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CHAPTER 5
PARADIPLOMACY AS INTERNATIONAL CUSTOM: SUB-NATIONAL GOVERNMENT AND THE MAKING OF NEW GLOBAL NORMS

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Introduction

At a time when mainstream international theory seems to discover the value of conventional international law as a form of regulation of the global system, it can be interesting to revisit one of the most classic debates in the field of international norms. We are talking about international *custom*, that is, the unwritten norms which nevertheless are legally binding for states. The particular conditions required for the formation of a new international custom are complex and subject to controversy among international lawyers. However, the corresponding theoretical debates seem more concerned with the structure of legal argument, than with its substantial content. But then, formal disagreement among lawyers about custom, is ultimately a form of political disagreement, since "arguments about law are arguments of political preference".[1]

According to conventional wisdom, the formation of customary international law depends on the more or less fortunate articulation of two elements: the existence of a generalized and relevant practice carried out by the community of states, and the general acceptance, or belief, that this practice is legally binding, and not merely a common usage or courtesy. Both elements, state practice and legal conviction, are frequently difficult to operationalize, but it seems reasonable to suggest that this formative process assumes different forms depending on historical circumstances.[2]

Thus in the case of diplomacy, the ability to conduct diplomatic relations is usually considered as one of the primary attributes of state sovereignty. Indeed, it may seem that the basic condition for the extension of diplomatic relations throughout the world was the existence of independent states able to develop political relations among themselves. However, it is beyond dispute that the origins of diplomacy were the multiple customary practices of communication among different political entities which have existed since ancient times.[3]

Certainly these practices underwent different historical transformations before becoming conventionally redefined as a supposedly exclusive attribute of the sovereign nation-state.[4] Through these changes, the old diplomacy was gradually adapted to the growing functional and legitimizing needs of world capitalism. Yet contemporary students of diplomacy tend to exclude a wide range of practices, such as corporate, nongovernmental, and sub-national governments' involvement in international affairs, in spite of their increasing relevance.[5] Indeed the widely held view of diplomacy as an exclusive attribute of sovereign state is more a matter of political and legal discourse than empirical reality.

The codification of diplomatic law greatly facilitated this centralization of diplomacy. But the 1961 Vienna Convention on Diplomatic Relations recognises that diplomatic law has been always fundamentally customary, and that it remains so. The Convention's preamble even affirms that the rules of customary law should continue to govern all questions not expressly regulated by its contents. But custom is not always the residue of the past that some practitioners and scholars use to imagine. As Langhorne reminds us, even nowadays "new customary rules of the game are emerging to allow international system to function securely and efficiently", adding that "the difficult task at this historical juncture is to identify and describe them accurately".[6] But common approaches to diplomatic law are narrowly formalistic, frequently reducing the legal content of diplomacy to a more or less detailed commentary of the corresponding codifying conventions.[7]

The purpose of this chapter is to ascertain whether the increasing involvement of sub-national governments in foreign affairs all over the world, is becoming normalised (in spite of the obvious resistance to it on the part of states) into an area of customary diplomatic law. The argument will be structured as follows. I will first offer some evidence about "paradiplomacy" as a generalized practice in the global system, indicating some of its more prominent highlights in the most disparate contexts. Next, I will briefly analyse these developments in the light of the contemporary understanding of how international custom is created, before arriving at a conclusion. I will argue that the contemporary process of creating new global norms is a contentious process in which the preferences of states, even the more powerful among them, have to be adjusted by taking into account the wider social force-field of the global political economy, its functional needs, and the changing requirement for legitimacy in late-modern capitalism. Consequently, my points of departure will not be state sovereignty or the convoluted decisions of international courts, but the much more pervasive dynamic of the global political economy.[8]

Paradiplomacy as a Relevant Global Practice

Paradiplomacy can be defined as sub-national governments' involvement in international relations, through the establishment of formal and informal permanent or *ad hoc* contacts, with foreign public or private entities, with the aim to promote socioeconomic, cultural or political issues, as well as any other foreign dimension of their own constitutional competences. The concept refers, simultaneously, to the tension with established diplomacy, and the fact that it is itself an art of the state.[9] Paradiplomacy does not preclude other forms of sub-national participation in the foreign policy process, which are often more directly subordinate to central governments priorities and objectives; or the increasing role of sub-national governments in multilayered structures for multilateral governance. Nor is it a particular feature of the constituent units of federal states, since the practice can be observed across the world, in the most diverse political systems. Indeed in spite of important constitutional differences among sovereign states, paradiplomacy displays a number of common characteristics which tend to be related to the wider institutional context created by the new regionalism.[10] On the other hand, paradiplomacy is not a simple reflection of the structural transformations of the global political economy; it is, perhaps unexpectedly, one of its most lively driving forces. Consequently, as Lecours has suggested, it has to be approached in terms of the complex relation between structure and action.[11]

Although recent research has established that sub-national involvement in foreign affairs today has become a phenomenon which is no longer a characteristic only of western OECD countries,[12] the European Union (EU) and North American Free Trade Agreement (NAFTA) have had important implications at sub-national level, establishing new structures of opportunity, and fostering regional governments' activity in domestic as well as foreign affairs. In both cases the controversial issue of the scope and limits of sub-national involvement in foreign affairs has been redefined as a result of integration. The EU has certainly undermined important regional competences, but its institutional framework establishes a favourable political context for sub-national mobilization, having transformed substantially intergovernmental relations and administrative cultures among member states, facilitating the normalization of inter-regional cooperation across the continent.[13]

Although very different in nature and scope, NAFTA has also activated sub-national governments in the United States, Mexico and Canada. In the process it has revealed serious institutional shortcomings of its political design early on.[14] Canadian provinces and US states have been particularly active denouncing the implications of the World Trade Organization (WTO) on sub-national political competences all over the world. Their complaints about the erosion of

constitutional prerogatives of sub-national authority as a result of global trade liberalization occasionally acquired the tone and vocabulary of a crisis in federal structure, both in the United States and in Canada; but the controversy has also resulted in a broader recognition of the role of sub-national government in global trade negotiations.[15] States and provinces are discovering that due to their economic power and social legitimacy, they are able to influence federal positions on relevant international issues such as global trade, security, human rights, or environmental problems. As Howard suggests, the controversial law passed by Massachusetts trying to deter business activity in Burma on grounds of human rights violations in that country, has raised key questions on the limits of US states' participation in foreign affairs.[16] The US Supreme Court declared the law unconstitutional but its decision has served ultimately to assert that sub-national governments are competent to participate in international relations as long as they do not ignore the primacy of federal government on foreign affairs.[17] In fact, albeit widely unknown, the federal government in Washington is increasingly taking in account the constituent units of the United States in its foreign policy design and implementation. This not only concerns the economic or environmental domains, but even the more sensitive international security issues.

In the case of Mexico, the combined effects of structural adjustment and regional trade liberalization under NAFTA, has increased regional inequalities, posing serious challenges to the country's political stability. In response to this, the central government has tried to revitalize Mexican federalism, fostering sub-national mobilization and involvement in both domestic and international policy-making.[18]

The Australian case also deserves particular attention. Due to its geographic situation and the competitive nature of its political system, the Australian states were among the first sub-national governments that tried to add a foreign dimension to their policy priorities. This has caused serious tensions in the past, and triggered constitutional conflict on the issue of federal powers and the limits of the states' involvement in international affairs. However, during the last few years, sub-national foreign policies seems to have been increasingly normalized, and controversy has significantly subsided.[19]

Now in order to show the global dimensions of the growth of paradiplomacy, let us explore the situation beyond the OECD countries. Thus the successor states of the USSR have displayed a particularly high level of activity in this domain. After the Soviet collapse in 1991, the administrative boundaries of numerous Russian republics and regions became international frontiers of the new federation. Demarcating and controlling the new limits was obviously a very difficult task, and Moscow encouraged its new border regions to make their own arrangements with their neighbours. Consequently, the new

federation assigned a special role to sub-national involvement in foreign affairs. In accordance with the new constitution, the major elements of foreign and security policies remain a federal responsibility, but in order to assure its new legitimacy the federal government decided to take into account regional interests in a way that Soviet foreign policy never did.[20] The central government cannot reach agreements with neighbouring states, nor subscribe or modify international treaties without consulting the relevant regions. New legislation allowed the regions to maintain international relations and sign certain international agreements on the basis of their own competences. The regions can also establish missions abroad and are entitled to receiving official delegations from equivalent regions of foreign states, whilst governors are routinely included as delegation members in official diplomatic missions and international negotiations.[21] This tolerant attitude has allowed the Russian Federation to try both to reduce ethnic demands and to facilitate its own integration into the global economy. Certainly, that tolerance is much more restricted regarding the efforts of the Caucasus regions to internationalize.[22] But the rise of regional power in Russia does not necessarily mean that the federation faces disintegration. Again with the exception of the Caucasus republics, regions only rarely have adopted foreign policy positions that radically differ from those of the federal government.[23]

Another area which has seen remarkable developments in terms of sub-national involvement in foreign affairs, is the wider Asia-Pacific region. Since the beginning of its experimental transition to capitalism, China has been promoting, directly or indirectly, international involvement of its provinces. When following the Tiananmen crisis, China adopted a new diplomatic strategy to avoid international isolation, and sought to develop new policy instruments, sub-national involvement in foreign affairs was among them, although this remained out of bounds for Tibet and, if less strictly, Xingjian.[24] Occasionally it was on the initiative of the central government in Beijing that the regions sought to insert themselves into the transnational trade and capital flows of the global economy. In other cases, the regional governments acted under their own steam in deciding which international contacts to pursue, increasing inter-regional competition in domestic as well as in foreign affairs.[25] Begun in the coastal regions with the aim to promote *de facto* economic integration with Hong Kong, Taiwan, and Japan, the process entailed increasing economic disparities between these provinces and the more depressed northern, inland, and western provinces. This led some regional governments to criticize Beijing's priorities by developing their own foreign strategies.[26] Due to these overlapping dynamics, during the last few years Chinese provinces have developed a dense network of transnational contacts. They participate in numerous cross-border cooperation

schemes, sending and receiving international missions and signing cooperative agreements with partners from all over the world.[27]

Paradiplomacy has developed differently in Southeast Asia. Instead of overseas representation and missions around the world, the internationalization of Indonesian, Malaysian, Thailand's, or Philippine's regional governments has been largely the result of a variety of informal economic cooperation schemes with a very specific territorial content. Through the configuration of the so-called "Triangles of Growth", sub-national governments have pursued their own political power and economic success, even if they have subsequently been forced to deal with new problems associated with increasing social turmoil. The oldest and more celebrated "Triangle" is the one that links Singapore, Malaysia's Johor province and Indonesia's Riau Island. Transnational economic experiments like this have important social implications, notably by engendering growing income inequalities, territorial imbalances, and ecological distress, and over time they may become a catalyst for political change.[28]

The federal system of India did not likewise facilitate sub-national paradiplomacy, at least until very recently.[29] Ethnic and territorial problems have all along complicated Indian foreign policy, and the idea that ethnic ties across borders, as in the case of Kashmir, Punjab or Assam, may be turned into a channel for cross-border cooperation beneficial for economic development and regional stability, is relatively new.[30] In addition, during the last years, and due to the considerable economic success of a number of southern Indian states, a certain north-south cleavage seems to have crystallised. The triangle formed by Karnataka, Andra-Pradesh, Tamil Nadu, and Maharastra is becoming increasingly dynamic, influencing both domestic and foreign affairs. However, the most relevant force driving the constituent units of the Indian federation to develop new transnational ties, are the disciplinary schemes resulting from Indian membership of the WTO, and those dictated by World Bank financing of sub-national debts.[31]

In non-NAFTA Latin America, disputes over borders and political authoritarianism have long prevented the emergence of powerful regional government.[32] However, the extension of formal democracy and the renewed efforts to rekindle regional integration such as Mercosur or the new Andean Community, have favoured decentralization across the subcontinent, too. In this changing context, and learning from the failures of the past, Latin American governments are increasingly aware of the value of paradiplomacy for the promotion of regional integration.[33] Simultaneously, sub-national governments have started to experiment with different modes of paradiplomatic activity, with the aim to promote foreign trade and investment as well as greater international cooperation on security, infrastructures or environmental issues. The case is particularly clear in Argentina and Brazil; both due to their strong federal

systems and the growing sub-national implications of Mercosur. In Argentina, the central government in 1992 took several legal and administrative measures in order to keep control of the growing internationalization of the provinces.[34] Brazil has followed a similar pattern. Since the early nineties, sub-national government has been involved in numerous cross-border integration projects. The governors of the Brazilian states are becoming so active in the international field that the federal government in 1997 reorganized the Ministry of Foreign Affairs in order to adapt to this new reality. In the new political climate, the World Bank offered important loans directly to Rio Grande do Sul, Rio de Janeiro, Minas Gerais, and Mato Groso do Sul. Although in a more complex political context, Colombian and Venezuelan sub-national authorities, too, have begun to develop their own activities.[35]

Finally, the African case. Although socioeconomic and political conditions of the vast majority of African states hamper the development of paradiplomacy, during the last few years significant developments have taken place. It has been argued that to foster and support general objectives of state building and democratization, starting off from the potential of some border regions might give a new impetus to preventive diplomacy and economic development. Presently, this trend is particularly clear in the case of South Africa, but in the near future it could be extended to other African countries. New regional cooperation schemes such as the renewed Southern African Development Community (SADC) have increased opportunities for sub-national mobilization, as testified by the celebrated Maputo Corridor. Certainly the social benefits of these new transnational projects are still far from demonstrable. But they are setting important examples for countries such as Nigeria, Ethiopia, or Uganda.[36]

Broadly speaking, then, under the conditions created by the far-flung trade and capital flows of contemporary global capitalism, sub-national governments all over the world have begun to respond to social and economic problems in ways that go far beyond the conventional imaginary of a differentiation between domestic and foreign policy. This structural change imposes the need to create new institutions, new modes of attributing responsibility and legitimacy, and ultimately, new global norms.[37] Let us see then whether these paradiplomatic practices are currently part of a process of international normalization and recognition that would acquire, in due course, the features of new international custom.

Paradiplomacy as Emerging International Custom

According to Article 38.1(b) of the Statute of the International Court of Justice, international custom can be defined as "evidence of a general practice accepted

as law". This definition contains the two fundamental elements—objective and subjective—which are needed in order to identify a practice as customary law. The first element is the material precedent, also called *usus*; the second, he subjective acceptance of this practice as legally binding, is the so-called *opinio iuris,* or spiritual element. The form in which the articulation of these elements materialises is nevertheless open to discussion, giving rise to one of the most frequently recurring debates in the field of international law. Different positions can be identified on this score today, depending on the understanding of the relative weight of practice versus legal conviction in the formation of international custom. But if approached historically, there is an obvious shift from the primacy of practice towards the assertion of *opinio iuris* as the specific mechanism for the creation of new customary law. In the past, consistent state practice was unanimously accepted as the prior and fundamental requirement for the emergence of international custom, but current understanding of international custom assigns a much more prominent place to *opinio iuris*. The existence of customary law is even assumed in cases where it still lacks a consistent practice supporting it, as happens frequently in the fields of environmental or humanitarian law.[38]

The primacy of legal conviction over practice has become the point of departure for contemporary advocates of legal idealism. Conversely, an emphasis on practice has proven particularly seductive for pragmatic liberals, as it supposedly demonstrates the relevance of spontaneous rule making based on shared expectations of reciprocity as the basis for social order. Primacy of practice also fits perfectly within realist approaches oriented towards the unequal capabilities of states to influence the evolution of international custom.[39] Finally, practice is also the key reference for those who regard custom as a form of states' adaptation to the functional requirements of the international system.[40] Nonetheless, all those approaches ignore the extent to which the evolving character of international custom reveals the changing historical conditions of global capitalism and the regulatory needs it entails quite irrespective of the will of states. After all, as Hamer has pointed out: "Custom is not solely a matter of identifying actual practice, but also is a reflection of the social condition and historical development that influence and change the actions of a state".[41]

However, in any discussion of the nature and formation of international custom it is important to note, as Kratochwil does, that the key issue is the change of character in the rule: "from an imputed or generally observed rule *of* behaviour to a rule *for* behaviour".[42] This change takes different forms depending on circumstances, but may generally be interpreted as a process by which international custom emerges more or less deliberately. Indeed, Cassese suggests, when participating in this process, states "do not act for the primary

purpose of laying down international rules, but in order to safeguard some economic, social, or political interests".[43] A similar argument can be made concerning the formation of a corresponding legal conviction. Instead of pretending its sudden crystallization, the formation of *opinio iuris* can be seen as a gradual process, in which states can first accept a certain practice as legally irrelevant, then "legally useful, later legally emerging, and finally legally binding".[44] Both the duration and uniformity of the practice are very much a matter of appreciation, but the consistency of custom depends greatly on these two aspects.

The evidence for custom formation meanwhile can be very diverse. Brownlie presents an extensive list, including, among others, diplomatic correspondence, policy statements, press releases, the opinion of official legal advisers, official manuals on legal questions, comments by governments, state legislation, international and national judicial law decisions, the practice of international organs, and related treaties.[45] Moreover, the relevant practice may be carried out not only by the organs charged with responsibility for international relations, but also by the administrative, judicial or legislative organs of the state.[46] The question of the generality of practice, too, deserves to be briefly commented on. One feature which clearly differentiates custom from other sources of international law is that international custom refers to a class of rules which applies, *prima facie*, to all states.[47] According to this view, customary rules are binding upon all members of the world community (or regional community in the case of regional customs), whereas treaties only bind those states that ratify or adhere to them. Certainly, in order to become customary law, a practice must be subjectively recognized as binding by states. But the fact that there will be states objecting to it does not itself impede the formation of a new customary law, as long as the conviction that such practice is necessarily binding—*opinio iuris sive necessitatis*—is held by widely by states.[48] If universality is not required, therefore, the real problem (following Brownlie again), is "to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others", since 'silence may denote either tacit agreement or a simple lack of interest in the issue".[49] On the other hand, against the voluntarist conception which considers international custom as the result of a tacit and but reflective agreement among states, some scholars have also argued that the emergence of new rules may be more often an unexpected result of various political constraints and expectations of reciprocity.[50] From this point of view, the formation of international custom is less frequently the result of a deliberate lawmaking process, than a consequence of the necessary adaptation to the functional and normative needs of the world system.

It is precisely in this broad sense that we may view the global spread of sub-national involvement in foreign affairs as indicating the emergence of a new international custom in the field of diplomatic law.[51] Certainly, states, and more properly speaking central governments, initially have been reticent to accept the international activities of their constituent units. But during the last few decades they have developed a wide variety of legal or political mechanisms aimed at normalizing a practice which as we saw, is becoming generalized across the world. Against conventional wisdom, these developments are not a peculiarity of federal countries or of well established democratic systems: in fact, the most diverse types of state, in highly divergent regional contexts, have established legal and institutional mechanisms meant to recognize and even incorporate this reality into established foreign policy mechanisms. Given the heterogeneous practice they try to regulate, these mechanisms are not fully uniform. Yet they are sufficiently widespread to have an effect, not only on the constituent units of each of the affected states, but also for the community of states as a whole. Indeed sooner or later, all states will need to consider, a) the treatment they are expected to offer to foreign constituent units, and b) the treatment they understand other states should offer to their own constituencies. Consequently, it is precisely the explicit or implicit consent of sovereign states that has allowed the extension of paradiplomacy all over the world during the last few decades.

Therefore, the binding content of the new custom we are trying to identify is not merely a descriptive statement about what paradiplomacy *is*. It is equally a normative statement about what paradiplomacy *ought to be*.[52] Paradiplomatic practices and discourses are not primarily controversial because of their material scope, or the supposedly undesirable legal consequences for the affected states; rather, controversy will result from the extent to which they appear to be symbolically relevant, and express values questioning precisely those values that are seen to sustain the normative optimum of centralization international relations by states. It can also maintained that this symbolic dimension to a large extent supports the political relevance of paradiplomacy.[53] Precisely for that reason, states need to establish criteria for judging a certain paradiplomatic practice as conforming to the custom they are reluctant, but ultimately inclined to accept; mainly as a result of the increasing complexity of the world political system. As Kratochwil puts it, "precisely because even widely accepted customary practices are far from uniform, actors need some type of *Gestalt* to recognize both behaviour that is deviant—but which still resembles the customary practice—and criteria for judging conduct which would indicate the absence, or desuetude, of custom". Hence we may agree with the author's conclusion that "that it is largely the underlying rule or norm and not the observable overt behaviour which gives a customary practice its recognizability and coherence".[54] The underlying rule here is easy to identify: the maintenance

of paradiplomacy as a relatively low profile activity, always submitted to the ultimate consent of the affected sovereign states.

Conclusion

International custom is generally ignored in current debates on the making of new global norms. Its somewhat outdated parlance seems to deter new generations of scholars from entering the debate, even apart from a concern to give preference to elaborating one's own analytical starting points. According to its critics, international custom is obsolete and unable to deal with the global challenges, which demand new regulatory mechanisms. But even the most cursory overview will bring out that international custom can cast light on how international norms are being formed and observed, raising important questions and suggesting definite answers. The attention that customary law gives to the objective and subjective elements in the making of norms, and the two corresponding sides of the reality it pertains to, are a case in point.

The formation of customary international law is an intriguing process. It depends on the more or less fortuitous articulation of two elements: the existence of a generalized and relevant practice carried out by the community of states, and the general acceptance, or belief, that this practice is legally binding, and not merely a common usage or courtesy. The articulation of these elements, state practice and legal conviction, undoubtedly is an issue riddled with controversy. But if we consider this debate historically, we may observe a clear displacement from the primacy of practice, towards the assertion of legal conviction, or *opinio iuris,* as the specific mechanism for the creation of new customary law.

Our exploration of sub-national paradiplomacy, then, seems to suggest that the growing sub-national involvement in foreign affairs is a phenomenon that is subtly transforming diplomacy all over the world. The making of new customary norms is a contentious process; but the priorities and preferences states will have to be tempered by taking into account the broad array of social forces operative in the global political economy. Sub-national entities engaging in paradiplomacy are a key vector by which contemporary politics deals with the growing and ever more complex requirements of late-modern capitalism in the areas of functional regulation and legitimation.

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32. R. Bernal Meza, "Papel de las regiones en la formulación de la política exterior y potencial de articulación con regiones de países limítrofes", *Integración Latinoamericana*, 156 (1990) pp. 28-39; J. Tapia, "Globalización, descentralización y paradiplomacia: la actividad internacional de la regiones", *Revista de Derecho*, 23 (2002) pp. 153-72.
33. Tapia, *El marco jurídico-institucional...*, *op. cit.* ; Vigevani and Wanderley, *A dimensão...*, *op. cit.*.
34. M. Colacrai and G. Zubelzú, "El creciente protagonismo externo de las provincias argentinas", in A. Bologna (ed.), *La política exterior argentina 1994-1997* (Rosario: CERIR, 1998), pp. 319-34.
35. V. Torrijos, "La diplomacia centrífuga: preámbulo a una política exterior de las regiones", *Desafíos*, 2 (2000) pp. 2-12.
36. I. Taylor, "The Maputo Development Corridor: Whose Corridor? Whose Development?" in Breslin, and Hook, *Microregionalism...*, *op. cit.*, pp. 144-66.
37. As a critical observer has recently pointed out: "Through efforts to attract transnational corporate investment and create transnational business networks, ... sub-national states become the structural site around which the local social foundations of transnational liberalism are built", adding that "this is a key element in the re-scaling of the state and the production of new geographies of global regulation in the twenty-first century" (D.E. Paul, "Re-scaling IPE: sub-national states and the regulation of the global political economy", *Review of International Political Economy*, 9: 3 (2002) p. 1.
38. Among those who suggest that this displacement implies the twilight of international customary law see N.C.H. Dunbar, "The Myth of Customary International Law", *Australian Yearbook of International Law*, 8 (1983) pp. 1-2, and J.L. Goldsmith and E.A. Posner, "A Theory of Customary International Law", *University of Chicago Law Review*, 66 (1999) pp. 1113-36. Conversely, advocates of the enduring relevance of international customary law, albeit through very diverse arguments, include, among others, K. Wolfke, *Custom in Present International Law*, (Dordrecht, Martinus Nijhoff, 1993) and T.E. Swaine, "Rational custom", *Duke Law Journal*, 52: 3 (2000) pp. 559-627.
39. A. D'Amato, "Trashing Customary International Law", *American Journal of International Law*, 81 (1987); M. Byers, "Custom, Power, and the Power of Rules: An Interdisciplinary Perspective on Customary International Law", *Michigan Journal of International Law* , 17 (1995), p. 109.

40. M. Reisman, "The Cult of Custom in the late 20th Century", *California Western Journal of International Law*, 17 (1987) pp. 113-40; M. Mendelson, "The Formation of Customary International Law", *Recueil des Cours-Académie de Droit International/The Hague Academy of International Law*, 272 (1998), pp. 155-410.
41. L. Hamer, "Transgressing Problems of Customary International Law via Foucault", paper presented at the XXI World Congress of the International Association for the Study of Philosophy of Law, Lund, Sweden, 2003, p.1.
42. F. Kratochwil, *Rules, norms, and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs*, (Cambridge: Cambridge University Press, 1989), p. 88.
43. A. Cassese, *International Law* (Oxford: Oxford University Press, 2002), p. 119.
44. Kolb, 'Selected problems..." *op. cit.*, p. 139.
45. I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 2003), pp. 5-7
46. O. Casanovas, *Unity and Pluralism in Public International Law* (The Hague: Martinus Nijhoff, 2001), p. 30.
47. *Ibid.*, p.27.
48. R. Huesa, *El nuevo alcance de la opinio iuris en el derecho internacional contemporáneo* (Valencia: Tirant lo Blanch, 1991).
49. Brownlie, *Principles...*, *op. cit.* p. 6.
50. I. Detter, *The International Legal Order* (Aldershot: Darmouth 1994).
51. My suggestion that subnational foreign action is presently acquiring the features of a new custom has a precedent in S. Beltran, *Los Acuerdos Exteriores de las Comunidades Autonomas*, (Barcelona: University of Barcelona, 2001). Beltran however centrally addresses the specific issue of treaty making power by constituent units in the European context, whereas I argue we are looking at a global phenomenon.
52. On the distinction between descriptive accuracy and normative appeal of custom see A.E. Roberts, "Traditional and modern approaches to customary international law : a reconciliation", *American Journal of International Law*, 95: 4 (2001) pp. 757-91.
53. Lecours, "Paradiplomacy..." *op. cit.*; Paquin, *Paradiplomatie et relations internationales, op. cit.*.
54. Kratochwil, *Rules, norms, and decisions, op. cit.*, p. 72.