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CURRENT LEGAL DEVELOPMENTS

The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor–State Arbitration?

PATRICK DUMBERRY*

Abstract

Like all rules of customary international law, those existing in the field of international investment law are binding on all states. According to the theory of the persistent objector, however, a state is not bound by a rule if it objected to it in the early stages of its formation and continued to do so consistently thereafter. This paper analyses the different grounds of criticism that have been raised against the concept. We found that there is only very weak judicial recognition of the concept, that there is no actual state practice supporting it, and that it is logically incoherent. Specifically, this paper argues that the concept should not be successfully used in investor–state arbitration proceedings to prevent the application of a custom rule by an arbitral tribunal. This is essentially because of the great importance of the few custom rules existing in that field and the fact that they represent universally recognized values.

Key words

consent; customary international law; international investment law; investor–state arbitration; persistent objector

The question of the existence of legal protection for foreign investors under customary international law has long been controversial. Indeed, as a result of a perceived lack of established customary principles, states concluded thousands of bilateral investment treaties (BITs) in the 1990s for the promotion and the protection of investments. Despite this early lack of consensus, it is undeniable that there now exist some rules of customary law in the field of international investment law. However, not all authors share this view. For instance, Professor Sornarajah argues that 'it would be difficult to show that there was free consent on the part of all the developing states to the creation of any customary international law' in international

* Ph.D., Assistant Professor, University of Ottawa (Civil Law section) [pdumberr@uottawa.ca]. The author wishes to thank Erik Labelle Eastaugh for his comments and suggestions on an earlier draft of this paper. This article reflects facts current as of March 2009.

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investment law.[1] He also believes that even 'if there was such customary international law, many developing States would regard themselves as persistent objectors who were not bound by the customary law'.[2]

Sornarajah's argument draws on the much-debated theory of the 'persistent objector'. In principle, a rule of customary international law is binding on all states. However, some have argued that a state should not be bound by a rule if it objected to it in the early stages of its formation and continued to do so consistently thereafter.

Articles recently published about the theory focus on its specific application in different areas of international law,[3] including international humanitarian law[4] and human rights law.[5] This paper intends to examine critically the concept of persistent objector – which is largely supported in doctrine – in its application to international investment law. An argument based on this concept was first raised in the context of investor–state investment arbitration in the 2007 case of *BG Group* v. *Argentina*.[6] It was later raised by the United States in its written submissions in the context of a NAFTA Chapter 11 arbitration, *Grand River Enterprises Six Nations Ltd. et al.* v. *United States*, when the concept was described as one 'which States and scholars regard as central to the legitimacy of an international legal order governed by rules of customary international law'.[7]

The first part of this article outlines the few rules of custom that have emerged in the area of international investment law. The second part deals with the basic definition of the concept of persistent objector and its conditions of application in general international law. This part intends to analyse briefly the different grounds of criticism that have been raised against the concept. Our survey will show that there is only very weak judicial recognition of the theory of persistent objector and that

1 M. Sornarajah, *The International Law on Foreign Investment* (2004), 213. He, however, admits that there are 'few' rules of custom in the field of international investment law (at 89).

2 Ibid. Elsewhere the author also argues (at 151) that 'it is difficult to establish that state responsibility for economic injuries to alien investors was recognized as a principle of customary international law. Latin American states as well as African and Asian States must be taken to be persistent objectors to the formation of such customary international law.' See also M. Sornarajah, 'Power and Justice in Foreign Investment Arbitration', (1997) 14 (3) *Journal of International Arbitration* 103, at 118; S. Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', (1999) 70 *British Yearbook of International Law* 99, at n. 305.

3 P. Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 ICLQ. (forthcoming); O. Barsalou, 'La doctrine de l'objecteur persistant en droit international public', (2006) 19 (1) *Revue québécoise de droit international*, at 4; O. Elias, 'Persistent Objector', in *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com/.

4 A. Steinfeld, 'Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons', (1996) 62 *Brooklyn Law Review* 1635 (dealing with the question whether a state possessing nuclear weapons can claim the status of persistent objector); C. G. Guldahl, 'The Role of Persistent Objection in International Humanitarian Law', (2008) 77 *Nordic Journal of International Law* 51; E. David, 'L'objecteur persistant, une règle persistante?', in P. Tavernier and J. Henckaerts (eds.), *Droit international humanitaire coutumier: enjeux et défis contemporains* (2008), 89–100.

5 L. Loschin, 'The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework', (1996) 2 *UC Davis Journal of International Law & Policy* 147, at 148 (discussing, in particular, the position of the United States as persistent objector with respect to a rule preventing the execution of juvenile offenders); H. Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law, (2005) 6 *Chicago Journal of International Law* 495.

6 *BG Group Plc v. Argentina*, UNCITRAL, Award, 24 December 2007.

7 Counter-memorial of the United States, December 22, 2008, *Grand River Enterprises Six Nations Ltd. et al. v. United States*, UNCITRAL, at 129, n. 466 (available at www.state.gov/documents/organization/114065.pdf). The case is still pending.

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there is no actual state practice supporting it. It will also be shown that the theory is logically incoherent and that its application is inconsistent. The third part of this article examines the concrete application of the theory to investor–state arbitration proceedings and the two recent cases where it was for the first time raised. Finally, we shall submit three reasons why, in our view, the concept of persistent objector should *not* be successfully used in investor–state arbitration proceedings to prevent the application of a customary rule of international investment law by an arbitral tribunal.

1. Rules of customary international law in international investment law

Custom is one of the sources of international law.[8] Custom has two constitutive elements: a 'constant and uniform' (but not necessarily unanimous) practice of states in their international relations and the belief that such practice is required by law (*opinio juris*).[9] This double requirement is one of the most well-established principles of international law. It has been recognized as such by several decisions of the International Court of Justice (ICJ).[10] For instance, in the *Continental Shelf (Libya v. Malta)* case the Court stated that '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.'[11] The double requirement of custom also applies in the context of investor–state arbitration. For instance, the *UPS* Tribunal stated that 'to establish a rule of customary international law, two requirements must be met: consistent state practice and an understanding that the practice is required by law'.[12]

This first part examines the historical development of the few existing rules of customary international law in the field of international investment law.[13]

1.1. From a lack of consensus to the proliferation of BITs

The question of the treatment to be accorded to foreign investors under customary international law has been very contentious for decades. The debate was summarized as follows by Judge Schwebel:

> Capital-exporting States generally maintained that host States were bound under international law to treat foreign investment at least in accordance with the 'minimum

8 ICJ Statute, Art. 38(1)(b).

9 International Law Association (ILA), Statement of Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee, London Conference, 2000, at 8.

10 *Right of Passage Case (Portugal v. India)*, Merits, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 42–3; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 44; see also *Lotus Case (France v. Turkey)*, Judgment, 7 September 1927, (1927) PCIJ Rep. Series A No. 10, at 18, 28.

11 *Case Concerning the Continental Shelf (Libya v. Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep. 13, at 29–30, para. 27.

12 *United Parcel Service v. Canada*, UNCITRAL, Jurisdiction Award, 22 November 2002, para. 84.

13 This section is largely drawn from P. Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?' (2010) 28 (4) *Penn State International Law Review* (forthcoming) (discussing the impact of BITs on the existence of custom in the field of international investment law and the argument raised by some scholars that these BITs now represent the 'new' custom and that they have the same content).

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> standard of international law'; and where the host State expropriated foreign property, it could lawfully do so only for a public purpose, without discrimination against foreign interests, and upon payment of prompt, adequate and effective compensation. Capital importing States maintained that host States were not in matters of the treatment and taking of foreign property bound under international law at all; that the minimum standard did not exist; and that States were bound to accord the foreign investor only national treatment, only what their domestic law provided or was revised to provide. The foreign investor whose property was taken was entitled to no more than the taking State's law afforded.[14]

A compromise between these different approaches was eventually reached in 1962 with the adoption by the United Nations General Assembly of the Resolution on Permanent Sovereignty over Natural Resources, affirming the right of host states to nationalize foreign-owned property, but nevertheless requiring 'appropriate compensation' in accordance with international law.[15] The so-called 'Hull formula' supported by developed states (providing for 'prompt, adequate and effective' compensation in the event of expropriation) was, however, rejected by developing states in 1974 with the adoption by the General Assembly of the Charter of Economic Rights and Duties of States.[16] Under this 'New International Economic Order' the requirement to provide 'appropriate compensation' for expropriation still existed, but any related disputes (or 'controversy') had to be 'settled under the domestic law of the nationalising state and by its tribunals' and not by an international tribunal under international law.

No broad international consensus emerged on the existing protection for foreign investors as a result of these persisting differences of approach between developed and developing states. The absence of consensus consequently prevented the development and crystallization of rules of customary international law in the field of international investment law. In the famous 1970 *Barcelona Traction* case, the ICJ drew the same conclusion:

> Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.[17]

The 1990s were marked by a new era of globalization, whereby private foreign investments were (almost) universally deemed by states to be an essential tool for

14 S. M. Schwebel, 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law', 2006 3 (2) *Transnational Dispute Management*.

15 Permanent Sovereignty over Natural Resources, UN Doc. A/RES/1803 (XVII) (1962).

16 Charter of the Economic Rights and Duties of States, UN Doc. A/RES/3281 (XXIX) (1974). The 'Hull formula' was first articulated by the US Secretary of State, Cordell Hull, in a letter to his Mexican counterpart in response to Mexico's nationalization of US companies in 1936. Hull argues that international law required 'prompt, adequate and effective' compensation for the expropriation of foreign investments; in G. H. Hackworth, *Digest of International Law* (1942), 228.

17 *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep. 4, at 46–7.

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their economic development.[18] At the time, uncertainty still remained on the types of legal protection existing for foreign investors under custom. Not surprisingly, efforts by the Organization for Economic Co-operation and Development (OECD) in 1995 to negotiate a comprehensive Multilateral Agreement on Investment (MAI) were unsuccessful.[19] As explained by scholars, it is precisely because 'customary law was deemed to be too amorphous and not to be able to provide sufficient guidance and protection' to foreign investors that capital-exporting and developing states frenetically started to conclude BITs.[20] It is now estimated that over 2,500 such BITs have been concluded worldwide (the vast majority in the 1990s).[21]

The substantive rules for the protection of foreign investments are found in these bilateral and multilateral investment treaties.[22] Such investment treaties regulate the treatment of foreign investors and their investments in the host state. Investment treaties typically contain detailed definitions of who qualifies as an 'investor' and what constitutes a protected 'investment'. They normally provide for equal treatment of domestic and foreign investors (the so-called 'national treatment' and 'most-favoured-nation treatment' clauses), a minimum standard of treatment to investors (the obligation for the host state to provide a 'fair and equitable treatment'), compensation in case of expropriation of an investment by the host state, and dispute resolution by international arbitration. In other words, investment treaties provide foreign investors with significant legal protection over and above the traditional protections otherwise available to them.[23] Of particular importance is the ability for foreign investors to resolve investment disputes by bringing claims to international arbitration *directly* against the states in which they invest.[24] As a result of

18 Thus the 1992 World Bank *Guidelines on the Treatment of Foreign Direct Investment* explained in its preamble that it 'recognizes' that 'a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular'.

19 OECD, Negotiating Group on the Multilateral Agreement on Investment, Draft Consolidated Text of 11 February 1998, document DAFFE/MAI (98)7, at 58–64.

20 R. Dolzer and A. von Walter, 'Fair and Equitable Treatment: Lines of Jurisprudence on Customary Law', in F. Ortino et al. (eds.), (2007) *Investment Treaty Law, Current Issues II* 99.

21 According to UNCTAD, 'Recent Developments in International Investment Agreements (2006–June 2007)', (2007) *IIA Monitor* No. 3, at 2, there were 2,573 treaties at the end of 2006. It should be noted that states have also entered into a limited number of multilateral investment agreements at the regional level. See North American Free Trade Agreement (NAFTA), 32 ILM 605 (1993), signed by Canada, Mexico, and the United States on 17 December 1992 which came into force on 1 January 1994. Other such treaties include, *inter alia*, the Energy Charter Treaty, 34 ILM 373 (1995),which came into force on 16 April 1998 and the Colonia Protocol on the Reciprocal Promotion and Protection of Investments (adopted on 17 January 1994 in the context of the Asunción Treaty creating Mercosur).

22 Protection is also often found in contracts entered into directly between foreign investors and states (or state-owned entities) or in the legislation of the host state of the investment.

23 Report of the International Law Commission, 58th Session, UN Doc. A/61/10 (2006), Chapter IV: Draft Articles on Diplomatic Protection and Commentaries, adopted by the ILC on Second Reading, 8 August 2006, 67, at 89–90: 'The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.'

24 Under these treaties, a foreign investor is no longer required to go before local courts or to have its claim 'espoused' by its state of origin.

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these developments, the number of arbitration cases between investors and states is booming.[25]

1.2. An outline of existing customary rules

Despite the controversy about the interaction between custom and BITs, it is undeniable that some principles of customary international law have emerged in the last decades in the field of international investment law. In the *Generation Ukraine* case, the Tribunal stated that '[i]t is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law.'[26] Some of the principles which have been considered as customary rules by arbitral tribunals and writers will now briefly be mentioned.[27]

The obligation for the host state of an investment to provide foreign investors with the 'minimum standard of treatment' is a norm of customary international law.[28] This is clear, for instance, in the context of the North American Free Trade Agreement (NAFTA), as explained by the Free Trade Commission in its Note of Interpretation.[29] More controversially, the obligation of the host state to provide foreign investors with fair and equitable treatment is considered by some to have crystallized as a norm of customary international law.[30] It has also been argued that the related principles prohibiting denial of justice[31] and requiring the host state to

25 According to UNCTAD, 'Latest Developments in Investor–State Dispute Settlement', (2008) *IIA Monitor*, No. 1, at 1, there are currently some 290 known investor–state arbitration cases pending. It should be noted that there are also a number of investor–state disputes currently being settled by arbitration about which information is not publicly available (for instance, those arbitrations conducted under the UNCITRAL Arbitration Rules as well as those other ad hoc arbitrations).

26 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, 44 ILM 404 (2005), at para. 11.3

27 See also P. Dumberry, 'The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?', (2010) 18 (3) *Michigan State Journal of International Law* (forthcoming) (arguing that no customary rule has emerged on the *jus standi* of shareholders before international arbitral tribunals).

28 L. Reed, J. Paulsson, and N. Blackaby, *A Guide to ICSID Arbitration* (2004), 48; I. Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (2006), 61–2; OECD, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment No. 2004/3 (2004), 8. Contra, Sornarajah, *supra* note 1, at 328; M. C. Porterfield, 'An International Common Law of Investor Rights?', (2006) 27 *University of Pennsylvania. Journal of International Economic Law* 80, at 80–2.

29 The 'Note of Interpretation of Certain Chapter 11 Provisions' of 31 July 2001 indicates, *inter alia*, that 'Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.' The Canadian 'Statement on Implementation of NAFTA', (1994) *Canada Gazette* 68, at 149, also states that Article 1105(1) 'provides for a minimum absolute standard of treatment, based on longstanding principles of customary international law.' In *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, 42 ILM 85 (2003), para. 121, the Tribunal stated that 'the phrase "Minimum standard of treatment" has historically been understood as a reference to a minimum standard under customary international law.' See also *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, 43 ILM 967 (2004), para. 91.

30 See Tudor, *supra* note 28, at 74 ff. Contra, T. Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations', (2008) 106 *Michigan Law Review* 853, at 880; A. Al Faruque, 'Creating Customary International Law through Bilateral Investment Treaties: A Critical Appraisal', (2004) 44 *Indian Journal of International Law* 304.

31 J. Paulsson, *Denial of Justice in International Law* (2005), 59–67; OECD, *supra* note 28, at 40.

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exercise due process[32] in protecting foreign investors have become customary rules, while the principles of transparency[33] and that of legitimate expectation have not.[34]

Under customary international law, the host state cannot expropriate a foreign investor's investment unless four conditions are met: the taking must be for a public purpose, as provided by law, conducted in a non-discriminatory manner, and with compensation in return.[35] It has been argued by writers,[36] and by arbitral tribunals,[37] that the standard of compensation under customary international law is 'full' compensation. According to an UNCTAD study, 'the overwhelming majority of BITs provide for prompt, adequate and effective compensation, based on the market or genuine value of the investment'.[38]

2. The concept of persistent objector in international law

2.1. What is a persistent objector?

A rule that has already crystallized into customary law is binding on all states of the international community.[39] A state is not allowed to opt out unilaterally.[40] The ICJ has clearly stated that customary rules 'by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its favour'.[41] One controversial question is whether a state should nevertheless be allowed not to be bound by a rule of customary law because it objected to this rule in the early stage of its formation (before its crystallization into a rule of law) and actively, unambiguously, and consistently maintained such an objection

32 *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 4 ICSID Report 245 (1997), dissenting opinion of Judge Asente ('the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law'); OECD, *supra* note 28, at 40.

33 *Mexico v. Metalclad*, 2001 BCSC 664, 2 May 2001 (B.C. Sup. Ct.) (Judicial Review before a British Columbia Court of *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 25 August 2000), at para. 68 ('[n]o authority was cited or evidence introduced to establish that transparency has become part of customary international law'); OECD, *supra* note 28, at 37 (describing the transparency requirement as a 'relatively new concept not generally considered a customary international law standard').

34 *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on Annulment, 21 August 2007, para. 89 ('[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations').

35 OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', (2004), Working Papers on International Investment no. 2004/4, at 3; *Generation Ukraine*, *supra* note 26, para. 11.3; C. MacLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2007), 16.

36 T. Gazzini, 'The Role of Customary International Law in the Protection of Foreign Investment', (2007) 8 *Journal of World Investment & Trade* 714. Contra, Sornarajah, *supra* note 1, at 441–3.

37 *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 497.

38 UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007), 52.

39 This part is largely drawn from Dumberry, *supra* note 3.

40 M. Akehurst, 'Custom as a Source of International Law', (1974–5) 47 *British Yearbook of International Law* 1, at 24–6.

41 *North Sea Continental Shelf Cases*, *supra* note 10, at 38.

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thereafter.[42] It should be stressed at this juncture that the only direct potential effect of a state's timely objection to the formation of a new customary rule is that it would not be bound by that rule. Its opposition would not prevent the rule from eventually crystallizing into customary law and, therefore, being recognized as general international law among all other states.[43] However, this distinction is not always easy to make in reality.[44]

2.2. The persistent objector under attack

Supporters of the legitimacy of the concept of persistent objector argue that it is 'firmly established in the orthodox doctrine on the sources of international law'.[45] This is in fact the prevailing position in doctrine.[46] It is also the position adopted by the International Law Association (ILA) in its Final Report on custom[47] and that of the American Law Institute in its 1987 *Restatement of the Law Third, The Foreign Relations Law of the United States*.[48]

However, the concept of persistent objector has been criticized by several leading scholars.[49] The debate among writers has been described as a 'theological war of principles'.[50] In the following subsections we shall examine three grounds of criticism that have been raised against the concept in general international law: its weak

42 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law'(1953) 30 *British Yearbook of International Law* 1, at 26; ILA, *supra* note 9, at 27; D. Colson, 'How Persistent Must the Persistent Objector Be?', (1986) 61 *Washington Law Review* 957, at 965–9.

43 Akehurst, *supra* note 40, at 26–7.

44 For instance, the persistent objection of a small but particularly dynamic and/or powerful group of states to a new rule may in fact prevent the rule from crystallizing into customary law. See US pleadings before the ICJ arguing that its opposition blocked the development of a customary norm preventing the threat and the use of nuclear weapons: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226.

45 T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', (1985) 26 *Harvard International Law Journal* 457, at 463.

46 Fitzmaurice, *supra* note 42, at 21–6; L. Henkin, 'International Law: Politics, Values and Function: General Course on Public International Law', (1989) 216 *Recueil des cours* 9, at 53–8; P. Weil, 'Le droit international en quête de son identité, Cours général de droit international public', (1992) 237 *Recueil des cours* 9, at 189–201; Akehurst, *supra*, note 40, at 23–7; P. Cahier, 'Changement et continuité du droit international: Cours général de droit international public', (1985) 195 *Recueil des cours* 9, at 231–7; O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', (1982) 178 *Recueil des cours* 1, at 36–9; M. Mendelson, 'The Formation of Customary International Law', (1998) 272 *Recueil des cours* 155, at 228–33; B. McClane, 'How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?', (1989) 13 *ILSA Journal of International and Comparative Law* 1, at 6.

47 ILA, *supra* note 9, at 27, 'principle' no. 15: ('[i]f whilst a practice is developing into a rule of general law, a State persistently and openly dissents from the rule, it will not be bound by it').

48 American Law Institute, *Restatement of the Law Third: the Foreign Relations Law of the United States* (1987), I, 26 ('a dissenting state which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures').

49 C. Tomuschat, 'Obligations Arising for States without or against Their Will', (1993) 241 *Recueil des cours* 155, at 284–90; J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', (1985) 56 *British Yearbook of International Law* 1; P. Dupuy, 'A propos de l'opposabilité de la coutume générale: enquête brève sur l'objecteur persistant', in *Mélanges Michel Virally* (1991); B. Conforti, 'Cours général de droit international public', (1988) 212 *Recueil des cours* 9, at 74–7; G. Abi-Saab, 'Cours général de droit international public', (1987) 207 *Recueil des cours* 9, at 180–2; A. D'Amato, *The Concept of Custom in International Law* (1971); Barsalou, *supra* note 3; J. P. Kelly, 'The Twilight of Customary International Law', (2000) 40 *Virginia Journal of International Law* 449, at 508 ff.

50 Tomuschat, *supra* note 49, at 285.

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judicial recognition (2.2.1), the lack of actual state practice supporting it (2.2.2), and its logical incoherence and inconsistent application (2.2.3).

2.2.1. The weak judicial recognition of the concept

The only ICJ decision that ever dealt with the question of persistent objector in the context of 'general' customary law is the *Fisheries Case*.[51] In that case, Norway had adopted its own traditional system of delimitation (the method of 'straight lines') in order to determine the drawing of the baseline for measuring the breadth of the territorial sea or fisheries zone with respect to bays. The United Kingdom only accepted the legitimacy of that method for 'historical bays'. It argued that another method of delimitation (the 'ten miles rule') had become customary law for all other situations and should, therefore, be applied by Norway. In their respective pleadings both states acknowledged the existence of the persistent objector principle.[52] The Court held that the 'ten miles rule' method had not acquired the authority of a general rule of international law. It then added that '[i]n any event the ten-miles rule would appear to be inapplicable as against Norway inasmuch as she always opposed any attempt to apply it to the Norwegian coast'.[53] The relevant quote is therefore a mere *obiter dictum*; the Court had already decided to reject the existence of any customary rule on other grounds.

Supporters of the concept of persistent objector often refer to the separate or dissenting opinions of judges in ICJ cases to sustain their claim.[54] In the present author's view these do not represent the strongest and most persuasive authorities in support of the concept of persistent objector.[55]

The concept of persistent objector was dealt with by the Inter-American Commission on Human Rights in two 'reports'.[56] In *Roach & Pinkerton*,[57] the Commission

51 *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116. It should be noted that another case, *Asylum Case (Colombia v Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266, often referred to in support of the concept of persistent objector, was decided in the different context of the development of a regional custom where the concept of persistent objector is generally recognized. See D'Amato, *supra* note 49, at 252–4.

52 *Fisheries Case (United Kingdom v. Norway)*, Pleadings, Vol. I, Judgment of 18 December 1951, [1951] ICJ Rep. 214, at 382–3 (Norway); Vol. II, at 428–9 (United Kingdom); Vol. III, at 291–6 (Norway).

53 *Fisheries Case*, *supra* note 51, at 131.

54 One example is the *Fisheries Jurisdiction Case*, [1974] ICJ Rep. 175, where both the United Kingdom and the Federal Republic of Germany had constantly rejected the extension by Iceland of its fisheries jurisdiction from 12 to 50 miles. The Court held that the extension of that zone beyond 12 miles was not opposable to them, but did not base its decision on their persistent objection to the extension, as it could have easily done so. It is only in the separate opinions of two judges (Judge Waldock (at 120) and Judge De Castro (at 91–2)) that reference is made to the concept. See also *Asylum Case*, *supra* note 51, dissenting opinion of Judge Azevedo (at 336–7); *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)*, Second Phase, Judgment, 18 July 1966, [1966] ICJ Rep. 6, separate opinion of Judge Van Wyk (at 169–70); *North Sea Continental Shelf Cases*, *supra* note 10, separate opinion of Judge Ammoun (at 130–1), dissenting opinions of Judge Lachs (at 238) and Judge Sorensen (at 247–8); *Nuclear Tests Case (Australia v. France)*, Judgment, 20 December 1974, [1974] ICJ Rep. 253, separate opinion of Judge Gros (at 286–9).

55 Charney, *supra*, note 49, at 10–11; Tomuschat, *supra* note 49, at 287–8.

56 These cases are discussed in Dumberry, *supra* note 3.

57 I/A Commission HR, *Roach & Pinkerton v. United States*, Rep. No. 3/87, Case 9647, 22 September 1987, Annual Report 1986–7. This case involves two individuals who received a death sentence and were executed in the United States for crimes committed before their eighteenth birthdays. In their complaint to the Commission, the petitioners alleged that the United States violated the American Declaration of the Rights and Duties of Man and customary international law by executing persons for crimes committed before their eighteenth

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recognized that a customary rule 'does not bind States which protest the norm' and concluded that '[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist'.[58] The Commission, however, held that no customary norm prohibiting the execution of juveniles existed and therefore did not apply the concept.[59] In the other case, of *Michael Domingues*,[60] the Commission also recognized the concept of persistent objector.[61] It concluded that the United States was nonetheless bound by a norm prohibiting the execution of juvenile offenders since it had become *jus cogens*.[62] In both cases the Commission's statements on persistent objector were merely theoretical, since they had no impact whatsoever on the outcome of the cases and did not prevent the United States from being held responsible for its breach of an international treaty.

To recap: to the best of our knowledge, no tribunal has ever ruled that the status of persistent objector can *effectively* prevent the application of a norm of customary law to the objecting state. In other words, no judicial body ever went so far as to conclude that it can simply not apply a rule of customary law to a state on the basis of its timely and persistent dissent from that rule.

2.2.2. The concept is not supported by state practice

There is consensus in doctrine (even among its supporters) that there is very limited actual state practice supporting the concept of persistent objector.[63] In fact, the concept is rarely used by states in their international relations. This is because its use would show a state's isolation from the rest of the international community.[64] Instead, states usually claim that a rule has simply not yet crystallized to become custom.

Moreover, an analysis of the very few instances of actual state practice involving the concept show that other states do not recognize the objector status of a dissenting

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birthday. In its written submission, the US government rejected the existence of any such customary rule and also maintained that, at any rate, it had always dissented from that alleged rule.

58 Ibid., paras. 51, 53. The Commission also added: 'For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of *jus cogens*.'

59 The Commission ultimately held that the diversity of practice in the United States on the execution of juveniles resulted in the arbitrary deprivation of life and inequality before the law in breach of the American Declaration of the Rights and Duties of Man.

60 I/A Commission HR, *Michael Domingues v. United States*, Report No. 62/02, Case 12.285,Merits, 22 October 2002. Domingues had been convicted and sentenced to death in respect of two homicides that occurred in the state of Nevada in 1993, when he was 16 years old. The petitioner argued that by sentencing Domingues to death for crimes committed while he was a juvenile, the United States had breach the American Declaration and, more specifically, a *jus cogens* norm prohibiting the execution of juvenile offenders. In its response, the United States denied the existence of such rule and, in any event, claimed the status of persistent objector.

61 Ibid., at para. 48: 'Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law . . . [A] norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based.'

62 Ibid., at para. 85: '[T]he United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age. As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.' The Commission held that by sentencing Domingues to death for crimes he committed when he was 16 years of age, the United States had failed to respect his life, liberty and security, in breach of Article I of the American Declaration.

63 Weil, *supra* note 46, at 192; Stein, *supra* note 45, at 459–60.

64 Dupuy, *supra* note 49, at 264, 270.

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state.[65] According to Charney, 'the evidence shows that no recognition is accorded to objecting States' and that they are 'treated as if they were in fact lawbreakers'.[66] For him, 'if the persistent objector really were the beneficiary of a legal right acceptable to the rest of the world, other States could be expected to give some recognition to that right'.[67] Other states will continuously exert political pressure on the objector so that it conforms to the new standards shared by the overwhelming majority of states. Ultimately, the dissenting state will not persevere in maintaining its initial opposition and will eventually accept the view of the majority.[68]

It is submitted that the complete lack of state practice supporting the actual and concrete usefulness of the status of persistent objector clearly undermines adherence to the concept. The ultimate aim of a state claiming the status of persistent objector is to *prevent* and stop the application of a specific rule of law. It is not merely to offer an opinion on the perceived negative development of a new rule of law. The present author has found no example of state practice where a state's opposition to a customary rule was recognized by other states and where the claimed special status was effective in preventing the application of that rule to the dissenting state. In short, there is little *practical* value in a legal concept that does not help states to resist new developments in international law and does not immunize them from the general will of the international community.[69] Dupuy is right in describing the concept of persistent objector as simply a 'myth'.[70] It is, in fact, 'more a tool of the scholar than that of the diplomat'.[71]

2.2.3. The concept is logically incoherent and its application inconsistent

The concept of persistent objector is mainly supported by writers adhering to the 'voluntarist' theory of international law. The concept has, indeed, been described as 'the clearest, most firmly established expression of volontarist conception of obligation in the accepted doctrines of sources'.[72] Another supporter of the concept has even stated that 'it is this opportunity for each individual State to opt out of a customary rule that constitutes the acid test of custom's voluntarist nature'.[73] The voluntarist theory is based on the assumption that the sovereign state's will is at the foundation of international law, and that a state is bound only by the law to which it has itself consented.

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65 These examples are discussed in Charney, *supra* note 49, at 11–14, 22; Dumberry, *supra* note 3. They include, *inter alia*, Japan and Western states' opposition to the extension of the territorial sea from 3 to 12 nautical miles and to the development of a 200-nautical-mile Exclusive Economic Zone. See also South Africa and the former Rhodesia's opposition to the emergence of a customary rule prohibiting racist regimes (now regarded as a *jus cogens* norm).

66 J. Charney, 'Universal International Law', (1993) 87 AJIL 529, at 539.

67 Ibid.

68 This phenomenon is acknowledged even by supporters of the concept: Cahier, *supra* note 46, at 236; Akehurst, *supra* note 40, at 27; Weil, *supra*, note 46, at 191, 197.

69 Charney, *supra* note 49, at 15.

70 Dupuy, *supra* note 49, at 259, 266.

71 Steinfeld, *supra* note 4, at 1655.

72 Stein, *supra* note 45, at 470, also at 458–9, 470.

73 P. Weil, 'Toward Relative Normativity in International Law', (1983) 77 AJIL 413, at 433–4.

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The vast majority of scholars believe that the actual and specific consent of a state in the formation and development of a general customary norm is irrelevant.[74] However, the situation is clearly different in the context of regional custom, where consent does, indeed, matter.[75] Voluntarist writers have also put forward the concept of a state's 'tacit' or 'implied' consent to explain the development of customary rules. This interpretation has also been refuted in doctrine.[76] It has been convincingly argued that 'the obligation to conform to rules of international law is not derived from the voluntary decision of a State to accept or reject the binding force of a rule of law'; it is instead 'the societal context which motivates States to have an international law and obligates them to conform to its norms'.[77]

Since the consent of a state in the creation of a norm of (general) customary law *does not actually matter*, it should therefore logically follow that there is simply no place for the concept of persistent objector in international law. Charney has rightly pointed to the irreconcilable position adopted by many writers who claim, on the one hand, that the consent of a state is *not* a necessary element in the formation of a customary rule, but nevertheless believe, on the other hand, that a state can (at least conceptually) successfully object to being bound by that same rule by simply not consenting to it.[78]

One clear illustration of the logical inconsistency of the concept of persistent objector is its peculiar application to the specific case of new states. A great number of scholars who support the concept in general nevertheless argue that new states are automatically bound by rules of customary international law and that they should consequently never be permitted to claim the status of persistent objector, at least with respect to rules already in existence at the time of a new state's accession to independence.[79] They argue that to allow new states simply to reject rules which enjoy broad community support would be to 'deny the existence of a general international legal order'[80] and would 'create unacceptable disorder'.[81]

This position is not legally coherent. There is no logic in refusing new states the right to claim the status of persistent objector if one considers a state's consent

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74 See, for instance, Henkin, *supra* note 46, at 57.

75 Since regional custom is (by definition) in derogation to general customary law, a state's specific acceptance of the 'special' rule is naturally required for such rule to be binding on it. The ICJ in the *Asylum Case*, *supra* note 51, at 276–8, recognized the validity of the concept of persistent objector to a regional custom.

76 See C. De Visscher, *Théories et réalités en droit international public* (1953), 182; Q. Nguyen, P. Daillier, and A. Pellet, *Droit international public* (1999), 319–20.

77 Charney, *supra* note 49, at 16, 18.

78 Ibid., at 5, 16. A good example is Akehurst, *supra* note 40, at 23–4, who believes that '[a] State can be bound by a rule of customary law even if it has never consented to that rule', but also admits that 'a State whose practice shows that it rejects the rule is in a different position'.

79 Only few voluntarist writers argue that a customary rule should not be imposed on a new State since it cannot have consented to that rule because it was simply not existing at the time of its coming into existence: H. Thierry et al., *Droit international public* (1985), 119; M. E. Villiger, *Customary International Law and Treaties* (1985), 36. In *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, [1986] ICJ Rep. 554, at 568, the Chamber of the ICJ held that a rule of customary law (in this case, the principle of *uti possidetis*) would apply to a new state 'immediately and from that moment onwards.' Contra, *North Sea Continental Shelf Cases*, *supra* note 10, at 130, separate opinion of Judge Ammoun.

80 H. Waldock, 'General Course on Public International Law', (1962) 106 *Recueil des cours* 1, at 52.

81 Henkin, *supra* note 46, at 57; G. Danilenko, *Law-Making in the International Community* (1993), 115.

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to be essential for it to be bound by customary law.[82] Why should consent be so important for one group of states (existing states) and not for the other (new states)? Either one accepts the legitimacy of a state claiming the status of persistent objector or one does not.[83] It is not entirely clear why allowing new states to claim such status would deny the existence of the international legal order and create disorder, while allowing the exact same thing for existing states should instead be viewed as a legitimate expression of state sovereignty. The dissension of 'new' states is not more disruptive than that of 'old' (or rather existing) states.

Some supporters of the concept of persistent objector have responded to these apparent logical inconsistencies by pointing out that 'logical consistency . . . may not be the most important value at stake here'.[84] Their support for the concept is based on ideological and political convenience rather than on legal reasoning. It should be recalled that the concept was embraced by Western states, and more specifically the United States, in the 1980s, at a time when they saw their influence on the development of international law being diminished by the new majority of developing states and socialist states and the changing nature of custom, which became increasingly driven by rapidly emerging rules developed in the context of multilateral fora (negotiation of multilateral treaties, international conferences, international organizations, etc.).[85] It is in this context that the American Law Institute published in 1987 the third edition of its *Restatement of the Law, The Foreign Relations Law of the United States*, which introduced for the first time the concept of persistent objector.[86]

In the light of the profound changes in the international legal order, the concept of persistent objector became necessary because it 'serves in part to prevent the tyranny of the majority in the multilateral forum' and the imposition of a system of majority voting in international law.[87] One author even goes so far as to suggest that the United States 'should find in the persistent objector principle a doctrinal basis for freeing themselves from the results of multilateral processes that are seen as subject to the domination of a hostile majority'.[88] Claiming the status of persistent objector would, indeed, allow a state to 'unilaterally . . . opt out of a rule that it cannot tolerate, whether on grounds of principle or *expediency*, without preventing the general application of the rule'.[89] It has even been suggested that 'this unilateralism may very well be the most important virtue' of the concept of persistent objector.[90] Clearly, the concept of persistent objector is based on political convenience rather than legal reasoning.[91]

82 Kelly, *supra* note 49, at 508, 513.
83 A. Guzman, 'Saving Customary International Law', (2005) 27 *Michigan Journal of International Law* 115, at 172–3.
84 Stein, *supra* note 45, at 476.
85 Weil, *supra* note 46, at 196.
86 *Restatement*, *supra* note 48 §102(d), Reporters' no. 2.
87 Stein, *supra* note 45, at 477–8; see also Mendelson, *supra* note 46, at 239–40.
88 Stein, *supra* note 45, at 468.
89 Ibid., at 476 (emphasis added).
90 Ibid.; see also Danilenko, *supra* note 81, at 111.
91 Barsalou, *supra* note 3, at 6. ('À la lumière des conditions et modalités d'application de la doctrine de l'objecteur persistant, nous constatons que la doctrine développée par les publicistes souffre d'un manque flagrant de

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3. The application of the concept of persistent objector in the context of international investment law

This section examines the potential use of the persistent objector argument in the specific context of international investment law. BITs are not a self-contained regime operating in isolation from general public international law.[92] Thus the Annulment Committee in *MTD* v. *Chile* explained that a tribunal should 'apply international law as a whole to [a] claim, and not the provisions of the BIT in isolation'.[93] There is therefore no doubt that the international law concept of persistent objector can be raised as an argument by one party (most likely by a state) in the context of investor–state arbitration proceedings. The other question is whether such a defence has any likely chance of success. This question will be examined below (section 3.2). First, we shall briefly examine two recent investor–state arbitration cases where the argument of persistent objector was for the first time raised (section 3.1). It should be noted, however, that in these two cases the argument was not raised to dissent from a customary rule specific to international investment law.

3.1. Arbitration cases where the argument was raised

3.1.1. The case of BG Group *v.* Argentina

To the best of our knowledge, the persistent objector argument was for the first time raised in arbitration proceedings in the case of *BG Group* v. *Argentina*.[94] BG Group Plc (BG), a UK company that was an indirect shareholder in the Argentine gas distributor MetroGAS S.A., commenced arbitration proceedings alleging that measures taken by Argentina in the context of the financial crisis of 1999–2002, including derogation from a previously agreed tariff, were contrary to the UK–Argentina BIT.

In defence, Argentina invoked the state of necessity doctrine to exclude its international responsibility under both the BIT and customary international law as codified in Article 25 of the Articles on State Responsibility of the International Law Commission (ILC).[95] The claimant objected to this argument on the ground that the ILC Articles were a 'non-binding codification of customary international law' and that its Article 25 had no application in bilateral relations involving the United Kingdom and Argentina.[96] The claimant also argued that the United Kingdom had

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clarté et de précision tant au niveau de son contenu effectif que de la forme ou des modalités de sa mise en œuvre. En ce sens, nous ne pouvons pas rattacher l'épithète de règle juridique à la doctrine de l'objecteur persistant. C'est à ce titre que nous associerons la notion d'objecteur persistant non pas à une règle ou à une théorie juridique, contrairement à ce qu'affirment certains auteurs, mais bien à une doctrine politique.')

92 MacLachlan, Shore, and Weiniger, *supra* note 35, at 15.

93 MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 61 (the ad hoc Committee indicates that both parties agreed to that statement). Similarly, the Tribunal in *Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 4 ICSID Report, 246, at 257, explained that a BIT 'is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature'.

94 *BG Group Plc v. Argentina*, *supra* note 6.

95 Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.602/Rev.1.ILC, 2001.

96 *BG Group Plc v. Argentina*, *supra* note 6, para. 400.

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been 'formally opposed to the inclusion by the ILC of a provision on "necessity"' and was therefore a 'persistent objector' to any such alleged principle of necessity under custom.[97] This is therefore a case where the argument of persistent objector was raised by an investor, and not by the respondent state.

The arbitral tribunal held that Argentina could not invoke the doctrine of necessity under customary international law to excuse its liability under the UK–Argentina BIT because the treaty contains no express provision on the matter. It also stated that even if it were to apply Article 25 of the ILC Articles, Argentina would not have met the restrictive conditions for its application. The Tribunal simply noted in a footnote that it was 'dismissing BG's allegation that the UK has always been a persistent objector'.[98] The Tribunal did not further discuss the concept, and ultimately held that Argentina had breached the fair and equitable treatment requirement under Article 2.2 of the Treaty and ordered it to pay in compensation more than US$185 million plus interest.[99]

3.1.2. The case of Grand River Enterprises Six Nations Ltd et al. *v.* United States

The defence of persistent objector was also raised by the United States in the context of the NAFTA Chapter 11 arbitration case of *Grand River Enterprises Six Nations Ltd et al.* v. *United States*.[100] The claimants, three individual members of Native American tribes and their Canadian company, are seeking compensation in a dispute related to the regulation of tobacco products in the United States. The claimants argue, *inter alia*, that the US government failed to treat them in accordance with NAFTA Article 1105, establishing the minimum standard of treatment of aliens under customary international law. Specifically, the claimants make reference to international human rights law obligations applicable to indigenous peoples allegedly breached by the United States. They contend that there is an 'emerging' customary international law norm which requires states to 'pro-actively consult' with 'First Nations investors' before taking regulatory action that will substantially affect their interests.[101] The United States flatly denies the existence of any such customary norm.[102] In any event, the United States also argues that it could not be bound by such a 'rule', based on its persistent objection to it:

> Even if Claimants had established the existence of such an 'emerging' norm, the United States clearly and consistently has articulated its view that the UN Indigenous Declaration and its provision requiring consultation prior to the adoption of legislation does not reflect customary international law. Given that 'in principle, a [S]tate that indicates its dissent from a practice while the law is still in the process of development is not

97 Ibid.
98 Ibid., n. 328.
99 Argentina challenged the final award before the International Court of Arbitration of the International Chamber of Commerce (ICC). The ICC Court dismissed the challenge. In March 2008 Argentina moved in the US District Court of the District of Columbia to vacate the arbitral award.
100 *Grand River Enterprises Six Nations Ltd et al. v. United States*, *supra* note 7. The author wishes to thank Mr Luke Peterson for the information on this case.
101 Claimant's memorial, 10 July 2008, paras. 184–92, 213–14.
102 Counter-memorial of the United States, 22 December 2008, at 127–8. This is also the position of Canada as explained in its Article 1128 submission, 19 January 2009, available at www.state.gov/documents/organization/115489.pdf.

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> bound by that rule even after it matures,' the United States cannot be bound by any consultation requirements contained in the UN Indigenous Declaration.[103]

The United States further explained that the principle of persistent objector is one 'which States and scholars regard as central to the legitimacy of an international legal order governed by rules of customary international law'.[104] The case is still pending.

3.2. Reasons for rejecting the application of the concept in arbitration proceedings

Quite apart from the above-mentioned shortcomings of the concept of persistent objector, there are other fundamental reasons specific to international investment law why such an argument should be rejected by an arbitral tribunal. The starting point of the analysis is the 'test' adopted by Professor Schachter to determine when the status of persistent objector may be permissible:

> It would be germane to consider a variety of factors including the circumstances of adoption of the new principles, the reasons for its importance to the generality of States, the grounds for dissent, and the relevant position of the dissenting States. The degree to which new customary rules may be imposed on recalcitrant States will depend, and should depend, on the whole set of relevant circumstances.[105]

These three criteria will be now briefly examined.

3.2.1. The circumstances of the adoption of customary rules

The first criterion to be examined is the circumstances of the adoption of rules of customary international law in the field of investment law. It is argued by some writers that the so-called 'rules' of customary law have been imposed on developing states which have always rejected them. For instance, Professor Sornarajah argues that

> The formation of customary principles has been associated with power. The role of power in this area is evident. Powerful States sought to construct rules of investment protection largely aimed at developing States by espousing them in their practice and passing them off as customary principles. They were always resisted . . . Nevertheless, the norms that were supported by the developed states were maintained on the basis that they were accepted as custom though that was never the case. The significance of the General Assembly resolutions associated with the New International Economic Order is that they demonstrated that there were a large number, indeed a majority, of states of the world, which did not subscribe to the norms maintained by the developed world. After that, it was no longer credible to maintain that there was in fact an international law on foreign investment, though the claim continues to be made simply because of the need to conserve the gains made for investment protection by developed States.[106]

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103 Ibid., at 128–9 (quoting from the *Restatement*, *supra* note 48, §102(d), Reporters' no. 2).

104 Ibid., at 129, n. 466.

105 Schachter, *supra* note 46, at 37–8. Similarly, Loschin, *supra* note 5, at 148, also developed an analytic model to determine when a state should be allowed to claim the status of persistent objector in the context of human rights law (and, more specifically, with respect to the execution of juvenile offenders).

106 Sornarajah, *supra* note 1, at 92–3.

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In a previous paper Professor Sornarajah also argued that 'The historical proposition that foreign investment arbitration was prejudiced in favour of the developed States is uncontested.'[107] He wonders whether 'the systems of dispute settlement that have replaced the more naked exercise of power are merely cleverly dressed up subterfuges for results that are based ultimately on solutions preferred by power'.[108] His paper also addresses the argument that 'the power that existed at the time of gun-boat diplomacy is the pervasive element in the creation of the system of foreign investment arbitration'.[109] Professor Sornarajah's pessimistic conclusion is that 'The vestiges of an old order based on power continue to dictate the course of developments in international foreign investment arbitration' and that such arbitration is not 'neutral' since 'Arbitrators have shown a keenness to develop rules which favour foreign investment protection and have discarded rules which may permit a more balanced assessment of the issues presented in a dispute.'[110]

One eminent arbitrator, Jan Paulsson, admits that 'it may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various international tribunals or commissions evidenced bias against developing countries'.[111] And it cannot be denied that, even today, the 'apparent equality as stated in the BIT can be overshadowed by parties' actual bargaining power, which is inherently unequal'.[112] There is, indeed, an asymmetry in BITs entered into between developing and developed states.[113] Moreover, developing countries will sometimes lack expertise in international investment law and may have to conduct treaty negotiations on the basis of the existing model agreements of their negotiating partners.[114]

107 Sornarajah, *supra* note 2, at 103–4.

108 Ibid.

109 Ibid.

110 Ibid., at 139–40.

111 J. Paulsson, 'Third-World Participation in International Investment Arbitration', (1987) 2 *ICSID Review – Foreign Investment Law Journal* 19, at 21. See also V. Igbokwe, 'Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word Been Said?', (1997) 14(1) *Journal of International Arbitration* 99, at 100–1: 'With the dismantling of the colonial edifice across Asia and Africa in the latter part of the twentieth century and the development of international norms against the use of force, the use of gun-boat diplomacy to settle international investment disputes was no longer acceptable. International arbitration was thus conceived by Western European nations in response to the need to provide some other form of protection for international investment contracts . . . Thus, since international arbitration was conceived as an investment protection measure, its early rules were tailored towards the attainment of that objective. The resource sectors of the economy of developing countries were tied up by a series of unequal contracts such as the traditional concession agreements. International arbitration played the primary role of bolstering up this regime in favour of the foreign investor.' Also, S. El-Kosheri, 'ICSID Arbitration and Developing Countries', (1993) 8 *ICSID Review – Foreign Investment Law Journal* 104, at 104.

112 Al Faruque, *supra* note 30, at 314.

113 J. Salacuse, 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain', in N. Horn and S. Kröll (eds.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004), 51, at 70: 'A bilateral investment treaty purports to create a symmetrical relationship between the two contracting states for it provides that the nationals and companies of *either* party to the treaty may invest under the same conditions and be treated in the same way in the territory of the other. In reality, of course, in a BIT between an industrialized country and a developing nation, an asymmetry exists between the parties since one state (the industrialized country) will be the source and the other state (the developing country) the recipient of that capital' (emphasis in original). See also G. van Harten, *Investment Treaty Arbitration and Public Law* (2007), 41.

114 UNCTAD, *supra* note 38, at 144. Prof. José E. Alvarez provides the following explanation: 'For many, a BIT relationship is hardly a voluntary, uncoerced transaction. They [US BIT partners] feel that they must enter into the arrangement, or that they would be foolish not to . . . [But] the truth is to date the US model BIT has

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This situation does not mean, however, that the types of legal protection existing for foreign investors under customary international law are necessarily biased against developing states. These rules may be 'Western' in origin, but it can no longer be argued that they are strictly 'Western' in nature. These rules of customary international law are universal. As explained by Schreuer and Dolzer, as a result of the new climate of international economic relations of the 1990s, 'the fight of previous decades against customary rules protecting foreign investment had abruptly become anachronistic and obsolete'.[115] Thus by the 1990s 'the tide had turned' and developing states were no longer opposed to the application of custom, but instead granted 'more protection to foreign investment than traditional customary law did, now on the basis of treaties negotiated to attract additional foreign investment'.[116]

For instance, developing states have long rejected the 'Hull formula', which was supported by developed states and which affirmed that the host state must pay 'prompt, adequate and effective' compensation in the event of an expropriation. As mentioned above, this standard of compensation is now part of customary international law. In recent years, developing states have signed hundreds of BITs containing provisions similar to the Hull formula.[117] For Guzman, these states sign BITs to have 'an advantage in the competition for foreign investment'.[118] The fact that developing states are now signing BITs which typically contain the type of provisions they have historically rejected is significant on many accounts. At the very least, it undermines the claim that contemporary customary rules applicable in international investment law have been imposed upon them.

In any event, one would normally expect that customary rules on expropriation and on the minimum standard of treatment, which are allegedly being imposed by the West, would not find their way into recent BITs entered into between developing states themselves. Developing states are thus increasingly concluding treaties with each other. For instance, of the 44 new BITs signed in 2007, 13 were between developing countries. These 'South–South' BITs now represent 26 per cent of the total number of BITs.[119] The figure of almost 700 'South–South' BITs is impressive, considering that only 47 such treaties existed in 1990.[120] Recent empirical studies show that the content of these 'South–South' BITs is not significantly different from those other treaties entered into by developing states with developed states.[121] One recent UNCTAD study concluded that, '[t]o a large part, South–South IIAs [international

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been regarded as, generally speaking, a "take it or leave it" proposition . . . A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on US terms, on what it would take to comply with the US drafts.' Quoted in G. Pilch, 'The Development and Expansion of Bilateral Investment Treaties', (1992) 96 *ASIL Proceedings* 532, at 552–3.

115 C. Schreuer and R. Dolzer, *Principles of International Investment Law* (2008), 16.

116 Ibid.

117 Guzman, *supra* note 83, at 640.

118 Ibid., at 687. See also Z. Elkins et al., 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', (2006) 60 *International Organization* 811.

119 UNCTAD, 'Recent Developments in International Investment Agreements (2007–June 2008)', (2008) *IIA Monitor* No. 2, at 3. The report does not include countries of 'South-East Europe' and those of the 'Commonwealth of Independent States' as 'developing States'.

120 UNCTAD, *supra* note 38, at 1.

121 Schreuer and Dolzer, *supra* note 115, at 16.

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investment agreements] are similar to North–South IIAs'.[122] For the report, '[t]o a certain extent, this is not surprising' since 'increasingly, developing countries are becoming capital exporting countries' and such a treaty 'could protect investment of a developing country in the territory of another developing country'.[123] The report does note some differences from North–South BITs in some minor aspects.[124] It also explains that these BITs typically contain provisions aimed at strengthening the development dimension.[125] Most importantly, the report does not mention any differences concerning the core sets of legal protection existing under customary international law (such as the minimum standard of treatment and the prohibition against expropriation).[126]

In sum, the circumstances of the adoption of the few customary rules existing in international investment law do not show any inherent bias against developing states. Since these rules represent universally recognized values, there is no reason why any state should be allowed to opt out unilaterally from them.

3.2.2. The reasons for the importance of the customary rules

The second criterion to be examined is the reasons for the importance to states of these customary rules. As already examined, there are only few rules applicable in investor–state arbitration which can be said to have crystallized to achieve the rank of customary law. The practical importance of these rules should not be underestimated.[127] Custom is the residual applicable legal regime between a foreign investor and the host state in the absence of any BIT. Thus, however numerous BITs may be, they certainly do not cover the whole spectrum of possible bilateral treaty relationships between states. According to one writer, BITs in fact cover only some 13 per cent of the total bilateral relationships between states in the world.[128] Since a BIT is only binding on the parties to the treaty and not on third parties,[129] the limited worldwide geographical scope of BITs necessarily results in gaps in the legal protection to foreign investments.[130] Thus a foreign investor originating from a state

122 UNCTAD, *South–South Cooperation in International Investment Arrangements*, UNCTAD Series on International Investment Policies for Development (2005), at 45.

123 Ibid.

124 Ibid., at 31–2. For instance, the Report notes some specific features of South–South BITs, such as the fact that they rarely grant free access and establishment of investment, that they 'typically refrain from explicitly prohibiting performance requirements', that they 'typically limit transparency requirements to the stage after the adoption of laws and regulations', and that they 'tend to put more emphasis on exceptions (e.g. for balance of payments or prudential measures) and on so-called 'fork-in the-road' clauses'.

125 Ibid., at 45.

126 See also UNCTAD, *supra* note 38, at 143, stating that 'the enormous increase in BITs has resulted in a remarkable degree of similarity as far as their *basic structure and content* are concerned' (emphasis in original); 'there is no major disagreement about what should be the core elements of a BIT and what basic content its key provisions should have'. The report also notes that 'despite this broad general consensus, it is clear that the picture becomes much more diverse when one looks into the details of individual BIT provisions'.

127 For instance, customary rules of international investment law are important as a supplement to an existing BIT. As explained by the Iran–US Claims Tribunal in *Amoco Int'l Fin. Corp. v. Government of the Islamic Republic of Iran*, 15 Iran–US CTR 189, 14 July 1987, 83 ILR 500 (1990), at para. 112, 'the rules of customary law may be useful in order to fill in possible *lacunae* of the treaty, to ascertain the meaning of undefined terms in the text or, more generally, to aid the interpretation and implementation of its provision'.

128 Gazzini, *supra* note 36, at 691.

129 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 34.

130 Schreuer and Dolzer, *supra* note 115, at 17.

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which has no BIT with the state where the investment is made will not be given the legal protection typically offered under such a treaty.[131] Custom, however, applies to all states, including those which have not entered into any BITs. Rules of customary international law can therefore be invoked by any foreign investor irrespective of whether its state of origin has entered into a BIT with the country where it makes its investment.

This is why the few existing customary rules are so important. They will often be the last bastion of international legal protection against unlawful conduct by states. These protections represent the lowest common denominator among states. To allow a state the benefit of the status of persistent objector would mean, in practical terms, that there would simply be no minimum standard existing for the protection of foreign investors in that country. The coherence of the system of international investment law requires that a set of basic legal protections be applicable to any foreign investors at all times. This strongly militates against allowing any state the status of persistent objector able to opt out from such basic requirements that must be binding on all states.

3.2.3. The grounds for dissent

The third criterion to be examined is the grounds for dissent of the state seeking the status of persistent objector.

It has been argued that 'when a rule is developed in response to certain States' behaviour, their claim to persistent objection is weakened' since 'the application of the doctrine in this way does not benefit the 'international community' and is thus difficult to justify'.[132] There is, indeed, quite a significant difference between one state's objection (such as that of the United Kingdom) to the extension of the territorial sea from 3 to 12 nautical miles and another state's objection to provide proper compensation to a foreign investor for its expropriated property. In the former case, a state adopts the less favourable regime of fishing rights, within only 3 nautical miles from its coast, while all other states extend their fishing rights to 12 nautical miles. In other words, this is a situation where a less favourable regime is self-imposed. In the later case of expropriation, however, the host state's dissenting position is solely for its own benefit and to the detriment of foreign nationals of other states which adopted more stringent rules. In one situation (fishing rights) the objecting state suffers from all the disadvantages of upholding its dissenting position without any of the advantages enjoyed by all other states, while in the other situation (expropriation) the objecting state is the only one benefiting from its dissenting actions. In this example the dissenting action of the expropriator state is clearly more damaging to the general interests of the international community than that of another state's self-imposed restriction on its own fishing rights. It is, indeed, one thing to limit your own right and quite another to restrict those of others.

131 That does not mean, however, that such investor will have no legal protection whatsoever. The investor will still be able to rely on contractual rights as well as those existing under the legislation of the host state.

132 Guldahl, *supra* note 4, at 84; Stein, *supra* note 45, at 479, seems to be arguing that a state cannot claim the status of persistent objector whenever a customary rule emerged specifically to counter the practice of that particular state.

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It is submitted that a dissenting state would have to advance compelling reasons to convince an arbitral tribunal not to apply such a basic principle as the requirement for the host state to provide foreign investors with the minimum standard of treatment under international law. Also, one can hardly think of any reasons persuasive enough to prevent the application of such essential legal protection as the prohibition of expropriation without any appropriate compensation in return.

There is simply no reason why an arbitral tribunal should reward a 'free rider' on the entire international legal order. The objector could refrain from providing certain basic legal protections to foreign investors while expecting that its own nationals and companies doing business abroad be given the exact same standard of protection by all other states. This is, indeed, the very nature of the persistent objector: '[It] offers a way to oppose the application of a customary rule while conceding the existence of the rule.'[133] What does that mean in the context of international investment law? On the one hand, the dissenting state will 'concede' the existence of the rule – that is, that all states will offer proper legal protections to any foreign investors, including its own nationals doing business abroad. On the other hand, however, the same dissenting state will not apply similar protection to foreign investors of other states. In other words, the dissenting state unilaterally decides to give less protection while knowing that in any event its own investor will be given better protection. This is a clear example of a free-rider state unjustified at international law.

4. Conclusion

According to Mendelson, the question whether the persistent objector rule 'exists' is a matter of 'induction from State practice and, to a subsidiary degree, from judicial and arbitral decisions'.[134] He believes that 'the existence of the persistent objector rule is well established in state practice, case-law and the literature, and justifiable as a matter of policy'.[135] The present paper has demonstrated that this is clearly not the case.[136]

There are only very few international courts and tribunals that have explicitly endorsed the concept of persistent objector. Some of these statements do not represent the strongest of authorities because they are merely *obiter dicta* or found in a limited number of judges' separate or dissenting opinions. In fact, no tribunal has ever ruled that the status of persistent objector can effectively prevent the application of a norm of customary law to the objecting state. In other words, no judicial body ever went so far as to conclude that it can simply not apply a rule of customary law to a state on the basis of the latter's timely and persistent dissent from that rule. The concept of persistent objector is also not supported by actual state practice. Thus it is rarely used by states and whenever it is invoked it ultimately fails. No example of state practice was found where a state's opposition to a customary rule

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133 Stein, *supra* note 45, at 466.
134 Mendelson, *supra* note 46, at 239.
135 Ibid., at 240.
136 Even supporters of the concept, such as Weil, *supra* note 46, at 192, admit the lack of case law and state practice supporting it.

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was recognized by other states and where such claimed special status was actually effective in preventing the application of such a rule to that dissenting state.

The theory of persistent objector also suffers from a measure of incoherence. The application of the theory to new states shows that it is ultimately based on political convenience rather than on legal reasoning. In our view, allowing a state not to be bound by a rule of law on the ground that such a rule is contrary to its own interests clearly undermines the very existence of custom as a source of law.[137] The concept of persistent objector is 'contraire à l'idée même d'un droit international général et commun à tous les États'.[138]

This paper has also shown that the concept of persistent objector should not be used to prevent the application of a rule of customary law by an arbitral tribunal sitting in an investor–state dispute. There are only few customary rules existing in international investment law. One such rule is the obligation for the host state of an investment to provide foreign investors with the 'minimum standard of treatment'. Another rule prevents the host state from expropriating a foreign investor's investment unless four conditions are met: the taking must be for a public purpose, as provided by law, conducted in a non-discriminatory manner, and with compensation in return. The circumstances of the adoption of these rules show that they represent universally recognized values and that there is no inherent bias against developing states. The importance of these few customary rules is also clear from the fact that they apply between foreign investors and host states in the absence of any BIT. In such circumstances, these customary rules should be considered as the last bastion of international legal protection against unlawful conduct by states. The coherence of the system of international investment law requires that a set of basic legal protections be applicable to all foreign investors at all times. These reasons strongly militate against allowing any state simply to opt out unilaterally from the application of these fundamental rules. It is submitted that to allow a state to claim the status of persistent objector would not be beneficial to the international community and to the further development of international investment law.

137 Schachter, *supra* note 46, at 38; Kelly, *supra* note 49, at 536: 'A theory that applies asserted universal norms to the majority of humankind without consent, while permitting others to escape from consensus norms under the persistent objector principle premised on individual consent, cannot serve as a source of legitimate norms. The conflicting bases of consent and consensus in customary law theory permit the assertion of implied consent or general acceptance when finding norms that correspond to one's values and interests, while the trump card of actual consent is reserved for norms one dislikes.'

138 Conforti, *supra* note 49, at 76.

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