Can a State claim the status of "persistent objector" in investor-State arbitration?

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The question of the existence of legal protection for foreign investors under customary international law has always been controversial. States have indeed entered into BITs precisely because of the lack of development of relevant custom rules in the field of international investment law. It is nonetheless largely agreed today that some rules of customary law have emerged. For instance, one such rule is the obligation for the host State of an investment to provide foreign investors with the "minimum standard of treatment". Another is that 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. Professor Sornarajah in the second edition of his book The International Law on Foreign Investment (at p. 213), generally denies that such custom rules have emerged in international investment law and further argues that, in any event, developing State could always claim the status of so-called "persistent objectors" in order not to be bound by these rules.

Is this right? Can a State successfully claim the status of persistent objector in investor-State arbitral proceedings to prevent the application of a specific rule of customary international law to its conduct?

The argument was for the first time raised in the recent 2007 case of BG Group v. Argentina. BG Group Plc (BG), a U.K. company, commenced arbitration proceedings alleging that measures taken by Argentina in the context of its financial crisis were contrary to the U.K.-Argentina BIT. In defence, Argentina invoked the state of necessity doctrine to exclude its international responsibility under both the BIT and custom as codified in Article 25 of the ILC's Articles on State Responsibility.

The Claimant objected to this argument on the ground that the ILC Articles were a "non-binding codification of customary international law" and that, in any event, the United Kingdom had 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 (Award, para 400). The Tribunal held that Argentina could not invoke the doctrine of necessity under customary international law to excuse its liability under the BIT and 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 did not further discuss the persistent objector argument.

The very existence of the concept of persistent objector is controversial in general international law. This is because, as a matter of principle, a rule that has already crystallised to become customary international law is binding upon all States. No State is allowed to opt out unilaterally. The persistent objector theory would allow for an exemption: when a State objected to a rule in the early stage of its formation and actively, unambiguously and persistently maintain such an objection thereafter. The concept of persistent objector has been criticised by several leading scholars. They argue that judicial findings in support of the concept of persistent objector do not represent the strongest authorities and that actual State practice does not support its existence.

I submit that there are other fundamental reasons specific to international investment law why an arbitral tribunal should reject a persistent objector defence. This analysis is based on the "test" adopted by Professor Schachter in his General Course 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 many be imposed on recalcitrant States will depend, and should depend, on the whole set of relevant circumstances."
These three criteria will be now briefly examined.

First, what are the circumstances of the adoption of customary rules? Some authors argue that custom rules have been imposed on developing States which have always rejected them (Sornarajah, p. 92-93). The better view is that while these rules may be "Western" in origin, they are not strictly "Western" in nature; they are truly universal. The fact that developing States are now signing BITs which typically contain the type of provisions they have historically rejected (such as the "Hull formula" on compensation for expropriation) clearly undermines the claim that customary rules have been imposed upon them. Moreover, recent empirical studies show that the same types of provision have also found their way in recent BITs entered into between developing States themselves. Thus, the content of these "South-South" BITs (representing 26% of the total number of BITs in 2008 according to UNCTAD, Recent Developments in International Investment Agreements (2007-June 2008) is therefore not significantly different from those other treaties entered into by developing States with developed States (UNCTAD, South-South Cooperation in International Investment Arrangements, p. 45). Since these rules represent universally-recognised values and are not biased against developing States, there are no reasons why any State should be allowed to opt out unilaterally from them.

Second, why are these customary rules so important in international investment law? The few existing rules which can be said to have crystallised to the rank of customary law in investor-State arbitration are important because they represent the last bastion of international legal protection against unlawful conduct by States. This is because custom is the residual applicable legal regime between a foreign investor and the host State in the absence of any BIT. These rules can therefore be invoked by any foreign investor in any country. To allow a State the benefit of the status of persistent objector would means, 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 time. This strongly militates against allowing any State the status of persistent objector to be able to opt out from such basic requirements that must be binding on all states.

Third, what could be the grounds for dissent of a State seeking the status of persistent objector? One can hardly think of any reasons persuasive enough to prevent the application of, for instance, the requirement for the host State to provide foreign investors with the minimum standard of treatment under international law. There is simply no reason why an arbitral tribunal should reward a "free rider" on the entire international legal order. The objector would, indeed, not provide certain very basic legal protections to foreign investors while expecting that its own nationals and companies doing business abroad be accorded that standard of protection by all other States.

In conclusion, for all these reasons I believe 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.

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