

## IS THERE AN EVOLVING CUSTOMARY INTERNATIONAL LAW ON INVESTMENT?

**PROFESSOR CAMPBELL McLACHLAN QC**

*Victoria University of Wellington, Visiting Fellow, All Souls College, Oxford  
Bankside Chambers (Auckland & Singapore), Essex Court Chambers*

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### THE DEMISE OF THE DIPLOMATIC PROTECTION OF INVESTMENT

*Diallo Affair (Guinea v Democratic Republic of the Congo) (Preliminary Objections) [2007] ICJ  
Rep 582, (Merits) 30 November 2010  
Barcelona Traction (Belgium v Spain) [1970] ICJ Rep 3*

#### I. CUSTOMARY INTERNATIONAL INVESTMENT LAW— AN ESSENTIALLY CONTESTED CONCEPT?

##### 1. The limiting effect of the process of diplomatic protection

- No general substitution of investor for investment  
Art 11, International Law Commission, Draft Articles on Diplomatic Protection (2006)
- Limited conception of direct rights of shareholder
- No development of substantive law on treatment of investments of aliens

##### 2. Twentieth-century dissent as to the content of the rights of alien investors

- The legacy of Calvo
- Failure to reach agreement on multilateral standards
- International Law Commission—shift from primary to secondary rules

##### 3. General shift of emphasis in international law from custom to treaty

#### II. INVESTMENT TREATIES AND THE APPEAL TO CUSTOM

##### 1. Express reference to custom

Art4, French model BIT; Art5, US model BIT (2004)

NAFTA Free Trade Commission (FTC), Interpretation of NAFTA Chapter 11 (31 July 2001) 6 ICSID Rep 567

##### 2. Adoption of the language of custom

##### 3. Choice of international law as part of the applicable law

Art42 ICSID Convention

*MTD Equity Sdn Bhd v Chile* (Decision on Annulment) ICSID Case No ARB/01/7 (ICSID, 2007)

##### 4. Form and conclusion of investment treaties

##### 5. Application of general rules of treaty interpretation

Ss2 & 31–2 Vienna Convention on the Law of Treaties 1969

### III. THE LIMITS OF CUSTOM

1. **Distinction between jurisdiction and applicable law**  
*Channel Tunnel Group Ltd v United Kingdom & France* (PCA, 30 January 2007)
2. **The choice of law process in the determination of investment claims**  
McLachlan 'Investment Treaty Arbitration: the Legal Framework' (2008) 14 ICCA Congress Series 95  
Douglas *The International Law of Investment Claims* (2009)
3. **The curative function of the treaty procedure**  
Arts 26 & 27 ICSID Convention
4. **Inherently special promises**
5. **The primacy of the treaty language**

### IV. A PROCESS FOR THE ARBITRAL APPLICATION OF CUSTOM

1. **Central function of interpretation**  
*Asian Agricultural Products v Sri Lanka (Award)* 4 ICSID Rep 245, 265-6, Rule D  
Fauchald (2008) 19 EJIL 301  
Art 31(3)(c) Vienna Convention  
International Law Commission, Fragmentation of International Law, Study Group Report and Conclusions (2006)  
McLachlan 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279  
— 'Investment Treaties and General International Law' (2008) 57 ICLQ 361
2. **Developing the relationship between custom and treaty in practice**
  - Functional equivalence of standards
  - Evidence for a general sense of obligation
  - Evolutionary standards  
*Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7  
*Iron Rhine Railway (Belgium v The Netherlands)* (PCA, 24 May 2005)
  - Development of content through arbitral practice
  - Relevance of human rights standards
3. **Understanding and applying general principles of law**  
Art 52(1)(d) ICSID Convention—'a fundamental rule of procedure'
4. **Reasoning from principle and analogy**  
*Eastern Extension, Australasia and China Telegraph Co Ltd* (1923) VI RIAA 112

### V. IMPLICATIONS FOR GENERAL INTERNATIONAL LAW

