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Special Issue

Customary International Law, Its Formation and Interpretation in International Tax and Investment Law

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This special issue of the *International Community Law Review* brings together some of the papers presented at the workshop 'Customary International Law and its Interpretation in International Tax and Investment Law' that took place at the University of Groningen on 20 February 2019 organized by the TRICI-Law project and the GLOBTAXGOV project.

The articles presented in this Special Issue explore the formation, interpretation and application of customary international law in international tax and investment law from different vantage points. Two contributions inquire into the practice of investment tribunals established under the Energy Charter Treaty to determine how these tribunals shape the content of customary rules. Similarly to the first two, the third contribution analyzes the practice of investment tribunals, but with an emphasis on the way these tribunals use the customary rules of treaty interpretation, as they have been enshrined in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT). Finally, the fourth contribution tackles the complex question of formation of customary international law in international tax law. The diversity of the subjects addressed provide a broad picture of the ways in which customary rules form and evolve through interpretation and application in these two branches of international law.

Cees Verburg examines the interpretative tools that investor-State tribunals use to establish the content of rules of customary international law on damages and reparation. The focus is on investor-State tribunals established under the Energy Charter Treaty which usually apply the 'full reparation' customary standard codified by the International Law Commission in the Articles on State Responsibility. Verburg demonstrates that the object and purpose (the

teleology) of the standard and the principle of effectiveness are important considerations which guide the arbitrators towards the amount of damages to be awarded, but also that the practice of ECT awards aids in distinguishing between two different stages in the 'life-cycle' of customary international law: interpretation and application of customary norms.

The study by *Gian Maria Farnelli* focuses on the trends concerning the interpretation of the standard of legitimate expectations in investment arbitrations in the renewable energy sector. The author zooms in on the positions taken by arbitral tribunals on the question whether or not the concept of legitimate expectations encompasses an expectation of legal stability; in other words, whether the investor is entitled to the protection of the expectation that the laws and regulations of the host country will not change. At the same time, this question concerns the scope of the doctrine of police powers under customary international law according to which any State has a sovereign right to amend its laws. *Gian Maria Farnelli* concludes that investment tribunals are more likely to find a violation of legitimate expectations if certain qualifying requirements are met, such as due diligence on behalf of the investor, rather than finding that there is an autonomous obligation of legal stability on behalf of the State.

Following this, *Emily Sipiorski* reflects on the value of the principle of good faith – which permeates the entirety of the customary rules on interpretation enshrined in the VCLT – both as an interpretative tool and as a standard for the conduct of an international judge in treaty interpretation. The author defines the meaning of the requirement of good faith by reference to relevant case law and explains the obligations that it places on States, investors and international judges. Sipiorski concludes that good faith is not only a moral indicator, but aids a teleological reasoning on the content of law and that it will continue to be an important consideration in the interpretation of investment law obligations.

Irma Mosquera Valderrama and *Dirk Broekhuijsen* inquire into the possibility of norms of international taxation to evolve into rules of customary international law. Whereas scholarly opinions on this question are divided, the commitment of a large number of States to the Base Erosion and Profit Shifting Project and the Multilateral Convention adopted in its context provide a reason to believe that this is possible. The authors find that among the norms concerning the minimum standard against aggressive tax planning and treaty shopping, the principle purpose test has the greatest potential to become a rule of customary international law. However, this will be possible only if evidence is found of the two elements of custom: State practice and *opinio juris*.

Although the Multilateral Convention itself is not compulsory for participation, it is highly likely that countries will be interested to implement the tax treaty obligations contained therein in their bilateral relations. This may supply the objective element for the formation of a customary rule. In contrast, finding the requisite *opinio juris* appears more problematic. This is because it is unclear what motivates States to adopt the principle purpose test – whether it is out of (pure) self interest or a belief that this is law. Therefore, the authors conclude that whether the principle purpose test becomes customary international law remains to be seen in the future.

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