I am interested in two aspects related to treaty regimes and opinio juris.

I. Treaties “confirming” custom v. treaties “contracting out” of custom

A treaty or series of treaties can be evidence of opinio juris or the existence of custom (“treaties confirming custom”) or, quite the opposite, be proof that no opinio juris/custom exists and that the absence of custom or a different customary rule was exactly the reason why the treaty was concluded (“treaties contracting out of custom”).

Although radically different, it can at times be difficult to draw the line between these two scenarios. Let me give two examples.

Most people would agree that MFN as expressed in the GATT of 1947 did not confirm MFN as a customary rule. Instead, at least in 1947 when GATT was concluded, the fallback custom was freedom to treat (and discriminate) imports as a country pleases. Only if a country joined the GATT club could it count on GATT MFN. If MFN were already part of custom, why would a country join the GATT? This seems to be the prevailing view up to this day: Until China or Russia joined the WTO, these countries could not count on MFN treatment under customary international law. To get MFN, they had to negotiate their way into the WTO treaty regime. In this sense, the WTO treaty regime is perceived as contracting out of (rather than confirming) custom. However, at what stage does

\footnote{In respect of MFN, see the ongoing ILC Study Group on the Most-Favored-Nation clause at \url{http://untreaty.un.org/ilc/summaries/1_3_part_two.htm}.}
a treaty regime flip from one scenario to the other? And does this even matter? Now that the WTO has 159 members instead of the GATT’s 23, when does the treaty regime start to confirm or establish custom rather than contract out of it? WTO members and countries that applied for WTO accession now represent 99.95 % of world trade, 99.98 % of world GDP and 99.35 % of world population.2

Another, more controversial example, is bilateral investment treaties (BITs) and the question of whether the rules therein on, for example, expropriation confirm or establish custom (binding also on non-signatories)3 or, instead, whether BITs were actually concluded to contract out of custom (lex specialis) which, in the 1950-1970s, was moving toward a more liberal regime.4 Although variously worded, by the end of 2011, UNCTAD counted a total number of 3’164 international investment agreements (including 2’833 BITs5), most (if not all) of which include an expropriation provision. Can these confirm or establish opinio juris around a certain expropriation norm or are they simply treaty provisions binding on the parties only, contracting out of, or establishing a treaty regime that is different from, fallback customary rules? Note, for example, that although thousands of BITs are in existence, in 2011, UNCTAD calculated that only one-fifth of possible bilateral relations were covered and that another 14’100 BITs would be required to provide full coverage.6 Here as well, how does one decide whether a treaty or series of treaties confirm or establish (new) custom or rather

3 In support: Andreas F. Lowenfeld, Investment Agreements and International Law, 42 COLUM. J. TRANSNAT’L L. 123 (2003) (concluding, at 129, that the substantive investment protections contained in BITs have moved “beyond lex specialis . . . to the level of customary law effective even for nonsignatories”); Stephen M. Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, 98 AM. SOC’Y INT’L L. 27 (2004); José Alvarez, A BIT on Custom, 42 NYU Journal of International Law and Politics (2009) at 17 (at 77, concluding that state practice and opinio juris “are demonstrated by the conclusion of investment treaties”).
4 See, e.g., M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 205-08, 213 (2d ed. 2004) (“[T]here is so much divergence in the standards in bilateral investment treaties that it is premature to conclude that they give rise to any significant rule of international law.”).
5 UNCTAD, World Investment Report 2012, at 84.
deviate from existing custom as between the particular parties? Can a treaty regime shift from one scenario to the other? Does this question even matter at a certain stage?

II. Informal International Lawmaking As Evidence of Custom or Even the "New Custom" of the 21st Century?

The annual increase in the number of new treaties concluded each year has been slowing down considerably since the 2000s. Countries and other stakeholders are increasingly creating norms outside of traditional international law that are generally considered not to be legally binding. *Opinio juris* is said to imply evidence that countries consider a norm, followed in state practice, as "legally binding". Does this imply that all of the informal lawmaking processes and outputs have no role to play in the creation of custom? Many of these new types of output are, however, supported and accepted by a large spectrum of stakeholders, well beyond nation states, and are often adopted following transparency and inclusiveness procedures that go further than traditional international lawmaking (or, for example, an expression of "legal bindingness" by a low ranking official which could be evidence of *opinio juris* and custom).

They also benefit, in most cases, from high compliance rates ("thick stakeholder consensus" versus the "thin state consent" of traditional treaties). At some level, this could mean that these "informal norms" should have more, not less, weight (more stakeholders accept them; their elaboration is more open; high rates of compliance). Actors in fields such as internet regulation, finance and health, take norms out of, respectively, the Internet Engineering Task Force (IETF), Basel Committee on Banking Supervision and International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), extremely seriously. Many of these norms are also followed and complied with (often at higher rates than "binding" treaties). In

this context, should the absence of “legal bindingness” continue to be a sufficient reason to reject any of these norms as establishing or reflecting evidence of “custom”? Does any of this even matter, given how these informal regimes work and impact actors?

Although such norms may not constitute or establish custom in the traditional sense, even today, traditional international tribunals can and do refer to them in the process of, for example, treaty interpretation. Even if not “law” or “legally binding” as such, these norms thus have legal effects. To the extent such norms are consistently followed by stakeholders and/or amount to “codes of good practice” in e.g. the standard-setting world, could they constitute the “custom” of 21st century global governance, gradually replacing older, state-centered notions of “custom”?  

Note, indeed, that pursuant to Article 38 of the ICJ Statute, “conventions” must be recognized by “states” thereby apparently excluding new actors. In contrast, for “custom” and “general principles” there is no explicit reference to “states”. Custom is defined as “evidence of a general practice accepted as law”, without specifying who must have accepted this practice as “law” and what it means to accept something “as law”. Is “accepting as law”, the same as recognizing that something is “legally binding”? Arguably not.8 General principles of law, in turn, must be “recognized by civilized nations”, where the word “nation” could be understood more broadly than central state actors alone. Both custom and general principles thereby leave the door open to new actors as well as new types of processes and outputs.

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