

# Washington Law Review

---

Volume 61  
Number 3 *Dedicated to the Memory of Ted L.  
Stein*

---

7-1-1986

## How Persistent Must the Persistent Objector Be?

David A. Colson

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [International Law Commons](#)

---

### Recommended Citation

David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 Wash. L. Rev. 957 (1986).  
Available at: <https://digitalcommons.law.uw.edu/wlr/vol61/iss3/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# HOW PERSISTENT MUST THE PERSISTENT OBJECTOR BE?

David A. Colson\*

In an essay written shortly before his death, Professor Ted Stein predicted “that the principle of the persistent objector will play an increasingly important part in international controversies.”<sup>1</sup> He described the principle as follows: “a state that has persistently objected to a rule of customary international law during the course of the rule’s emergence is not bound by the rule.”<sup>2</sup> Professor Stein showed that while the principle of the persistent objector is firmly established in orthodox legal doctrine, it has played a surprisingly limited role in the legal debate between States. He suggested that the contemporary customary international law making process, in which increased significance is given to the work of multilateral conferences, will promote recourse by States to the escape hatch offered by the principle of the persistent objector. Ted Stein invited comment upon several unexplored questions concerning the principle. One question he raised, which I propose to examine here from a practitioner’s perspective, is “how persistent the objecting state must be and by what means that objection must be made known.”<sup>3</sup>

This essay has three parts. The first part discusses several ways states invoke international law which provide the opportunity for a persistent objector to make its views known. The second part, following the second part of Ted Stein’s essay, addresses the formation of customary law and the legal relationships between States and the means by which objections to the formation of such law may be made. The third part suggests that any answer to the question of “how persistent must the persistent objector be” must take into account the context in which the principle is applied.

In this essay I have taken the principle of the persistent objector beyond its traditional bounds. I have not limited its application to the single situation whereby it exempts a dissenting State from an otherwise generally applicable rule of customary international law. The principle of the persistent objector is the logical consequence of the consensual nature of the

---

\*David Colson is Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs, Office of the Legal Adviser, Department of State. The views expressed in this essay are his alone, and do not constitute the views of the United States Government or any of its entities.

Mr. Colson wishes to thank the editors for their invitation to participate in this memorial edition of the *Washington Law Review*. Professor Ted Stein was his friend and colleague.

1. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L. J. 457, 457 (1985).

2. *Id.*

3. *Id.* at 478.

formation of international law. States object to new trends in international legal practice that they dislike. If those trends crystallize into law, they continue to object as persistent objectors. The line between these two stages is never clear, however, except perhaps in retrospect. Accordingly, it is appropriate to investigate all the situations where States may express their consent, or their objection, to the formation of legal rules.

## I. THE SETTINGS FOR THE PERSISTENT OBJECTOR

States seldom bring their international legal debates into court. The practitioner of public international law, however, commonly relies upon international legal principles outside the international courtroom. It is in such contexts that the opportunity to be a persistent objector arises.

A prudent practitioner is mindful that the out-of-courtroom enunciation or reliance upon a legal principle may affect how that principle ultimately may be used in court. It is his or her responsibility to foresee those courtroom possibilities, however remote, and to ensure that legal principles are used outside the international courtroom in a manner which is consistent with national policy. However, the international lawyer's job is complicated by the fact that the client—a State—has certain legal predilections. These may include national traditions, national interests, and national aspirations. International law is used to justify these traditions, support these interests, and promote these aspirations. Unfortunately, such traditions, interests and aspirations may not be mutually consistent in legal terms. Furthermore, on the national political scene, international law positions are not voiced with the same degree of precision called for in a courtroom.

The most obvious situations where international law is invoked outside the international courtroom are settings where statements of international legal position are expected: reservations or declarations upon signing or becoming a party to an international agreement; statements at the time of signing final acts of diplomatic conferences; statements in explanation of votes at international conferences; and diplomatic communications between governments such as the typical protest note. Each of these situations provides the State that wishes to object to the formation of a rule of law with the opportunity to do so. Indeed, given the law-making characteristics of such settings, a prudent practitioner would advise a client State of the importance in such settings of making a legal response to opposing views to avoid any appearance of acquiescence in an unacceptable position.

Another situation where international law is invoked outside the international courtroom is the negotiating context. In virtually any negotiation there is a point where each party justifies its position in international legal

terms. It claims its national position is fully consistent with its rights and obligations under international law. A State may indicate willingness to negotiate a practical compromise on the substantive matter at issue, but is likely to say it is prepared to do so only without prejudice to its legal position. Protestations regarding the content of international law are repeatedly made and rejected. Perhaps, occasionally, such statements do convince the other side and thus do influence the outcome of a negotiation, but in my experience, they more often do not. The parties know the other's legal position before the negotiations start. Statements of legal position during the negotiating process serve as filler, a means by which to posture, to play to a domestic audience, or to make statement for the record with an eye to the future. They also, of course, are an opportunity for the persistent objector.

The third context where one finds statements of national legal position outside the international courtroom is within the domestic law making setting. National legislation or proclamations from officials of the responsible branches of government often contain clear-cut statements of national position on international issues. Major United States law of the sea statements include the 1945 Truman Proclamation,<sup>4</sup> the Outer Continental Shelf Lands Act,<sup>5</sup> the Magnuson Fishery Conservation and Management Act,<sup>6</sup> the 1983 Reagan Economic Zone Proclamation,<sup>7</sup> and the 1983 Ocean Policy Statement.<sup>8</sup>

National policy debates provide less clear statements of a national position. When one side of such a debate justifies its position based upon international law, it generally calls forth a contrary statement from the other side. In these situations political compromise can result in ambiguous positions on international law.

The United States Clean Water Act of 1977<sup>9</sup> may be cited as an example of a national policy debate leading to an ambiguous international law position. That Act amended portions of the Federal Water Pollution Control Act to make it unlawful to discharge oil or hazardous substances "which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act)."<sup>10</sup> This

---

4. Proclamation No. 2667, Policy of the United States With Respect to the National Resources of the Subsoil and Seabed of the Continental Shelf, 10 Fed. Reg. 12,303 (1945).

5. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982).

6. Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1982).

7. Proclamation No. 5030, 3 C.F.R. §§ 22-23 (1984) (establishing the exclusive economic zone).

8. Statement by the President of the United States Regarding the Proclamation of the Exclusive Economic Zone, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983).

9. Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982).

10. 33 U.S.C. § 1321(b)(3).

sweeping assertion of pollution control jurisdiction out to 200 nautical miles from the United States coast was promoted by coastal protection interests in the Congress, but was narrowed by navigational freedom advocates, in the penalty provisions of the Act, to make clear that penalties are to be assessed only against those who are "otherwise subject to the jurisdiction of the United States."<sup>11</sup> Just exactly who that might include at any moment in a specific ocean area could be a complicated question.<sup>12</sup> It is left for the future to determine precisely how the United States will apply these provisions and thereby define a United States position on pollution control jurisdiction over foreign vessels in its 200 nautical mile zone.

Another way ambiguous international law positions are expressed is by domestic law assertions which do no more than state that United States jurisdiction over a particular activity is subject to international law. For instance, the penalties of the Marine Sanctuary Act are not to be applied against non-United States citizens, nationals, or resident aliens "unless in accordance with . . . generally recognized principles of international law."<sup>13</sup> These types of legislative statements are more likely to be indicative of a difference in domestic councils as to how far international law may go in allowing control over foreign nationals in the circumstances than an indication of national willingness to go along with a determination by outsiders of the proper scope of international law.

National policy debates can also result in abrupt shifts of international legal position. An example occurred with the passage of the Magnuson Fishery Conservation and Management Act in 1976, which established the 200 nautical mile United States fishery conservation zone.<sup>14</sup> Based upon their judgment of international law, the State Department and the Defense Department recommended a veto of the bill, only to have President Ford sign it over their objection.<sup>15</sup> Suddenly, what the State and Defense Departments had regarded as unlawful in international law was lawful in United States domestic law, requiring an immediate turnabout in the international law positions of both Departments.

International law plays a role in at least two other domestic settings: bureaucratic debate and decision making, and decisions by domestic courts. The practitioner, if well positioned, can have some effect upon bureaucratic policy determinations. By formulating an issue in international law terms one may succeed in narrowing the problem under review to

---

11. 33 U.S.C. § 1321(b)(6)(A).

12. See 33 U.S.C. § 1321(a)(17).

13. 16 U.S.C. § 1435 (1982).

14. Marine Sanctuary Act, 16 U.S.C. § 1811 (1982).

15. Statement by President Upon Signing H.R. 200 Into Law-Fishing Conservation and Management Act of 1976, 12 WEEKLY COMP. PRES. DOC. 644. (Apr. 13, 1976).

a more manageable size. This is so because often there is a substantial body of international law where there is common ground even between the most hostile adversaries.

For instance, United States naval presence in the Mediterranean Sea raises the prospect of conflict with Libya over Libya's claim to the Gulf of Sidra. If no law of the sea principles are taken into account, any number of outcomes and expressions of national policy are possible. If, however, law of the sea principles are considered, the scope of the disagreement is narrowed and the policy options are better focused. In international law terms it is clear that there is a substantial portion of the law of the sea about which there is no international law dispute between the United States and Libya (e.g. there is no dispute that Libya has a right to control fishing or mineral resource activity in the Gulf of Sidra). The disagreement concerns only the existence and exercise of the freedom of navigation and overflight. Thus, international law may focus an issue and by doing so clarify the policy options available.

A final use of international law which should be mentioned is its role in domestic courtrooms. Pronouncements upon international law by domestic courts, or by the government before such courts, are certainly candidates for citation in the international courtroom. In this setting, legal rationale, distinctions, and the fine points of the law are more likely to be honed to a sharpness not found in extra-judicial situations. Therefore, these are particularly useful situations for the practitioner to put the national legal position on the record; and, thus, is another excellent opportunity for the persistent objector.<sup>16</sup> In all of the domestic circumstances discussed above, the State has the opportunity to make its international law position known and to speak out as a persistent objector.

## II. FORMS OF LEGAL OBJECTIONS

The purpose of this essay is to discuss the mechanics of being a persistent objector. I shall take as a given that international law is formed through expressions of consent by sovereign States and that individual States may escape being bound by rules when they object during the formation of the rule.

---

16. There is, of course, a question concerning notification to other governments of positions taken in domestic courts. However, in most cases, if Government *A* is litigating an issue in domestic courts which is also the subject of a dispute with Government *B*, Government *B* will be fully aware of the matter. Furthermore, in these cases international law is not likely to hold Government *B* responsible for responding to what Government *A* states in its own courts. Rather, the problem is for Government *A* to maintain consistency between the position it espouses internationally and that which it takes in its own courts.

Expressions of consent by States are quite varied; they may be overt, vocal, time certain, and otherwise clear in all respects; but they also may be no more than a quiet acceptance of a state of things, or quite ambiguous. Can objections—persistent objections—also take a variety of forms?

In trying to answer this question it may be useful to examine two considerations that, for better or worse, influence the way States act as they present their legal objections to others: one is the political significance given to the wording and tone; and, the other is the perceived need to take action beyond a verbal or written statement of position.

The public probably would be surprised at the lengths to which diplomats go to soften the presentation of a statement of legal objection. There are two related reasons for this. One is the perception that a statement that is gently phrased and that contains words of moderation will not be regarded as politically contentious. The other is the hope that such a softened statement will open doors otherwise closed and perhaps lead to a dialogue or negotiation to resolve the matter at hand, or at least not disrupt ongoing efforts to resolve or reconcile differences. Such sentiments are pervasive in foreign ministries. Because these views are so common, when a straightforward undisguised statement of position is received, it often is regarded as a negative political signal. This characteristic of foreign policy making is particularly true when dealing with allies, or neutrals, and less so when dealing with adversaries.

An illustration is the diplomatic shift from protest to non-acceptance. A standard diplomatic protest is usually in the following form: "the government of X therefore protests the action of the government of Y and reserves its rights and those of its nationals in this regard." This is a straightforward legal objection. In and of itself, it is not meant to be politically contentious. Nonetheless, recipients often perceive an unintended negative political content. Thus, the legal objection, so fundamental to the persistent objector, inadvertently takes on political character. To avoid a political downside, especially with allies and neutrals, the language is often softened. The foreign ministry lawyer is assailed with a variety of formulae proposed by other officials. These formulae are designed to accomplish the same legal end, but to do so in a way perceived to be more palatable. Thus, the lawyer is asked repeatedly: "won't this form of words protect our legal position just as well?" The lawyer has nothing but common sense and experience on which to base an answer. Generally, the conclusion will be that the message can be softened from protest to non-acceptance. Thus, the language is changed to "the government of X therefore cannot accept at this time the views of the government of Y," or something even more innocuous.

In this regard it may be instructive to note that between 1969 and 1979 the United States and Canada sent to each other more than thirty written

diplomatic communications concerning their respective positions on the location of the maritime boundary in the Gulf of Maine area. These statements of national legal position formed the background of the recent Gulf of Maine maritime boundary case before a Chamber of the International Court of Justice.<sup>17</sup> A review of the more than thirty communications shows that seldom was the same form of words used to express legal objection to activities of the other side, and on no occasion was the word “protest” used.

The point is that legal statements made in the normal course of diplomatic relations often make use of moderate and uncontentious statements of position to avoid perceived adverse political consequences. The lack of bombastic tone in these statements, however, should not be regarded as a weakness in legal position, nor as a lack of resolve to maintain the position. The language is designed to promote the peaceful resolution of the dispute. The fact that the statement thus may contain a moderate statement of legal objection should not detract from its place on the persistent objector’s ledger.

In this connection a word about form also is called for. Within foreign ministries there is often discussion of whether a particular form of presentation of legal position is required. Is a first person diplomatic note necessary? What about a third person note? Or, can the statement of position be given in some other form of written or oral communication? It seems clear that one can be guided by the holdings of the International Court of Justice in other legally similar contexts. The Court has repeatedly held that the question of form is not decisive and that “the sole relevant question is whether the language employed in any given declaration does reveal a clear intention.”<sup>18</sup>

The second consideration affecting how a persistent objector operates is the perception that action is required to protect a legal position. One often hears: “we’re going to lose our rights if we don’t use them.” This point of view potentially has much more serious consequences for international relations than a strongly worded protest note. One must seriously question whether international law requires action based upon legal position in order to preserve the position. One would hope that a continuing clear statement of position is sufficient in international law to maintain one’s legal place,

---

17. *See* *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U. S.), 1984 I.C.J. 246. The text of these communications is found in Annexes, Volume IV, of the United States Memorial for that case.

18. *Temple of Preah Vihear* (Cambodia v. Thailand), 1961 I.C.J. 32. *See also* *Nuclear Tests Cases* (Austl. v. Fr.), 1974 I.C.J. 267–68; *Aegean Sea Continental Shelf Case* (Greece v. Turk.), 1978 I.C.J. 50 (separate opinion of Judge Lachs). Of course, it cannot be denied that the form of presentation may have, and is often intended to have, a particular political impact.

without the need actually to provoke others and risk confrontation for the simple sake of maintaining a legal position. One possible reason for the continued validity of the principle of the persistent objector in international law is to provide a means whereby a State may protect its legal interests without using confrontational actions. Actions are an indication of national resolve and an affirmative effort to influence the formation of international law. Whether they are a necessary tool of the persistent objector is less clear. Further study of this question could prove illuminating.<sup>19</sup>

One further point should be noted concerning the way States act in presenting their legal objections. There is a common belief that a State must engage in tit-for-tat episodes with other States to insure that it is not at a disadvantage in a legal dispute. Thus, one side pronounces, the other side pronounces, one side acts, and the other side takes a corresponding action. The goal is to balance the equation. This attitude at times has an element of childishness about it. As long as it is limited to words and paper, perhaps it is harmless. But once it enters the realm of active deeds, the potential for [dangerous?] confrontation exists. It can become an inefficient and expensive means of promoting national policy.

This balancing act most often occurs in the bilateral context. Disputed maritime boundary situations often give rise to the phenomenon. For example, when the United States found out that Canada had taken steps to promote oil and gas development in continental shelf areas disputed by the United States, the United States believed it to be legally necessary to take its own steps toward leasing outer continental shelf areas disputed by Canada—to balance the ledger so to speak. This was an expensive and time-consuming way to show national resolve and to make a legal point.<sup>20</sup>

In these respects, recent decisions of the International Court of Justice provide some comfort. In the *Libya-Tunisia* case,<sup>21</sup> the *Libya-Malta* case,<sup>22</sup>

---

19. In examining this question further two additional points should be borne in mind. First, not all States are in the same position when it comes to expressing themselves through deeds. Small, perhaps relatively weak States may have no practical recourse to deeds. They may have to rely in all cases upon written and verbal statements of legal position. Second, even the most activist State may not have the wherewithal to express itself in deeds in all circumstances. If State *A* objects to a rule propounded by States *B* through *Z*, but it only has the opportunity to assert its rights with deeds against States *C*, *D*, and *E*, has it only prevented a rule of law from forming between itself and *C*, *D*, and *E*? Does its action in opposition to *C*, *D*, and *E* help it in its legal posture against the other States?

20. The United States outer continental shelf program on Georges Bank would have been simplified and less costly had it not been constructed as if there were no dispute with Canada concerning the northeastern one-third of the bank. To indicate national resolve, promotion of the United States maritime boundary position, and non-concurrence with the Canadian position, the United States went forward with preparation of protraction diagrams and environmental impact statements which covered the disputed area, despite the fact there did not seem to be any prospect that the United States would actually lease any of the area in dispute with Canada, pending the settlement of the dispute.

21. Continental Shelf (Tunisia v. Libyan Arab Jamahiraya), 1982 I.C.J. 18.

22. Continental Shelf (Libyan Arab Jamahiraya v. Malta), 1985 I.C.J. 13.

and the *Gulf of Maine* case<sup>23</sup> the Court was inundated with an enormous diplomatic record and a lengthy list of actions by each party. These were designed to create some impression of imbalance between the parties in the case before the Court. The Court, however, did not seem to be impressed with the one-up-manship. It found no legal relationships flowing from what can best be described as the balancing gamesmanship States often engage in.

Thus, returning to the question “can persistent objections take a variety of forms?” we can conclude that the answer is yes. The persistent objector in international law need not be provocative in its position. Its statement of objection may be couched in a variety of ways and may be communicated through various means. National positions probably do not need to be expressed in deeds to form a valid legal objection. Words, clear but gently stated, are sufficient in international law to protect the position of the persistent objector.

### III. HOW PERSISTENT MUST THE OBJECTOR BE?

The statement of national legal position, however framed, gives notice to other States of that government’s particular legal point of view. Thus, to the extent the international law that binds States is a function of their consent, the statement of contrary position identifies the objector. The continued maintenance of an objection makes the State a persistent objector in international law. How is the position to be maintained?

I submit that there is no answer to this question that may serve in all situations. In each case the answer should take into account characteristics of the legal principle involved. In this connection, for purpose of analysis, legal principles may be grouped into four categories: (1) principles promoted as being universally applicable and which are indeed supported by the majority of States; (2) principles promoted as being universally applicable but where it is less clear that they enjoy the support of a majority of States; (3) principles having application in a strictly bilateral setting; and (4) new assertions in international law that depart from customary norms and which affect the rights of the international community as a whole. An example of each follows.

In the first category, a legal principle of universal application is clearly supported by the majority of States, yet one or more States seek not to be bound by this principle through the maintenance of legal objections. This is the traditional persistent objector situation. Most examples Ted Stein identified in his essay are in this category; the United States tuna<sup>24</sup> and deep

---

23. *Delimitation of the Marine Boundry in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246.

24. 16 U.S.C. §§ 1802(14), 1813, 1825(4)(c) (1982). United States law excludes jurisdiction over

seabed mining positions<sup>25</sup> are examples of persistent objections under such circumstances. The question is how persistent the United States must be in restating its tuna and deep seabed mining positions to insure that it does not become bound, should the majority views on these issues be considered customary international law.

In the second category a principle of universal application is at issue, but an objective observer might find the law to be in an uncertain state with large blocks of States taking opposing positions. An example might be the issue of prior notification or authorization of warship innocent passage in the territorial sea. Many States, including the United States, firmly believe there is no such requirement in international law. There is clearly a block of coastal States with an opposing viewpoint. In this kind of situation both sides of a dispute are likely to argue that their positions are founded in customary international law. The dispute is really about the substance of customary international law itself. The question is how persistent or activist must the United States be in this kind of a situation to protect its position on the prior notification/authorization of warship innocent passage in the territorial sea.

In the third category a legal principle is applied solely in a bilateral situation without any effort to assert that such principle is of universal application. An example would be a dispute over a specific maritime boundary. For instance, one State argues that the boundary should be a strict equidistant line while the neighboring State objects and argues for a different line based upon special or relevant circumstances. To keep law from forming between these two States on this issue, how persistent must a State be in maintaining its position?

In the fourth category a State asserts a new right in international law which is contrary to customary practice and which adversely affects the rights of the international community. An example might be a State which asserts that other States do not enjoy the freedom of navigation and overflight in its 200-nautical-mile exclusive economic zone, or a State which suddenly declares certain waters off its coast to be its historic waters in which the navigation rights of other States will not be recognized. The question is, how does one deal with this kind of a situation?<sup>26</sup>

---

tuna beyond the territorial sea, and provides sanctions against those nations which seize United States tuna vessels based upon claims not recognized by the United States.

25. The Deep Seabed Hard Mineral Resources Act, 30 §§ U.S.C. 1401-1473 (1982). The Act states that: it is the legal opinion of the United States that exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law. 30 U.S.C. § 1401(a)(12).

26. In all of this there is, of course, some difference in perspective if one is the objector or the objectee. However, that is not to say that categories one and four are simply the converse of one another.

The actions required of a persistent objector depend upon the category of the situation. In the traditional persistent objector situation in which the United States finds itself on deep seabed mining or tuna, it seems apparent that the objector needs to be especially vigilant in protecting its legal position. It is clear that more than a majority of States maintain that deep seabed mining may only occur under the structure envisioned by the 1982 Law of the Sea convention (LOS Convention).<sup>27</sup> The United States and a few other States disagree and assert their right to engage in deep seabed mining outside the LOS Convention. In this situation, where the majority position—if you can call it that—has a forum in the Preparatory Commission, where this majority is engaged in active and continuous activity and makes statements in United Nations fora consistent with its view, and where an institutional structure will be established to implement its views once 60 States ratify the Convention, it behooves the persistent objector not to become quiescent.

The situation with the United States tuna position is, from a legal point of view, the same if not more difficult. Virtually all other coastal States claim and recognize coastal State jurisdiction over tuna within 200 nautical miles. The only justifiable legal position for the United States to take is that it is not bound to recognize the validity of those claims in international law because it has vigorously, and indeed notoriously, maintained its right not to be bound by such jurisdictional claims.

Thus, it can be concluded that in a case falling into this first category, where the activity is intense, structured, clear, and vocal, and the principle involved is without question supported by most States, the persistent objector must continually make its position known to ensure that the law does not find tacit consent through a relatively short period of silence.

It must be said that a persistent objector in these situations is in an unpopular political position. The political cost of remaining a persistent objector in these situations is likely to increase at an exponential rate as the objector becomes more isolated and as the issue increases in political visibility.

In the second category the actions of the persistent objector should be evaluated differently. In this situation customary international law is in a more formative stage. The number of States on each side of an issue is perhaps more in balance, or at least is less clear. As long as the law remains in such a condition, a State perhaps need not be as aggressive in reserving

---

In category one the objecting State maintains a legal position that once was the position of most States. In category four a State takes a new position which goes beyond existing or previous practice.

27. For the official text, *see* United Nations, *The Law of the Sea: United Nations Conference on the Law of the Sea and Final Act of the Third United Nations Conference on the Law of the Sea*, U.N. Sales No. E.83.V.5 (1983).

its position as it might need to be if it is dealing with a situation in the first category. Customary law is not likely to be formed quickly against it. Other States, with common objectives, may also be active in keeping customary law from forming.

At the same time, a State in this position may have another interest which should be recognized. Not only may it wish to escape being bound by law forming contrary to its interests, it also may hope to promote acceptance of its viewpoint as the correct international law position. Thus, it may embark upon an active campaign to advance its legal position and to influence the formation of customary international law. A state often puts forth such a legal position in a bilateral setting. However, its statement has wider implications because it can influence the formulation of customary international law in a general sense.

The promotion of the United States view of international law is one function performed by the freedom of navigation program of the United States Navy.<sup>28</sup> Under this program United States naval units are directed to operate in accordance with the United States legal position, off the coasts of States which maintain a different legal view. These operations, therefore, are a clear statement of the national resolve to maintain navigational rights and freedoms and to mold customary international law into the desired form.

In the third category, exemplified by the maritime boundary dispute, the formation of law between States falls more naturally into the traditional realms of legal acquiescence, estoppel, and prescription. This being the case, the law looks for a pattern of practice and/or statements in support of various positions. At the same time, due to the international interest in seeing such disputes resolved peaceably, the law is not likely to require States aggressively to protect or assert their legal positions. The interest of the international community is to resolve the dispute, rather than to see principles of law formed. Restraint in legal statement and actions, intended to encourage negotiation, should not be penalized by international law.

In the final category, where a State makes a new claim in international law which departs from customary norms and affects the interests of the international community, the legal position of other States presumably can be protected by their written and verbal objections. However, since the

---

28. See generally *U.S. Will Challenge Coastal Sea Claims that Exceed 3 Miles*, N.Y. Times, Aug. 10, 1979, at A1, col. 4. It should be noted that by virtue of the policy set forth in the President's 1983 Ocean Policy Statement, see *supra* note 8, the United States does not now object to coastal State territorial sea claims of 12 nautical miles or less in breadth so long as the coastal State respects the rights of others to engage in innocent passage, and where appropriate, transit passage and archipelagic sealanes passage. For recent commentary on the U.S. Navy's exercise of rights program, see *U.S. Navy Jets Challenge Libya's Sovereignty Claim*, Washington Post, July 27, 1984, at A1, col 2, and *Those Maritime Exercises*, Washington Post, Aug. 4, 1985, op. ed.

formation of customary international law is the quintessential slippery slope, the State that wishes to discourage a change in a reasonably stable legal situation may find it desirable to state its position emphatically through deeds. In doing so, it not only protects its legal position in regard to the State making the new claim, but it serves notice to other States that it will strongly resist any change in customary legal relationships.

#### IV. CONCLUSION

What conclusions may be drawn about the need for persistency by the persistent objector? Or, perhaps a better way to frame the question is: what conclusions may be made about the mechanics of making a legal objection in international practice?

First, States should not regard legal statements of position as provocative political acts. They are a necessary tool of the international lawyer's trade and they have a purpose beyond the political, since, occasionally, States do take their legal disputes to court.

Second, there is no requirement that a statement of position be made in a particular form or tone. A soft tone and moderate words may still effectively make the necessary legal statement.

Third, action by deed probably is not necessary to protect a State's legal position as a persistent objector when that State has otherwise clearly stated its legal position. Action by deed, however, promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.

Fourth, not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos.

Fifth, the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position.

Ted Stein noted that "there may be a considerable disjunction between the arguments formal doctrine makes available to States and those on which they in fact choose to rely."<sup>29</sup> I have tried to illustrate that this disjunction is more a matter of form than substance. The principle of the persistent objector is often applied in practice by many States, not the least of which is the United States. However, there is a disjunction between the words and acts States use to express their objection and traditional assumptions about how to protect a legal position.

Ted Stein argued "that the conditions may be ripe for the rediscovery of the principle of the persistent objector and indeed for giving it a vitality that it has hitherto lacked."<sup>30</sup> I agree. Further, an analysis of the objector's role

---

29. Stein, *supra* note 1, at 481.

30. *Id.*

will bring us to a better understanding of the formation and operation of customary international law itself. I hope that others will continue this discussion that Ted Stein began before his sad death.