

Global Ordo-Liberalism, Private Power and The Transfiguration of Diplomatic Law

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Abstract

Diplomatic law is commonly depicted as a field of law particularly differentiated and stable, and apparently at least not particularly vulnerable to the tensions associated to the restructuring of the global political economy which are so easily observable in other fields of international law. For centuries its formative process was customary. Later, early diplomatic practices, institutions, and norms were tailored to measure the functional and normative needs of a world of nation States. However, it was not until the signing in 1961 of the Vienna Convention on Diplomatic Relations that its basic rules were formally codified. But, as the preamble in this Convention affirms, the rules of customary law continue to govern all questions not expressly regulated by its contents. Custom however is not always the residue of the past that some practitioners and scholars use to imagine. Moreover, its formative processes are also embedded in wider historical transformations of global capitalism. Through the examination of current transformations affecting diplomatic settlement of disputes, diplomatic protection, diplomatic immunity and diplomatic reciprocity, this article contends that diplomatic law is becoming another field of struggle, both particularly unexpected and revealing, in the current transition from *embedded* liberalism towards a new era of global *ordo-liberalism*.

Key words

Global law making; diplomatic law; privatization; international law; ordo-liberalism; diplomatic protection; diplomatic immunity; diplomatic reciprocity; settlement of disputes

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Resumen

El derecho diplomático se representa comúnmente como una rama del derecho especialmente diferenciada y estable, y aparentemente al menos no particularmente vulnerable a las tensiones asociadas a la reestructuración de la economía política global, que son tan fácilmente observables en otros ámbitos del derecho internacional. Su proceso formativo era habitual durante siglos. Más tarde, las tempranas prácticas diplomáticas, instituciones y normas se adaptaban para medir las necesidades funcionales y normativas de un mundo de estados naciones. Sin embargo, no fue hasta la firma en 1961 de la Convención de Viena sobre Relaciones Diplomáticas, que sus normas básicas fueron codificadas formalmente. Pero, tal y como se afirma en el preámbulo de la mencionada Convención, las normas de derecho consuetudinario continuarán rigiendo las cuestiones no reguladas expresamente por su contenido. La costumbre, sin embargo, no siempre es el residuo del pasado que algunos practicantes y estudiosos imaginan. Por otra parte, los procesos de formación también están integrados en las transformaciones históricas más amplias del capitalismo global. A través del análisis de las transformaciones actuales que afectan al arreglo diplomático de las disputas, la protección diplomática, la inmunidad diplomática y la reciprocidad diplomática, este artículo sostiene que el derecho diplomático se está convirtiendo en otro campo de lucha, particularmente inesperado y revelador, en la actual transición del liberalismo *solidario* hacia una nueva era del *ordo-liberalismo* global.

Palabras clave

Decisiones del derecho global; derecho diplomático; privatización; derecho internacional; ordo-liberalismo; protección diplomática; inmunidad diplomática; reciprocidad diplomática; arreglo de diferencias

Table of contents

1. Introduction.....	769
2. Sociology of diplomatic law	770
3. Singularity of diplomatic law.....	772
3.1. Diplomatic law and the transformation of customary law.....	773
3.2. Diplomatic law as self-contained regime	776
4. Transfiguration of diplomatic law.....	777
4.1. From diplomatic settlement of disputes to courts	779
4.2. From right to duty: diplomatic protection reversed.....	783
4.3. Relativization of State immunity.....	785
4.4. Diplomatic reciprocity dodged	786
5. Beyond commodification	787
Bibliography	789

1. Introduction

It can be arguably said that diplomatic law, perhaps even more than general international law, has been historically the real 'master civilizer of nations' (Koskenniemi 2001). Being its core content the regulation of formal relationships between States, diplomatic law uses to be depicted as a legal field particularly differentiated and stable. Through diplomatic law States perform a delicate choreography that serves to cultivate and sustain the fictions of State sovereignty. But apparently at least, one not particularly vulnerable to the turbulences provoked by the restructuring of the global political economy that are so easily observable in other fields of international law.¹ Current debates on the new global regulatory landscape, for instance, do not pay any significant attention diplomatic law. Even in spheres of global law making where its relevance would seem indisputable such as global trade and investment, its importance is frequently ignored. Instead, there is a prevalence of approaches that tackle the response to new global regulatory challenges as a mere technical challenge, without any relevant connection with the old institutions of diplomatic law (Mattli and Woods 2009, Bütthe and Mattli 2011).

Whilst international lawyers only exceptionally refer to the importance of diplomatic law in formative process of international law,² those coming from –or moving towards– other legal fields are more inclined to translate –more or less convincingly– the categories of international law to the new grammars of 'systems theory', 'global administrative law', and 'global constitutionalism', than to explore the foundations of contemporary global law making through the angle of diplomatic law, under the non-explained assumption that this would be basically irrelevant in the context of current debate.³ The lack of attention to diplomatic law is also particularly salient in the field of socio-legal studies. Its slow historical development, the non-controversial character of its codification process, and apparent lack of dynamism, have facilitated the neglect of this legal field even amongst those interested in the sociology of international law.

Against that background, this paper contends that diplomatic law is becoming another field of struggle, both particularly unexpected and revealing, in the current transition from *embedded* liberalism towards a new era of global *ordo-liberalism*. As recently pointed out by Schnyder and Siems 'ordoinstitutional perspectives have gained in appeal in the context of the current financial crisis, because they seem to attenuate extreme views of market libertarianism, while still accommodating broadly neo-liberal, anti-Keynesian and anti-socialist ideas'.⁴ The connection of this context with the field of diplomatic law is not obvious at the first sight, but a careful examination of some crucial transformations in that legal field will, hopefully, reveal that the radical modification of some of its classic institutions is of utmost importance for the ultimate ordo-liberal project.

Bearing these reflections in mind, this article aims to show that diplomatic law, same as it happens with State's constitutional designs and other classic foundations of international legal order, is being now radically revised and forcefully submitted to market imperatives. For so doing we will proceed in four stages. Firstly, and aiming to ascertain their respective potential for a deeper understanding of current transformations of diplomatic law, we will offer a brief review on its somewhat oblique treatment within diverse traditions of socio-legal studies. We are less interested however in celebrating the superiority of the so-called critical approaches, than in considering their differential value for our understanding of the law form under the contemporary conditions of global capitalism. Secondly, we will

¹ See for instance Ian Hurd (2011).

² See amongst the exceptions Boyle and Chinkin (2007).

³ For authoritative introduction to these approaches see respectively Teubner (1997), Kingsbury *et al.* (2005) and Zumbansen (2012).

⁴ For a well-informed and nuanced introduction to ordo-liberalism see Schnyder and Siems (2013, p. 268).

discuss the singularity of diplomatic law as a form of 'self-contained' regime, as well as its character as one of the quintessential pillars of international law understood as a salient expression of global public order. Particular attention will be given to the idea that despite its codification processes, diplomatic law constantly returns to the social fabric of customary law, perhaps more directly than any other field of the international legal system. Thirdly, we will examine some current transformations in fields such as diplomatic settlement of disputes, diplomatic protection, diplomatic immunity and diplomatic reciprocity, the combined effects of which result in what can be arguably called the *commodification* of diplomatic law. Finally, we offer some final reflections about the implications of these ideas for our better understanding of global law making beyond, and behind, diplomatic law.

Undoubtedly, many of the issues we wish to discuss here have received extensive attention in diverse specialization fields such as international trade and investment law, human rights law, or within the study of what has become known as the privatization of security. However, the specific implications of the *transfiguration* of diplomatic law, for our critical understanding of the current commodification of global law making, in the vein we aim to put forward here, remains largely unnoticed.

2. Sociology of diplomatic law

As previously said, the lack of attention to diplomatic law is also particularly salient in the field of socio-legal studies. Customary formative processes of some emblematic legal institutions such as diplomatic immunity, diplomatic protection or diplomatic reciprocity, along with its universal diffusion, look as particularly fitting for those interested in a socio-historical approach to the idea of a global legal culture, but the most influential works in that research line seem to ignore it (Koch 2003). Possible reasons for that neglect may be found in its slow historical development and the non-controversial character of its codification process in the Vienna Convention on Diplomatic Relations adopted in 1961. All these issues make diplomatic law a not so obvious research topic even for those most interested in the sociology of international law.

Almost a century ago, Swiss lawyer and diplomat Max Huber wrote an ambitious sociology of international law in which he portrayed that field as the legal crystallization of the necessary mediation of power between States. However, his work was mainly focused on the problem of the binding force of norms - by analogy to other social orders such as those observable in domestic forms of law making - and thus he only addressed marginally the implications of the wider socio-historical and economical context for the formative process of international law (Delbrück 2007). In other words, despite his timid recognition of the rising power of corporate actors, he was unable to place international law in the wider context of his epoch, namely that posed by liberal order and industrial capitalism. Huber's approach, in sum, reified the State form, and was unable to grasp that international law making is at the end another social process, driven as such not by anthropomorphised States but by real social actors whose ultimate interests, either public or private, are embedded in the historical transformations of the global political economy. Almost a century later, resistance to accept this elemental assumption is one of the most salient features of mainstream socio-legal approaches to global law making,⁵ affecting frequently even to those that present themselves as representatives of some kind of critical approach. An interesting illustration of this is Joseph A. Conti's recent attempt to examine the 'social contexts of disputing' at the World Trade Organization (WTO). Though he announces as his main goal the examination of the links between 'macrolevel characteristics of the world political economy to microlevel interactions of institutions and situated individuals', he analyses so carefully the WTO as the context that shapes the interests and expectations of

⁵ See for instance Hirsch (2005).

State representatives, and elaborates such an ambitious modelling of the way in which these are administered by legal advisors in their trade disputes, that, at the end, he leaves completely outside the picture any critical interrogation between such a specific and complex institutional framework and the ultimate role of the WTO in the wider global political economy (Conti 2010, p. 11).

Fortunately however, and in sharp contrast with the approaches indicated above, there is also a critical tradition,⁶ ranging from forgotten Marxist classics such as Evgeny Pashukanis, to new distinctive voices such as Picciotto (1997b), Cutler (1997), or Chimni (2004), amongst others, that provide theoretical frameworks arguably better equipped to contribute to a socio-historical understanding of international law. That body of works, together with the distinctive contributions on the rise of 'internationalized legal constructions', represented by Dezalay and Garth (1996, 2002) and Madsen (2006), built on Bourdieu's (1987) critical sociology of law, provides in sum the theoretical inspiration behind this piece of work.

Through these lenses diplomatic law and its classic institutions, despite of their apparent insignificance, can be understood as a venue for the settlement of disputes between contending parts in global competition, which only reveals its ultimate importance in those transitional periods. Whilst in previous historical crisis, old struggles until then frequently conducted through 'intervention, blockade or non-recognition', were later managed 'within the limits of normal diplomatic relations and contractual law' (Pashukanis 1980, pp. 180-183), in the current context, the restructuring of the global political economy is propelling new changes through which diplomacy and diplomatic law more than transformed are becoming transcended.

Sol Picciotto has convincingly examined the important political implications of the current transition from 'embedded' liberalism to a new global 'ordo-liberalism' in which constitutional designs and global law making are subordinated to market imperatives. In that context, he contends, 'law is being called upon to mediate shifts in the structures of power' (Picciotto 1997a, p. 259), whilst an increasingly complex landscape of global regulatory networks is taking form, which contribute to the displacement of authority and relevance from State to market authorities (Picciotto 2008 pp. 315-341). In that new context the classic divide between public and private international law implodes, showing, as Claire A. Cutler convincingly argues, its ultimate unity and the ideological functions of its differentiation. According to her, these developments show that a new

alliance between private and public authorities who are united in their commitment to the expansion of capitalism (...) is advancing this ideology and contributing to the troubling and paradoxical exercise of public authority by private actors' (Cutler 1997, p. 261).

In a similar vein, Kanishka Jayasuriya has advanced in the context of what he calls the 'rise of regulatory State', some compelling arguments on the connection between new global regulation, State fragmentation, and the reconfiguration of political power within and amongst States (Jayasuriya 2005b). Moreover, drawing in a post-Marxian reading of Bourdieu's conceptual models, Jayasuriya, contends that contemporary crisis of relevance of diplomacy can be read as the complicate re-adjustment – by impulse of the many imperatives posed by a new global political economy – of mutual relationship between both the diplomatic system considered as an objective *field* and the diplomatic *habitus*, understood as the inter-subjective milieu, slowly formed across historical time, through which diplomats interpret their role and deploy with more or less fortune their practices and discourses (Jayasuriya 2005a). This restructuring is deeply transforming, through a variety of interventions, the very role of the State in the regulation of global capitalism, forcing its rapid adaptation, from very different positions and frequently competing

⁶ For a compelling introduction to this research line see Miéville (2004).

legitimacies, to its changing functional and normative needs (Jayasuriya 2005a, p. 53-54). More specifically, on the importance of diplomacy in that restructuring process, Jayasuriya argues:

It is useful to consider diplomatic activity as an 'autonomous social field' with its own particular type structural relationships. In this context, what gave diplomatic activity its autonomy was a form of privileged monopoly over a set of highly specialized diplomatic practice and routines. No doubt, the manner in which the symbolic capital was enshrined in these diplomatic practices and routines has been continually challenged and contested by various groups...however, what is unique in the emergence of the regulatory state and the fragmentations of sovereignty that it implies is the fact that the monopoly of traditional canters with regard to the instruments and activities is being contested. Along with the increasing fragmentation of diplomatic activity is a loss of control over the symbolic capital that gave this privileged monopoly of diplomatic routines (Jayasuriya 2005a, p. 54)

That loss of control over the representations of diplomacy is particularly clear in the combination of experts, private diplomatic consultants, corporate managers, NGOs activists, and celebrities that now populate the once highly selective fora of diplomatic negotiation. As Stephen Gill has recently pointed out, many of these practices represent a form of genuine contestation, modes of critical political agency not so easily reducible to normalization attempts. But many others, such as those this work aims to analyze, may be better considered as the expression of the imperative adaptation of diplomacy to the 'common sense' of global liberalism (Gill 2012), which propelled by policy advisors, consultants and legal experts, is now reaching a new and unexpected legal field, namely that of diplomatic law.⁷ For the case of United States, Dezalay and Garth have convincingly analyzed the way in which legal expertise, first called by State Department officers seeking support, have finally displaced diplomats and executive officers as the crucial agents in fields such as global trade or investment disputes (Dezalay and Garth 2008), but this is a trend that more discreetly is also observable in many other foreign services all over the world. However, despite the cogency of Jayasuriya's analysis on the new roles of diplomacy –and his undisputable expertise in socio-legal studies- he does not consider specifically the many consequences of those processes he rightly identify on diplomatic law. Bearing this aspect in mind, this work aims to extend Jayasuriya important insights on the changing roles of diplomacy in the new global regulatory landscape, to the study of some transformations currently in process in diplomatic law. But this goal will require previously a brief discussion on the singularity of diplomatic law.

3. Singularity of diplomatic law

In her now classic commentary on the Vienna Convention on Diplomatic Relations, Eileen Denza presents diplomatic law as a precondition for international law making:

Diplomatic law in a sense constitutes the procedural framework for the construction of international law and international relations. It guarantees the efficacy and security of the machinery through which States conduct diplomacy, and without this machinery States cannot construct law whether by custom or by agreement in matters of substance (Denza 2008, p. 2).

Denza's statement looks rather formalistic in view of current discussions on the fragmentation of international law and global legal pluralism, but it has also the virtue to remind us what were the ultimate foundations of international legal making until very recently. In addition, her statement offers us a valid point of reference to ascertain the possible importance of some changes currently in process in diplomatic law that are not receiving perhaps, the attention deserved. As previously said, diplomatic law is generally presented as a particularly stable and

⁷ For an early critique of such approaches see Dezalay and Garth (2002).

differentiated legal field, albeit naturally subordinated to the basic principles of general international law. Given its particular material content, namely the management of formal relationships between States, diplomatic law does not seem especially vulnerable to the diverse tensions – whether socio-economic, environmental or technological – that so significantly affect other material domains of the international legal system. Its uniqueness is based on the fact that all its legal and institutional architecture appears as the quintessential expression of State's sovereignty. However, the advent of modern diplomatic law was not only crucial for the shaping of an inter-state system, but also for the territorialisation of politics within each and one of those states, through the consequent deploy of an ensemble of diplomatic-military and administrative *dispositifs*, for the purposes of what Foucault called *governmentalité*.⁸

That process of centralization is visibly expressed in the progressive codification of diplomatic law – in the long period spanning from the Congress of Vienna in 1815 to the 1961 Convention, and other codifying conventions adopted thereafter, as a particularly exclusive domain of international law, reserved to states and their official representatives. This process was not immediately fulfilled, as shown by the persistence of privileges regarding representation and immunity enjoyed until the mid Nineteenth Century by the British East India Company (Garrett 2008). Nevertheless, as this work will try to show later, when current developments in diplomatic law are contemplated in historical perspective there is no doubt that currently we are witnessing a new transition only comparable with that previous one. That transition ultimately entails a shift in relevance from public authority and law as both the ultimate foundation and the main locus of political authority to a new hybrid system in which a wide and variety of new and not so new private actors, powerfully emerge and compete with State power, and increasingly displaces that as the main pillar of international legal order. That transition reveals, in sum, the re-composition of global order from old forms of classic liberalism to a new era of global ordo-liberalism to which diplomatic law can hardly escape. Nonetheless, before to examine directly these impacts a more nuanced presentation of the singularity of diplomatic law is needed.

3.1. Diplomatic law and the transformation of customary law

In a more direct manner than in any other field of the international legal system, and despite of its significant codification process, diplomatic law constantly returns to the social fabric of customary law, not only regarding the forms it may have acquired in the past, but particularly with respect to the new processes that highlight its current revision. Indeed, as if wanting to acknowledge its necessarily incomplete character, the Vienna Convention itself points out in its preamble that the norms of customary law must continue to rule over all questions that are not expressly regulated in the provisions stipulated on that important occasion. This question is widely recognized by specialists in diplomatic law. However, the precision demanded by their specialization causes their interest to be limited to those manifestations of custom that are especially clear from a legal point of view, even though that may exclude other phenomena of considerable political relevance from their analysis.

According to conventional wisdom the formation of customary international law is a somewhat intriguing process which 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, namely state practice –*usus*– and legal conviction –*opinio iuris*–, are not easily operational, but it can be said that those formative process, same as its doctrinal interpretation- acquires different profiles depending on the historical

⁸ See on this McMillan (2010).

circumstances (Kolb 2003). In the past, consistent state practice was unanimously accepted as the prior and fundamental requirement for the emergence of international custom, but current dominant understanding of international custom in past decades assigned a much more prominent place to *opinio iuris* even at the point to assert the existence of customary law when it lacks of the corresponding consistent practice, as it happens frequently in the fields of human rights and humanitarian law. That primacy of legal conviction –or *normative appeal*– over practice –or *descriptive accuracy*– is the unavoidable point of departure for contemporary advocates of legal idealism.⁹

Conversely, emphasis on practice results particularly seductive for pragmatic liberals since it supposedly shows the relevance of spontaneous rule making based on shared expectations of reciprocity as the basis for social order (Goldsmith and Posner 1999, pp. 1113-36, Swaine 2000). Primacy of practice fits also perfectly within realist approaches more interested on the unequal capabilities of States to influence the evolution of international custom (Byers 1995, p. 109, D'Amato 1987). Practice is also the crucial point for those who regard custom as a form of States' adaptation to the functional requirements of the international system (Reisman 1987, Mendelson 1988, p. 272). However, and against the voluntarist conception which considers international custom as the result of a tacit but reflective agreement among States, some scholars consider that the emergence of new rules may be more frequently explained as the unexpected result of diverse political constrains and expectations of reciprocity. Beyond doctrinal discussions on the current formative process of customary law, in the framework of a particularly stylized approach to the 'global administrative model' of current global law-making, Nicolaidis and Shaffer have also praised the virtues of some form of 'decentralized' global regulation currently at play arguing that:

Transnational mutual recognition regimes are a core element of any global governance regime that eschews global government (...) The diffusion of mutual recognition regimes partakes in shaping a system of global subsidiarity that rejects (or at least does not unquestionably accept) the temptations of centralization and hierarchical constitutionalization of global economic relations (Nicolaidis and Shaffer 2005).

Interestingly enough they compare the model of transnational mutual recognition represented by the current combination of public and private mechanism for the mutual incorporation of standards of accountability, technical assistance, regulatory coordination, consistence and fairness in procedures, and so on, with the narrow model posed by the modes of recognition within diplomatic law:

Recognition creates extraterritoriality. In the diplomatic world, this happens in a minimalist guise through the establishment of embassies as extraterritorial islands of home country sovereignty in the host state. But when one examines states' recognition of what the others do, rather than of their respective existence and boundaries, the islands of extraterritoriality are larger and more pervasive. In fact, they cannot be thought of as islands anymore, but more aptly as rivers and streams flowing from one domestic legal landscape to another. While mutual recognition is an expression of the broader category of "extraterritoriality," it is not extraterritoriality of a "unilateralist" (or "imperial") bent, but rather extraterritoriality applied in a consensual or at least bi- or plurilateral, "other-regarding" manner (Nicolaidis and Shaffer 2005, p. 267).

From this point of view, the formation of international custom is less frequently the result of a deliberate law-making process than the consequence of the necessary adaptation to the functional and normative needs posed by the evolving context. Trying to emphasize that sociological dimension, Worster has recently examined the formative process of custom through the perspective of 'critical mass' as used in the study of collective decision-making. In addition to the specific content of the

⁹ On the distinction between 'normative appeal' and 'descriptive accuracy' of custom, see Roberts (2001).

norm, he asserts the importance of 'influence through networks' and 'opinion leaders' and 'opinion diffusers' (Worster 2013). Notwithstanding their interesting remarks however, his approach ignores the extent in which the evolving character of international custom may reveal the changing historical conditions of global capitalism, as well as its regulatory priorities even beyond the will of States. More open perhaps to that possible influence, Koskeniemi refers to the weight of socio-historical context as the 'normative force of habit' (Koskeniemi 1992).

By our side, we understand that contemporary making of new customary norms in the field of diplomatic law is a contentious process in which the initial will of the States has to be tempered taking into account the wider social forces behind the global political economy, as well the increasing functional and legitimizing needs of late-modern capitalism, and the growing power of a variety of private authorities ranging from human rights advocates to transnational private investors (Cutler *et al.*, 1999).

Furthermore, in contrast with other areas of the international legal system in which the decisive element in the contemporary formation of custom have shifted from the material element to the *opinio iuris*, as authoritatively expressed in ICJ decisions, in the case of diplomatic law, practice remains to be the fundamental element in its gradual and often silent configuration. In fact, only a down-to-earth vision of the formation processes of new international custom will enable us to show the relationship between transformations of diplomatic law that are underway and the more extensive restructuring process of the global political economy. For as soon as it is considered from this perspective, it becomes immediately visible that, despite its special character, diplomatic law cannot escape from the imperatives established by the reality of global capitalism. In short, it is important to emphasize that diplomatic custom is not only an echo of the past, but the most tangible expression of the dynamic character of diplomacy, and of its inevitable historicity, even before its legal implications have taken form. In this context, as Langhorne has correctly pointed out, today, as in the past, the ever-changing international realm is, without doubt, modifying diplomacy and configuring new forms of international custom. The true challenge is, at this present time, to identify those new forms of international custom, at least in origin, that would enable the necessary adaptation of diplomacy to the new conditions of the international system (Langhorne 2005, p. 334).

A possible illustration of this would be the growing recognition of the need to revise traditional notions of diplomatic law in view of new technological developments. After analyzing new practices such as diplomatic negotiation via on-line hypertexts or the exercise of a great number of consular functions through the network, Wong-Mog Choi (2006), has raised in a very convincing manner and long before the irruption of Wiki-leaks and Snowden cases, the issue of the increasing obsolescence of the Vienna Conventions on Diplomatic Relations (VCDR) and Consular Relations (VCCR) with regard to the custody of documents, and the need for a radical revision of the notions associated to the inviolability of the mission, documents and archives, freedom of official correspondence, tax privileges, and legal immunity, defending additionally the need to adopt new rules of inviolability for what he defines as *cyber diplomatic bags*.

Although very different in nature, equally important are surely the challenges that the singularity of the European Union (EU) -and its capability to enter into diplomatic relations with third States and international organizations- poses to conventional understanding of diplomatic law as formalized in the VCDR. The status of the EU delegations abroad, the consideration of their diplomatic and consular activities, the diplomatic status of its representatives with regard to their immunities, passports, and position in matters of precedence within diplomatic corps, but also its intrinsic impossibility to reciprocate make the EU a particularly singular but revealing case about the way in which contemporary diplomatic law

hardly can escape from historical change (Wouters and Duquet 2012). In the context of the phenomena analysed here, the case of the EU is perhaps the sole case in which transformations of diplomatic law are developed without putting in compromise its ultimate role as an expression of public authority.

But, as we will try to show later, the transformative processes of diplomatic law currently in process can also be understood through very different lens to those suggested by our previous illustrations. But in order to address the difficult issue of what may be more relevant in the new formative process of customary diplomatic law, it should be recalled, as Koskenniemi appropriately underlines, that legal arguments are always, ultimately, arguments of 'political preference' (Koskenniemi 1992, p. 284). Given the above-mentioned considerations, we aim to examine in the following sections certain innovations in the practice of diplomacy, indicative of a new tension between public and private authority in the context of the on-going global political economy restructuring, and which can be considered manifestations of a new diplomatic custom in shaping, the implications of which we intend to highlight for a conventional understanding of diplomacy and diplomatic law.

3.2. *Diplomatic law as self-contained regime*

In the context of an insightful discussion on the significance of the historical transition from *ius gentium* to *ius inter-gentes*, Sylvie Lechner has recently stressed the unavoidable historicity of diplomacy, although in a rather abstract way that keeps diplomacy safe from any social or political turbulence (Lechner 2006, p. 235). Ignoring the mutual co-determination between domestic political order and the shaping of modern diplomatic system previously discussed, she simplifies perhaps in excess when she affirms that, simply because its very formation was the result of the mutual specific needs of modern states, diplomacy is an international institution that cannot be extracted by analogy from the domestic model of law or politics. This is arguably a quite disputable statement in view not only of the increasing implications for diplomatic law of contemporary discussions on global constitutionalism and global administrative law, but also in view of historical evidences that reveal the logical and causal relation between changing forms of international order and the evolving domestic order within states themselves. In this vein, Cornelia Navari traces the historical lineages of diplomacy in terms of the passing through the consecutive requirements –in terms of both diplomatic means and ends- of absolutist, republican and liberal democratic states across historical time. It is at this point where after briefly discussing liberal notions and practices of political and economic freedom and human rights, she emphasizes the growing incompatibility between 'global liberal' order and traditional or 'Westphalian' diplomacy, arguing that 'liberal practices de-centre the state and displace the state-centric view. Liberals insist that it is plural impulses operating above and below the level of the state that should attract our attention (Lechner 2006, p. 579).

Is in that 'liberal' context that Navari delineates, that this work will analyze later the contemporary transformations of diplomatic law. But in contrast with the somewhat benign portrait that Navari elaborates of 'liberal order', our discussion will be framed in the more critical understanding of what 'really existing' liberalism entail as the shaping force behind the new global regulatory landscape.

But once the connection between domestic political order and diplomacy has been problematized, in order to approach diplomatic law is crucial to emphasize sufficiently that its historical formation through both international custom and codification has been always based on mutual consent and reciprocity among States. By virtue of this emphasis on reciprocity and mutual recognition among States, it can be held that – however much the empirical existence of the State is not formerly dependent on diplomatic recognition – the uniqueness of diplomacy and its legal institutions rests in the constitutive character of the international order as an inter-State system. In Denza words:

Reciprocity forms a constant and effective sanction for the observance of nearly all the rules of the Convention. Every State is both a sending and a receiving State. Its own representatives abroad are in some sense always hostages. Even on minor matters of privilege and protocol their treatment may be based in reciprocity. For the most part, failure to accord privileges or immunities to diplomatic missions or their members is immediately apparent and it is likely to be met by appropriate countermeasures (Denza 2008, p. 2).

The International Court of Justice (ICJ), in a controversial advisory opinion regarding the conflict between Iran and the United States due to the hostage-taking incident in Teheran, recognized the singular character of diplomatic law in 1980 (International Court of Justice 1980). In view of the Iranian government's claim that those events should be understood as part of a broader dispute involving serious breaches of the basic principles of international law by US diplomatic agents – such as that of non-intervention in internal affairs – which would justify the adoption of drastic retaliatory measures, the Court determined that the norms of diplomatic law constitute a self-contained or *lex specialis*, that establish specific and efficient counter-measures available to the host State, such as the declaration of *persona non grata* or the breaking off itself of diplomatic relations, for cases of possible abuse from members of diplomatic missions as an appropriate response without having to resort to other forms of reprisal that may, sometimes, be justifiable in other spheres of general international law.

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious (International Court of Justice 1980, paragraph 40).

An in-depth analysis of the consistency and consequences of this controversial opinion for our understanding of global legal order is beyond the scope of this work.¹⁰ Following Simma and Pulkowski we can say that the notion of 'self-contained regimes' shall not be misconceived as an argument in favour of entirely autonomous legal subsystems. As they assert 'social systems cannot exist in splendid isolation from their environment' (Simma and Pulkowski 2006, p. 492). But it would be a mistake to ignore the meta-legal dimensions of the distinction formulated by the ICJ. In turn, this singularity pointed out by the ICJ, however difficult it may be to define, certainly explains that discussions such as those in reference to the norms of imperative law and *erga omnes* obligations that are so important for an understanding of contemporary transformations of general international law, seem to be in conflict with certain key institutions of diplomatic law, such as those referring to diplomatic protection and immunities which – amongst others- will be discussed later in this work. But against the ICJ's opinion diplomacy –and diplomatic law- cannot escape its historicity, and in the same way that it was the rise of the modern State that defined the contours evident today, its contemporary transformation, under the pressures of global political economy, will also determine nowadays –with varying degrees of intensity– its reconfiguration.

4. Transfiguration of diplomatic law

The changing relationship between public and private in the field of diplomacy, which we aim to analyze below may, in a certain way, be perceived as a *privatization* process. However, the question should not be viewed, as Hocking has correctly emphasized (Hocking 2004), as a simple dissolution of the public, but rather as an expression of a complex and contentious process of readjusting positions between 'public' and 'private' power in the new global system, and that acquires diverse configurations in various specific contexts. It remains true however

¹⁰ For a cogent introduction to this debate see Simma (1985) and Bamhoorn (1994).

that if we consider the prevailing inertia and the observable outcomes, the resulting picture is one which can be quite appropriately labelled as a 'corporate take-over' of diplomatic law.

Certainly, not all manifestations of this new relationship between public and private in the diplomatic arena are presented as expressions of a contentious relationship. On the contrary, many times they appear as an expression of an unconditional will to collaborate between the private sector and State diplomacy. This becomes especially evident in respect of forms of private diplomacy developed in close collaboration with partner States, such as it frequently happens in fields such as cultural and educational diplomacy, and even in the most delicate field of international mediation.¹¹ Similarly, albeit the participation of private contractors in military operations is certainly controversial it is also true that its deployment has been generally conducted through bilateral agreements between both sending and receiving States (Haufler 2008). However, in spite of the undisputable importance of those developments, in the context of our argument the most revealing expressions of what can be called the privatization of diplomacy are those registered in the economic domain.¹²

The appointment of prominent representatives from the private sector to represent the State in diverse areas of international diplomatic negotiation is not at all new. However, the ever-increasing practice of appointing special ambassadors - recruited directly from the Boards of Directors of major corporations - to represent the State in multilateral conferences or negotiations on matters of critical interest to the private sector does eloquently illustrate the tendency that we would like to analyze. Similarly, one may highlight the changes in the exercise of consular functions that would confirm this perception. This is reflected in the reconversion of a large proportion of representation and consular functions in service centres for the corporate sector, with the development of a wide range of consultancy services for trade and investment. In the opposite direction Richard Langhorne has also identified another important trend within the corporate sector:

Increasingly corporations are hiring retired diplomats to advise the CEO and senior management or to lead an international affairs division as a way to manage the increasingly complex relations of the company with other firms in the industry, states and intergovernmental organizations, and the ever changing networks of non-governmental organizations (Langhorne 2005, p. 337).

Beyond the area of economic advancement one may find even a closer association of the private sector with consular management processes, as is shown by the business development of software for on-line visa applications and extensions, or the increasing cooperation of airline companies in controlling mobility in these processes (Pigman and Deos 2008).

But it is in the case of commercial diplomacy were some developments result of particular interest in the context of this article. For instance, both in the United States as in the European Union institutional channels of consultation and petition have been made available for private actors, permitting them to request the initiation of diplomatic negotiations conducive to the reduction of trade barriers. These formal channels have become stronger through initiatives such as the so-called Trans-Atlantic Business Dialogue (TABD),¹³ which, in contrast to classic forms of *lobbying* associated to powerful pressure groups such as the European Roundtable of Industrialists that emerged from the corporate sector itself, as Sherman and Eliasson have aptly emphasized, are distinguished by three key features: they have been created deliberately by governments; they offer the

¹¹ See for example, Herrberg and Kumpulainen (2008).

¹² An example of these practices can be found in the commercialization, for the mutual interests of both States and companies, of flags of convenience for foreign fishing fleets (Florek and Conejo 2007).

¹³ On the origin of the privatization process of commercial diplomacy in the transatlantic context, see Cowles (2000), Vannoni(2013).

private sector new channels of influence in the political process; and they permit the private sector to plan and define the trade agenda - for instance, diplomatic negotiation for the elimination of trade barriers not prohibited under the world trade regime- with matters not chosen by the governments themselves (Sherman and Eliasson 2006).

Therefore, the true novelty here does not reside in the fact that through diplomatic negotiation with regard to trade liberalization, investment promotion and security, environmental regulation, intellectual property and many other issues, the States serve certain private sector interests. After all, this is one of the classic functions of diplomacy and is recognized in the 1961 Vienna Convention for Diplomatic Relations. Nor does it reside in the growing importance of corporate pressure groups that seek to influence those processes, given that this is equally an enduring characteristic of international economic relations (Pigman and Vickers 2012). Rather, the novelty lies in the increasingly marked tendency of the States to enter into forms of direct horizontal dealings with the private sector as a result of which the principle of State authority becomes weaker (Pigman 2005). Indeed, it is increasingly the private sector that, by using these channels, undertakes negotiations, seizes the initiative to form the agenda and, more and more, assumes the very representation of the State and even the control itself of commitments. That trend is having important effects upon diplomatic institutions and practices that despite of its undisputable importance only recently have received due attention in diplomatic studies (Ruel and Visser 2012).

4.1. From diplomatic settlement of disputes to courts

Diplomatic negotiation of disputes remains the predominant mode to manage and settle international disputes, but in the past three decades there are two crucial domains in which its role have been significantly reduced, namely those of commercial and investment disputes (Waibel 2010). This process has been fostered by the proliferation of arbitral and judicial bodies that are beyond classic diplomatic channels for the settlement of disputes, increasing opportunities for private actors to bring actions against the States themselves in the framework of both international and domestic law. Surely, growing institutionalization of arbitral and judicial settlement may be regarded as a step forward in terms of legal certainty in which private actors operate, particularly regarding trade and investment. Moreover, this may be understood in a broad sense, in the manner proposed by advocates of new global administrative law, as the expression of a streamlining process on a global scale through multiple mutual agreement procedures, of which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 was a unique illustration.¹⁴

To the extent in which it provides new institutional channels for private actors in the defence of their rights and interests against the States, this new context can also be understood as privatization of the international legal system, both as an expression of corporate power advancement or as a reinforcement of individual guarantees for investors (Orrego-Vicuña 2004). Yet, from the analytical perspective of this study, it is evident that this triple process, that Orrego characterizes as 'constitutionalization, accessibility and privatization', implies, at the very least, a significant reduction of the margin available to States for diplomatic negotiation as a means to peaceful dispute settlements -through negotiation, good offices, mediation, enquiry or conciliation- in general and, in particular, with regard to trade and investment.¹⁵

¹⁴ On the delicate balance between State defence of domestic public interest and States decisions with regard the enforcement of foreign awards under the New York Convention, see Fry (2009).

¹⁵ On diplomatic negotiation as the method par excellence to the settlement of disputes between States see Koopmans (2003).

Furthermore, the creation of the WTO also substantially changed the traditional forms of commercial diplomacy. Whilst the establishment of a system for the resolution of differences of a mandatory nature and with the effective capacity to sanction was, initially, welcomed by States, it is true that the negative effects on diplomatic discretion were soon apparent.¹⁶ Although initially the idea that the best guarantee for the effective and non-discriminatory compliance with commercial law lay within the impressive structure of the WTO was widely shared,¹⁷ thorough examination of its practice in reality immediately expressed great reservations regarding this question (Alter 2003). While some experts advocated for an even more radical transition to 'power-based diplomacy' to 'rule-based diplomacy',¹⁸ others have correctly pointed out that the arrival of this singular rule of law, based on the most narrowly commercial formulations conceivable, has undermined all the valuable diplomatic experience concerning trade dispute settlement through diplomatic dialogue, negotiation and the flexible search for diverse forms of reciprocity by linking different items of the agenda, and on which, for decades, the work methodology of GATT was based.¹⁹ Although many observers have aptly analyzed the implications of this move from diplomatic negotiation to legal dispute that WTO entail, their insights remain largely ignored in current discussions on global governance and global legal pluralism.²⁰

However, the interpenetration between public and private and the ever-stronger influence of the private sector on diplomatic negotiation and new, global restructuring processes is, above all, reflected in the case of international investment regulation.²¹ Traditionally investors could not sue States directly under international law, and arbitration tribunals did not had general jurisdiction over international investment disputes. As Van Harten has aptly formulated the traditional approach:

Conventionally, investors could not sue states directly under international law and international arbitration tribunals had no general jurisdiction over investment disputes. Under international rules of state responsibility, investor claims against host states were brought by the investor's own state and international tribunals were established to adjudicate claims relating only to a specific dispute or historical event. Thus, the adjudication of international disputes was restricted to dispute resolution between states and individuals did not have standing to bring claims on their own behalf. Disputes between a foreign national and a host state could be the subject of an international claim of diplomatic protection on the part of the home state of the foreign national. But those claims were most commonly resolved through negotiation and, if the individual was dissatisfied with the result that his or her government obtained, then he or she was without further remedy under international law (Van Harten 2005).

In contrast, under the provisions of the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 - ICSID Convention- a new system of investor protection has emerged that combines direct investor-state arbitration and new standards of investor protection that significantly modified the previous scheme. As Van Harten conveniently remarks, the new system 'elevated the legal status of investors -but not other individuals- in international law by allowing them to make international claims for damages against host states'. Furthermore:

¹⁶ As Smith (2000) argued when 'drafting governance structures for international trade, political leaders weight the benefits of improved treaty compliance against the costs of diminished policy discretion.'

¹⁷ In order to illustrate this initial optimism, see Bhandari (1998).

¹⁸ See -with regard to NAFTA- the arguments provided by Byrne (2000).

¹⁹ The classic formulation of that idea owes to Hudec (1970).

²⁰ In this critical vein, see Young (1995), Reich (1997) and Weiler (2002). For a more balanced perspective see Zapatero (2009).

²¹ For a particularly interesting discussion on the different antinomies between public and private as a constitutive tension of international investment law, and the controversies inevitably generated, see Mills (2011).

Although the system depends on state authority for its establishment and ongoing effectiveness, the system adopts private authority as a method of transnational governance by permitting private investors to make claims and by giving private arbitrators the power to resolve those claims. This provides significant advantages to multinational enterprises at the expense of governmental flexibility in both capital-importing and capital-exporting states, as revealed by the recent explosion of investor claims' (Van Harten 2005, p. 602).

In contrast to the prevailing model of the 1950s and 1960s, when the investment-recipient States expressed frequently their opposition to foreign investors dominance thus affirming their sovereignty - as provided in the so-called Calvo Clause which was of particular importance in Latin America-,²² the outbreak of the debt crisis in the 1980s and the need to establish a favourable environment for foreign investment in the context of the structural adjustment programmes brought about the arrival of a new generation of Bilateral Investment Treaties (BITs) which institutionalized recourse to international arbitration mechanisms as the best guarantee for investors. This revitalized recourse to the provisions established under the ICSID Convention and, more specifically, to the International Centre for Settlement of Investment Disputes (ICSID). Created with the purpose of increasing legal security in overseas investments and reducing the vulnerability of the private sector with respect to State discretion, ICSID provides the possibility of recourse, for both foreign investors as well as the States themselves, through institutionalized channels rather than through national courts, for the resolution of disputes arising in the framework of the BITs. Certainly, these BITs not always allow investment disputes to be settled through the ICSID. A recent empirical study concludes, quite unsurprisingly, that

home governments prefer and typically obtain ICSID clauses in their BITs, particularly when internal forces push strongly for such provisions and when they have significantly greater bargaining power than the other signatory. Yet some home governments are less likely to insist upon ICSID clauses if they have historical or military ties with the other government. On the other hand, although host governments are often hostile toward ICSID clauses, particularly when sovereignty costs are high, they are more likely to consent to such clauses when they are heavily constrained by their dependence on the global economy (Allee and Peinhardt 2010).

However, in spite of the complexity of their theoretical model, and interestingly enough, in a single footnote they emphasize that:

the presence of diplomatic relations (embassies) is by far that strongest predictor of BIT signing across all exogenous and endogenous regressors in the model (Allee and Peinhardt 2010, p. 21).

More interesting are nonetheless the conclusions of another work of the same authors, in which they clearly shows that new combination of BITs and ICSID is actually having important adverse effects for signatory States:

These potential FDI losses occur through two distinct channels: First, governments experience reduced FDI upon becoming an ICSID respondent, even if the case is pending or unresolved. Second, the ultimate loss of an ICSID dispute, or even the perception of a loss, leads to large further decreases in FDI. This one-two punch generated by investment arbitration activity recasts the debate over the workings of BITs by demonstrating an important new source of costs associated with the treaties -the reputational costs of noncompliance. From a policy standpoint, this potential for BITs to ultimately harm signatories can have profound real-world

²² The Calvo Clause, adopted in the 1960s and 1970s by a number of Latin American States in national law and in international investment agreements, and which is named after the jurist that formulated its content, established the waiver of the right of foreign investors to diplomatic protection from their States to settle disputes arising with regard to investment in the State that provided the clause. In this way, in addition to affirming the principle of sovereignty with respect to interference from other States, it set foreign investors on an equal footing with nationals, thus limiting the defence of their interests to the State's national legislation from which the dispute might arise.

consequences and suggests that governments who are unsure about their future ability to abide by the treaties may be better off not signing BITs in the first place (Allee and Peinhardt 2011, p. 429).

Although at the time of its negotiation it did not arouse much interest, the implications of its real functioning in the past three decades has highlighted the extraordinary implications of the ICSID for State sovereignty, in the extent in which it modifies in a radical manner traditional notions of attribution of powers within the Vienna Convention on the Law of Treaties (Cole 2011).

This explains the growing dissatisfaction of a number of investment-recipient States with its functioning, and the growing opposition to this system, particularly in Latin America, as is evident in new practices such as the submission of the new bilateral investment agreements to constitutional control, indicative of the clear commitment of an ever-increasing number of States to reaffirm their sovereignty, as conspicuously illustrated by recent nationalization processes in both Argentina and Bolivia. The reestablishment, and even the radicalization, of the spirit of the Calvo Clause express in sum the commitment to reaffirm in bilateral diplomatic negotiations regarding investment –and more or less fortunately- the precedence of public authority and public interest over private interests, as the basis on which the investment regulation system arising from diplomatic negotiation should rest, both in legal and practical terms.²³

In all events, it is interesting to underline that in contrast to the indisputable continuity of the argument that would justify the defence of that clause, and other similar conditions, the arguments that have historically opposed the Calvo Clause, since its original formulation to the expressions adapted to the reality of our present time, have evolved in a particularly eloquent manner. In the traditional understanding, the States objecting to the clause invoked their inalienable right to protect their national investors, sometimes even over the will of those investors themselves. Today, in contrast, the argument shifts to investors invoking their intrinsic right to claim the necessary protection not only by the State to which they pertain as nationals, but also by any other, as is the case when *ius cogens* norms and *erga omnes* obligations are invoked. Similarly, it is worth reflecting on the fact that as a result of the above-mentioned evolution, a new array of conflict of essentially private interests, between shareholders and corporations themselves is emerging. Conflicts to which the States -who are increasingly called upon for diplomatic protection on such cases- are ultimately forced to respond, not for the purposes of asserting the prevalence of public interest, but to positioning itself taking side in favour of one of the side in a dispute purely of private nature. In light of the disputes arising from these phenomena, Brower has recently delivered an interesting and balanced analysis on the relative consistency of various narratives in dispute regarding the debate on the implications of new international investment law: firstly, that construed on the notion of legal security and transparency for investments equally agreed upon by both parties in a contract; secondly, that emphasizing – often through analogy or even the juxtaposition of arguments taken from the protection of human rights – the need to establish protection mechanisms for private actors against abuses by States; and finally, that of an openly critical foundation, based on the premise that the proliferation of direct access to settlement by arbitration reveals, in the end, a deliberate attempt to evade State regulation (Brower II 2011).

Beyond the doctrinal controversies, it is, nevertheless, indisputable that these procedures of judicializing international disputes with regard to trade and investment, have been driven by a whole new industry of leading global law firms that have identified in the possibility of international litigation, presented by these new institutional channels and the increasing activity of Courts of Arbitration and

²³ For an interesting analysis in respect of this, see Fach (2011).

other legal bodies, a unique opportunity for the growth of their global business.²⁴ It is not, hence, just a matter of investors in a country receiving legal advice offered by these firms for the best defence of their interests against possible breaches by the State in the framework of bilateral agreements between the home State and the investment-recipient State. Through what has become known as *treaty-shopping*, -that is, opportunistic location strategies in multiple jurisdictions through an increasingly sophisticated network of subsidiaries- the corporate sector has proven itself able to evade the formal framework of these bilateral agreements defined by inter-State diplomacy, to enjoy the protection of interests offered by those agreements regarding nationality, even if their home States took no part in nor acquiesced to that negotiation (Muchlinski 2011).

4.2. *From right to duty: diplomatic protection reversed*

The institutionalization of court and arbitration proceedings for the settlement of investment disputes, either in the framework of more than two thousand signed BITs in barely half a century, or within diverse regional integration schemes in place, has considerably reduced the resort to traditional diplomatic protection and, with it, the settlement of disputes in this field through bilateral negotiation between States. Insofar as these new channels gave private investors the right of direct action against the investment-recipient State, resort to diplomatic protection, which in the past was a fundamental instrument, was initially relegated to the background. But against that trend and the initial impressions it produced diplomatic protection presently knows nevertheless a true revival as the last resort in the hands of investors when States fail to comply with investment arbitration awards (Tejera Pérez 2012).

This question is still of great relevance. The International Law Commission, at the request of the United Nations General Assembly and after arduous preparation, finally produced the Draft Articles on Diplomatic Protection that endeavour to define the new content in the light of the aforementioned transformations. According to Kateka's (2007) interpretation, the basic principle that this draft seems to express with respect to the question at hand is that the corporation would be protected by the State of nationality and not by that of the shareholders. In turn, however, the shareholders would equally have the right to diplomatic protection when their own rights were affected. On assessing these innovations, together with others of equal relevance also included in the draft, it is important, as Torroja (2007) has rightly pointed out, to be aware that it remains to be seen whether the States will be prepared to formalize those innovations by conventional methods.

Nevertheless, considering the provisional outcome of this revision as well as the development of the ICJ's doctrine, from the *Mavrommatis* case to *Barcelona Traction* and the most recent jurisprudence in this respect – such as *La Grand*, *Avena* and specially *Diallo* - it can be argued that the on-going transformation of the content of diplomatic protection can be characterized as a double shift from the very foundation of this notion. Though not without ambiguities or occasional setbacks, the first shift involves the transition from the exercise of diplomatic protection of a person by reason of his nationality, to the exercise of the same based on the protection of his subjective rights. The second shift, of equal importance, shows the change in the traditional consideration of diplomatic protection as a right exercised at the discretion of the State even when this was not invoked by a national, to the growing present consideration of it as an obligation of the State where the protection of its nationals –and even of those of foreigners- must be exercised at the request of the individual whose rights are in question. Although there are two prerequisites to the exercise of diplomatic protection - nationality and exhaustion of local remedies- and its exercise is prohibited in the

²⁴ See the critical and pioneering analysis of the rise of arbitration as a means of evading State regulation provided by Dezalay and Gath (1995).

context of investment arbitration by the ICSID Convention, the fact is that private sector is increasingly able to invoke that old institution when losing States fail to comply arbitration awards (Tejera Pérez 2012).

The original understanding of diplomatic protection lay in the legal fiction that the violation of an individual's rights could be, ultimately, understood as a violation of the rights of the State of which that individual is a national. In this way, on exercising diplomatic protection, the State was defending its own rights, even when in order to do so it resorted to the use of force, and not so much those of the individual that invoked that right. For this reason, diplomatic protection was a right that could not be waived nor withdrawn by the individual. Vermeer-Künzli has recently offered a careful analysis on the origins and evolution of diplomatic protection, as well as a thoughtful discussion on the importance of legal fictions as elements which, far from revealing an inconsistency in the legal systems, have the advantage of solving, at least discursively, the many social antinomies which law must cover. But she does not take her analysis to its ultimate consequences, for the crisis of the legal fiction on which the classic notion of diplomatic protection rested would, in short, reveal the crisis of State sovereignty itself and of its characteristic socio-legal system of representation as result of the current conditions established by global capitalism and its corresponding functional and normative needs (Vermeer-Künzli 2007b).

Recent developments of international law in the field of State responsibility before the individual propelled by innovations of trade, investment and human rights law are the driving forces behind the new consideration of diplomatic protection not as the discretionary exercise of a right by the State but as an obligation to protect the individual rights' of those who resort to it.²⁵ In the words of Distefano, this 'transfiguration' can be summarized as one in which the status of the individual in international law evolves from that of an 'object' merely accessory of his/her own state- to 'subject' (Distefano 2012).

In sum, although the new scheme enable individual investors and traders to directly bring their own claims against other states bypassing the traditional system of diplomatic protection (de Brabandere 2011), they are rediscovering diplomatic protection as an important tool when domestic courts fail to satisfy their claims. Through the so-called mixed arbitration, and the juxtaposition of the legal grammars of human rights protection and foreign investment law, a new climate is resulting in which the gradual assertion of State obligation to protect the interests of its nationals –and even not nationals- when investing or trading abroad, is taking ground (Parlett 2007).

In *Barcelona Traction* case the ICJ established an important precedent on determining that the nominal nationality of a corporation took precedence over the effective nationality of its shareholders, asserting that diplomatic protection is applicable not only to individuals but also to legal entities, whilst simultaneously holding that the national state of a shareholder may not bring a diplomatic protection claim when the shareholder is harmed because the rights of the company are violated, since those shall be protected through the domestic law of the company's State of nationality.²⁶ That decision explain the rapid development of international investment law, as seeking to secure the protection of investors beyond old notions of diplomatic protection, States promoted the multiplication of BITs and the adoption of ICSID Convention, even to the extent that a new doctrinal understanding, widely shared amongst legal practitioners working in global law firms, contends that a new custom is taking shape,²⁷ that challenges traditional

²⁵ That shift, and the consequent abandon –for the sake of realism- of the legal fiction over which the traditional notion of diplomatic protection was formed, has been also advocated by Pellet (2007).

²⁶ For a classic and compelling account on this, see Diez de Velasco (1974).

²⁷ For a compelling analysis of the implication of these BITs on the formative process of new international customary law see Congyan, (2008).

legal understanding of diplomatic protection so as to allow shareholders to give rise to standing.²⁸ An advocate of that new understanding, contend that:

shareholders have direct rights under customary international law, and that where their national state takes a diplomatic protection action in defence of shareholders' direct rights, international, not domestic law should be the law applicable to that claim' (Juratowitch 2011).

The determination shown by Juratowitch in the paragraph above, does not diminish even in front of the recent *Diallo* case, in which, almost five decades later, the ICJ refused again to allow the national state of the shareholders to protect those shareholders where the rights of their company would had been transgressed. Quite the opposite, in view of the reluctance of the ICJ to recognize the emergence of a new customary law modifying the traditional understandings of diplomatic protection, Juratowitch self-confidently declares:

These developments have not yet convinced the Court to declare that customary international law has evolved, either on questions of standing or on questions of the law applicable to the substantive rights of shareholders. Given the difficulties with the current position, it is to be hoped that such evolution will soon be declared to have occurred'.

Parlett also shares this view, albeit he expresses it in even sharper terms:

The court's unwillingness to accept that these developments have modified the rules of diplomatic protection must be correct and does much to dispel the fallacy that mixed arbitration in this context is a morphed form of delegated diplomatic protection (Parlett 2007, p. 535).

At the risk of redundancy, it is worth to remark that this doctrinal movement advocating for the inversion – *de lege ferenda* - of the foundations of diplomatic protection, is taking place through the growing overlap of the two essential mechanisms that individuals may resort to when claiming protection by invoking the responsibility of the State. On the one side, the classic institution of diplomatic protection, on the other, the existence of norms of imperative law and *erga omnes* obligations from which the States cannot escape.²⁹ Although some critical voices exist advocating for the priority of public interest in investment treaty arbitration (Kato 2009), it is worth to remark that the current trend in favour of the rapprochement of global trade and investment law with human rights law for the purposes of better protecting the interest of investors and traders,³⁰ sharply contrast with the many practical and doctrinal resistances encountered by those advocating for similar juxtaposition of regimes as a way for improving global standards in legal fields such as environmental, health, education, cultural or labour rights.³¹

4.3. Relativization of State immunity

These developments have also had a significant impact on another important legal institution not strictly part of diplomatic law but cannot be understood if not in relation to it, namely, State immunity.³² As in the previous cases, the transformations observed in the last decades leave no doubt as to the ultimate meaning of the current transition. In this case, the most outstanding feature is the increasing irrelevancy of the principle of absolute State immunity, and the affirmation, conversely, of its restrictive nature, for the purpose of strengthening the capacity of different forms of defence of private interests in their disputes

²⁸ See, for instance, Laird (2005).

²⁹ See, for instance Franck(2005) and Vermeer-Künzli (2007a).

³⁰ See as representative of this approach, Petersmann (2005).

³¹ See for instance the critical analysis provided for the cases of the rights of access to food and medicines in Picciotto (2007)

³² On the relationship between State immunity and diplomatic immunity that historically precedes it, see Lewis (1990).

against the States. Certainly, this principle may be understood as progress insofar as it enables the possibility of holding the State accountable for committing particularly serious violations of human rights of any individual and not only of their nationals under the norms of imperative law and *erga omnes* obligations. However, that evolution also has its ambivalences, for, once again, there is an interpenetration of the field of human rights protection and that of investors' rights protection which is quite undesirable not only for those States in breach, but also for those other States whose governments, protected by the claim of absolute immunity, seek to assert their development goals, and their objectives of social cohesion and environmental sustainability against the interests of investors whose sole concern is the exploitation of resources beyond any socio-labour, environmental or fiscal consideration.

In sum, although there is no lack of arguments on both sides, the notion of restrictive immunity with its distinction between the 'public' and 'private' acts of States as a formula for resolving the existence State immunity against suits by individuals, is arguably difficult both in legal terms and in actual practice to operationalize. Although it has been suggested that a possible solution to this would be the introduction of judicial review to clarify this,³³ a great number of States, particularly in Africa and Latin America, faced with the increase in the litigation capacity of the private sector, feel that their position has been considerably weakened.³⁴

The examples that have been discussed are undoubtedly not the only series of cases confirming that certain key institutions in diplomatic law are undergoing significant changes under the growing pressure of private power. Such is the case, for instance, in the context of the current global economic recession, of the major transformation recently undergone by what is known as debt-diplomacy resulting from the importance acquired by private rating agencies over the past decades as configuring, and one might even say openly distortive, elements of the capacity of States, as examples of public authority, to conclude amongst themselves approaches to solving their financial problems in situations of crisis.

4.4. *Diplomatic reciprocity dodged*

The history of diplomatic immunity can be summarized as the history of the discovery and more or less contentious acceptance of the convenience of securing some special treatment and mutual protection to foreign envoys. The rationale for this significantly evolved across time, and the foundations for diplomatic immunity first moved from the personal representation of the sovereign to the fiction of extraterritoriality, and then, in the contemporary era, to the idea of functional necessity. The extension of diplomatic immunities to non-diplomats, such as civil servants working for international organizations, always have been a delicate issue, in the extent in which it complicates very much the reciprocal basis of diplomatic immunity.³⁵

More recently however new customary practices are taking ground that do not fit easily in the conventional understanding of that venerable institution of diplomatic law. We refer to the increasingly widespread practice of asymmetrically extending diplomatic immunity not only to military personnel, within the framework of the Status of Forces Agreements (SOFAs), but also to private contractors that provide a diverse range of services ranging from security, restoration and business activities which one might say are incompatible with the necessarily reciprocal basis of immunities in common diplomatic law. Albeit always sanctioned in bilateral

³³ See for instance Vermeer-Künzli (2006).

³⁴ In this respect, it is interesting to compare Moursi-Badr (1984) and Bankas (2005). Whilst the former defends the validity of this distinction, the latter is far more critical of its implications. In the middle ground we can place Fox (2006).

³⁵ For an impressive study on this, see Frey and Frey (1999).

agreements its doctrinal foundation is basically unilateral and not really compatible with the notion of diplomatic reciprocity. In order to assess the implications of this emerging practice for our understanding of diplomacy, it is interesting to highlight that the doctrinal controversies raised in the United States, and increasingly elsewhere, even when concentrate in critical approaches to private contractors immunity, are generally addressed from a strictly unilateral perspective –as if they were the expressions of a virtuous gaze-, to the extent that there is an invariable focus on the more or less critical evaluation of the content of the US Foreign Sovereign Immunities Act –and similar legal instruments- without any particular attention of what these instruments mean in terms of the displacement of the necessary reciprocity and mutual consent by the side of the receiving States.³⁶ In his important study on diplomatic immunity, McClanahan offered a functional justification of the rationale for the non reciprocal character of these practices, in very articulated terms that nevertheless conceal both the power relations surrounding the negotiations of SOFAs –even when the signatories are the US and Israel- and the rise of corporate power that this practice reveal:

The immunities of military forces and their dependents abroad are sought by the sending state and granted by the receiving state in order to make the forces abroad have better discipline and morale and therefore greater effectiveness in achieving the goals of an alliance or a bilateral, shared strategic relationship. The immunities of diplomats exists to make the whole system of relations between sovereign states function. This is obviously a longer-range goal and a broader one. In practice every national government wants its diplomats to have immunity on a reciprocal basis. In contrast, the majority of governments see no general need to station their armed forces abroad, and few relish the idea of having foreign forces stationed in their own territory, with or without special rights and privileges (McClanahan 1989, p. 74-75).

But two decades after this reflective statement was written, it is not only the asymmetrical character displayed by those mechanisms that renders it unlikely that the requirement of reciprocity, irrevocable for diplomatic law and practice, can be later observed. Even more troubling it is perhaps that now we have realized that it has been the corporate sector represented by private contractors, and not the military in its classical sense, who has obtained the greater benefits of it. In short, the emergence of these practices, not only in the United States, but also in other countries, and increasingly within the multilateral frameworks of both the UN and the NATO, is another element of concern, whose repercussions on both the principle of sovereign equality of States, and the idea of on international public order, are beyond the scope of this book.

5. Beyond commodification

The main goal of this article was to demonstrate that diplomatic law, in spite of both its old-fashioned appearance and marginal position in current discussions of global law making, is becoming another field of struggle, both particularly unexpected and revealing, in the current transition from *embedded* liberalism towards a new era of global *ordo-liberalism*.

A new interest in diplomacy is easily observable in the corporate world. But the soft-power narratives that characterize that field in mainstream literature cannot conceal –in spite of their rhetorical efforts- the harder expressions of corporate power that are really shaping the ‘corporate take-over’ of some venerable institutions of diplomatic law. With its selective approach to innovation, always in the direction that better meets the expectations of the private sector, recent transformations affecting diplomatic settlement of disputes, diplomatic protection, and diplomatic reciprocity, along with other important aspects, such as the relativization of State immunity, clearly show which are the forces that drive the

³⁶ Although the bibliography on this subject is immense, a particularly instructive introduction to this debate in keeping with our argument in this study is offered by Wen (2003).

most significant changes in the on-going restructuring of the global system. Under the tireless impulse of legal professionals at the service of the corporate world, these developments in diplomatic law tellingly illustrate what Cutler has aptly labelled as a new 'commodity form' theory of law (Cutler 2009).

As way of concluding we could summarize the indicators of that process as follows: First, the growing role of corporate actors in the performance of the highest functions of negotiation, regulation, administration and control in critical areas, whether by formal appointments, discreet consultation, privatization or sub-contracting procedures. Second, the proliferation of institutionalized channels for the direct access of the private sector to the justice system in its disputes with the State, through autonomized procedures that are increasingly outside the control of the State and significantly narrow the options for the diplomatic settlement of disputes in crucial domains such as global trade and foreign investment. Third, the shift of the basis of diplomatic protection from the discretionary exercise by the State of its right to protect an individual by virtue of their nationality, to its current consideration as an obligation of the State to protect individuals by reason of their subjective interests. Fourth, the relativization of the principle of absolute immunity as a result of the configuration of a new principle of restrictive immunity, based in a distinction between private and public acts of the State particularly difficult to operationalize in both theoretical and practical terms, but whose effects are increasingly visible. Fifth, the unilateral extension of diplomatic immunities to private contractors undertaking activities of a diverse nature with regard to foreign operations and that seem incompatible with the necessarily mutual and reciprocal foundations of diplomatic law.

These transformations affecting some venerable institutions of diplomatic law seem to questioning not only the functional efficacy of diplomatic system, but even the ultimate normative principle of its very foundation, namely the public nature of the power upon which diplomatic recognition, representation and negotiation was built as one of the quintessential expressions of international law understood as form of public order.

Same as it happens with regard to the privatization of security (Cutler 2010), the privatization of diplomacy and that of its legal institutions is also a process propelled by global experts always ready and eager to offer their legal advise about how to resolve the many tensions that the displacement of authority, and the deformalization of diplomatic law entails (Dezalay and Garth 2010). In addition to contribute to the fragmentation of State power, all these aspects – along with others such as the new visibility acquired by the so-called 'celebrities' in diplomacy³⁷ – contribute in sum to destabilize both the functional and symbolic dimensions that sustain the representation of diplomacy and diplomatic law as the quintessential expression of State sovereignty and public order in the global realm.

In view of these processes in the wider realm of global law, some authors have recently advocated for the normative reassertion of the public foundations of authority behind the new formative processes of international law, but that is perhaps a quite idealistic ambition in view of the huge displacement of relevance already registered in favour of private authorities (von Bogdandy *et al.* 2010). Garth and Dezalay have aptly argued that the legitimacy of any potential transnational legal order depends on 'some symmetry between the private law side of economic law and corporate law firms on one side, and the world of NGOs and human rights on the other might develop together'. But perhaps their analysis gives up too soon of the potential role that, under parliamentary control, may play official diplomatic and executive representatives of democratic States (Garth and Dezalay

³⁷ This important aspect of celebrity diplomacy it is not considered in the otherwise compelling Cooper (2007).

2012). Consequently, in the light of these developments, we rather prefer to conclude with the some words that Sol Picciotto wrote more than a decade ago:

It would be illusory once again to attempt the separation of public and private. What is needed is to develop modes of interaction which can more effectively ensure the primacy of public over private interests in the management of economic activities generally (Picciotto 2001, p. 359).

In sum, contemporary, legal and political regulation of diplomatic practice and recent transformations in diplomatic law, same as happens with many other ongoing regulatory processes across the world, reveal a contentious process in which the initial will of the States, even that of the most powerful amongst them, has been tempered, taking into account not only the global functional dynamics propelled by technological innovations or environmental challenges, but also with the consequent challenge to the precarious legitimation of global capitalism, the growing influence of the private powers and interests of corporate elites. In front of this, we could arguably said that in diplomatic law, same as in many other legal fields, it will be necessary to identify and to cultivate experiences of resistance to global commodification which could help to maintain the practices and rules of diplomatic law as a non-commodified sphere (Williams 2005).

Bibliography

- Allee, T. and Peinhardt, C., 2010. Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions. *International Studies Quarterly*, 54, 1-26.
- Allee, T. and Peinhardt, C., 2011. Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment. *International Organization*, 65 (3), 401-432.
- Alter, K.J., 2003. Resolving or exacerbating disputes? The WTO's new dispute resolution system. *International Affairs*, 79 (4), 783-800.
- Bamhoorn, L.A.NO.M., 1994. Diplomatic Law and Unilateral Remedies. *Netherlands Yearbook of International Law*, 25, 39-81.
- Bankas, E.K., 2005. *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*. Berlin: Springer.
- Bhandari, S., 1998, *World Trade Organization and Developing Countries: Diplomacy to Rules-Based System*. New Delhi: Deep and Deep.
- Bourdieu, P., 1987. The Force of Law: Towards a Sociology of the Juridical Field. *Hastings Law Journal*, 28, 805-853.
- Boyle, A., and Chinkin, C., 2007. *The Making of International Law*. Oxford University Press.
- Brower II, C.H., 2011. Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties. *Santa Clara Journal of International Law* [online], 9 (1), 179-215. Available from: <http://digitalcommons.law.scu.edu/scujil/vol9/iss1/7/> [Accessed 14 September 2013].
- Büthe, T. and Mattli, W., 2011. *The New Global Rulers: The Privatization of Regulation in the World Economy*. Princeton University Press.
- Byers, M., 1995. Custom, Power, and the Power of Rules: An Interdisciplinary Perspective on Customary International Law. *Michigan Journal of International Law*, 17 (1), 109-180.
- Byrne, J., 2000. NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access. *Texas International Law Journal*, 35, 415-434.

- Chimni, B.S., 2004. An Outline of a Marxist Course on Public International Law. *Leiden Journal of International Law*, 17 (1), 1-30.
- Choi, W.-M. 2006. Diplomatic Law and Consular Law in the Internet Age. *Singapore Yearbook of International Law*, 10, 117-132.
- Cole, T., 2011. Treaty Conferring Treaties: The Meaning of 'Investment' in the ICSID. *Leiden Journal of International Law*, 24, 305-344.
- Congyan, C., 2008. International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules. *Chinese Journal of International Law*, 7 (3), 659-679.
- Conti, J.A., 2010. *Between Law and Diplomacy: The Social Context of Disputing at the World Trade Organization*. Stanford University Press.
- Cooper, A.F., 2007, *Celebrity Diplomacy*. London: Paradigm Publishers.
- Cowles, M.G., 2000. Private Firms and the US-EU Policy-making: The Transatlantic Business Dialogue. In: E. Philippart and P. Winand, eds. *Policy-making in the US-EU Relationship*. Manchester University Press.
- Cutler, A.C., 1997. Artifice, Ideology and Paradox: the Public/Private Distinction in International Law. *Review of International Political Economy*, 4 (2), 261-285.
- Cutler, A.C., 2009. Constituting Capitalism: Corporations, Law, and Private Transnational Governance. *St Antony's International Review*, 5 (1), 99-115.
- Cutler, A.C., 2010. The legitimacy of private transnational governance: experts and the transnational market for force. *Socio-Economic Review*, 8, 157-185.
- Cutler, A.C., Haufler, V., and Porter, T., 1999. The Contours and Significance of Private Authority in International Affairs. In: A.C. Cutler, V. Haufler and T. Porter, eds. *Private Authority and International Affairs*. Albany: State University of New York Press.
- D'Amato, A., 1987. Trashing Customary International Law. *American Journal of International Law*, 81 (1), 101-105.
- de Brabandere, E., 2011. Non-State Actors and the Proliferation and Individualization of International Dispute Settlement. In: B. Reinalda, ed. *The Ashgate Research Companion to Non-State Actors*. Farnham: Ashgate, 347-359.
- Delbrück, J., 2007. Max Huber's Sociological Approach to International Law Revisited. *European Journal of International Law* [online], 18 (1), 97-113. Available from: <http://www.ejil.org/pdfs/18/1/217.pdf> [Accessed 29 September 2013].
- Denza, E., 2008. *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*. Oxford University Press.
- Dezalay, Y. and Garth, B., 1995. Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Corporation for Transnational Business Disputes. *Law and Society Review*, 29 (1), 27-64.
- Dezalay, Y. and Garth, B., 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. University of Chicago Press.
- Dezalay, Y. and Garth, B., 2002. *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*. Ann Arbor: University of Michigan Press.

- Dezalay, Y. and Garth, B., 2008. Law, Lawyers, and Empire: From the Foreign Policy Establishment to Technical Legal Hegemony. *The Cambridge History of Law in America, vol. III*. Cambridge University Press.
- Dezalay, Y. and Garth, B., 2010. Marketing and Selling Transnational 'Judges' and Global 'Experts': Building the Credibility of (Quasi) Judicial Regulation. *Socio-Economic Review*, 8 (1), 113-130.
- Dezalay, Y. and Garth, B., eds., 2002, *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*. Ann Arbor: The University of Michigan Press.
- Diez de Velasco, M., 1974. Protection diplomatique des sociétés et des actionnaires. *Recueil des Cours de l'Académie du Droit International*, 141.
- Distefano, G., 2012. The Position of Individuals in Public International Law Through the Lens of Diplomatic Protection: The Principle and Its Transfiguration. In: R. Kolb and G. Gaggioli, eds. *Research Handbook on Human Rights and Humanitarian Law*. Cheltenham: Elgar, 65-74.
- Fach, K., 2011. Latin America and ICSID: David versus Goliath. *Law and Business Review of the Americas*, 17 (2), 195-226.
- Florek, M. and Conejo, F., 2007. Export flagships in branding small developing countries: The cases of Costa Rica and Moldova. *Place Branding and Public Diplomacy*, 3 (1), 48-62.
- Fox, H., 2006. *Law of State Immunity*. Oxford University Press.
- Franck, S.D., 2005. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. *Fordham Law Review*, 73, 1521-1625.
- Frey, L. and Frey, M., 1999, *The History of Diplomatic Immunity*. Columbus: Ohio State University Press.
- Fry, J.D., 2009. Désordre Public International under the New York Convention: Wither Truly International Public Policy. *Chinese Journal of International Law*, 8 (1), 81-134.
- Garrett, D., 2008. The Corporation as Sovereign. *Michigan Law Review*, 60, 129-133.
- Gill, S., 2012 Towards a Radical Concept of Praxis: Imperial. common sense' versus the Post-modern Prince. *Millennium Journal of International Studies*, 40 (3), 505-524.
- Goldsmith, J.L. and Posner, E.A., 1999. A Theory of Customary International Law. *University of Chicago Law Review*, 66, 1113-36.
- Haufler, V., 2008. MNCs and the International Community, Conflict, Conflict Prevention and the Privatization of Diplomacy. In: V. Rittberger and M. Nettesheim, eds. *Authority in the Global Political Economy*. London: Palgrave Macmillan, 217-237.
- Herrberg, A. and Kumpulainen, H., eds., 2008 *The private diplomacy survey 2008: Mapping of 14 Private Diplomacy Actors in Europe and America*. Brussels: Crisis Management Initiative.
- Hirsch, M., 2005. The Sociology of International Law: Invitation to Study International Rules in their Social Context. *University of Toronto Law Journal*, 55, 913-921.
- Hocking, B., 2004. Privatizing Diplomacy? *International Studies Perspectives*, 5 (2), 147-152.

- Hudec, R., 1970. The GATT Legal System: A Diplomat's Jurisprudence. *Journal of World Trade*, 4, 615-665.
- Hurd, I., 2011. Law and the Practice of diplomacy. *International Journal*, 66 (3), 581-596.
- International Court of Justice, 1980. *Case concerning United States diplomatic and consular staff in Teheran (United States vs. Iran)*, Judgment of 24 May 1980 [online]. Available from: <http://www.icj-cij.org/docket/files/64/6291.pdf> [Accessed 14 September 2013].
- Jayasuriya, K., 2005a. Breaking the Westphalian frame: regulatory State, fragmentation and diplomacy. In: J. Robertson and M. East, eds. *Diplomacy and Developing Nations: post-Cold-War foreign policy-making structures and processes*. London: Routledge, 39-54.
- Jayasuriya, K., 2005b. *Reconstituting the Global Liberal Order: Legitimacy and Regulation*. London: Routledge.
- Juratowitch, B., 2011. Diplomatic protection of shareholders. *The British Yearbook of International Law*, 81 (1), 281-323.
- Kateka, J., 2007. John Dugard's Contribution to the Topic of Diplomatic Protection. *Leiden Journal of International Law*, 20, 921-930.
- Kato, N., 2009. The Role of Diplomatic Protection in the Implementation Process of Public Interests. In: T. Komori and K. Wellens. *Public Interest Rules of International Law: Towards Effective Implementation*. London: Ashgate Publishing, 189-210.
- Kingsbury, B., Krisch, N. and Stewart, R., 2005. The Emergence of Global Administrative Law. *Law and Contemporary Problems* [online], 68 (3-4), 15-61. Available from: <http://scholarship.law.duke.edu/lcp/vol68/iss3/2/> [Accessed 30 September 2013].
- Koch, C.H., 2003. Envisioning a Global Legal Culture. *Michigan Journal of International Law*, 25 (1), 1-77.
- Kolb, R., 2003. Selected problems in the theory of customary international law. *Netherlands International Law Review*, 50 (2), 119-50.
- Koopmans, S.M.G., 2003, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation*. The Hague: Kluwer.
- Koskenniemi, M., 1992. The normative force of habit: international custom and social theory. In: M. Koskenniemi, ed. *International Law*. Darmouth: Aldershot, 213-289.
- Koskenniemi, M., 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge University Press.
- Laird, I.A., 2005. A Community of Destiny: the Barcelona Traction Case and the Development of Shareholder Rights to bring Investment Claims. In: T. Weiler, ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, Nafta, Bilateral Treaties and Customary International Law*. Nottingham: Cameron May, 77-96.
- Langhorne, R., 2005. The Diplomacy of Non-State Actors. *Diplomacy and Statecraft*, 16 (2), 331-339.
- Lechner, S., 2006. What Difference Does Ius Inter Gentes Make? Changing Diplomatic Rights and Duties and the Modern European States-System. *The Hague Journal of Diplomacy*, 1 (3), 235-259.
- Lewis, C.J., 1990, *State and Diplomatic Immunity*. London: Lloyd's of London Press.

- Madsen, M.R., 2006. Transnational Fields: Elements of a Reflexive Sociology of the Internationalisation of Law. *Retfærd Argang*, 29 (3), 23-39.
- Mattli, W. and Woods, N., eds., 2009. *The Politics of Global Regulation*. Princeton University Press.
- McClanahan, G.V., 1989. *Diplomatic Immunity: Principles, Practices, Problems*. London: Hurst & Co, 74-75.
- McMillan, K., 2010. European diplomacy and the origins of governmentality. In: M.de Larrínaga and M. G. Doucet, eds. *Security and Global Governmentality: Globalization, Governance and the State*. London: Routledge, 23-43.
- Mendelson, M., 1988. The Formation of Customary International Law. *Recueil des Cours - Académie de Droit International/The Hague Academy of International Law*. Leiden: Brill.
- Miéville, C., 2004. *Between Equal Rights: a Marxist Theory of International Law*. Leiden: Brill.
- Mills, A., 2011. Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration. *Journal of International Economic Law*, 14 (2), 469-503.
- Moursi-Badr, G., 1984. *State Immunity: An Analytical and Prognostic View*. The Hague: Martinus Nijhoff.
- Muchlinski, P., 2011. Corporations and the Uses of Law: International Investment Law Arbitration as a 'Multilateral Legal Order'. *Onati Socio-Legal Series* [online], 1 (4). Available from: <http://ssrn.com/abstract=1832562> [Accessed 2 September 2013].
- Nicolaidis, K. and Shaffer, G., 2005. Transnational Mutual Recognition Regimes: Governance without Global Government. *Law and Contemporary Problems* [online], 68, 263-317. Available from: <http://scholarship.law.duke.edu/lcp/vol68/iss3/9/> [Accessed 15 September 2013].
- Orrego-Vicuña, F., 2004, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*. Cambridge University Press.
- Parlett, K., 2007. Role of Diplomatic Protection in the Protection of Foreign Investments. *The Cambridge Law Journal*, 66 (3), 533-535.
- Pashukanis, E., 1980 [1925]. International law. In: P. Beirne and R. Sharlet, eds. *Selected Writings on Marxism and Law*. New York: Academic Press, 180-183. Available from: <http://www.marxists.org/archive/pashukanis/1925/xx/intlaw.htm> [Accessed 15 September 2013].
- Pellet, A., 2007. La seconde mort d'Euripide Mavrommatis? Notes sur le projet de la C.D.I. sur la protection diplomatique. *Droit du pouvoir, pouvoir du droit - Mélanges offerts à Jean Salmon*. Brussels: Bruylant, 1359-1382.
- Petersmann, E., 2005. Human Rights and International Trade Law: Defining & Connecting the Two Fields. In: T. Cottier, J. Paulwelyn, J and B.E. Bürgi B, eds. *Human Rights and International Trade*. Oxford University Press.
- Picciotto, S., 1997a. Fragmented States and International Rules of Law. *Social and Legal Studies*, 6 (2), 259-279.
- Picciotto, S., 1997b. International Law: The Legitimation of Power in World Affairs. In: P. Ireland and P.Laleng, eds. *The Critical Lawyers' Handbook*. London: Pluto Press.

- Picciotto, S., 2001. Democratizing Globalism. In: D. Drache, ed. *The Market or the Public Domain? Global Governance and the Asymmetry of Power*. London: Routledge.
- Picciotto, S., 2007. The WTO as a Node of Global Governance: Economic Regulation and Human Rights Discourses. *Law, Social Justice & Global Development Journal*, 1. Available from: http://www.go.warwick.ac.uk/elj/lgd/2007_1/picciotto [Accessed 7 September 2013].
- Picciotto, S., 2008. Regulatory Networks and Multi-Level Global Governance', In: O. Dilling, M. Herberg, and G. Winter, eds. *Responsible Business: Self-governance and the law in transnational economic transactions*. Oxford: Hart, 315-341.
- Pigman, G.A. and Deos, A., 2008. Consuls for hire: Private actors, public diplomacy. *Place Branding and Public Diplomacy*, 4, 85-96.
- Pigman, G.A. and Vickers, B., 2012. Old habits dies hard? Diplomacy at the World Trade Organization and the 'new diplomatic studies' paradigm. *International Journal of Diplomacy and Economy*, 1 (1), 19-42.
- Pigman, G.A., 2005. Making Room at the Negotiating Table: The Growth of Diplomacy between Nation-State Governments and Non-State Economic Entities. *Diplomacy and Statecraft*, 16 (2), 385-401.
- Reich, A., 1997. From Diplomacy to Law: The Juridification of International trade Relations. *Northwestern Journal of International Law and Business*, 17 (1), 775-849.
- Reisman, M., 1987. The Cult of Custom in the late 20th Century. *California Western Journal of International Law*, 17, 133-45.
- Roberts, A.E., 2001. Traditional and modern approaches to customary international law: a reconciliation. *American Journal of international law*, 95 (4), 757-91.
- Ruel, H. and Visser, R., 2012. Commercial diplomats as corporate entrepreneurs: explaining role behaviour from an institutional perspective. *International Journal of Diplomacy and Economy*, 1 (1), 42-79.
- Schnyder, G., and Siems, M.M., 2013. The Ordoliberal Variety of Neoliberalism. In: S. Konzelmann and M. Fovargue-Davies, eds. *Banking Systems in the Crisis: The Faces of Liberal Capitalism*. Abingdon: Routledge.
- Sherman, R. and Eliasson, J., 2006. Trade disputes and Non-State Actors: New Institutional Arrangements and the Privatisation of Commercial Diplomacy. *The World Economy*, 29 (4), 473-489.
- Simma, B. and Pulkowski, D., 2006. Of Planets and the Universe: Self-Contained Regimes in International Law. *European Journal of International Law* [online], 17 (3), 492. Available from: <http://www.ejil.org/pdfs/17/3/202.pdf> [Accessed 29 September 2013].
- Simma, B., 1985. Self-Contained Regimes. *Netherlands Yearbook of International Law*, 16, 111-136.
- Smith, J.M., 2000. The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts. *International Organization*, 54 (1), 137-180.
- Swaine, E.T., 2000. Rational custom. *Duke law Journal*, 52 (3), 559-627.
- Tejera Pérez, V.J., 2012. Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards Journal of International Dispute Settlement. *Journal of International Dispute Settlement*, 3 (2), 444-475.

- Teubner, G., 1997. Global Bukovina: Legal Pluralism in the World Society. In: G. Teubner, ed. *Global Law Without A State*. Aldershot: Dartmouth-Gower, 3-28.
- Torroja, H., 2007, *El derecho del Estado a ejercer la protección diplomática*. Barcelona: Bosch.
- Van Harten, G., 2005. Private authority and transnational governance: the contours of the international system of investor protection. *Review of International Political Economy*, 12 (4), 600-623.
- Vannoni, M., 2013. Monopolistic Competition, Intra-Industry Trade and direct Lobbying: The Case of the Transatlantic Business Dialogue. *Political Perspectives*, 7 (1), 26-45.
- Vermeer-Künzli, A., 2006. Restricting Discretion: Judicial Review of Diplomatic Protection. *Nordic Journal of International Law*, 75, 279-307.
- Vermeer-Künzli, A., 2007a. A matter of interest: Diplomatic Protection and State Responsibility Erga Omnes. *International and Comparative Law Quarterly*, 56 (3), 553-574.
- Vermeer-Künzli, A., 2007b. As if: The Legal Fiction in Diplomatic Protection. *European Journal of International Law* [online], 18 (1) 37-68. Available from: <http://www.ejil.org/pdfs/18/1/220.pdf> [Accessed 29 September 2013].
- von Bogdandy, A., Dann, P., and Goldmann, M., 2010 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities. In: A. von Bogdandy et al., eds. *The Exercise of Public Authority by International Institutions*. Berlin: Springer Verlag, 3-32.
- Waibel, M., 2010. The Diplomatic Channel. In: J. Crawford and A. Pellet, eds. *The Law of International Responsibility*. Oxford University Press.
- Weiler, J.H.H., 2002. *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*. Cambridge: Harvard Law School.
- Wen, A.H., 2003. Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities. *Columbia Law Review*, 103 (6), 1538-1587.
- Williams, C.C., 2005. *A Commodified World? Mapping the limits of Capitalism*. London: Zed Books.
- Worster, W.T., 2013. The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law. *Boston University International Law Journal*, 31 (1), 2-78.
- Wouters, J. and Duquet, S., 2012. The EU and International Diplomatic Law: New Horizons?. *The Hague Journal of Diplomacy*, 7, 31-49.
- Young, M.J., 1995. Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats. *The International Lawyer*, 29 (2), 389-409.
- Zapatero, P., 2009. Diplomacia y cultura legal en el sistema GATT/OMC. *Cuadernos de Derecho Transnacional*, 1 (2), 262-272.
- Zumbansen, P., 2012. Comparative, global, and transnational constitutionalism. *Global Constitutionalism*, 1 (1), 16-52.