to the extent that the absence of diverse performance reciprocity is also attributed to the uncommunicative formation of custom,96 here are examples of instances in which customary rule formation was part of a highly communicative process even though bound up with treaty making and conference diplomacy.97 There is no apparent reason to think that such continued use of multilateral treaty-making conferences and other multilateral, institutional fora such as the General Assembly will cease. The apparent reluctance on the part of states such

94 Professor Trachtman has questioned this oceanic international economic law example, in our correspondence, as being an example of the last gasp of customary international law. But the practical importance of existing parallel custom could ebb and flow. A recent example involves states exiting from the ICSID Convention. Assuming that past participation in ICSID has contributed toward the crystallization of a customary rule — as the arbitrator in Texaco v. Libya ruled — and that investment contract disputes may be submitted to international arbitration by agreement, how, now, would an exiting state propose to contract out of that customary rule?

95 See UNGA res 1803, paras. 4 and 8.

96 Kelly, supra note 74, at 532.

97 Alvarez sees negotiations in such “universalistic fora” to be less “vague” and more “structured” than the making of non-treaty-intertwined custom in the past; Alvarez, INTERNATIONAL ORGANIZATIONS, supra note 76, at 587.
as China to accept custom that is not formed by such deliberate discussion is noteworthy in this respect.\textsuperscript{98}

We can imagine an even more radical argument than Trachtman’s – that, where treaty parties have traded off different things in order to reach agreement, a customary rule is thereby precluded from being formed.\textsuperscript{99} But it is difficult to see how this can be said with certainty. Much will depend upon the facts of each case. Nothing turns on the motivations of states, as opposed to finding the usual elements of custom – state practice and \textit{opinio juris}. At most, it might be possible to say that where a state binds itself to a treaty rule only because of a diverse reciprocal trade-off, it does not therefore evince a sense of legal obligation for the purposes of forming a parallel customary international law rule.

Trachtman’s final functional criticism is that treaties will be required to create this kind of highly customized international organizational support in the first place. But while this may be true of the UN Conferences on the Law of the Sea and the UN General Assembly, the San Francisco Conference, which created the United Nations Charter and Organization, was more akin to the Philadelphia Convention that drafted the U.S. Constitution. In the international economic law field, one thinks of such informal devices as the Basel Committee (albeit housed for convenience in the Bank for International Settlements), the various “Gs,” including the G20, and Asia-Pacific Economic Cooperation forum.

The more difficult question is why these non-treaty-based fora, which exhibit some of the organizational characteristics of treaty-based organizational support, have generated soft law but not, apparently, custom.\textsuperscript{100} Various answers have been suggested – ranging from the growing irrelevance of hard law, which is now being displaced by soft law,\textsuperscript{101} to Tim Meyer’s argument that it is precisely those similarities between custom and soft norms – for example, low contracting costs and the avoidance of politically charged domestic debates over ratification – that have enabled soft law to replace custom to the extent that soft law has become “the new custom.”\textsuperscript{102}

This is an untidy comparison. First, nonlegal organizations do not ordinarily set out to make law, even if some forms of soft law can be made as easily as the rules of a club. In some cases, their processes and procedures may even be unique, such as,
for example, the interaction between the Basel Committee’s processes and national administrative processes. Attention naturally turns to the possibility of new legal forms, such as soft laws, but without, I think, the need to reject more traditional conceptions of law. In contrast, the organs of legally based or legally constituted organizations tend, as was the case with the UN General Assembly, to become consciously used or adapted toward shaping general, customary law as well as various UN-sponsored treaties in the international economic field (such as the New York Convention on the Enforcement of International Arbitral Awards, and the UN Convention on the International Sale of Goods).

Secondly, saying custom has been displaced by soft law probably goes too far – one view is that “though the Basel Committee does not operate as a legislative body with formalized law-making power, it nonetheless creates customary international law because most States act in concert with its rules and feel a perceived legal obligation or requirement to do so.” It may be questioned whether that perception of a legal obligation actually exists, but the more basic, general point here is that you do not have to set out to make custom to do so. As with treaty bodies that “co-generate” parallel custom, soft law bodies, too, can generate custom insofar as the normal requirements for doing so have been met.

Turning, finally, to Trachtman’s criticism in this volume of custom’s “democratic” shortcomings, I have already mentioned that where custom is made in parallel with treaty lawmaking, legislative oversight of the latter amounts to oversight of the former. But Trachtman is also concerned about legitimate legal rule formation on the international plane. He argues that we cannot proclaim the existence of new customary rules without grounding them in states’ actual or presumed consent. If so, either the consent of all states is required, or if not that would simply amount to majoritarianism. According to Trachtman, treaty lawmaking avoids this “holdout” problem. Put simply, treaties are easier to make because they consist of contractual rules, not general rules. As contracts that apply only to the parties, their legitimacy is not called into question, not, at least, by those to whom they would apply.

Whatever its general merits, Trachtman’s claim of illegitimacy does not apply so easily in the international economic field where famous controversy had ensued over the very legitimacy of the world economic order. Third-world legal scholars urged their nations to shape custom in the UN General Assembly during the 1960s and 1970s while developed, capital-exporting nations had turned toward bilateral,

---


105 See also McGinnis, supra note 74, at 250 (drawing a linkage with the problem of diverse performance reciprocity, addressed earlier).
“contractual” treaty making in safeguarding the contractual and property rights of foreign investors. It is important to notice that for such third-world scholars, making new customary rules was a democratic tool, one which was to be used to counter undemocratic attempts to internationalize state contracts, reactionary arbitral awards, and the writings of publicists who were too closely allied to the demands of international capital.\footnote{Somarajah, supra note 27, at 30.} For them, a neoconservative global agenda had succeeded instead on the back of treaties and treaty regimes.\footnote{Somarajah, supra note 27, at 31.} The attempt to fashion new customary rules, indeed a customary “New International Economic Order,” had failed, but would have been more “democratic” precisely because forming custom through organs such as the UN General Assembly required the participation, deliberation, and consent of third-world countries where their strength in numbers – their democratic vote – would count for something more, even more than the “contractual” arrangements that by then were emerging in the form of BITs between industrialized and developing nations.\footnote{Alvarez makes a similar point about the legitimacy of certain “universalistic fora” accruing to custom made through proceedings in organizations such as the UN General Assembly; Alvarez, \textit{International Organizations as Law-Makers}, supra note 76, at 388.} The developing nations had intended to outvote power itself as wielded by the industrialized nations.\footnote{Lim, “Neither Sheep nor Peacocks,” supra note 19, at 303–10.} I have already mentioned that these views linger in contemporary descriptions of China’s approach toward the formation of custom.\footnote{Pan, supra note 98, at 241–42.}

Such views were not shaped by the kind of democratic discourse about international lawmaking that we would find in the writings today of scholars in the United States. There was no great concern with domestic legislative oversight of international lawmaking, although there has been, amongst some scholars and members of the activist community, a sense that they are targeting special minority interests in the capital-exporting states. To the extent that customary international law doctrines – ranging from the precautionary principle to assertions of an emergent rule against cultural genocide, and the established doctrine of permanent sovereignty over natural resources – are invoked in today’s international economic and commercial disputes, that way of thinking may be traced to the older attempts, described, to invoke custom as a progressive tool.

In any event, the modalities of customary law formation also allow for “contractual” customary law formation. Special or regional customary rules, and the persistent objector rule, are evidence of these,\footnote{For acknowledgement of the similarity between contractual lawmaking and the persistent objector rule, see Timothy Meyer, “From Contract to Legislation: The Logic of Modern International Lawmaking,” 14 \textit{Chi. J. Int’l L.} 559, fn 185 at 607 (2014).} putting aside more esoteric, contractualist
accounts of the formation of custom generally.  Moreover, progressive or avant
garde customary international law rules that are insufficiently supported by state
practice are perhaps not so likely to emanate from international tribunals and
domestic courts after all, which is where pressing problems of legitimacy might tend
to lie.

We now come full circle. Trachtman’s argument is a response to events at the
turn of the millennium that have challenged the legitimacy of international treaty
regimes, in the face of sustained deadlock in various multilateral treaty negotiations.
The 2001 NAFTA FTC Interpretation was intended to reorientate NAFTA’s FET
and FPS standards toward a presumed customary MST norm against the backdrop
of a democratic backlash against investor-state dispute settlement. But the most
visible backlash against treaty regimes have of course been Seattle and Cancun in
the late 1990s and early 2000s, and the collapse of the effort to establish a multilateral
agreement on investment in 1998.

CONCLUSION

The truth in what Trachtman says – that treaties and treaty making are generally
more convenient and efficient tools of lawmaking – cannot be fully denied. What
this chapter tries to show and explain, however, is that custom is nonetheless alive
in the international economic law field and that we should expect custom to have
a future role even in the lawmaking sphere. Part of that explanation has to do with
some of the reasons that are cited for custom’s demise – increased treaty lawmaking
and the greater institutionalization of international law, not least in the establishment
of third-party settlement mechanisms. These have led to both “strongly” intertwined
treaty and customary lawmaking and application, and the “weakly” intertwined
application of customary international law by international investment tribunals in
the course of applying treaties.

112 See Curtis A. Bradley & Mitu Gulati, supra note 102; C. L. Lim & Olufemi Elias, “Withdrawing
from Custom,” 20 DUKE J. COMP. & INT’L L. 143 (2010), restating our earlier view that “special” or
“particular” custom and the requirement of non-dissent in the persistent objector rule are ultimately
more revealing about the consensual underpinnings of customary international lawmaking; O.

113 Some would argue that one area of exception lies in the practice of international investment tribunals,
where the acceptance of broad claims of protection for foreign investors has led to a backlash against
investor-state dispute settlement.

114 Nigel Blackaby & Caroline Richard, “Amicus Curiae: A Panacea for Legitimacy in Investment
Arbitration?” in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 261
(Michael Waibel et al. eds., 2010).

115 Sornarajah, supra note 27, at 34.
Intertwined lawmaking, in particular, addresses customary law formation’s alleged deficiencies, ranging from difficulties with prospective lawmaking, to custom’s lack of detailed predictability, its perceived inability to accommodate complex trade-offs, and the presumed absence of bespoke organizational support for customary lawmaking. Trachtman’s thesis understates this intertwination that helps to answer some of custom’s weaknesses. Lest it be thought that intertwination is simply a doctrinal construct, Choi and Gulati’s latest research on the practice of courts and tribunals shows that, however puzzling this may be, treaties are somehow seen to provide the best, or at least the most popular, evidence of custom.\textsuperscript{116} Intertwination is the principal lens through which custom is now viewed, and here we enter into one of the central themes of the present book – tribunals may tend to identify the contents of custom by looking to what states prefer, or what they are most willing to accept,\textsuperscript{117} but if so, the best way to do so may be to look at the treaties to which states have already bound themselves.\textsuperscript{118}

As for the debate in the economic field about the demise of international hard law, spurred by the current widespread failure of multilateral treaty initiatives, we should not ignore the growth in arbitral and other forms of third-party settlement, particularly since the 1990s. In the foreseeable future, custom’s presence, and also that of treaties, is likely to be felt more rather than less in these “adjudicative aspects” of international economic law, and in the application of parallel as well as prior customary rules that will have to be systemically integrated – and thus reformulated in tandem – with the continued operation of existing, and new, treaty rules. In so many ways, custom’s fate is bound to that of treaty law.\textsuperscript{119}


\textsuperscript{117} See Curtis Bradley, “Customary International Law Adjudication as Common Law Adjudication” (in this volume).

\textsuperscript{118} In contrast, Bradley and Gulati consider the use of treaties as evidence of custom to be a mystery; Bradley, “Customary International Law Adjudication as Common Law Adjudication” (in this volume); Choi & Gulati, “Customary International Law: How Do Courts Do It?” (in this volume).

\textsuperscript{119} With the usual caveat, I am indebted to Joel Trachtman for our correspondence, to Curt Bradley, Tomer Broude, Mitu Gulati, Brian Lepard, and Ingrid Wuerth for their helpful comments, and to my former student Mr. Zachary Korman for his valuable research assistance.