ABUSE OF RIGHTS IN INVESTMENT DISPUTES: A CRITICAL ANALYSIS[1]

OSCAR M. GARIBALDI
Independent arbitrator, member of the District of Columbia Bar

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Resumen: En los últimos veinte años, la jurisprudencia arbitral en controversias sobre inversiones ha venido articulando, adoptando y aplicando, con creciente frecuencia y confianza, diversas versiones de la doctrina del abuso del derecho. Esa jurisprudencia parece

Abstract: In the last twenty years, arbitral tribunals sitting in investment disputes have articulated, embraced, and applied, with growing frequency and confidence, various versions of a doctrine of abuse of rights. Those tribunals appear to understand that doctrine,

1. © Oscar M. Garibaldi. Biographical information on the author can be found at www.garibaldiarbitrator.com. At an earlier stage of his career, while the author was a partner at Covington & Burling LLP, he was lead-counsel to the claimants in *Mobil Corporation et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, and *Tidewater, Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5. In those cases, issues related to the topic of this article were debated and the tribunals rendered decisions which are analyzed below. Nevertheless, the opinions expressed in this article are personal to the author and do not necessarily coincide with the positions of the claimants in those cases or the positions of any past or present client of Covington & Burling LLP. The author wishes to acknowledge the able assistance of his former Covington colleagues Mary Hernández, Luisa Torres, and Bruno Teixeira in conducting the research on which an early (2013) version of this article was based. For the final version, which is substantially different from the earlier one, the author had the benefit of the inestimable assistance of Professor Michail Risvas in bringing the research up to date (May 2021) and, more generally, in helping to carry this long-delayed project to completion.

entender esta doctrina, así como la subdoctrina del abuso del proceso, como la aplicación a controversias relativas a inversiones de una doctrina general de interdicción del abuso del derecho, la cual es aceptada expresa o tácitamente como parte del Derecho internacional general. Este artículo tiene por fin examinar críticamente los presupuestos conceptuales y jurídicos sobre los que descansan esas decisiones y la medida en que guardan coherencia con los principios y la lógica de la doctrina que pretenden acoger y aplicar. Para ello, el artículo analiza las principales cuestiones (conceptuales, metodológicas, político-ideológicas) que subyacen la doctrina del abuso del derecho; la controvertida cuestión de si dicha doctrina ha pasado a formar parte del Derecho internacional; la progresiva aceptación de la doctrina en la jurisprudencia en materia de inversiones; y, en fin, los tres principales problemas que plantea la forma en que la doctrina viene aplicándose: su estatus jurídico, los derechos a que se aplica y el criterio para calificar un ejercicio de un derecho como abusivo. El artículo concluye con breves observaciones sobre tres temas más generales: las razones de la aceptación, generalmente acrítica, de la doctrina del abuso de derecho en la jurisprudencia sobre inversiones; la transformación de la doctrina, en su origen una institución típica del Derecho civil continental basada en un criterio general de abuso, en una norma de características similares a las del «common law», aplicada sobre la base de similitudes de hecho con casos anteriores; y la incertidumbre que suscita la potencial aplicación plena de la doctrina a los derechos de los Estados.

Palabras clave: Abuso de derecho – Abuso del proceso – Arbitraje de inversiones – Buena fe – Reestructuración de inversiones – *Phoenix, Mobil v. Venezuela – Pac Rim, Tidewater, Philip Morris v. Australia.*

and the sub-doctrine of abuse of process, as the application to investment disputes of a general doctrine of abuse of rights, which those tribunals explicitly or implicitly accept as part of general international law. The purpose of this article is to examine, from a critical perspective, the conceptual and legal assumptions on which those arbitral decisions are based and the extent to which they are consistent with the tenets and logic of the doctrine they purport to embrace and apply. To this end, the article discusses the main issues (conceptual, methodological, politico-ideological) that lie at the basis of the doctrine of abuse of rights; the vexed question whether that doctrine has become a part of international law; the gradual acceptance of the doctrine in investment jurisprudence; and the three main problems arising from the way the doctrine is being applied: the legal status of the doctrine, the rights to which it applies, and the criterion of abuse. The article concludes with brief observations on three more general topics: the reasons for the generally uncritical acceptance of the doctrine of abuse of rights in investment disputes; its transformation from a quintessential civil-law doctrine based on a general criterion of abuse into a common-law-type rule applied on the basis of similarities of fact patterns; and the uncertainties that arise from the potential full application of the doctrine to the rights of states.

Keywords: Abuse of rights – Abuse of process – Investment arbitration – Good faith – Investment restructuring – *Phoenix, Mobil v. Venezuela – Pac Rim, Tidewater, Philip Morris v. Australia.*

I. INTRODUCTION

At the turn of the XX century, a group of French scholars formulated a legal theory which later came to be called the doctrine of abuse of rights. The nub of that theory was that the abusive exercise of rights ought to be prohibited or, more precisely, that judges ought to have the power to restrict the exercise of rights on the basis of a general criterion of abuse. Within a few decades, that theory became the law in France and other countries in Continental Europe and throughout much of the civil-law world.

Shortly after the end of World War I, a group of international legal scholars conceived the idea that the doctrine of abuse of rights, which had been so well received at the national level, ought to be incorporated in international law, to serve as a means of restricting the rights of states in the interest of peace and harmony among nations. Over the following two decades, amidst the rise of totalitarian ideologies and the threat of a new war, the argument changed in character and urgency: the doctrine of abuse of rights, it was then said, was already a part of international law.

For a variety of reasons to be explored later, these twin theories – that the doctrine of abuse of rights ought to be a part of international law and that it already was – became highly controversial. Legal scholars were sharply divided, and in the end the doctrine was excluded from codification efforts. The Permanent Court of International Justice and its successor the International Court of Justice adopted a cautious and ambivalent attitude: they would occasionally refer to the doctrine of abuse of rights as something that could support a viable claim or defence, but they would take pains not to apply it. This was, broadly speaking, the status of the debate when the XX century came to a close and, in the context of disputes between states, it is generally where the matter stands today.

In the last few decades of the XX century, an increasing number of disputes between foreign investors and host states came to be submitted to international arbitral tribunals, under bilateral or multilateral treaties concerning trans-border investments. The decisions of those tribunals have formed a se-

parate corpus of legal practice, parallel to that of courts and tribunals resolving disputes between states. At the turn of the XXI century, tribunals sitting in investment disputes began to make tentative references to the doctrine of abuse of rights, and in the ensuing two decades they have articulated, endorsed, and applied various versions of the doctrine, with increasing confidence and frequency. As a result, abuse of rights has become a pervasive theme in investment disputes, a frequently invoked defence against assertions of jurisdictional, substantive, or procedural rights, and a recurring rhetorical embellishment to other claims or defences.

While the doctrine of abuse of rights appears to enjoy broad acceptance in the jurisprudence of investment disputes, many controversies that lie at the origin and foundation of the doctrine remain unresolved. Some of the underlying problems are conceptual: What is «abuse» of rights? How can rights be «abused»? How does a doctrine of abuse of rights work? What does it do to the rights to which it applies? Other problems are methodological: should rights be restricted on a piecemeal basis, when circumstances arise making a particular restriction desirable, or should they be restricted holistically, by subjecting them to an *a priori* general criterion of abuse? Other problems are politico-ideological: if rights are (or ought to be) restricted holistically, does the applicable general criterion of abuse reflect a particular political ideology (or ought to do so)? The more general and more critical problems concern the status of the doctrine in relation to international law: as a matter of the law that ought to be (*lex ferenda*), should the doctrine of abuse of rights be incorporated in international law? And as a matter of the law that is (*lex lata*), is the doctrine of abuse of rights indeed a part of international law? All of these problems deserve to be taken seriously, not only by those who are new to this field, but also by those of us who have a life-long acquaintance with one or more versions of the doctrine[2].

Recently, in 2020, Jan Paulsson published a long-overdue re-examination of the doctrine under the title *The Unruly Notion of Abuse of Rights*[3]. In that book, Paulsson states a powerful case for the proposition that «the notion of abuse of rights […] cannot be the foundation for a general principle of law or an acceptable rule of decision on the international plane[4]». Paulsson reaches that conclusion on both analytical and policy grounds, which he develops at length in a subtle, complex, broad-ranging argument. Paulsson concludes, in

2. I was initiated in the mysteries of the doctrine of abuse of rights in the mid-1960s, in my first course on civil law in my first year of my first legal studies.
3. Paulsson, Jan, *The Unruly Notion of Abuse of Rights* (Cambridge University Press, 2020). See also the review of that book by Paparinskis, Martins in (2021) 37(1) *Arbitration International*, 387-395.
4. Paulsson, *op. cit.*, *supra*, at p. x.

brief, that the notion of abuse of rights is not something that can or should be applied as international law.

I am generally in sympathy with much of what Paulsson says, though my own analysis may differ from his in some respects. Regardless of any differences, I see Paulsson's book as a lucid, timely reminder that the international doctrine of abuse of rights rests on some shaky foundations and cannot (or no longer) be viewed as something beyond criticism. The purpose of this article is not to comment on Paulson's arguments (which the reader is urged to examine on his or her own), but to offer my own critical analysis of the doctrine of abuse of rights, on lines that, compared with Paulson's views, sometimes coincide, sometimes run in parallel, and occasionally may diverge. In this article, I am less concerned with the question whether the doctrine of abuse of rights is (or is not) a good institution, or the related but different question whether it ought (or ought not) to be incorporated in municipal or international law. My principal concerns are (i) the conceptual problems underlying the doctrine; (ii) the vexed question whether the doctrine is international *lex lata*; and (iii) the way the doctrine has been applied in investment disputes and, in particular, whether it has been applied in a manner that is conceptually sound and internally consistent. In other words, my principal aim is to take the doctrine seriously and to discuss it on its own terms.

The approach I follow in this article is primarily analytical. The analysis is partly descriptive, to the extent descriptions are needed, but it is fundamentally critical, in the sense that it is directed towards questioning the reasons offered in support of the conception, development, legal status, and application of the doctrine of abuse of rights. It is in this sense that I refer to my approach as a «critical analysis»[5].

After this Introduction (Part I), the analysis will be conducted in two stages. The first stage (Part II) concerns the idea of abuse of rights in general, including the conceptual issues presented by that idea, the conception and development of a legal doctrine of abuse of rights on the municipal plane, and the question whether such a doctrine has been incorporated in international law. The second stage (Part III) contains a survey of the decisions that developed and applied a doctrine of abuse of rights in the context of investment disputes, followed by a critical analysis of the principal elements of that doctrine, as articulated in those decisions. A few general reflexions are added by way of conclusion (Part IV).

5. I hasten to add, for the avoidance of doubt, that I use the words «critical» and «criticism» in the rationalist tradition of Kant and Popper, not in reference to any post-modern deconstructionist theory. See, *e.g.*, Popper, Karl R., *All Life is Problem Solving* (Routledge, 2001), Ch. 1.

II. ON ABUSE OF RIGHTS IN GENERAL

1. HOW «ABUSE OF RIGHTS» IS USED AND (SOMETIMES) ABUSED

We use the expression «abuse of rights» in statements of different kinds, made in different contexts, for different purposes. Everyone speaks of «abuse of rights» rhetorically, to express disapproval of some conduct, to exhort someone to refrain from doing something, or to persuade someone else to take action to stop or prevent the «abuse». Legislators use «abuse of rights» in prescribing and justifying general rules, and judges and arbitrators do the same in framing and justifying individual decisions. Advocates use «abuse of rights» in efforts to persuade legislators, judges, and arbitrators. Scholars and commentators use «abuse of rights» in their (true or false) descriptions of particular legal systems. The uses of «abuse of rights» are indeed as varied as the uses of language.

In this article we are concerned primarily with «abuse of rights» as used in the prescriptive language of legislation and legal decisions, in the descriptive language of those who purport to tell others what the law is, and in the argumentative language of those who purport to tell others what the law ought to be.

What do we mean when we speak of «abuse of rights» in these contexts and for these purposes? The answer is not self-evident. Marcel Planiol famously pointed out that rights *cannot* be abused: «the right stops when the abuse starts, and there cannot be 'abusive use' of any right, because the same act cannot be both in conformity and contrary to the law at the same time»[6]. This observation looks hard to refute. But if «abuse of rights» is an oxymoron, and speaking of «abuse of rights» amounts to an abuse of language, how is it possible that we do understand a claim that someone has abused a certain right by engaging in a certain conduct? Could it be, as it is often argued, that the abuse of rights concerns only the «exercise of rights», and not the rights themselves? If «abuse of rights» does not concern the rights themselves, do we really sacrifice any portion of our rights by prohibiting abuse? These and other conceptual issues have beset the legal discourse on abuse of rights for well over a century and a quarter. They should not be ignored, because they lie at the root of many misunderstandings and misconceptions, which still affect the way scholars think about the abuse of rights and the way judges and tribunals invoke «abuse of rights» as a basis for decision.

6. Planiol, Marcel, *Traité Élémentaire de Droit Civil II*, No. 871 (Cotillon F. Pinchon, 1901-2), p. 265. The passage is quoted at greater length in Paulsson, *op. cit.*, p. 28.

To address those issues, we must examine how the terms «abuse» and «right» are used in legal discourse, and to do so we need an adequate analytical framework[7].

In modern legal contexts, we say that someone has abused something when that person has used that thing in a way that we deplore or consider «bad». «Abuse» is, then, another word for misuse or bad use. In this sense, it is true, as Paulsson points out, that «[a]buse is always wrong»[8]. But abuse is always wrong only in a tautological sense, because, in current parlance, «abuse» means wrong use. For a meaningful discussion of «abuse» to be possible, we need to know what use or uses of the thing in question the speaker considers misuses or, alternatively, what criterion the speaker uses to identify misuses within the universe of possible uses.

Lawyers and non-lawyers use the word «right» (in the sense of legal right) in a variety of contexts. Three of those contexts are particularly relevant to an assertion that rights can be abused. First, we say that a person has a legal *right* to engage in a certain conduct, consisting of acts or omissions, when the legal system taken as reference permits the person both to engage in that conduct and to refrain from engaging in that conduct. Second, we say that a person has a legal *right* to another person's conduct when that other person is obligated by the system to engage in such conduct for the benefit of the holder of the right. Third, we say that a person has a legal *right* to a certain conduct of his own or to someone else's conduct when the system provides the holder of the right with the means of enforcing that right, that is, a mechanism to seek from a judge or tribunal an individualized determination that the right exists and a consequential remedy. Complex bundles of rights like ownership are aggregates of discrete rights in the three senses just mentioned.

Whenever we say that someone has a legal right, we do so in reference to a particular *legal system*, which may be more or less comprehensive in terms of the elements that compose it. For present purposes, let us think of a legal system as any set, however broad or narrow, that (a) consists of rules, principles, and definitions; (b) produces legal consequences; and (c) includes those consequences[9]. For example, a statement about rights may explicitly or

7. For an analytical discussion which has several features in common with mine, see Schauer, Frederick, «Can Rights Be Abused?», (1981) 31(124) *The Philosophical Quarterly*, pp. 225-230.
8. Paulsson, *op. cit.*, p. 4.
9. Accordingly, as used in this article, the term «system» should *not* be understood as referring solely to the entire legal order of a state or that of a political subdivision. A legal system, in the sense used here, can be included within a more comprehensive system, so that the first can be called a subsystem of the second. For a more precise discussion of the concept of (normative) system, see Alchourrón, Carlos E. and Bulygin, Eugenio, *Normative Systems* (Springer-Verlag, 1971), Ch. IV. I shall occasionally use the term «order»

implicitly refer to (i) a particular clause in a contract; or (ii) the contract as a whole; or (iii) the contract together with the governing legislation; or (iv) the entire legal order of a subnational jurisdiction; or (v) the entire legal order of a given national state; and so on. Many of the conceptual difficulties that cloud the debates on abuse of rights disappear when we realize that any statement about legal rights is always *referential*, in the sense that it refers, explicitly or implicitly, to a particular legal system. A statement that a right exists or has certain boundaries may be true in relation to a given system (*e.g.*, a contract) but not true in relation to another system, including a more comprehensive one (*e.g.*, the contract plus the governing legislation).

A legal right of the kind that is relevant here has a certain *material scope*. That is the universe of normatively qualified (*i.e.* permitted, obligatory, or prohibited)[10] acts and omissions of the holder, and of others towards the holder, that forms the content of the right. The material scope of a right is determined, with a greater or lesser degree of precision, by the system of reference, including the rules, principles, criteria, and definitions contained in that system[11].

If we accept that the material scope of a right depends on the system that is taken as reference at a particular time, it follows that a conclusion concerning that scope may be altered by a shift in the system or in the time of reference or in both. A shift in the system of reference may be called a *static* shift; a shift in the time of reference may be called a *temporal* shift.

A *static* shift occurs when an observer changes the frame of reference used to determine the material scope of the right from one system to another, especially to a more comprehensive one. The right in question may have been created by subsystem S_1 with a certain material scope, but at the same time that scope may be modified (restricted or expanded) by the more comprehensive subsystem S_2, and may be further modified (restricted or expanded) by the even more comprehensive subsystem S_3, and so forth. For example, the material scope of a right created by a given contractual clause may be restricted by the contract as a whole, and further restricted by the

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to refer to larger systems, including the entire legal system of a national or subnational jurisdiction and to international law.

10. On the interdefinability of these normative operators, see von Wright, Georg H., *Norm and Action: A Logical Enquiry* (Routledge, 1963), Ch. V.

11. This is not to say that the material scope of a right is always formally defined or easy to ascertain. The concepts that determine the material scope of a given right may be scattered over a large number of prescriptive statements or legal definitions or may be concepts drawn from a natural language without a technical legal meaning. In the end, no matter how precisely defined, the concepts that determine the material scope of a right are always subject to the relative indeterminacy of the natural language in which they are expressed.

applicable legislation. If we change our frame of reference from one subsystem to another, our conclusions regarding the material scope of the right may change as well.

The material scope of the right may also be modified (restricted or expanded) by shifting from one temporal stage of the system of reference to another temporal stage. For example, let us say that at time T-1 the material scope of my right to write this article consists of the universe of actions and omissions that the system of reference (S_{T-1}) allows me to perform or to refrain from performing in writing an article, including the universe of opinions that I may wish to express and the modes of expressing them. Now let us suppose that at time T-2 the system of reference is amended to exclude certain opinions or certain modes of expression from the universe of opinions and modes of expression to which I was formerly entitled. Under the amended system of reference (S_{T-2}), the resulting material scope of the right will not include the right to express the excluded opinions or to use the excluded modes of expression. I may strongly disagree with the restriction, but my sentiment in that respect would be a matter of policy or ideology, and it would not alter the structure or result of the preceding analysis.

One final observation on method: there are two basic alternative techniques which a legislator may use to restrict the material scope of a single right or a generality of rights. A legislator may restrict the scope of rights in a *piecemeal* way, by amending the relevant system in such a way as to carve out from the material scope of the relevant right those actions or omissions considered undesirable. Alternatively, the legislator may restrict the scope of a generality of rights *holistically*, by introducing in the system of reference a set of general principles designed to restrict, or to authorize adjudicators to restrict, the material scope of those rights.

With the preceding analytical framework in mind, let us address the vexed question whether it makes any sense at all to speak of «abuse of rights». Let us assume that a given right has a certain material scope as determined by subsystem S_1 (*e.g.*, a Civil Code). Let us further assume that S_1 is included within the more comprehensive system S_2, which may or may not also contain an overriding principle prohibiting the abuse of rights on the basis of a certain criterion of abuse. If S_2 does contain such a principle, shifting the frame of reference from S_1 to S_2 will amount to carving out a portion of the original scope of the right, so that the right-holder will no longer have a right in respect of that carved-out portion. The same result will follow if the reference is shifted, over time, from system S_{T-1} to an amended system S_{T-2} that includes the prohibition of abuse. On the contrary, no such carve-out will occur if S_2 (or S_{T-2}) does *not* include an overriding principle prohibiting abuse of the right.

It is easy to see that «abuse of rights» is indeed an oxymoron if we take the more comprehensive S_2 (or the amended $S_{T\text{-}2}$) as our system of reference, because if that system includes a prohibition of «abuse», that prohibition has already carved out, from the material scope of the right, the portion covered by «abuse». It truly makes no sense to talk of «abuse» of the residual scope of the right, *i.e.* the material scope that is left after all «abuse» has been carved out. Nor would it make sense to talk of «abuse of rights» in a description of S_2 or an amended $S_{T\text{-}2}$ if those systems did *not* contain a prohibition of «abuse». But it is perfectly understandable to speak of «abuse of rights» in the context of the operation of a doctrine of abuse included in the relevant system or in the context of an argument for adopting it. For example, it is quite understandable to say that the right determined by subsystem S_1 has been abused for the purposes of the prohibition that is (or ought to be) included in S_2, or that the material scope of the right defined in $S_{T\text{-}1}$ is affected by a prohibition of abuse that was included (or ought to have been included) in $S_{T\text{-}2}$. Planiol was right that «abuse of rights» is an oxymoron, but only if we apply his observation to the rights defined by the entire legal order, including all the restrictions imposed thereby, which may or may not include a doctrine of abuse[12]. This conclusion, however, does not prevent us from intelligibly using the expression «abuse of rights» in other contexts.

We are now in a position also to assess the argument that prohibiting the «abuse» of a right restricts only the «exercise» of the right, leaving the right itself (or its «essence» or «nature») unimpaired. Let us take the right to one's own conduct as an example. The material scope of that right is the universe of acts and omissions that the system of reference permits the holder both to perform and to refrain from performing. The holder *exercises* the right by performing or refraining from performing individual acts or omissions within that universe. If a particular «exercise» of the right is prohibited (for example on grounds of «abuse»), the resulting scope of the right will *no longer* include the conduct that was prohibited. The right, or more precisely the material scope of the right, will be very much impaired by the exclusion. Therefore, to say that a prohibition of abuse of rights restricts only the exercise of rights *leaving the rights themselves unimpaired* is plainly incorrect[13]. At best, it is a seriously

12. Depending on the vagueness of the criterion of abuse, it may be difficult to determine *a priori* (*i.e.* before adjudication) whether, under the more comprehensive subsystem S_2 (or $S_{T\text{-}2}$) which includes a prohibition of abuse of right, the holder still has a right at a given point of the original scope of the right. If the criterion is wholly open-ended (*e.g.*, «abuse» is whatever the judge decides it is), that question would be impossible to answer except *a posteriori*, a fact of not inconsiderable importance to the right-holder. Even in such cases, though, the end result would be that the holder does or does not have a right at any given point of the original scope. *Tertium non datur*.
13. Sometimes this argument is framed in terms of non-impairment of the «essence» or «nature» of the right. The view that the prohibition of abuse applies externally, leaving the «es-

misleading description of the way the prohibition of abuse of rights works; at worst, it is a rhetorical device aimed at concealing the real cost of applying that prohibition, which indeed impairs the material scope of the rights to which it is applied. Nevertheless, as long as the process is clearly understood, we may tolerate the (misleading) common usage that rights are restricted in their exercise, while firmly rejecting the view that the rights themselves are untouched.

When in a legal context we say that «abuse of rights» is (or ought to be) prohibited, we refer to a legal institution that is (or ought to be) part of a system of law. Let us take a closer look at that institution, starting from the way it is characterized. Sometimes it is called a theory, sometimes a doctrine, sometimes a principle or set of principles, and the various characterizations are not necessarily related to whether the institution is described as *lex lata* or put forward as *lex ferenda*. I have been referring to it as a doctrine and shall continue to do so, but I do not wish to suggest that anything important turns on how the institution is called.

The doctrine of abuse of rights can be described as an actual or proposed legal system (or subsystem) which is designed to control the material scope of a generality of legal rights on the basis of a general criterion of «abuse». To fulfil that design, that is, to control the material scope of rights defined by

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sence» or «nature» of the right untouched, is what German scholars call the *Aussentheorie* (they refer to an «external» restriction of the rights as an *äussere Rechtsbeschränkung*) . See, *e.g.*, Bolgár, Vera, «Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine», (1975) 35 *Louisiana Law Review* 1015-1036 at p. 1026 (citing literature). This theory suggests that prohibiting the «abuse» of rights is not only morally correct but also cost-free, because such a prohibition does not affect the «essence» (or «nature») of the rights. The basis of this conception is a philosophical tradition called methodological essentialism, which stemmed from Aristotle's revisions to Plato's theory of forms or ideas, flourished in medieval and later scholasticism, waned under the influence of Kant and the British empiricists, and enjoyed a revival in the philosophies of Hegel and Husserl. According to this tradition, things, including legal concepts such as rights, have «essences», which are knowable through intellectual intuition, a faculty that we humans (or perhaps only the philosophical elite) are supposed to possess. In this view, restricting a right, on grounds of «abuse» or otherwise, is perfectly all right as long as the restriction leaves the «essence» of the right untouched, and this is something that a scholar or judge can readily determine by relying on his or her own intellectual intuition. The scholastic version of this theory was the dominant way of thinking among many (if not most) civil-law scholars at the time I took my first course on civil law in the mid-1960s, and I have reason to believe that this view still has considerable influence in the civil-law world. One difficulty with this theory is that one person's intellectual intuition into the «essence» of a legal concept is not falsifiable, nor is it really subject to rational discussion. That is why debates on the essence of legal concepts usually end up either as futile confrontations of contrary intuitions or equally futile appeals to authority. Legal analysis based on methodological essentialism is dogmatic and sterile. For a critical discussion of methodological essentialism, see Popper, Karl R., *The Open Society and Its Enemies* (London, Routledge & Kegan Paul, 5th ed. 1966), vol. I, Ch. 3(vi) pp. 31-33 and notes; vol. II, Ch. 11(ii), pp. 9-21 and esp. n. 54, pp. 399-401.

other systems, the doctrine of abuse of rights must be structurally placed in a legal order in such a way as to override the systems that determine the material content of those rights. For example, if the rights in question are defined in a civil code, the doctrine of abuse of rights must be able to override those definitions, either as *lex superior* or *lex posterior*[14]. Accordingly, from the standpoint of the structure of a legal order, the doctrine of abuse of rights works as a *second-order system*, in the sense that its function is to control first-order systems that define rights, for which purpose it has to stand in an appropriate relationship with such first-order systems. And from a methodological standpoint, the doctrine of abuse is a device for restricting rights *holistically*, that is, for controlling through a single criterion the material scope of all or a broad generality of rights.

The key questions presented by any doctrine of abuse of rights are: (i) is the doctrine *lex lata* or *lex ferenda*? (ii) what are the rights that are subject to the doctrine? and (iii) what is the criterion of «abuse» embedded in the doctrine? These are the questions to be borne in mind as we briefly review how the doctrine of abuse of rights appeared and prospered on some national stages and how it has fared on the world stage. The same key questions will reappear in Part III, where we shall critically examine the doctrine of abuse of rights as it has been embraced in the adjudication of investment disputes.

2. THE DOCTRINE OF ABUSE OF RIGHTS ON THE NATIONAL STAGE

2.1. Abuse of Rights as *Lex Lata* and as *Lex Ferenda*

The idea that courts should not permit the «abuse» of rights had its origin in a handful of judicial decisions rendered in France in the second half of the XIX century[15]. At the turn of the XX century, a group of French scholars, chief among them Louis Josserand, developed what they saw as the principle underlying those decisions into a full-fledged legal theory, purporting to describe the law as it was and also to state the law as it ought to be[16].

14. As the doctrine of abuse of rights is based on a general criterion and applies to a generality of rights, it is difficult to think how it could be *lex specialis* in respect of the system that defines a particular right.
15. The origin and development of the doctrine of abuse of rights are well known to students of civil law. A recent critical account of this history can be found in Paulsson, *op. cit*., pp. 24-29. For these reasons, only a brief account is needed here.
16. See, *e.g.*, Paulsson, *op. et loc. cit*.; *XI International Encyclopedia of Comparative Law* (henceforth, IECL), Chapter 2, ¶ 235, p. 107 (with citations). For a history of the development of the theories of abuse of rights in civil-law countries, *see* IECL at ¶¶ 230-255, pp. 105-119. See also, Bolgár, *op. cit*., *supra* n. 13. The IECL contains a survey of the laws of a relatively large number of countries in that tradition. Although the survey is sadly out of date, it is illustrative of the way theories of abuse of right developed and the various

Josserand's theory was not a mere exercise in systematization; it was an ideological programme. The driving force behind the new theory of abuse of rights was a political reaction against the perceived rigidity and individualist character of the private rights guaranteed by the law of the time, which reflected the influence of classical liberalism[17]. This turn-of-the-century anti-liberal programme later received additional impetus from a post-World War I movement promoting the «moralization» of the law, a movement which sought to subject existing law to certain general principles, among them the prohibition of abuse of rights, which their proponents claimed to derive from a superior moral order[18]. This asserted moral basis for the doctrine of abuse of rights largely explains the highly moralistic and self-righteous tone in which the doctrine is often articulated and applied.

The resulting doctrine of abuse of rights was not without controversy but, in the end, it became generally accepted by French courts without an amendment to the Civil Code. A different version of the doctrine of abuse of rights was introduced in the German Civil Code of 1900[19], and yet another version was included in the Swiss Civil Code of 1907[20]. Over the ensuing decades, other civil-law countries, including Spain and those of Latin America, adopted various versions of the doctrine, sometimes through judicial decisions, more often by incorporating the doctrine in new or amended Civil Codes[21]. At present, the doctrine of abuse of rights, in different versions, is generally viewed as part of the laws of many, but by no means all, civil-law jurisdictions.

By contrast, common-law jurisdictions have generally declined to adopt the doctrine of abuse of rights[22]. This does not mean that, under the laws of

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criteria adopted by different countries. It is unnecessary for the purposes of this article to ascertain the current state of the law in each of those countries.

17. Josserand, Louis, *De l'abus de droit* (Librairie nouvelle de droit et de jurisprudence Arthur Rousseau, 1905), p. 7 *et seq*. See, *e.g*, Paulsson, *op. cit*., pp. 26-27. See also, *e.g.*, Lunel, Alexandre, «L'abus de droit et la rédefinition des rapports juridiques entre patrons et ouvriers en droit français (seconde moitié XIXe siècle, premier quart XXe siècle)», (2009) 87 *Revue historique de droit français et étranger* 515-549, at pp. 516-519; Calvo Sotelo, José, *El Abuso del Derecho* (Librería General de Victoriano Suárez, 1917) 21; Savatier, René, *Du Droit Civil Au Droit Public* (Librairie générale de droit et de jurisprudence, 1945), 7.
18. See Ripert, Georges, *Le Régime Démocratique et Le Droit Civil Moderne* (Librairie Générale de Droit et de Jurisprudence, 1948), no. 118 *et seq*.; IECL at ¶ 248.
19. German Civil Code (BGB) (1900), article 226: «*Die Ausübung eines Rechts ist unzulässig, wenn sie nur den Zweck haben kann, einem anderen Schaden zuzufügen*» («The exercise of a right is unlawful if it can only have the purpose of causing harm to another»).
20. Swiss Civil Code (1907), article 2: «*Chacun est tenu d'exercer ses droit et d'exécuter ses obligations selon les règles de la bonne foi. L'abus manifeste d'un droit n'est pas protégé par la loi*». (Everyone is required to exercise his rights and to perform his obligations according to the rules of good faith. The manifest abuse of a right is not protected by the law»).
21. See IECL at ¶¶ 230-255 *passim*.
22. See Paulsson, *op. cit*., p. 21; IECL at ¶¶ 233, 255.

those jurisdictions, rights are unrestricted or restricted only in a piecemeal manner. But common-law legal orders tend to favour piecemeal restrictions over holistic restrictions, as well as restrictions affecting narrower categories of rights over restrictions affecting broader categories of rights. These tendencies reflect the structure of common-law legal orders, which normally consist of subsystems and legal categories which are narrower than those of their civil-law counterparts. For example, common-law legal orders typically restrict rights associated with ownership of land by means of specific torts such as nuisance, rather than a general doctrine of abuse[23]. Even when those legal orders restrict a generality of rights under general criteria such as reasonableness, the restrictions tend to operate only within confined sectors of the law[24].

It is sometimes claimed, however, that common-law jurisdictions have adopted doctrines that are «functionally equivalent» to that of abuse of rights. That theory, which presents factual, conceptual, and logical difficulties, will be critically examined in Section II.3.2., in the context of the claim that the doctrine of abuse of rights is one of the general principles of law recognized by civilized nations[25].

2.2. The Scope of the Doctrine of Abuse of Rights

The universe of rights that are subject to a particular version of the doctrine of abuse of rights can be called the *scope* of that doctrine. For present purposes, it is unnecessary to ascertain the scope of the particular version of the doctrine in each jurisdiction that has adopted it. Broadly speaking, the doctrine of abuse of rights applies generally to all rights held by individuals and private legal entities, including substantive and procedural rights, except (in some cases) for rights considered peculiarly discretionary.

As we have seen, the purpose and function of the doctrine of abuse of rights are to restrict rights. It follows that the doctrine applies only to rights that exist. A right that never existed or has ceased to exit cannot be abused.

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23. See, *e.g.*, *Restatement (Second) of Torts* (1979), Chapter 40, Nuisance. («§ 822. General Rule: One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities»).
24. Sourgens, Frederic, «Reason and Reasonableness: The Necessary Diversity of the Common law» (2014) 67 *Maine Law Review*, 73, p. 77 («the diversity of reasonableness paradigms is a necessary, structural quality of the common law»).
25. *See* Part II of this article, *infra*, Section II.3.2. For an example of the «functional equivalence» theory, see, *e.g.*, Kiss, «Abuse of Rights» in (2012) I *The Max Plank Encyclopedia of Public International Law* 20, at ¶ 9.

The doctrine of abuse of rights generally applies to the rights of private individuals and private legal entities. In many civil-law countries, however, a structurally similar doctrine has been developed to control the exercise of the powers or competences of public officials, especially administrative agencies. That is the doctrine of *détournement de pouvoir*, also known as deviation or misuse of power[26]. An organ commits *excés de pouvoir* when it acts outside its sphere of competence (*ultra vires*), but it commits *détournement de pouvoir* when it acts within that sphere but «misusing» its competence. Just as the doctrine of abuse of rights requires an accepted criterion of «abuse», the doctrine of misuse of power requires an accepted criterion of «misuse» of the legal power conferred on public officials whose competences are subject to the doctrine.

2.3. The Criteria of Abuse

Every version of the doctrine of abuse of rights contains or presupposes one or more criteria of «abuse». Even the absence of a stated or prescribed criterion of abuse amounts to an open-ended criterion, leaving the question of what constitutes an «abuse» to the discretion of those empowered to apply the doctrine. Various criteria of «abuse» can be found in the different versions of the doctrine which have become *leges latae*. Some jurisdictions have adopted a single criterion, others a combination of criteria, and sometimes the criteria adopted have changed over time. Those criteria differ in the key concepts on which they are based, as well on their degree of generality and open-endedness. Naturally, the more general and open-ended the chosen criterion is, the more discretion adjudicators will have to determine whether «abuse» has occurred in a particular case.

Paulsson has identified 34 criteria of «abuse» from various sources, including legislation, court decisions, and scholarly writings[27]. Paulsson cites this «cacophony of criteria», as he calls it, as one reason for his conclusion that the notion of abuse of right does not afford a workable rule of decision[28]. The multiplicity of criteria is indeed a serious argument against the merit and viability of the doctrine. But the fact remains that some of the criteria on the list are incorporated in the laws of certain national jurisdictions. For the purposes of this article, then, we must take them at face value, for they are part of the intellectual baggage with which many scholars and adjudicators approach the

26. *See, e.g.*, Letourneur, Maxime, *Le détournement de pouvoir en France* (1960); Brewer-Carías, Allan, *Estudios de Derecho Administrativo 2005-2007* (Editorial Jurídica Venezolana, 2007), 158; Rodríguez-Arana Muñoz, Jaime, and, Miguel Ángel Sendín, *Derecho Administrativo Español Tomo II* (Netbiblio, 2009), 45.
27. Paulsson, *op. cit.*, pp. 36-39.
28. *Id.*, pp. 39-44.

doctrine of abuse of rights and the question of extending it to the international realm.

The criteria of abuse that are most frequently found in municipal legal systems are the following:

- *Sole Intention To Harm*: A right is abused if the holder exercises it solely to cause harm to another (*solo animo nocendi*)[29].
- *Absence of Self-Interest*: A right is abused if it is exercised in a manner that causes damage to another without any benefit to the holder. This criterion is sometimes used as evidence that the holder acted solely with the intention of causing harm to another, or as a presumption of such an intention[30].
- *Choice of Harmful Alternative*. A right is abused if, having a choice between equally beneficial ways of exercising a right, the holder chooses the way that is harmful to others[31].
- *Bad Faith*. A right is abused if the holder exercises it in bad faith[32].
- *Flagrant Disproportion Between Harm Caused and Benefit Obtained*. A right is abused if the holder exercises it in a way that causes harm to another to pursue a personal benefit out of all proportion to the harm caused[33].
- *Inconsistency with the Purposes for Which the Right Exists*. A right is abused if the holder exercises it in a manner that contradicts the ends or purposes for which the right has been created or the function that it fulfils[34].

The criteria of sole intention to harm, absence of self-interest, choice of harmful alternative, and bad faith are *subjective* criteria, in the sense that they focus (primarily at least) on the state of mind and choices made by the holder of the right. Bad faith is the most comprehensive of these subjective criteria. Sole intent to harm, absence of self-interest, and choice of harmful alternative can fairly be considered particular cases of bad faith or at least «badges» of bad faith, that is, circumstances strongly suggestive of bad faith which should be considered, along with all other relevant circumstances, to determine whether the right-holder acted in bad faith.

The criterion of flagrant disproportion is an *objective* criterion if the harm and the benefit are to be weighed objectively, without regard to the state of

29. IECL at ¶¶ 235-238.
30. *Id.* at ¶¶ 239-240.
31. *Id.* at ¶¶ 241-243.
32. *Id.* at ¶¶ 253-254.
33. *Id.* at ¶¶ 244-245.
34. *Id.* at ¶¶ 246-250.

mind of the holder of the right[35]. As a practical matter, however, a flagrant disproportion between the harm and the benefit can serve as evidence of the holder's intention to harm or an absence of self-interest on the holder's part, in which case this criterion would have a subjective character and could serve as a badge of bad faith.

The criterion of inconsistency between the exercise of the right and the purpose or function of the right (usually called the *functional* or *teleological* criterion) is often portrayed as the objective criterion *par excellence*, on the ground that it is independent of the state of mind of the right-holder. This is the most controversial criterion of abuse, because it requires a conceptual shift away from the classical liberal conception of rights and a willingness to give judges very broad powers to restrict rights on the basis of a selected ideological principle. In the classical liberal tradition, rights are regarded as preserving an area of *personal autonomy*, which consists of the residual scope of a person's rights after applying all the restrictions imposed by the relevant system. To the contrary, Josserand, the most influential proponent of the functional criterion, advocated a corresponding «functional» or «teleological» conception of rights: «Subjective rights are function-rights; they keep within the bounds of the function which they are to fulfil; otherwise the holder commits an excess, an abuse of rights; an abusive act is an act contrary to the object of the institution, its spirit and its purpose»[36]. A conception of rights constrained by a built-in purpose or function cannot be reconciled with the very notion of autonomy which lies at the basis of the liberal conception of rights. I am no longer autonomous in the range of opinions I may express in this article and elsewhere if my «autonomy» extends only to the expression of opinions that fulfil a particular purpose or function, whichever that may be. Autonomy constrained by an imposed purpose or function is not autonomy at all.

This functional or teleological conception of rights raises three key questions: (i) what is the purpose or function of a given right? (ii) how is that purpose or function to be established? and (iii) by whom? These questions are usually answered by reference to a «social» (as opposed to «liberal» or «individualistic») conception of rights, according to which rights are or have a «social function» or are created to serve a «social purpose»[37]. Under this conception, the purpose and function of rights are determined by concepts such as «the interests of society» (or the community, or the state), and those interests are in turn determined by an underlying political ideology.

35. Some systems require that the holder of the right be aware of the circumstances resulting in the disproportion. *Id.* at ¶¶ 244-245.
36. IECL at ¶ 248. Josserand, Louis, *De l'esprit des droits et de leur relativité*, 292 (Librairie Dalloz, 1939).
37. IECL at ¶ 248.

For example, Soviet-bloc countries eagerly embraced the teleological-functional criterion of abuse of rights, and used it to restrict, in the interests of the state, such private rights as were allowed to exist[38]. In the Western and post-socialist countries that have adopted this criterion, the politico-ideological framework used to determine the «function» of rights tends to be less intrusive or oppressive (so far), but the conceptual apparatus, being the same, can easily accommodate a change of ideology. Methods of control put at the service of one political ideology often perform just as well in the service of another. In fact, the teleological-functional criterion of abuse, precisely because it is ultimately based on a political ideology, can work as a highly effectual device to change, in one fell swoop, the politico-economic complexion of an entire system of rights. This was, to be recalled, the ideological programme of those who first put forward the doctrine of abuse of rights – to change the «individualistic» character of existing law and to make it more «moral».

In any case, the teleological-functional criterion of abuse confers on judges a great deal of discretion to determine the «social purpose» or «social function» of a right in accordance with their own politico-ideological preferences (or those of their masters or political environment, depending on the degree of independence they may enjoy), and on that basis to decide, *a posteriori*, whether the right was abused[39]. So, in the end, the trumpeted objectivity of the teleological-functional criterion is an illusion. This criterion is not less subjective than any of the others – except that it substitutes the state of mind of the judge for the state of mind of the right-holder.

In the case of the related doctrine of *détournement de pouvoir*, which applies to the misuse of competences by public officials, the most common criterion of misuse is a teleological-functional one: an organ misuses its competence by exercising it for a purpose different from that for which it was granted. In this context, however, a teleological-functional criterion is more readily justified, because in administrative systems, or at least in those that do not rely entirely on the whim of public officials, an administrative agent

38. A good example is Article 5 of the 1964 Civil Code of the Russian Soviet Federated Socialist Republic: «Civil rights are protected by law excepting in cases where they are exercised in a manner which would be inconsistent with the purposes of such rights in a socialist society during the period of the establishment of Communism». IECL at ¶ 246. Other examples include Article V of the Polish Civil Code of 1964 («No one is entitled to exercise a right in a manner contrary to its social and economic purpose, or to the rules of community life in force in the People's Republic of Poland. […].) and Article VI of the Civil Code of Czechoslovakia («the exercise of rights and the fulfillment of duties arising according to civil law must be in conformity with the rules of socialist coexistence»). IECL at ¶ 247.

39. IECL at ¶ 249 («The adoption of the 'social purpose' test means that the personal, political and social opinions of the judge are bound to play a major role, which creates grave risks of arbitrary justice») (citing Belgian scholars).

is normally granted powers or competences only to perform a relatively circumscribed function.

3. THE DOCTRINE OF ABUSE OF RIGHTS ON THE WORLD STAGE

Soon after the doctrine of abuse of rights gained a foothold in the civil-law world, some scholars inevitably began to argue that it ought to be transposed to international law, and gradually those arguments turned into claims that the doctrine had already become international *lex lata*. The question whether some version of the doctrine of abuse of rights ought to be incorporated in general international law, and the related question whether it already is, have become highly contentious issues. Today, a century after those issues were raised, they are still unsettled. Because Paulsson has recently explored these matters in depth, I shall address them only in summary fashion, as an introduction to the discussion in Part III[40].

3.1. The Doctrine of Abuse of Rights as International *Lex Ferenda*

In the first decades of the Twentieth Century, several international legal scholars, many of whom were originally trained in civil-law systems, argued that a doctrine of abuse of rights should be recognized as an institution of the international legal order[41]. Nikolaos Politis, perhaps the most influential of the early proponents of an international doctrine of abuse of rights, lectured in 1925 that «nothing prevents the extension of the theory of abuse to international relations, but on the contrary it is authorized and rendered necessary by the same motives which have led to its success in internal law. Application of the theory in the international domain is then theoretically conceivable»[42]. Of course, to say that the extension of the «theory» to the international domain is «theoretically conceivable» and is supported by the same reasons that led to the theory being adopted in internal law is to offer a cautious argument *de lege ferenda,* not a demonstration that the theory is *lex lata*.

In 1933, Hersch Lauterpacht followed Politis in advocating an international doctrine of abuse of rights as an «instrument of change,» which would

40. Paulsson, *op. cit.*, Chapters 5 and 6.
41. In 1920, the Committee of Jurists that elaborated a draft of the Statute of the Permanent Court of International Justice cited the prohibition of abuse of rights as one of several examples of general principles recognized by civilized nations. *Procés verbaux des séances du Comité Des Juristes, La Haye* (1920) 314-316, 335. But when the International Law Institute considered the issue in 1927, opinions were divided (Hammarskjöld, Huber and Weber in favor, Dupuis and Le Fur against), and the Institute eventually dropped the subject. *Annuaire de l'Institute De Droit International*, (1927) at pp. 770-816.
42. Politis, Nikolaos, «Le Problème des Limitations de la Souveraineté et la Théorie de l'Abus des Droits dans les Rapports Internationaux» (1925) 6 *Recueil des Cours* 93.

allow judges to restrict the rights of states when required by the general interest of the international community[43]. In a later (1958) work, Lauterpacht made a famous pronouncement which is sometimes cited as the sole authority needed to establish the doctrine on the world stage: «There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused»[44]. This statement, however, was as much *de lege ferenda* as *de lege lata*. Lauterpacht was referring to «the modest beginnings of a doctrine [that of abuse of rights] which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal»[45]. He added: «The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint»[46].

The proposal to extend the doctrine of abuse of rights to the international domain was driven by a desire to constrain the sphere of state sovereignty, in the hope of achieving greater harmony among nations and promoting peace. As already noted, the municipal doctrine of abuse of rights was first conceived and developed as a reaction against the individualistic character of the laws of the time and a sweeping means of restricting the scope of individual autonomy guaranteed by the then-existing fabric of rights, to meet the demands of a new political ideology or the dictates of a higher moral order. Similarly, the international doctrine of abuse of rights was first proposed as an equally sweeping way of limiting, in the name of peace and harmony, the rights of states, including in particular the residual bundle of rights and autonomy that we call sovereignty[47]. If under municipal law the rights of individuals were being holistically limited in the interest of others or society, so would the rights of states be holistically limited in the interest of other states and the «international community» at large[48].

The impetus to «moralize» municipal law can easily be transmuted into an impetus to «moralize» international law. The *moral* calculus appears to be the same. For example, if it is morally wrong for an individual be exercise his or her rights for the sole purpose of causing harm to another, surely it is equally wrong for a state to exercise its rights for the sole purpose of causing harm

43. Paulsson, *op. cit*., pp. 82-84, citing Lauterpacht, Hersch, *The Function of International Law in the International Community* (Clarendon Press, 1933), pp. 285, 287.
44. Lauterpacht, Hersch, *The Development of International Law by the International Court* (Stevens & Sons, Ltd., 1958), p. 164.
45. *Id.*
46. *Id.* As we shall see, Lauterpacht's admonition has been generally heeded by the International Court of Justice, but not always by tribunals sitting in investment-treaty cases.
47. See, *e.g.*, Politis, *op. cit*., pp. 111-116.
48. See Paulsson, *op. cit*., pp. 81-84.

to another state. Yet, the *political* calculus is radically different. It is one thing for a government to embrace a doctrine of abuse of rights internally, in its own laws, to restrict private rights holistically in accord with a general criterion of abuse that it accepts and is to be administered by its own courts. But it is quite different for a state to accept the holistic restriction *of its own international rights*, including rights pertaining to the core of its sovereignty, according to a more or less open-ended criterion of abuse administered by international courts and tribunals. Likewise, it is one thing to embrace a municipal doctrine of abuse of rights designed to destroy the individualistic character of existing law and quite another to accept an international doctrine of abuse of rights designed to destroy (or at least to curtail) the prerogatives of states under the existing international order.

The criterion of abuse is a critical element in this political calculus. Subjective criteria of abuse expose every state to an examination of the motives it had in exercising each one of its international rights, a prospect that not every government might view with equanimity. Worse, if the doctrine of abuse were to rely on a teleological-functional criterion or to leave the criterion unspecified, the scope of the state's rights would largely be left to the creative judgment of the courts or tribunals hearing disputes about the way those rights were exercised. A state accustomed to exercising its rights in what it perceives to be the national interest may not take kindly to the notion that henceforth its rights will be a function of the interests of the community of states, as such interests are determined by international courts and tribunals.

It is not surprising, then, that the doctrine of abuse of rights as international *lex ferenda* became a highly contentious issue – even apart from the methodological question whether is better to restrict rights holistically, on the basis of a general criterion, than on a piecemeal basis, at the point where specific rights clash or other circumstances may so require. Yet, some scholars and judges continued to press the issue and, in the midst of rising despotism and the threat of war, claims began to be made that the doctrine of abuse of rights had already become international *lex lata*.

3.2. The Doctrine of Abuse of Rights as International *Lex Lata*

An institution such as a doctrine of abuse of rights does not become a part of international law just because a scholar or group of scholars, however prestigious, argue that it ought to be the law, or because they assert that it is the law, or because a similar system has been incorporated in the laws of some, but not all, members of a group of states following a particular legal tradition.

An institution can be considered a component of the international legal order if, and only if, it meets the criterion of identity of that order, *i.e.* the set

of accepted criteria that must be met for membership in that order[49]. Those accepted criteria, traditionally referred to as the «sources of international law», are set forth in Article 38(1) of the Statute of the International Court of Justice, which was taken *verbatim* from the corresponding provision in the Statute of the Permanent Court of International Justice. The international legal order consists of (i) international conventions, whether general or particular; (ii) international custom, as evidence of a general practice accepted as law; and (iii) the general principles of law recognized by civilized nations or, in the modern phrase, the general principles of law recognized by the principal legal systems of the world[50]. Subsidiary means for the determination of international rules of law are (i) judicial decisions and (ii) the teachings of the most highly qualified publicists of the various nations[51].

The issue is, then, whether a proposed international doctrine of abuse of rights meets any of these criteria.

A. Treaties

No general treaty has established or adopted any doctrine of abuse of rights. Certain particular treaties prohibit abuse of rights in discrete areas, but the prohibition extends only to the rights specified in those treaties[52]. Similarly, some special instruments governing international organizations have incorporated the doctrine of *détournement de pouvoir*[53]. But treaties adopting versions of the doctrine of abuse of rights in particular areas are *leges speciales*

49. The international legal order, just as every municipal legal order, has its own criterion of identity (also known as criterion of validity or rule of recognition), that is, a criterion allowing an observer to determine whether a given norm or system belongs or does not belong to that order.
50. Statute of the International Court of Justice, Art. 38(1); Statute of the Permanent Court of International Justice, Article 38(1).
51. *Id.*
52. *See, e.g.,* United Nations Convention on the Law of the Sea, Article 300 («States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right»), with perceptive commentary by Paulsson, *op. cit*., pp. 70-73; European Convention on Human Rights as amended by Protocol No. 14 as from its entry into force on 1 June 2010, at Article 35 (3)(a). («The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application»).
53. See, *e.g.*, Article 263 of the Treaty on the Functioning of the European Union (T.F.E.U.) at EUR-Lex website *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN* (last visited on 26 April 2021) provides that «[t]he Court of Justice […] have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers».

and cannot by themselves support an argument that the doctrine, in any of its possible versions, has become a part of general international law[54].

B. International Custom

There is scant evidence of State practice invoking or applying a general doctrine of abuse of rights, as distinguished from instances of piecemeal restriction of rights or accommodation of competing rights or interests in specific situations[55]. Since the proposed doctrine of abuse of rights purports to apply to *all rights* under international law, there would have been innumerable occasions since the early 1900s for states to invoke such a doctrine in their international relations. And yet no state practice appears to have developed of sufficient scope and regularity, and attended by *opinio juris*, to establish a doctrine of abuse of rights as international custom[56].

Over a period of 47 years, the International Law Commission undertook the comprehensive codification and progressive elaboration of the law on state responsibility[57]. The resulting Articles on State Responsibility, adopted by the Commission in 2001, do not include any doctrine of abuse of right[58]. A proposal to incorporate such a doctrine was made by Special Rapporteur F. V. García Amador but was opposed by his successor Roberto Ago, and the Commission finally decided to drop the subject[59].

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54. See Paulsson, *op. cit*., pp. 69-73.
55. In analyzing alleged instances of State practice concerning abuse of rights, it is important not to confuse genuine appeals to an international doctrine of abuse of rights from (i) piecemeal restrictions on state rights resulting from international custom or *ad hoc* accommodation and (ii) rhetorical charges of «abuse» as ways to condemn particular state conduct. See *supra*, Section II.1. on the various uses of the expression «abuse of rights». In particular, it is a fallacy to take piecemeal restrictions of sovereignty developed by custom (especially before the modern theory of abuse of rights was developed) and to reinterpret them as instances of a general doctrine of abuse of rights. A survey of events claimed to be state practice supporting a doctrine of abuse of right can be found in Iluyomade, B.O, «The Scope and Content of a Complaint of Abuse of Right in International Law», (1975) 16 *Harvard International Law Journal* 47, 66-71. Iluyomade mixes genuine appeals to a doctrine of abuse of rights with unresolved matters and claims not founded on abuse of rights. The evidence he presents is wholly insufficient to make a case for any version of the doctrine of abuse of right to have become international custom.
56. See Paulsson, *op. cit*., pp. 73-75.
57. Available at the Website of the International Law Commission, at *http://untreaty.un.org/ilc/texts/9_6.htm* (last updated on 22 September 2011, last visited on 7 February 2013).
58. «Draft Articles on Responsibility of States for Internationally Wrongful Acts», *Yearbook of the International Law Commission,* Vol. II, Part Two (2001).
59. At the XXII session of the International Law Commission, García Amador, as Special Rapporteur advocated the incorporation of a theory of abuse or rights in the codification of the law of state responsibility. García-Amador, Francisco, «State Responsibility» in II *Yearbook of the International Law Commission* 41-68, 60-66 (1960) and Ago, Roberto, «Review of previous work on codification of the topic of the international responsibility of States» in II *Yearbook of the International Law Commission* 125-156, 125. Roberto Ago,

C. *General Principles of Law Recognized by Civilized Nations*

As already noted, many civil-law jurisdictions have adopted various versions of the doctrine of abuse of rights, but most common-law jurisdictions have not[60]. Yet it is often claimed that the doctrine of abuse of rights, in one of the versions adopted in civil-law countries, is a general principle of law recognized by civilized nations and, for that reason, it has become incorporated in general international law. As will be shown, this claim rests on a logically invalid inference from a faulty factual premiss[61].

The factual basis of the claim is that, even though common-law legal orders do not generally contain doctrines of abuse of rights, they do include principles or doctrines that are *functionally equivalent* to the doctrine of abuse of rights, as it has been adopted (in different versions) in civil-law countries[62]. But the concept of functional equivalence on which this theory rests is problematic. All doctrines or systems that restrict rights (or authorize courts to restrict rights) are functionally equivalent, but only in a trivial sense. Any meaningful concept of functional equivalence should include, at the very least, a reference to the class of rights that are being restricted and the standards or criteria on which the restriction is based. As we have discussed, common-law systems tend to restrict rights on the basis of standards which differ from the criteria of abuse used in civil-law systems and which operate at a lower level of generality than the civil-law doctrines of abuse of rights[63]. To restrict rights on the basis of a variety of standards operating discretely in different areas of the law is not «functionally equivalent» to applying a single criterion of abuse to all or a broad generality of private rights, unless the concept of functional equivalence is reduced to a triviality.

Apart from these factual and conceptual difficulties, the theory that a single doctrine of abuse of rights is a general principle of law recognized by civilized nations rests on a logical fallacy. Although the form of the argument is seldom made explicit, it appears to be as follows: (i) civil-law systems contain doctrines of abuse of rights; (ii) common-law systems contain doctrines that perform equivalent functions; (iii) therefore, a doctrine of abuse of rights *of the civil-law type* is a general principle recognized by civilized nations. Even if common-law systems contained general principles that functionally operated

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who succeeded García Amador as Special Rapporteur, opposed incorporation of such a theory. *Yearbook of the International Law Commission* 177-198, 193.

60. See *supra*, Section II. 2.
61. Paulsson's critique of arguments based on Article 38(c) of the Statute of the International Court of Justice is based on different grounds. Paulsson, *op. cit.*, pp. 76-78.
62. See, *e.g.*, Kiss, *supra* n. 25.
63. See generally Dalhuisen, Jan, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law* (Hart Publishing, 2007), 295.

in the same way and at the same level as civil-law doctrines of abuse of rights, which they do not, it would not follow that the general principle recognized by civilized nations should necessarily coincide with a particular version of the civil-law doctrine with its attendant criterion of abuse[64].

D. The Principle of Good Faith

The theory that a doctrine of abuse of rights is a general principle of law recognized by civilized nations is often confused or conflated with an alternative theory, according to which some version of the doctrine of abuse of rights can be derived from the principle of good faith, which is generally accepted as a norm of general international law.

As a matter of general legal theory, even if a norm does not independently meet the criterion of identity of a given system, it can be regarded as belonging to that system if it is shown, *by logical derivation*, that it is a consequence or special application of a more general norm that has previously been accepted as a component of the system. Therefore, *if* a general doctrine of abuse of rights can be logically derived from the principle of good faith, which is already accepted as part of the international legal order, it does not need an independent legal basis to be counted as a member of the system. By the same token, if such a doctrine of abuse of rights derives from the principle of good faith without an independent legal basis, it can only have a derivative content, that is, a content that is a specific application of the principle of good faith[65].

The principle of good faith is well established as a norm of general international law, so much so that the International Court of Justice has placed it at

64. A variant of this argument goes as follows: (i) all legal systems contain principles aimed at preventing the misuse of rights; (ii) *the* doctrine of abuse of rights is one of such principles; (iii) therefore, *the* doctrine of abuse of rights is a general principle recognized by civilized nations. As noted, the first premise may be true in a trivial way, but it is misleading, because it fails to account for the differences in the way legal systems prevent the «misuse» of rights: common-law systems tend to do it by restricting rights on a piecemeal basis or by criteria operating at a low level of generality, while civil-law systems tend to do it by restricting rights on a holistic basis on the basis of criteria applying at a very high level of generality. The second premise is not true, because there is no single doctrine of «misuse» of rights in the civil-law world. But even if the two premises were true, it would *not* follow from them that *a single doctrine of abuse or misuse of rights equal to some version of the civil-law doctrine* is a general principle of law recognized by civilized nations. The fallacy becomes apparent when we consider that the purported syllogism has the following form: (a) all Greeks have mothers; (b) Helen is a mother; (c) therefore, Helen is the mother of all Greeks.

65. If a doctrine of abuse of rights could be derived from the principle of good faith, it would just be a matter of terminology whether to call it «good faith in the exercise of rights» or «abuse of rights». Bin Cheng used the first expression as the title of the chapter where he discussed this topic and the second expression as the subtitle. Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953; paperback, 2006), Ch. 4, pp. 121-136.

the basis of the modern international legal order. In the *Nuclear Tests Case*, the Court recognized it as «[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source» and the foundation of the principle *pacta sunt servanda*[66]. The Vienna Convention on the Law of Treaties requires that treaties be interpreted and performed in good faith[67]. But the principle of good faith referred to in the *Nuclear Tests Case* and in the Vienna Convention concerns *legal obligations*, be they primary obligations of the subjects of international law or secondary obligations relating to the interpretation and application of treaties.

To say that the principle of good faith governs the performance of international obligations and the interpretation of treaties does not logically entail that it (also) governs the exercise of international rights[68]. Nor can the gap be filled by mere analogy. An obligation under international law, including an obligation concerning the interpretation of treaties, concerns conduct that is defined (with some specificity) and qualified as obligatory. Applying the principle of good faith to the performance of those obligations does expand the universe of obligatory conduct, but only in an ancillary manner, in relation to the content of those obligations. In contrast, the exercise of rights under international law includes a large universe of unspecified conduct which is qualified as permitted because international law does not prohibit it. If that universe of permitted conduct were subject to a generic obligation to act in good faith, the rule of closure of the international order (everything not prohibited is permitted), the resulting autonomy of states, and the structure of the international order based on such autonomy would be radically altered. Such a result would not be logically impossible, but it cannot simply be assumed, nor can it be inferred from the obligation to perform international *obligations* in good faith.

If logic alone cannot establish that the principle of good faith extends to the exercise of international rights, what evidence is there for any such extension? The proponents of the extension often rely on the authority of Bin Cheng and that of several decisions which he cited in a chapter titled «Good Faith in the Exercise of Rights»[69]. A close analysis of those decisions shows that in none of them does the *ratio decidendi* include a pronouncement to the

66. *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. 457, p. 473 (20 December 1974); see also *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, 105 (20 December 1988). How the principle of good faith has become a component of the international legal order is a question that exceeds the scope of this article.
67. Article 26 and 31(1) of the Vienna Convention on the Law of Treaties.
68. Paulsson reaches the same conclusion on a powerful line of argument which generally runs parallel and occasionally coincides with my own. *See* Paulsson, *op. cit.*, pp. 20-24 and especially 33-35.
69. Cheng, *op. cit.*, Ch. 4, pp. 121-136.

effect that the principle of good faith applies to the exercise of international rights[70].

Two decisions of the Permanent Court of International Justice are often cited as supporting either an extension of the principle of good faith to the exercise of rights or a stand-alone doctrine of abuse of rights: the *Chorzów Factory Case* of 1927 and the *Free Zones Case* of 1932[71]. Paulsson correctly points out that those decisions did not need to refer to abuse of rights at all[72]. I suggest that no such reference was needed because the underlying principle at play was the familiar one requiring good faith in the performance of treaty *obligations*.

The relevant issue in the *Chorzów Factory Case* was Germany's right to alienate public property in Polish Upper Silesia between the date of signature of the Treaty of Versailles and the effective date of the treaty, which provided for the cession of that territory to Poland[73]. The Court ruled that in that interval Germany retained the right to alienate the property, and only a «misuse» of that right would have invalidated the act of alienation[74]. The Court found no such misuse: «The act in question does not overstep the limits of the normal administration of public property and was not designed to procure for one of the interested parties an illicit advantage and deprive the other of an advantage to which he was entitled»[75]. This statement ostensibly refers to the *right* of alienation, but it must be read in the context of Germany's treaty *obligation* to

70. See Paulsson, *op. cit.*, pp. 22-23. Paulsson classifies the decisions cited by Cheng into three groups: (i) those did not need to refer to abuse of rights at all; (ii) those that referred to abuse of rights only in *obiter dicta*; and (iii) those that refused to apply a doctrine of abuse of rights in the circumstances of the case. As Paulsson notes, in a later work Cheng himself declined to take a position on «the place of the theory of abuse of rights in international law». *Ibid.*, p. 24, referring to Cheng's foreword to Jean-David Roulet's book *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Baconnière Neuchatel, 1958).
71. *Case Concerning the Factory at Chorzów (Germany v. Poland) (Claim for Indemnity) (Jurisdiction)* [1927] P.C.I.J., Ser. A, No. 9 (July 26); *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland) (Judgment)* [1932] P.C.I.J. Ser. A/B, No. 46 (June 7).
72. Paulsson, *op. cit.*, p. 22.
73. *Case Concerning the Factory at Chorzów (Germany v. Poland) (Claim for Indemnity) (Jurisdiction)*, [1927] P.C.I.J., Ser. A, No. 9 (July 26); see also *Case Concerning Certain German Interests in Upper Silesia (Merits)*, [1926] P.C.I.J., Ser. A, No. 7 (May 25), at p. 30: «Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement».
74. *Case Concerning the Factory at Chorzów (Germany v. Poland) (Claim for Indemnity) (Jurisdiction)*, [1927] P.C.I.J., Ser. A, No. 9 (July 26), at p. 15; see also *Case Concerning Certain German Interests in Upper Silesia (Merits)*, [1926] P.C.I.J., Ser. A, No. 7 (May 25), at p. 30.
75. *Id.* at 37-38.

transfer the territory to Poland. In that context, «misusing» its right to alienate the property is indistinguishable from performing in bad faith its obligation to transfer the territory, by depriving Poland of an advantage (concerning the legal status of land) in the territory which Poland was to receive as cessionaire.

The *Free Zones Case* concerned France's treaty obligation to maintain duty-free zones in certain frontier areas adjoining Switzerland[76]. The issue was whether certain taxes that France had imposed in connection with a control cordon at the border were in breach of that obligation. The Court held that France had the right to impose the cordon and to apply its fiscal legislation in its territory, but it added: «A reservation must be made as regards the case of abuses of right, since it is certain that France must not evade its obligations to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court»[77]. The «abuse of right» that the Court had in mind would have been the deceitful evasion of France's treaty obligations, which is another way of referring to a breach of good faith in the performance of those obligations[78].

More generally, treaties often impose obligations without specifying the manner of performing them or what the obligor is permitted or not permitted to do in the period leading to the required performance. In such cases, it is possible (in principle) to say that the obligor has rights concerning the manner of performing the obligation and its conduct prior to the act of performing. Yet, any such rights do not exist in a vacuum, but in the framework of the obligation to be performed. Under general international law, that obligation must be performed in good faith, which means that, in addition to that (principal) obligation, the obligor is subject to ancillary obligations derived from the principle of good faith. Those ancillary good-faith obligations control the exercise of any rights that the obligor may have concerned the manner of performing the principal obligation, including any pre-performance conduct that may affect the performance. In Planiol's terminology, these rights of the

76. *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland) (Judgment)* [1932] P.C.I.J. Ser. A/B, No. 46 (June 7).
77. *Id.* at 167.
78. The International Court of Justice addressed a similar issue in the *Right of Passage Case (Portugal v. India)* 1960 I.C.J. 6 (12 April 1960). The Court ruled that Portugal had a right of passage through Indian territory to the extent necessary for the exercise of sovereignty in certain Portuguese enclaves in respect of private persons, civil officials, and goods in general, and India, as the territorial sovereign, had a correlative obligation to permit such passage, subject to a right of regulation and control. In the wake of certain disturbances that included the ousting of the Portuguese authorities in one of the enclaves, India refused to permit the passage of Portuguese officials through Indian territory. The Court found the Indian measure justified in the circumstances, without reaching the question whether it had been taken in good faith. The principle at issue was India's duty to perform its international obligation (permitting passage) in good faith.

obligor end where the principal obligation, augmented by the ancillary obligations derived from the principle of good faith, begins. For this reason, in cases in which a right exists within the framework of performance of an obligation, exercising the right in good faith is indistinguishable from performing the obligation in good faith. In such cases, therefore, it is unnecessary to extend the principle of good faith to the exercise of rights or to characterize the bad-faith performance of the obligation as an abuse of rights.

In sum, apart from the pronouncements of arbitral tribunals in investment cases, a subject to be examined in Part III, there appears to be little or no evidence for the proposition that the principle of good faith extends to the exercise of international rights, at least when such exercise is undistinguishable from the performance in good faith of international obligations[79].

E. Supplemental Means

Judicial decisions and the teachings of the most qualified scholars are supplemental means for determining whether a norm or system is a part of international law. In the international legal order, such decisions and opinions are not law in themselves (except for the effects of a judicial or arbitral decision on the particular case in which it is rendered), nor are they primary criteria for the identification of the norms of the system. Their value is that of *persuasive authority*. The authority of a judicial pronouncement depends on how clearly and conclusively it is stated, the validity of the norms or criteria on which it is based, the soundness of the supporting reasoning, and the extent to which it is part of the *ratio decidendi* for the conclusion reached.

The teachings of scholars on the question whether general international law incorporates a doctrine of abuse of rights are sharply divided. This has been a vexed question since the early 1900s, and the debate among legal scholars continues unabated and unresolved to this day[80].

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79. In an unpublished case, I filed a partial dissenting opinion in which I accepted the view that an international doctrine of abuse of rights could be based on the principle of good faith. After reading Paulsson's book and reviewing the evidence on the scope of the principle of good faith, I realized that my earlier view had not sufficiently considered that evidence, and developed instead the analysis set forth in the text.

80. See Paulsson, *op. cit.*, *passim*. Supporters of the doctrine include Politis, Lauterpacht, Kiss, Liszt, Salvioli, Scelle, Trifu, van Bogaert, García Amador, Silbert, and more recently Kolb. See Politis, *op. cit.*; Oppenheim-Lauterpacht, *International Law* 346 (1958); Kiss, Alexandre, *L'abus de droit en Droit International* (Librairie générale de droit et de jurisprudence, 1952), 179; von Liszt, Franz, *Völkerrecht,* (Springer, 1925), 182; Fitzmaurice, Gerald, «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 p. 53; Salvioli, Gabriele, «Règles générales du droit de la paix», (1933) 46 *Recueil des Cours* 1, pp. 66-69; Scelle, Georges, «Règles générales du droit de la paix», (1933) 46 *Recueil des Cours*) 327, at p. 369; Selea, Trifu, *La Notion de l'abus de droit dans le Droit International*

The Permanent Court of International Justice and its successor the International Court of Justice have approached the subject of abuse of rights with a great deal of caution. In 1961 Paul Reuter observed that «[t]he jurisprudence [of international tribunals] resorts [to the expression 'abuse of rights'] more as a warning in cases in which it does not rely on it, whereas if it relied upon this notion, it would probably refrain from mentioning it»[81]. Neither Court has ever applied a doctrine of abuse of rights, though both have intimated, *obiter*, that such a doctrine might be applicable in an appropriate case. This ambivalence suggests a continually renewed compromise within each Court between the proponents and the opponents of an international doctrine of abuse of rights.

The most relevant decisions of the Permanent Court of International Justice are those in the *Chorzów Factory Case* and the *Free Zones Case*, already discussed[82]. The International Court of Justice has continued the same practice of neither applying nor rejecting the doctrine, more recently in the context of the now fashionable claims of «abuse of process», which in this context

(Domat-Montchrestien, 1940); van Bogaert, Elie *Het Misbruik In Her Volkenrecht* (1948); García-Amador, Francisco, «State Responsibility New Problems», (1958) 94 *Recueil des Cours* 376; Sibert, Marcel, *II Traité de Droit International Public,* (Dalloz, 1951), 205, at p. 283; Kolb, Robert, *Good Faith in International Law* (Hart Publishing, 2017). Scholars who have denied that a doctrine of abuse of rights is part of international law include Scerni, Cavaglieri, Schlochauer, Ago, Schwarzenberger (with certain nuances), Brownlie, Jiménez de Aréchaga, Balladore-Pallieri, Roulet, and Paulsson. See Scèrni, Mario, *L'abuso di diritto nei rapporti internazionali* (Amonima Romana Editoriale, 1930); Cavaglieri, *Corso Di Diritto Internazionale*, (Alfredo Rondinella, 1934), 507; Schlochauer, «Die Theorie des abus de droit im Völkerrecht» (1933) 17 *Zeitschrift für Völkerrecht*, 373; Ago, Roberto, «Délit International» in (1939)68 *Recueil des Cours,* 415, at p. 442; Schwarzenberger, Georg, «Uses and Abuses of 'Abuse of Rights' in International Law», (1956) 42 *Transactions of the Grotius Society*, 147; Brownlie, Ian, *Principles Of Public International Law*, (Clarendon Press, 1973), 430-432; Jiménez de Aréchaga, Eduardo, «International Responsibility» in Sørensen, *Manual Of Public International Law* (1968), p. 540. See also de la Feria, Rita and Vogenauer, Stefan (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law* (Hart Publishing, 2011); Kotuby, Charles, and Sobota, Luke, *General Principles of Law and International Due Process* (Oxford University Press, 2017); Taylor, Graham D. S., «The content of the rule against abuse of rights in international law» (1972-73) 46 *British Yearbook of International Law*, 323.

81. Reuter, Paul, «Principes de Droit International Public», (1961) 103 *Recueil des Cours* 429 (*«L'expression 'abus de droit' n'est peut-être pas très heureuse et c'est pourquoi la jurisprudence s'en sert plutôt comme avertissement dans des espèces où elle n'en use pas, alors qu'il est vraisemblable que si elle usait de la notion elle ne la mentionnerait pas»*). Individual judges of the Permanent Court of International Justice or the International Court of Justice have invoked doctrines of abuse of rights in dissenting opinions. *See, e.g.,* Dissenting Opinion of Judge Alvarez in *Admission of a State to the United Nations (Charter, Art. 4)*, 1948 I.C.J. Reports (1948) 57, at pp. 91-92. In contrast, *e.g.*, Judge Anzilotti expressly rejected the doctrine of abuse of right in his dissenting opinion in *Electricity Company of Sofia*, PCIJ, Ser A/B, No. 77, p. 98.
82. *Supra*, Section II.3.2.D.

means abuse of the right to bring a dispute to adjudication. Two recent decisions of the Court are illustrative.

In the *Immunities and Criminal Proceedings Case*, France sought to dismiss a claim brought by Equatorial Guinea on the ground that the latter had committed «abuse of process»[83]. Equatorial Guinea had relocated its embassy to a building in Paris which was subject to a penal attachment in connection with French criminal proceedings against, among others, the son of the President of Equatorial Guinea. After relocating the embassy, Equatorial Guinea brought a claim against France under the Vienna Convention on Diplomatic Relations[84]. The Court rejected the plea of «abuse of process» with the following statement: «It is only in exceptional circumstances that the Court should reject a claim based on a valid title to jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances»[85]. It is remarkable that the Court declined to find «exceptional circumstances» even in a case in which a treaty dispute appears to have been created *ex post facto* to counter pre-existing domestic criminal proceedings.

In the *Alleged Violations of the 1955 Treaty Case*, the United States argued that Iran's claim was inadmissible on grounds of «abuse of process», because Iran was invoking the 1955 Treaty of Amity in a dispute that solely concerned the application of a separate instrument called the Joint Comprehensive Plan of Action (JCPOA)[86]. The Court rejected the argument, on the ground that «exceptional circumstances» justifying a finding of abuse of process were lacking. The Court noted, *inter alia*, that the dispute concerned alleged breaches of the Treaty of Amity and not the application of the JCPOA and that the compromissory clause of the treaty provided a valid basis for jurisdiction in respect of Iran's claims[87].

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83. *Immunities and Criminal Proceedings Case, Preliminary Objections, Judgment* (6 June 2018), ¶¶ 23-41, 139-152. See also the summary of facts in Judge Donoghue's Dissenting Opinion, ¶¶ 9-16.
84. *Immunities and Criminal Proceedings Case, supra*, *loc. cit*. Equatorial Guinea invoked the Protocol on Compulsory Settlement for Disputes as the basis for the Court's jurisdiction. *Id*.
85. *Immunities and Criminal Proceedings Case*, ¶ 150. To the same effect, *Certain Iranian Assets (Iran v. United States)*, ¶ 114. The Court has also pointed out that «clear evidence» of abuse of process is required. *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), pp. 42-43, ¶ 113; *Jadhav (India v. Pakistan)*, Judgment, ICJH Reports 2019 (II), p. 433, ¶ 49.
86. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, ¶¶ 85-96. The Joint Comprehensive Plan of Action was an instrument signed by China, France, Germany, the Russian Federation, the United Kingdom, the United States, a representative of the European Union, and Iran concerning Iran's nuclear programme. *Id.*, ¶ 31.
87. *Id.*, ¶ 94. In *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Pre-

In the current jurisprudence of the Court, the fate of a claim of «abuse of process» depends on a finding of «exceptional circumstances» by «clear evidence»[88]. The Court has not explained on what legal basis it might accept such a claim, or what substantive or jurisdictional rights might be denied effects on grounds of «abuse», or what criteria should be used to determine what circumstances are «exceptional» or what constitutes «abuse». Until the Court actually applies the doctrine in a case and clarifies these points convincingly, the status of the doctrine of abuse of rights as *lex lata* and the contours of the institution will remain uncertain and controversial.

We turn to consider the way in which tribunals sitting in investment disputes have addressed the doctrine of abuse of rights and the extent to which they have answered those questions, without suggesting that the *auctoritas* of those tribunals is equal to that of the International Court of Justice.

III. THE DOCTRINE OF ABUSE OF RIGHTS IN INTERNATIONAL INVESTMENT DISPUTES

1. ABUSE OF RIGHTS IN INVESTMENT DISPUTES: A BRIEF SURVEY

1.1. Introduction

In the early years of the decade of 2000, arbitral decisions rendered in investment disputes began to incorporate references to some version of a doctrine of abuse of rights. At first, the tribunals approached abuse of rights cautiously, just as the Permanent Court of International Justice and the International Court of Justice had done in their own decisions. Sometimes the tribunals referred to a doctrine of abuse of rights as something acceptable in principle, but they seldom applied it as a basis for decision. Nor did they formulate the doctrine in detail or explain what legal basis there might be for applying it.

That cautious attitude ended in 2009. In that year the tribunal in *Phoenix Action v. The Czech Republic* deliberately articulated and embraced a doctrine of abuse of rights based on the principle of good faith[89]. That decision and a

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liminary Objections, Judgment of 13 February 2019, ICJ Reports 2019, ¶¶ 107-115, the Court rejected, on similar grounds, a plea by the United States that Iran's claim amounted to an abuse of process. The Court observed that no exceptional circumstances existed, as the Treaty of Amity was in force and included a compromissory clause. *Id.*, ¶ 114.

88. See *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 2018 (I), p. 336, ¶ 150; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 255, ¶ 38.

89. *Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009) (B. Stern, presidin* g, A. Bucher, J. Fernández-Armesto), henceforth *Phoenix.* Publication details for this and the other decisions on investment disputes cited in this article are

cluster of others which followed in quick succession can justly be described as the leading cases in this field. Taken as a whole, those decisions enunciated a doctrine of abuse of rights for application to investment disputes and paved the way for the cases that followed.

Whether correctly decided or not, the leading decisions confirmed, in effect, that the doctrine of abuse of rights was available as a claim or (especially) as a defence in investment disputes. There followed a considerable number of cases in which the doctrine was invoked, typically as a defence and usually as an objection to jurisdiction, in an ever-expanding variety of factual settings. Sometimes the tribunals presiding over the new cases upheld the pleas of abuse of rights, sometimes they did not. But even when they rejected those pleas, they did so on factual grounds, without questioning the doctrine itself or the legal bases articulated by the leading cases. As a result, abuse of rights has become a nearly ubiquitous plea and hence a recurring matter for decision in investment disputes.

In the remainder of this Section III.1, we shall summarize the principal early cases (Section III.1.2), the leading cases (Section III.1.3), and the main cases that followed (Section III.1.4). The purpose of the summaries is not to analyse the decisions in detail, because space will not allow it, but to provide an overview of the evolution of the arbitral practice on this matter, to serve as context for our critical analysis of the doctrine, which is the subject of Section III.2.

1.2. The Early Cases

As already discussed, the expressions «abuse» and «abuse of rights» can be used in a variety of legal contexts to refer to «misuse» or «bad use» or to express disapproval of particular instances of use. Accordingly, the use of the word «abuse» in a tribunal's decision does not necessarily imply a reference to a doctrine of abuse of right. Only when the context indicates that the tribunal is referring to such a doctrine, either to apply it or to hold it inapplicable to the case, is it possible to analyse the decision as one that is relevant to a study of the doctrine of abuse of rights.

In some of the early cases, the term «abuse» appears in the context of references to municipal-law doctrines allowing courts to «pierce the veil», that is, to disregard a party's legal personality in cases of fraud, misrepresentation, and the like. Examples of the use of «abuse» in this context can be found in

omitted. Every decision cited has been published and is readily available on various web sites.

Autopista Concesionada v. Venezuela[90], *Tokios Tokelès v. Ukraine*[91], and *ADC v. Hungary*[92]. For instance, in *Tokios Tokelès v. Ukraine*, a majority of the tribunal held that a claim brought against the respondent by a foreign company owned and controlled by Ukrainian nationals was consistent with the terms of the treaty and the ICSID Convention[93]. The tribunal also rejected the respondent's plea that the claimant's corporate personality be disregarded. The tribunal reasoned that, assuming that it had the power to pierce the claimant's corporate veil, the respondent had failed to show or even to suggest that the claimant had used its corporate status «to perpetrate fraud or to engage in malfeasance» or «to evade applicable legal requirements or obligations», nor had the respondent claimed that the veil should be pierced to protect third parties[94]. The tribunal added that the creation of the claimant involved «no abuse of legal personality»[95]. It noted that the claimant had not been created for the purpose of gaining access to arbitration under the treaty, as the enterprise had been founded six years before the treaty entered into force[96]. This *dictum* bore the germ of a legal theory which would attain full growth in later cases.

The issue of abuse also appeared in the context of jurisdictional objections based on the claimant's acquisition of the investment from an earlier owner, often in the context of an internal corporate reorganization[97]. In *Aguas del Tu-*

90. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 September 2001) (G. Kaufmann-Kohler, presiding, K-H. Böckstiegel, B. M. Cremades), ¶ 116: a criterion of control chosen by the parties to an investment agreement would be upheld as long it is «reasonable and the purposes of the [ICSID] Convention have not been abused (for example in cases of fraud or misrepresentation)».
91. *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction and Dissent (29 April 2004) (P. Weil, presiding, D. M. Price, P. Bernardini) (hereinafter *Tokios Tokelès v. Ukraine*).
92. *ADC Affiliate Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Final Award on Jurisdiction, Merits, and Damages (27 September 2006) (N. Kaplan, presiding, C. N. Brower, A. J. van den Berg), ¶¶ 356-360 (control of claimants by nationals of a third country and origin of capital deemed irrelevant under the terms of the treaty; the domestic doctrine of veil piercing held inapposite because it «only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability» [¶ 358]).
93. *Tokios Tokelès v. Ukraine*, at ¶¶ 37-52.
94. *Id.* at ¶ 55.
95. *Id.* at ¶ 56.
96. *Id.* Professor Weil, the president of the tribunal, dissented on the ground that the object and purpose of the ICSID Convention is to protect foreign investors. Weil Dissent at ¶¶ 1, 3, 5. In his view, «an investment made in Ukraine by Ukrainian citizens with Ukrainian capital – albeit through the channel of a Lithuanian corporation – cannot benefit from the protection of the ICSID mechanism» because the claimant was not a «foreign investor» in the Ukraine. *Id.* at ¶ 23. Professor Weil framed his views in terms of an interpretation of the Convention in the light of its object and purpose, not in terms of an «abuse» of legal personality or rights conferred by the treaty.
97. One such case was *CME Czech Republic B.V. v. Czech Republic,* Partial Award and Separate

nari S.A. v. Republic of Bolivia[98], the tribunal rejected an objection based on a change in the corporate structure of the investment, but addressed, *obiter*, certain issues that would recur in later cases. At the time of the initial investment, the claimant was predominantly owned by a Cayman Islands company, which was in turn wholly owned by a U.S. company[99]. A few months afterwards, following intense public opposition to the claimant's concession, the investment was restructured to convert the Cayman Island company into a Luxembourg corporation and to insert it in a chain of affiliates, without any change in the ultimate U.S. parent[100]. Four months later, following major violent protests, the Bolivian government terminated the concession. The tribunal found that the matter was governed by the law of the place of incorporation or legal seat of the company, which authorized the transfer of a corporate charter with no change of legal personality[101]. As the company's legal personality had not changed, the requirement that the company maintain its original shareholding had been met[102].

After reaching its decision, the tribunal added «concluding observations», dismissing several «more provocative arguments» raised by Bolivia. The tribunal dismissed those arguments on factual grounds, without accepting or rejecting the legal theories on which they were based. The state had argued that, as suggested by the timing, the change of structure had been done in anticipation of the subsequent events that gave rise to the claim. The tribunal rejected the argument, noting that the planning of the corporate restructuring had «likely predated the transfer by at least several months». The tribunal also observed that, while strong opposition to the concession had arisen at the time of the restructuring, «the record [did] not establish that the severity of the particular events» that occurred afterwards was «foreseeable» at the time the change took place[103].

The tribunal also dismissed Bolivia's argument that the change of structure had been a «fraudulent or abusive device» to acquire ICSID jurisdiction

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Opinion (13 September 2001), Ad hoc – UNCITRAL (W. Kühn, presiding, S. M. Schwebel, J. Hándl), ¶¶ 384, 396 (the claimant's acquisition of the investment from a related foreign company was protected by the treaty, which made no distinction whether the investor had made the investment originally or had acquired it from a predecessor; the tribunal added, without explanation, that the assignment of the investment «does not have, on the face of it, the stigma of an abuse» [¶ 396]).

98. *Aguas del Tunari SA v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) (D. D. Caron, presiding, J. L. Alberro-Semerena, H. C. Alvarez).
99. *Id.* ¶ 60.
100. *Id.* ¶¶ 64, 67-70.
101. *Id.* at ¶¶174-178.
102. *Id.* at ¶ 165-166.
103. *Id.* at ¶ 329.

under the treaty[104]. The tribunal stated that it did not find in the record a sufficient basis to support «an allegation of abuse of corporate form or fraud»[105]. It added the following observation:

> «[A] decision as to where to locate a joint venture is often driven by taxation considerations *although other factors such as the availability of BITs can be important to such a decision*. […] [I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, *including the availability of a BIT*»[106].

The issue of a genuine link between a claimant and the state of incorporation resurfaced in *Saluka Investments B.V. v. The Czech Republic*[107]. The tribunal dismissed an objection to jurisdiction based on the alleged absence of a genuine social and economic link between the claimant and the state of incorporation. The tribunal held that the claimant satisfied the requirements imposed by the treaty, *i.e.* that it be a legal person constituted under the law of the other Contracting Party[108]. As for the respondent's argument that the claimant lacked genuine links to the state of incorporation, the tribunal expressed «some sympathy» for that argument, noting that mere shell companies may raise concerns of «abuses of the arbitral procedure» and «practices of 'treaty shopping' which can share many of the disadvantages of the widely criticized practice of 'forum shopping'»[109]. The context makes clear, however, that the tribunal viewed those concerns as something to be addressed by the states parties at the time of drafting the treaty[110].

The concepts of «abuse of process» and «treaty shopping» referred to in *Saluka* went on to become major themes in the development of the doctrine

104. *Id.* at ¶¶ 330-331.
105. *Id.*
106. *Id.* at ¶ 330 (c) and (d) (emphasis added).
107. *Saluka Investments BV v. The Czech Republic*, Partial Award (17 March 2006), PCA-UNCITRAL (A. Watts, presiding, L. Y. Fortier, P. Behrens) (henceforth *Saluka v. Czech Republic*).
108. *Id.* at ¶ 223.
109. *Id.* at ¶ 240.
110. *Id.* at ¶ 241. «[T]he predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add». *Id.*

of abuse of rights in investment disputes. These matters will be discussed in detail in Section III.2. Suffice it to say, for the moment, that in investment disputes the term «abuse of process» has generally been used to refer indiscriminately to any form of misconduct related to the arbitral process, such as invoking a tribunal's jurisdiction without a right to do so, asserting unfounded claims, or misbehaving in the course of the arbitral proceeding. The expression «treaty shopping» is a pejorative way of referring to the practice of structuring or restructuring an investment in such a way as to obtain the protection of a treaty on investments. A more neutral term conveying the same idea is «investment-treaty planning».

«Abuse of process» soon became a common objection to jurisdiction in investment disputes. Sometimes «abuse of process» was presented as an additional way of framing a defence of lack of jurisdiction for failure to meet one of the jurisdictional requirements of the applicable treaty. In *Azurix v. Argentina*[111], for example, the respondent first objected to jurisdiction on the ground that certain administrative appeals filed by the claimant precluded later recourse to arbitration under the applicable treaty. The tribunal dismissed that objection on the ground that the agency in question was not an administrative tribunal for the purposes of the treaty[112]. The tribunal then addressed the additional defence of abuse of process and dismissed it on the same grounds, which suggests that the tribunal viewed the defence of abuse of process as a recasting of the earlier objection[113].

In other cases, a defence of abuse of process was raised as a generic way of contesting the claimant's right to initiate the arbitral process, without reference to any general criterion of «abuse». For example, in *Bayindir v. Pakistan*[114], the respondent argued that the claimant had committed abuse of process by pursuing treaty claims in parallel with contract claims. The latter had been withdrawn at the outset of the jurisdictional hearing together with an acknowledgment that they were time-barred[115]. The tribunal upheld the claimant's right to pursue its treaty claims and rejected the defence of abuse of process, without prejudice to the potential effect of the claimant's conduct on the allocation of costs[116]. Likewise, in *Saipem v. Bangladesh*[117], the respondent

111. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/0112, Award on Jurisdiction (8 December 2003) (A. Rigo Sureda, presiding, E. Lauterpacht, D. H. Martins).
112. *Id.* at ¶ 92.
113. *Id.* at ¶ 96.
114. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (G. Kaufmann-Kohler, presiding, F. Berman, K.-H. Böckstiegel).
115. *Id.* at ¶¶ 171-172.
116. *Id.*
117. *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on

argued that the claimant had committed abuse of process by bringing a treaty claim after the Bangladeshi courts had annulled an ICC award. The tribunal noted that the claimant's claim did not concern the ICC award but the courts' alleged wrongful interference with the ICC arbitration process. The tribunal upheld its jurisdiction to rule on alleged treaty breaches, in whichever context they may arise, and accordingly dismissed the defence of abuse of process[118].

1.3. The Leading Cases

A. Phoenix Action v. The Czech Republic

In 2009, in *Phoenix Action v. The Czech Republic*,[119] a tribunal composed of three arbitrators from countries which had adopted municipal doctrines of abuse of rights rendered the first decision under an investment treaty that fully articulated an international doctrine of abuse of rights as a rule of decision. In brief, the tribunal ruled that jurisdiction *ratione materiae* was lacking because the investment was abusive, in the sense of being contrary to the principle of good faith. The tribunal's approach is puzzling, because the claim could have been dismissed for lack of jurisdiction *ratione temporis*. This case must be discussed in some detail to appreciate the tribunal's extraordinary effort to articulate an international doctrine of abuse of rights and to apply it to the circumstances of the case.

The claimant, an Israeli company wholly owned by an Israeli individual who had been a Czech national, acquired an interest in two Czech companies and then brought claims under the Israel-Czech Republic bilateral investment treaty based on the respondent's treatment of those companies[120]. The tribunal found that the claims asserted in the case had already arisen by the time the claimant acquired its interest in the two Czech companies[121]. In particular, the tribunal found that «all the damages claimed by Phoenix had already occurred […] when the alleged investment was made»[122]. This finding would have been sufficient to dispose of the case, because the tribunal also ruled, in parallel, that jurisdiction *ratione temporis* lay only in respect of claims arising after the date the claimant acquired its interest in the Czech companies[123]. As all the

Jurisdiction and Recommendation of Provisional Measures (21 March 2007) (G. Kaufmann-Kohler, presiding, C. H. Schreuer, P. Otton).

118. *Id.* at ¶¶ 154-158. In the Award rendered in the same case, the tribunal held that the Bangladeshi courts had abused their supervisory jurisdiction over the ICC arbitration process and that conduct violated the international doctrine of abuse of rights. *Id.*, Award (30 June 2009), ¶¶ 159-161. See *infra*, Section III.1.3.
119. *Phoenix*, *supra* n. 89.
120. *Id.* at ¶¶ 44-51.
121. *Id.* at ¶ 141.
122. *Id.* at ¶ 136.
123. *Id.* at ¶¶ 65-71.

damages had occurred and the claims had arisen before the claimant acquired the investment, the treaty simply did not apply to those claims.

Nevertheless, the tribunal went on to develop an elaborate theory to reach the conclusion that jurisdiction *ratione materiae* was lacking because the dispute had not arisen directly out of an investment, as required by Article 25 of the ICSID Convention. The tribunal postulated that, to qualify for protection under the ICSID Convention, an investment must consist of six elements: (i) a contribution of money or other assets, (ii) a certain duration, (iii) an element of risk, (iv) an operation made to develop an economic activity in the host State, (v) assets invested in accordance with the laws of the host State, and (vi) assets invested *bona fide*[124]. Of these postulated elements, the tribunal ruled that the fourth and the six were absent. Those two elements were analysed separately, but in both cases the analysis boiled down to the conclusion that the claimant's conduct had been «abusive», in the sense of being contrary to the principle of good faith.

On the fourth element, the tribunal found that the claimant's investment had been made for the sole purpose of obtaining ICSID jurisdiction to pursue a pre-existing claim; more particularly, «to transform a pre-existing domestic dispute into an international dispute» and not to engage in an economic activity in the host State[125]. The tribunal described the applicable principles in terms of «abuse»:

> «The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with *the sole purpose* of taking advantage of the rights contained in such instruments, *without any significant economic activity*, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system. […]
>
> International investors can of course structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. […]
>
> But on the other side, an international investor cannot modify *downstream* the protections granted to the investment by the host State,

124. *Id.* at ¶ 114. This formula modified and expanded the «test» for a qualified investment for ICSID purposes first proposed in *Salini Costruttori S.p.A v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (15 November 2004) (G. Guillaume, presiding, B. Cremades, I. Sinclair).
125. *Id.* at ¶ 142.

> *once the acts which the investor considers are causing damages to its investment have already been committed*»[126].

In other words, in the tribunal's view investors are free to restructure their investments to obtain international protection *prospectively*, *i. e.* in respect of future claims (but not *retrospectively*, in respect of pre-existing claims), as long as they have the good-faith intention to engage, or to continue to engage, in economic activities in the host State.

The sixth element of the tribunal's concept of «investment» (assets invested in good faith) rested explicitly on the international principle of good faith. The tribunal ignored the thorny issue whether that principle applies also to the exercise of rights and directly asserted that international *rights* may not be abused:

> «The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties "to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage …" […] This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused»[127].

The tribunal articulated in these terms an international doctrine of abuse of rights derived from the principle of good faith (understood to apply also to the exercise of rights) in which the criterion of «abuse» is *bad faith*. The tribunal then applied this doctrine to its earlier finding that the claimant had made the investment solely for the purpose of transforming a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty[128]. The tribunal held that «[t]his kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system»[129]. It added: «All the elements analysed lead to the same conclusion of an abuse of rights. The abuse here could be called a "*détournement de procedure*", consisting in the Claimant's creation of a legal fiction in order

126. *Id.* at ¶¶ 93-95. In this context, «upstream» means prospectively or for the future, and «downstream» means retrospectively or for the past. The metaphor is counterintuitive, because it rests on the assumption that streams flow uphill.
127. *Id.* at ¶ 107 (quoting from D'Amato, Anthony, (1984) 7 *Encyclopedia Of Public International Law*, 107 («This principle requires parties «to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage…»).
128. *Id.* at ¶ 142.
129. *Id.*

to gain access to an international arbitration procedure to which it was not entitled»[130].

The *Phoenix* case suggests a few preliminary observations, in anticipation of the more comprehensive critical analysis to be made in Section III.2. First, the tribunal enunciated an international doctrine of abuse of right derived from the principle of good faith, taking bad faith as the criterion of abuse. Second, it found nothing wrong with restructuring an investment to obtain international protection prospectively but considered it abusive to do so retrospectively. Third, the tribunal framed the issues in terms of a doctrine of abuse of process (*détournement de procédure*), considered as a species of abuse of rights. Fourth, the tribunal did not have to articulate or apply an international doctrine of abuse of rights or a sub-doctrine of abuse of process to decline jurisdiction *ratione materiae*, because it followed from its own analysis that jurisdiction *ratione temporis* was lacking. Fifth, the tribunal applied the doctrine of abuse of rights as a condition for an investment to be protected, instead of applying the doctrine to the act of asserting rights based on the treaty[131]. Notice that applying the doctrine to the act of asserting rights under the treaty would have exposed it as superfluous, because the treaty was inapplicable *ratione temporis* and hence the claimant had no right to treaty protection that could be abused.

130. *Id.* at ¶ 143.

131. The tribunal in *Phoenix* may have understood the requirement of good faith as an additional condition for an investment to be *protected* by the applicable treaty, as distinguished from an additional condition to qualify as an «investment». This fine distinction has no practical consequences for our purposes. In any event, the notion that good faith is a separate element of the concept of «investment» (for the purposes of the ICSID Convention) was expressly rejected in *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (12 July 2010) (E. Gaillard, presiding, H. van Houtte, L. Lévy). In that case, the tribunal ruled, correctly in my opinion, that «the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be 'legal' or 'illegal,' made in 'good faith' or not, it nonetheless remains an investment. The expressions 'legal investment' or 'investment made in good faith' are not pleonasms, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons. While a treaty should be interpreted and applied in good faith, this is a general requirement under treaty law, from which an additional criterion of 'good faith' for the definition of investments, which was not contemplated by the text of the ICSID Convention, cannot be derived». *Id.* at ¶¶ 112-113. A similar position was adopted in *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013) (G. Kaufmann-Kohler, presiding, J. M. Townsend, C. von Wobeser). The tribunal said: «The Tribunal does not share the view expressed for instance in *Phoenix* pursuant to which […] respect of good faith [is an] element[ ] of the objective definition of investment under Article 25(1) of the ICSID Convention. […] [A] breach of the general prohibition of abuse of right, which is a manifestation of the principle of good faith, may give rise to an objection to jurisdiction or to a defense on the merits. This does not mean that these elements are part of the objective definition of the term 'investment' contained in Article 25(1) of the ICSID Convention».

B. Mobil v. Venezuela

In 2010, in *Mobil v. Venezuela*[132], the tribunal, also composed of arbitrators from countries which had adopted municipal doctrines of abuse of rights, articulated and applied a doctrine of this kind as international *lex lata*. Only the portions of the decision that concern that doctrine are addressed here. The relevant claimant, a Dutch corporation which indirectly owned a stake in a petroleum investment in Venezuela, asserted claims against the respondent under the Netherlands-Venezuela bilateral investment treaty. The asserted claims arose out of a series of separate government measures which, the claimant alleged, progressively impaired the investment, culminating in an expropriation without compensation. Some of those measures were taken before the claimant acquired its interest; other measures, including the expropriation, were taken afterwards. As the tribunal noted, the claimant invoked ICSID jurisdiction «only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed»[133].

The tribunal framed the question of jurisdiction in terms of an international doctrine of abuse of rights. It began by observing that «in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law», and referred to the concepts of «good faith», «misuse of power», and «abuse of right»[134]. The tribunal then cited a series of authorities for the proposition that the principles of good faith, misuse of power, and abuse of right have been recognized as part of general international law[135]. According to the tribunal, «[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case»[136]. The tribunal further noted that earlier decisions had used different criteria to determine whether or not an abuse of right had occurred, but in all cases the question is «to give "effect to the object and purpose of the ICSID Convention" and to preserve "its integrity"»[137].

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132. *Mobil Corporation et al. v. Bolivarian Republic of Venezuela (renamed Venezuela Holdings B.V. et al. v. Bolivarian Republic of Venezuela)*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) (G. Guillaume, presiding, G. Kaufmann-Kohler, A. S. El-Kosheri) (hereinafter *Mobil v. Venezuela* or *Mobil*). The author acted as lead counsel to the claimants in the proceeding leading to this decision and subsequently in the proceeding on the merits, until withdrawing in 2013 as a consequence of his retirement from Covington & Burling LLP.
133. *Id.* at ¶ 205.
134. *Id.* at ¶ 169 (italics added).
135. *Id.* at ¶¶ 170-184.
136. *Id.* at ¶ 177.
137. *Id.* at ¶ 184 (citing Prosper Weil's dissent in *Tokios Tokelès v. Ukraine*).

In the course of applying the theory of abuse of rights to the circumstances of the case, the tribunal ruled that it was legitimate (*i.e.* not abusive) to assert ICSID jurisdiction in respect of future disputes, but not in respect of pre-existing disputes:

> «As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding [company] was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.
>
> With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs"»[138].

The tribunal concluded that it had jurisdiction in respect of any dispute that came into being after the relevant date of restructuring (including the dispute related to the expropriation) but not in respect of any dispute that came into being before that date[139]. The application of this principle to the particular disputes in the case, an issue which the tribunal joined to the merits, is not central to the present discussion.

The main contribution of the *Mobil* decision was the tribunal's attempt to give a legal foundation to an international doctrine of abuse of rights. The tribunal failed to make clear whether the «abuse» lay in the act of restructuring the investment or in the act of asserting treaty rights in respect of a pre-existing dispute, though the logic of the decision seems to point in the latter direction. Nor did the tribunal articulate the criterion of «abuse» on which it was relying, beyond references to the concept of good faith, the need to take into account all the circumstances of the case, and the need to give effect to the object and purpose of the ICSID Convention and to preserve its integrity.

C. Pac Rim v. El Salvador

In 2012, in *Pac Rim v. El Salvador*, the tribunal examined in detail a question of «abuse of process», in the sense of abuse of a claimant's right to submit a dispute to international arbitration under an applicable treaty[140]. The

138. *Id.* at ¶¶ 204-205.
139. *Id.* at ¶ 206.
140. *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Res-

claimant, a U.S. corporation, brought a claim against the respondent under the investment provisions of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA). The claim was predicated on the respondent's alleged failure to act on applications for a mining concession and environmental permits following the claimant's discovery of valuable deposits of gold and silver under an exploration permit. The claimant's parent, a Canadian company, had filed the original applications. Three years later, while the applications were still pending, the claimant transferred its corporate charter from the Cayman Islands to a state of the United States. Three months later, the respondent's president made a public announcement acknowledging a policy of denying mining permits[141].

The relevant issue was whether, in the circumstances of the case, the claimant's change of nationality was abusive. On the facts, the tribunal found that the availability of international arbitration under CAFTA had been one reason for the change[142]. On the law, the tribunal endorsed the general proposition, taken from *Mobil*, that «in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law»[143]. It also adopted the view, expressed in *Mobil*, that restructuring an investment could be «legitimate corporate planning» or an «abuse of right» depending upon the circumstances in which it happened[144]. The tribunal then accepted the proposition, taken from *Phoenix*, that an investor is entitled to structure its investment prospectively in a manner that best fits its need for international protection, but may not modify that structure retrospectively once the state acts that gave rise to the investor's claim have been committed[145]. On this basis, the tribunal concluded that «if a corporate restructuring affecting a claimant's nationality was made in good faith before the occurrence of any event or measure giving rise to a later dispute, that restructuring should not be considered as an abuse of process»[146].

That conclusion raised the question whether the measure or measures on which the claim was based had occurred before or after the change in the claimant's nationality. The tribunal found that the measure at issue was a governmental «practice» of withholding mining-related permits. That practice had begun before the claimant changed its nationality and continued thereafter, and in the end a presidential speech had acknowledged it as a governmental

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pondent's Jurisdictional Objections (1 June 2012) (V. V. Veeder, presiding, G. S. Tawil, B. Stern), henceforth, *Pac Rim v. El Salvador* or *Pac Rim*.

141. *Id.* at ¶ 2.58.
142. *Id.* at ¶ 2.22.
143. *Id.* at ¶ 2.44 (quoting from *Mobil v. Venezuela*).
144. *Id.* at ¶ 2.45.
145. *Id.* at ¶ 2.46.
146. *Id.* at ¶ 2.47.

policy[147]. The tribunal analysed that policy of not granting permits as a continuing act, that is, an allegedly unlawful act in which the act and the unlawfulness continued over a certain period[148].

As the claimant had changed its nationality in the course of that continuing state act, the tribunal examined the legal consequences of the change (i) under the theory of abuse of process it had previously outlined and, separately, (ii) under the rules concerning application of the treaty *ratione temporis*.

As a matter of abuse of process, the question was at what point in the course of the continuing act the claimant's change of nationality could be deemed «abusive». The tribunal selected that point on the basis of a fairly restrictive criterion of *foreseeability*. What must have been foreseeable is *that a specific future dispute would occur with a very high degree of probability*:

> «In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances […]»[149].

The tribunal also noted that «abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute»[150]. This appears to be a reference to a situation in which the investor is aware of the injurious state conduct but delays crystallisation of a dispute (by expressing its disagreement with that conduct and formulating a claim thereon) until the change of nationality is completed.

On the application of the treaty *ratione temporis*, the tribunal took the view that the result would not necessarily coincide with that which followed from the doctrine of abuse of process[151]. The tribunal started from the general principle that treaties have no retroactive effect unless they so provide ex-

147. *Id.* at ¶¶ 2.86-2.91.

148. *Id.* at ¶ 2.92. The tribunal noted that the same approach had been adopted for the omission to pay debts. *Id.* at ¶ 2.93 (citing *Société Générale de Surveillance SA v. Philippines and African Holding Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration (29 January 2004) (A. S. El-Kosheri, presiding, J. R. Crawford, A. Crivellaro) and *African Holding Company of America Inc (AHL). and the African Society of Construction in Congo (SARL) v. The Democratic Republic of the Congo*, ICSID Case No ARB/05/21, Decision on Jurisdiction and Admissibility (23 July 2008) (F. Orrego Vicuña, presiding, O. LO de Witt Wijnen, D. Grisay).

149. *Id.* at ¶ 2.99. The tribunal also «recognise[d] that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area». *Id.*

150. *Id.* at ¶ 2.100.

151. *Id.* at ¶ 2.101.

pressly or by clear implication[152]. Under the non-retroactivity principle, the treaty applies only to the portion of a continuing act that occurred after the treaty became applicable, regardless of earlier events or the claimant's knowledge thereof[153]. The portion of the continuing act that took place before the treaty became applicable would still be relevant as factual background for the dispute, but not as a factual element of the claim[154].

The tribunal concluded that it would have jurisdiction under the treaty *ratione temporis* if the dispute between the parties arose after the date the treaty became applicable (by reason of the claimant's change of nationality), based on a continuing act existing after that date[155]. The tribunal noted, however, that the relevant date for deciding the abuse-of-process issue would be *earlier* than the date for deciding the issue of jurisdiction *ratione temporis*[156]. Even if a basis for jurisdiction *ratione temporis* existed, the exercise of that jurisdiction would be precluded, the tribunal said, «on the basis of abuse of process if the Claimant had changed its nationality during that continuous practice knowing of an actual or specific future dispute, thus manipulating the process under CAFTA and the ICSID Convention in bad faith to gain unwarranted access to international arbitration»[157].

The tribunal's lengthy and at times passionate excursus on the doctrine of abuse of process ended in a remarkable anti-climax: the tribunal summarily found that no abuse of process had been proven, and rejected the respondent's defence on that ground.[158] The tribunal separately ruled that the respondent had effectually invoked the CAFTA denial-of-benefits clause, and consequently dismissed all claims under that treaty, while upholding ICSID jurisdiction over non-CAFTA claims under a consent clause contained in a municipal investment statute[159].

152. *Id.* at ¶ 2.103. *See also* Article 24 of the Draft Articles on the Law of Treaties, *II Yearbook of the International Law Commission,* Part III (1966) («Article 24. Non-retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party») and Article 28 of the Vienna Convention on the Law of Treaties («Article 28 Non-retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party».)
153. *Id.* at ¶ 2.104.
154. *Id.* at ¶ 2.105.
155. *Id.* at ¶ 2.106.
156. *Id.* at ¶ 2.107.
157. *Id.*
158. *Id.* at ¶ 2.111.
159. *Id.* at ¶¶ 4.92, 7.1(A)(3), 7.1(B).

The tribunal's analysis, superior in depth and subtlety to those of earlier cases, suggests a few preliminary observations. First, the decision endorsed and applied an international doctrine of abuse of process which appears to be a particular application of a more comprehensive international doctrine of abuse of rights. Second, even though the abuse was predicated on the claimant's change of nationality (which made the treaty applicable), the «abuse of process» at issue was in fact the submission of a dispute to arbitration under the treaty. Third, while the tribunal clearly used *bad faith* as the criterion of abuse, it failed to explain why the investor's state of mind «ordinarily» changes from good faith to bad faith at the point the investor foresees that a specific future dispute had a very high probability of occurrence. These issues will be discussed at length in Section III.2.

D. Tidewater v. Venezuela

Tidewater v. Venezuela[160], decided in 2013, can be included among the leading cases because the tribunal adopted a somewhat different criterion of foreseeability, which introduced the concept of *imminence* of the specific state measure giving rise to the claim. The relevant issue was whether an assertion of jurisdiction under the bilateral investment treaty between Barbados and Venezuela was an abuse of right[161]. A U.S. corporation indirectly owned a Venezuelan company whose Venezuelan subsidiary provided maritime services to the oil industry in Venezuela[162]. In February 2009, the investment was restructured to insert a new Barbados company in the chain of ownership, so that the two Venezuelan companies became subsidiaries of the Barbados company, without changing the ultimate parent[163]. Three months later, the respondent expropriated one portion of the operating company's business, and two months later the expropriation was extended to the company's remaining business in Venezuela.[164] The Barbados company and its first-tier Venezuelan subsidiary (deemed to be a Barbados national under the treaty) brought a claim against the respondent for breach of the treaty.

The respondent contested jurisdiction on the ground that the investment had been restructured for the purpose of gaining access to ICSID jurisdiction

160. *Tidewater, Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, (8 February 2013) (C. McLachlan, presiding, A. Rigo Sureda, B. Stern), henceforth *Tidewater v. Venezuela* or *Tidewater*. The author was lead counsel to the claimants in that case until withdrawing upon his retirement from Covington & Burling LLP.
161. Jurisdiction had also been asserted on the basis of a Venezuelan statute. The respondent's objection in that regard, which was sustained, is not relevant to the present discussion.
162. *Id.* at ¶ 3.
163. *Id.* at ¶¶ 4, 165-166.
164. *Id.* at ¶¶ 171-173, 181.

in respect of a dispute that was already in existence or, alternatively, anticipated and foreseeable. The tribunal dismissed the objection on both counts.

The tribunal analysed the respondent's objection under a doctrine of abuse of rights, without elaborating on the legal basis of the doctrine or the criterion of abuse to be applied[165]. The tribunal merely relied on the passage in *Mobil* upholding as legitimate the goal of seeking the protection of an investment treaty in respect of future disputes but not in respect of pre-existing disputes[166]. It also relied on *Mobil* for the proposition that «abuse of right is to be determined in each case, taking into account all the circumstances of the case»[167]. The tribunal found that «one of the two reasons for the reorganization was a desire to protect Tidewater from the risk of expropriation by incorporation of an investment vehicle in a state having investment treaty arrangements with Venezuela»[168]. The tribunal held that «it is a perfectly legitimate goal, and no abuse of the investment protection regime, for an investor to seek to protect itself from the general risk of future disputes with the host state in this way. But the same is not the case in relation to pre-existing disputes between the specific investor and the state»[169].

The tribunal first found, on the facts, that the dispute submitted to arbitration did not predate the reorganization[170]. Then the tribunal turned to the respondent's argument based on foreseeability. For the purposes of the analysis, the tribunal adopted, without explanation, one author's proposed formulation of the issue: whether «the objective purpose of the restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor»[171]. The tribunal made clear, however, that what must be within the investor's «reasonable contemplation» is the *imminence* of the *specific measure* that gave rise to the claim[172]. The tribunal found that the *nationalisation* was not reasonably foreseeable as *imminent* at the time of the restructuring, and accordingly dismissed the objection based on abuse of rights[173].

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165. *Id.* at ¶ 146.
166. *Id.*
167. *Id.* at 147.
168. *Id.* at ¶ 183.
169. *Id.* at ¶ 184.
170. *Id.* at ¶ 185-192.
171. *Id.* at ¶ 150, quoting from Douglas, Zachary, *The International Law of Investment Claims* (Cambridge University Press, 2009), 465 («In evaluating the second possibility, the Tribunal will consider whether 'the objective purpose of the restructuring was to facilitate access to an investment treaty tribunal with respect to a claim that was within the reasonable contemplation of the investor'»).
172. *Id.* at 194. The tribunal framed the question thus: «was there a reasonable prospect [at the relevant times] that such a nationalisation was imminent?».
173. *Id.* at ¶¶ 194-197.

1.4. The Aftermath

The decisions in the leading cases were promptly followed by a considerable number of others which applied the doctrine of abuse of rights or the sub-doctrine of abuse of process to a variety of factual circumstances, sometimes to find abuse, sometimes to reach the opposite conclusion. Taken together, those decisions marked a steady expansion of the factual contexts in which the doctrines of abuse were considered to be applicable. Even the decisions that declined to apply either version of the doctrine did so on factual grounds, without questioning the applicability of the doctrine as international *lex lata*. We shall first summarize the principal decisions that applied a doctrine of abuse of rights or a sub-doctrine of abuse of process, and then, more briefly, those that rejected pleas based on those doctrines.

Two decisions rendered in 2009, shortly after *Phoenix* was made public, applied the doctrine of abuse of process to cases in which a necessary element of jurisdiction was lacking because it was based on false evidence. The first of those cases was *Europe Cement v. Turkey*[174]. In that case, the tribunal found that the claimant could not produce sufficient evidence that it had an investment in Turkey at the relevant time, and on this basis alone it concluded that jurisdiction was lacking[175]. The tribunal went on to consider whether the claim amounted to an abuse of process. It found that the evidence clearly implied «that the claim to share ownership was based on inauthentic documents and […] was fraudulent»[176]. The tribunal concluded that the claim had not been made in good faith and constituted an abuse of process: «If as in *Phoenix*, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation[177] is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process»[178].

The second case was *Cementownia v. Turkey*[179]. The case concerned the same companies involved in the *Europe Cement* case and a similar lack of evidence that the claimant owned shares in those companies[180]. The tribunal found that the alleged transfers of shares had never occurred, and that the

174. *Europe Cement Investment & Trade S.A. v. Republic of Turkey,* ICSID Case No. ARB(AF)/07/02, Award (13 August 2009) (D. M. McRae, presiding, L. Lévy, J. Lew).
175. *Id.* at ¶¶ 142-143.
176. *Id.* at ¶ 163.
177. The tribunal should have added «on an existing claim» to be faithful to the holding of the *Phoenix* decision. *See supra*, Section III.1.3.
178. *Id.* at ¶ 175.
179. *Cementownia «Nowa Huta» S.A. v. Republic of Turkey,* ICSID Case No. ARB(AF)/06/2, Award (11 September 2009) (P. Tercier, presiding, M. Lalonde, J. C. Thomas) .
180. *Id.* at ¶¶ 1, 3.

claim was a sham[181]. On this factual basis, the tribunal held that the claim failed to meet the «requisite standard of good faith conduct» and was manifestly ill-founded[182]. It held, relying on *Phoenix*, that the claimant «intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that it was not the case. This constitutes indeed an abuse of process»[183]. The tribunal dismissed the claim and imposed on the claimant all the costs of the proceeding and the respondent's legal fees[184]. As these would have been the normal consequences of filing a frivolous claim, the expansion of the concept of «abuse of process» to a case in which the claimant had no jurisdictional right to be abused was wholly unnecessary.

The tribunal also speculated, *obiter*, on how the case should have been resolved if the transfer of shares had indeed taken place. The tribunal found that (i) the alleged transferor was a Turkish national who feared adverse government action and wished to protect his interests and (ii) the companies were already on notice of such adverse action[185]. The tribunal then opined that, in such circumstances, the transfer would have amounted to impermissible treaty shopping, which «is not in principle to be disapproved of», except when it is «a mere artifice employed to manufacture an international dispute out of a purely domestic dispute»[186]. The tribunal concluded that «the share transfers would not have been *bona fide* transactions, but rather attempts […] to fabricate international jurisdiction where none should exist»[187].

The question of abuse in the context of fraud was also raised in *Churchill Mining v. Indonesia*[188]. The tribunal found that the claims were based on documents forged to carry out a fraud aimed at obtaining mining rights. While the author of the forgeries and fraud was not identified, the tribunal found that the fraud was serious, comprehensive, and intentional, and that it was compounded by the claimant's lack of diligence, even after indications of forgery had arisen. The tribunal held that, on those facts, the general principle of good

181. *Id.* at ¶ 121, 147, 149.
182. *Id.* at ¶ 157.
183. *Id.* at ¶ 159. See *Phoenix, supra* at ¶¶ 154, 156.
184. *Cementownia v. Turkey*, *supra* n. 179, at ¶ 178. The issue of fraud in the making of the investment was also raised in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (10 June 2010) (B. Stern, presiding, B. Cremades, T. T. Landau), at ¶ 96. The tribunal noted that an investment is not protected *inter alia* if it has been created in violation of the principle of good faith «by way of corruption, fraud, or deceitful conduct». *Id.* at ¶ 123.
185. *Cementownia v. Turkey*, *supra* n. 179, at ¶¶ 116-117.
186. *Id.* at ¶ 117.
187. *Id.*
188. *Churchill Mining and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016) (G. Kaufmann-Kohler, presiding, M. Hwang, A. J. van den Berg).

faith and the prohibition of abuse of process entailed that the claims could not benefit from protection under the applicable treaty. It accordingly declared the claims inadmissible[189].

Other decisions applied the doctrine of abuse of process in the familiar context of a corporate reorganization or the acquisition of an existing investment by an unrelated foreign investor. In *ST-AD v. Bulgaria*[190], for example, the tribunal held that the initiation and pursuit of the arbitration was an abuse of process, because the damage that formed the basis of the claim had occurred before the claimant (a German company) had acquired its interest from the original Bulgarian owner[191]. The damage had resulted from a decision by the Bulgarian Supreme Cassation Court rejecting a set-aside application in a dispute between the original Bulgarian owner and the state. The tribunal noted that this was an attempt to manufacture arbitral jurisdiction by introducing a German investor in the local company after all of its domestic legal options had failed[192].

In *Renée Rose Levy v. Peru*[193], the tribunal declined to exercise jurisdiction on grounds of abuse of process. In that case, a family investment had been transferred to the claimant, a family member having French nationality, shortly before the measure that gave rise to the dispute[194]. The tribunal adopted the criterion of foreseeability set forth in *Pac Rim* (foreseeability of a future dispute as highly probable) and found that the criterion was met in the circumstances of the case, which included a source likely providing advance information of the measure, as well as the use of untrustworthy and backdated documents[195].

In *Philip Morris v. Australia*[196], the question presented was whether, in the context of a corporate reorganization, the claimant's invocation of the applicable treaty was an abuse of rights. The tribunal reviewed prior decisions and concluded that they had articulated legal tests which revolved around the concept of foreseeability without implying a finding of bad faith[197]. Accordingly,

189. *Id.* at ¶¶ 507-529.
190. *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (18 July 2013) (B. Stern, presiding, B. Klein, J. C. Thomas).
191. *Id.* at ¶¶ 419-421. The tribunal relied heavily on *Phoenix* and to a lesser extent on *Mobil*. *Id.*, at ¶¶ 412-418.
192. *Id.* The tribunal also found that the claimant had engaged in procedural misconduct and invoked that fact as an additional reason for an imposition of costs. *Id.* at ¶¶ 424-429.
193. *Renée Rose Levy et al. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015) (G. Kaufmann-Kohler, presiding, E. Zuleta, R. Vinuesa).
194. *Id.* at ¶ 188.
195. *Id.* at ¶ 188-195.
196. *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) (K.-H. Böckstiegel, presiding, G. Kaufmann-Kohler, D. M. McRae).
197. *Id.* at ¶¶ 538-554.

the tribunal took the view that «the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable»[198]. The tribunal then adopted a foreseeability test which is less restrictive than that of *Pacific Rim*: «a dispute is foreseeable when there is a reasonable prospect […] that a measure which may give rise to a treaty claim will materialise»[199]. On the facts, the tribunal found that the relevant dispute was foreseeable to the claimant at the time of the restructuring and that, absent sufficient evidence of other business reasons, the determinative reason for the restructuring was the intent of bringing a claim under the treaty[200]. The conclusion was that the initiation of the arbitration constituted an abuse of rights and the claims were inadmissible[201]. The foreseeability test and other important aspects of the *Philip Morris* decision will be discussed in Section III.2.

In *Transglobal v. Panama*[202], the respondent objected to jurisdiction on several grounds, among them that the claimant had abused «the international investment treaty system». The tribunal chose to address this objection first, «because the existence of abuse of process is a threshold issue that would bar the exercise of the Tribunal's jurisdiction even if jurisdiction existed»[203]. The tribunal noted that, to determine whether an abuse of rights has occurred, tribunals have considered all the circumstances of the case, including *inter alia* the timing of the purported investment, the timing of the claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of the restructuring[204]. On the facts, the tribunal found that the claimants had been inserted in the chain of ownership of the investment (i) at a time a state agency was showing reluctance to comply with a domestic court judgment that had been rendered in favor of the investor and (ii) with a view to assisting in enforcing that judgment[205]. The tribunal concluded that this was an attempt to create international jurisdiction over a pre-existing domestic dispute[206].

198. *Id*. at ¶ 554.
199. *Id*.
200. *Id*. at ¶¶ 569, 584, 585-587.
201. *Id*. at ¶ 588.
202. *Transglobal Green Energy, LLC et al. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award (2 June 2016) (A. Rigo Sureda, presiding, C. Schreuer, J. Paulsson).
203. *Id*., at ¶ 100.
204. *Id*. at ¶ 103 (citing *Phoenix*, *Venezuela Holdings*, *Renée Rose Levy v. Peru*, and *Tidewater*).
205. *Id*. at ¶¶ 104-117.
206. *Id*. at ¶ 118.

In *Orascom v. Algeria*[207], the tribunal extended the doctrine of abuse of rights to a case involving multiple treaties and overlapping claims. In that case, an investment controlled by an individual was structured in the form of a vertical chain of companies, each one positioned in such a way as to claim protection from a different treaty on investments[208]. The controlling individual indeed directed various corporate layers to assert or threaten to assert claims against the respondent in a strategic manner, even though they related to the same dispute[209]. The tribunal ruled that it is not illegitimate to structure an investment through several layers of corporate entities in different states, but it is abusive for an investor who controls several entities in a vertical chain of companies to sue the host state multiple times in relation to the *same investment*, the *same measures*, and the *same harm*[210]. The tribunal reached this conclusion by choosing as the criterion of abuse, without citing any support therefor, the exercise of a right for purposes other than those for which the right was established[211]. The tribunal reasoned that the purpose of the right to seek protection (which it conflated with the purposes of treaties on investments in general)[212] was fulfilled once protection is sought at one level of the chain and is not served by allowing other entities in the chain for the same harm inflicted on the investment[213]. It might have been possible to reach the same result by applying bad faith as the criterion of abuse.

In *Capital Financial v. Cameroon*[214], the tribunal applied the doctrine of abuse of rights to actions aimed at reviving a company to satisfy the nationality requirements of a treaty. The issue was whether the claimant was a national of Luxembourg by reason of having its *siège social* in that country. The tribunal found that the claimant had been created in Luxembourg many years earlier but had been dormant, without complying with certain corporate, ac-

207. *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017) (G. Kaufmann-Kohler, presiding, A. J. van den Berg, B. Stern).
208. *Id.* at ¶¶ 544-545.
209. *Id.* at ¶ 545.
210. *Id.* at ¶ 542.
211. *Id.* at ¶ 540.
212. The tribunal asserted that the purposes of treaties on investments in general is «to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development». *Id.* at ¶ 543. The notion that all treaties on investments have exactly these purposes and no others is highly questionable. The purposes of a given treaty, let alone the purpose of each right granted by that treaty (if relevant), must be determined by an examination of the treaty, not by assuming that the treaty belongs to a class and assuming that all members of the class have the same assumed purposes.
213. *Id.*
214. *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017) (P. Tercier, presiding, A. Mourre, A. Pellet).

counting, and fiscal requirements. The tribunal further found that, about the time a claim against the respondent was envisaged, measures were taken to correct those deficiencies and to give the claimant the appearance of an active company[215]. In these circumstances, the tribunal ruled, the claimant's behaviour had been abusive, and hence the claimant was not entitled to the benefit of the substantive and procedural provisions of the treaty[216].

Finally, two cases addressed the issue of abuse of rights by the respondent state. In *Saipem v. Bangladesh*[217], the question on the merits was whether the respondent's courts had abused their supervisory jurisdiction over an earlier ICC arbitration case. The tribunal found that the local court's decision to revoke the authority of the ICC tribunal was based on a finding of misconduct that lacked any justification, and hence was grossly unfair. The tribunal adjudged this conduct under a doctrine of abuse of rights, taking as the criterion of abuse the exercise of a right for a purpose other than that for which it was created[218]. The tribunal concluded that the court's supervisory jurisdiction cannot be used to revoke arbitrators for reasons wholly unrelated to misconduct, and that «taken together, the standard for revocation used by the Bangladeshi courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right»[219].

The possibility of abuse of rights by the respondent state was also addressed in *Renco v. Peru*[220]. In that case, the relevant treaty required that a claimant's notice of arbitration include a waiver of other remedies. The claimant had included such a waiver, but it had also inserted a reservation of rights, which (the tribunal found) made the waiver not compliant with the requirement of the treaty. For present purposes, the relevant issue was whether the respondent had abused its right to insist on a compliant waiver and to object to jurisdiction on that basis, because the particular reservation of rights at issue would not have prejudiced the respondent or, in the circumstances, prevented the waiver from having full force and effect[221]. The tribunal concluded that the respondent had not abused its right to raise the waiver objection, because it had done so to vindicate its right to receive a compliant waiver, not for an improper motive such as to evade its duty to arbitrate the claims[222]. *Obiter*, the tribunal expressed the view that, if the claim were to be submitted again to

215. *Id*. at ¶¶ 362-364.
216. *Id*. at ¶ 365.
217. *Saipem v. Bangladesh*, *supra*, n. 117.
218. *Id*. at ¶ 160, citing Kiss, *op. cit.*, *supra* n. 25.
219. *Id*. at ¶¶ 155-159.
220. *The Renco Group, Inc. v. Republic of Peru* I, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (M. Moser, presiding, L. Y. Fortier, T.T. Landau).
221. *Id*. at ¶¶ 178-179.
222. *Id*. at ¶ 186.

arbitration, it might be an abuse of right for the respondent to assert that the claim was time-barred.

In a second group of cases, the tribunals accepted the possibility of applying the doctrine of abuse of rights and the sub-doctrine of abuse of process but found those doctrines to be inapplicable to the facts of the case.

In the context of claims brought after a corporate restructuring or another kind of acquisition, the tribunals dismissed abuse-of-process defences in *Tafneft* v. *Ukraine*[223], *Cervin v. Costa Rica*[224], *Energoalliance v. Moldova*[225], *MNSS v. Montenegro*[226], *Flemingo v. Poland*[227], *Hydro v. Albania*[228], and *SCB v. Tanzania*[229].

In the context of the alleged fabrication of evidence for the purpose of meeting the requirements for access to arbitration, pleas of abuse of process

223. *PAO Tafneft (formerly OAO Tafneft) v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction, (28 September 2010) (F. Orrego Vicuña, presiding, C. N. Brower, M. Lalonde), ¶¶ 220-221 (internal acquisition of two related potential claimants by a third one was not considered abusive because the acquired entities could have brought claims under other treaties with comparable standards of protection and the acquiring claimant had also suffered a loss).
224. *Cervin Investissements S.A. et al. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction (15 December 2014) (A. Mourre, presiding, R. Ramírez, A. Jana), ¶¶ 287-302 (internal restructuring at the level of subsidiaries was not considered abusive because the transferors could have brought claims under a different treaty with comparable standards of protection; burden of proof of abuse placed on the respondent).
225. *Energoalliance Ltd. v. The Republic of Moldova*, UNCITRAL, Award (23 October 2013) (unofficial translation) (D. Pellew, presiding, M. Yuryevich, V. K. Volchinsky), ¶¶ 152-155 (no abuse of process because the acquisition took place many years before any of the alleged treaty violations and there was no evidence of bad faith on the claimant's part).
226. *MNSS B.V. et al. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) (A. Rigo Sureda, presiding, E. Gaillard, B. Stern), ¶¶ 180-183 (no abuse of process because the dispute arose after the corporate reorganization through which the claimant acquired its interest; a contemporaneous agreement to which the respondent was a party had expressly disclaimed the existence of disputes other than those scheduled).
227. *Flemingo Duty Free Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (12 August 2016) (H. van Houtte, presiding, W. Kühn, J. M. Townsend), ¶¶ 343-347 (abuse-of-process defence rejected because respondent failed to disprove that the corporate reorganization had taken place well before the measure at issue was «in the air» and that it had been conceived for business purposes and in good faith).
228. *Hydro S.r.l. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award (24 April 2019) (M. Pryles, presiding, I. Glick, C. Poncet), ¶¶ 544-554 (a transfer of interests was found not to have been abusive because, even though it took place when the dispute was foreseeable, it was between parties of the same nationality who were entitled to treaty protection at all times and also because it was made for a legitimate commercial reason).
229. *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* II, ICSID Case No. ARB/15/41, Award of the Tribunal (11 October 2019) (L. Boo, presiding, D. Unterhalter, K. Hossain), ¶¶ 218-230 (claimant bank acquired non-recourse restructured loans from the original Malaysian lending banks under a restructuring initiated by the Malaysian banking authority; the tribunal found that the claimant had assumed the investment risks of the original loans and rejected the respondent's argument that the claimant's position was analogous as that of the claimant in *Phoenix*).

were rejected for lack of evidence in *Gustav F W Hamester v. Ghana*[230] and *Quiborax v. Bolivia*[231]. In a different setting, fraud was also the basis for an abuse-of-process objection in *Malicorp v. Egypt*[232]. The issue in that case was whether the claimant had engaged in fraud and bad faith in concluding with the respondent the investment contract on which the claim was based. The tribunal took the view that, under an international doctrine of abuse of rights based on the principle of good faith, deception or fraud would taint the investment and the right to invoke the protection of the investment agreement[233]. The tribunal decided, however, that the issue of fraud should be examined with the merits and upheld its jurisdiction[234].

In the contexts of multiple claimants, parallel proceedings, overlapping claims, and claims that could have been brought by affiliates, the defence of abuse of process was rejected in *Abaclat v. Argentina*[235], *Sanum v. Laos*[236], *Am-*

230. *Gustav v. Ghana*, *supra* n. 184. The tribunal stated that «[a]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention». *Id.* at ¶ 123. The issue in that case was whether fraud had been committed in the initiation of the investment. The tribunal upheld jurisdiction on the ground that the evidence was insufficient to sustain a finding of fraud. *Id.* at ¶¶ 138-139.

231. *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/02, Decision on Jurisdiction (27 September 2012) (G. Kaufmann-Kohler, presiding, M. Lalonde, B. Stern), ¶ 297-298 (no abuse of process and accordingly no breach of the principle of good faith because the fraud alleged by the respondent was not supported by the evidence).

232. *Malicorp Ltd. v. The Arab Republic of Egypt,* ICSID Case No. ARB/08/18, Award (31 January 2011) (P. Tercier, presiding, L. Olavo Baptista, P.-Y. Tschanz).

233. *Id.* at ¶¶ 115-116.

234. *Id.* at ¶¶ 119-120. On the merits, the tribunal rejected the claim, holding that the grounds on which the respondent had rescinded the investment agreement appeared serious and adequate and therefore the measure could not be considered expropriatory. *Id.* at ¶¶ 130-143. The question of abuse of rights did not play a significant role in that determination.

235. *Abaclat et at. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (P. Tercier, presiding, G. Abi-Saab, A. J. van den Berg), ¶¶ 642-659 (the doctrine of abuse of rights, as an expression of the principle of good faith, is generally applicable in ICSID proceedings; one claim of abuse joined to the merits, another dismissed on the ground that the alleged abuse did not concern the claimants' rights but the interests of a third-party organization claimed to represent the claimants).

236. *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction (13 December 2013) (B. Hanotiau, presiding, B. Stern, A. Rigo Sureda), ¶ 367 (no abuse of process in two related companies pursuing overlapping claims before two different arbitral tribunals because the respondent had refused to consolidate the two proceedings). The other arbitration case was *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (14 December 2014) (I. Binnie, presiding, B. Hanotiau, B. Stern). In that case the respondent contested jurisdiction *ratione temporis* and explicitly disclaimed making an abuse-of-process objection. Nevertheless, the tribunal engaged in a long, superfluous discussion of abuse of process, based on *Phoenix*, *Mobil*, and *Pac Rim*, and the differences

pal-American v. Egypt[237], *Bridgestone v. Panama*[238], *Unión Fenosa v. Egypt*[239], *Strabag v. Poland*[240], and *AMF v. Czech Republic*[241]. Particularly noteworthy is *Ampal-American v. Egypt*, a case in which different claimants pursued four parallel arbitration proceedings having the same factual matrix and related claims. The respondent argued that the parallel proceedings constituted an abuse of process. The tribunal rejected the contention for the following reasons:

> «It is possible, as a jurisdictional matter, for different parties to pursue distinct claims in different fora seeking redress for loss allegedly suffered by each of them arising out of the same factual matrix. As a matter of general principle, contract claims are distinct from treaty claims. Further, in the absence of an agreement to consolidation, two treaty tribunals may each consider claims of separate investors, each of which holds distinct tranches of the same investment. None of the four arbitrations at issue here is, per se, an abuse. It may not be a desirable situation but it

between abuse of process and lack of jurisdiction *ratione temporis*. In the end, the respondent's objection to jurisdiction *ratione temporis* was rejected. *Id.*, ¶¶ 64-75, 158.

237. *Ampal-American Israel Corporation et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) (L. Y. Fortier, presiding, C. McLachlan, F. Orrego Vicuña).

238. *Bridgestone Licensing Services, Inc. et al. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13 December 2017) (N. Phillips Baron of Worth Matravers, presiding, H. A. Grigera Naón, J. C. Thomas), ¶¶ 325-331 (the claimant, a subsidiary entitled to protection under a treaty, paid a judgment debt for which it and its parent company were jointly and severally liable; the tribunal found no abuse of process because all the elements necessary to enable the claimant to bring a claim under the treaty were present before the judgment was issued and the claimant had a claim for damages in addition to those arising from the payment of the debt).

239. *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018) (V. V. Veeder, presiding, J. W. Rowley, M. Clodfelter), ¶¶ 6.77-6.83 (the respondent alleged that the claimant had committed abuse of process in the form of «claim splitting»; the claimant and a subsidiary had brought four parallel arbitration proceedings under separate legal bases, with overlapping factual issues and evidence; the tribunal noted that the tactics of the claimant and its subsidiary appeared to be wasteful but declined to find that they were not acting in good faith).

240. *Strabag SE et al. v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction (4 March 2020) (V. V. Veeder, presiding, K.-H. Böckstiegel, A. J. van den Berg), ¶¶ 6.9-6.14 (threshold for finding an abuse is high; no abuse in pursuing claims for breach of the treaty while pursuing contract claims under domestic law in the domestic courts). This decision followed *Philip Morris v. Australia*, *supra*, in taking the view that the notion of abuse does not imply a showing of bad faith.

241. *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award (11 May 2020) (P. Tercier, presiding, S. A. Alexandrov, J. E. Kalicki), ¶¶ 485-490 (distinguishing *Orascom v. Algeria* and holding that «the principle of good faith in international law cannot be and has never been interpreted to exclude seeking remedies in parallel or subsequently before national courts and international tribunals for the same economic harm, given the different nature of the two legal systems, in particular the dispute resolution mechanisms they offer» [¶ 489]).

cannot be characterized as abusive especially when the Respondent has declined the Claimants offers to consolidate the proceedings»[242].

In numerous cases concerning claims brought against Spain for measures affecting the renewable-energy industry, the tribunals found that the claimants had failed to prove that a certain enactment by Spain was not a *bona fide* tax. In some of those cases, the issue was framed as the application of the doctrine of abuse of rights to the state's conduct. In *Antin v. Spain*[243], for example, the tribunal said: «The Tribunal must therefore determine if the [measure at issue] was adopted by Spain with the precise aim of abusing its rights under the [Energy Charter Treaty], by strategically creating the [measure] to curtail the investors' alleged rights under the Treaty, in a manner that abusively sought to employ the taxation exclusion»[244]. The tribunal ruled that a claim of abuse is subject to a high standard of proof and that no such proof had been provided in the case[245].

To complete this survey, we should refer to a decision that applied the doctrine of abuse of process in a novel setting. In *Dan Cake v. Hungary*[246], the respondent sought revision and annulment of the award in parallel proceedings. In the revision proceeding, it applied for a stay of enforcement of the award, which the claimant opposed. The tribunal found that, in the circumstances, the respondent's application for a stay was not made in bad faith or for purely dilatory purposes and *therefore* it did not constitute an abuse of process[247]. Thus the tribunal subsumed under the doctrine of abuse of process the criteria previously used by tribunals and annulment committees to grant or deny a stay of enforcement of the award[248].

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242. *Ampal American v. Egypt*, *supra*, at ¶ 329 (footnotes omitted). The tribunal observed, however, that one claim was being pursued in both treaty cases. It noted that, while it may be reasonable to seek to protect the same claim in two fora while the jurisdiction of each tribunal is unclear, it would be abusive to do so once the jurisdiction is confirmed. This resulting abuse of process, the tribunal pointed out, is merely the result of the factual situation and not a sign of (initial) bad faith on the part of the claimants. *Id.* at ¶ 331. The tribunal noted that Article 26 of the ICSID Convention excluded the pursuit of other remedies and invited the relevant claimant to confirm that election or otherwise to make its choice known, indicating that it would revisit the question of abuse of process in light of the claimant's response. *Id.* at ¶¶ 335-339.
243. *Infrastructure Services Luxembourg S.à.r.l. (formerly Antin Infrastructure Services Luxembourg S.à.r.l.) et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018) (E. Zuleta, presiding, J. C. Thomas, F. Orrego Vicuña).
244. *Id.* at ¶ 317.
245. *Id.*
246. *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Request for the Continued Stay of Enforcement of the Award (Revision Proceedings) (25 December 2018) (P. Mayer, presiding, T. Landau, S. W. Schill).
247. *Id.* at ¶¶ 56-60.
248. *Id.* at ¶ 51.

2. A CRITICAL ANALYSIS

2.1. Introduction

The preceding survey shows that in the last twenty years tribunals presiding over investment disputes have accepted the possibility of applying to such disputes various versions of the doctrine of abuse of rights or the sub-doctrine of abuse of process. Even if we take account of the overlapping composition of many tribunals, it appears that these doctrines have gained broad currency, even among arbitrators whose training presumably did not include full immersion in municipal doctrines of abuse of rights. In these circumstances, it may seem futile to attempt a critical analysis of these doctrines, as formulated and applied in those cases. Yet, all products of the human intellect must be open to critical re-examination, in the light of new reasons or new evidence. Criticism and countercriticism of established ideas and institutions are the only way of revealing mistakes and learning from them.

A critical analysis of the international doctrine of abuse of rights and the sub-doctrine of abuse of process must address two main issues.

- The first issue is the *legal status* of the doctrine: Is it international *lex lata*? If so, on what basis? If it is a part of the international legal order, is it structurally placed so as to control the material scope of all rights, including those conferred by treaty? This issue, to be called the *problem of the legal status* of the doctrine, will be examined below in Subsection 2.2.
- The second issue is the *prescriptive content* of the doctrine: if it is *lex lata*, what does it permit, require or prohibit?

With regard to the second issue, some aspects of the prescriptive content of the doctrine of abuse of rights are not problematic. It is generally understood that the doctrine *prohibits* the *abusive* exercise of *rights*, which was, as we have seen, the purpose for which the doctrine was first conceived and designed. The *legal consequences* of the prohibition are also clear. As already discussed, to say that a particular exercise of a right is abusive is tantamount to saying that the universe of acts or omissions constituting the scope of the right does not include such exercise. In Planiol's terms, the right ceases to exist to the extent that the particular exercise at issue is (or is found to be) abusive[249]. It follows that, if a particular exercise of a right is carved out of the material scope of the right, then the right *as exercised* (being a non-right) cannot be effectually asserted, invoked, or opposed to another party, or recognized or enforced by a tribunal[250].

249. *Supra*, Section II.1.
250. Depending on the circumstances, the abusive exercise of a right may also give rise to

While it is clear that the doctrine contains a prohibition and that the prohibition produces certain uncontroversial legal consequences, two questions remain. The first, to be addressed in Subsection 2.3, can be called the *problem of the scope* of the doctrine, *i.e.* the problem of identifying the class of rights the abusive exercise of which is prohibited. The second question, to be discussed in Subsection 2.4, can be called the *problem of the criterion of abuse*, that is, the problem of identifying when an exercise of rights is «abusive» or, in other words, identifying the criterion included in or presupposed by the doctrine to determine whether a given exercise of a right is or is not abusive.

2.2. The Problem of Legal Status: Is the Doctrine of Abuse of Rights International *Lex Lata*?

As already discussed, for a doctrine of abuse of rights to be applicable as international *lex lata*, it must satisfy one or more of the criteria for inclusion in the international legal order, usually referred to as the sources of international law.

We are concerned in this Part III with the applicability of the doctrine of abuse of rights in investment disputes. Consequently, we should start by asking whether the international legal order includes a specific international doctrine of abuse of rights, or a specific international sub-doctrine of abuse of process, applicable only to trans-border investments and disputes arising therefrom. The answer is surely no. While various prohibitions of abuse of rights can be found in special treaties dealing with other matters, there is no general treaty governing investment disputes, nor am I aware of any particular treaty on investments or investment disputes that incorporates any such doctrine[251]. Nor is there any evidence that any such special doctrine has been established as a matter of customary international law. On the contrary, the international doctrine of abuse of rights invoked and applied in *Phoenix* and *Mobil* and the decisions that followed them is explicitly described as an instance of a general doctrine of abuse of rights, which is said to apply to the exercise of international rights in general[252]. We can only conclude, then, that if an international doctrine of abuse of rights (or an international sub-doctrine of abuse of

liability, such as, for example, liability for costs for abuse of process in the prosecution or defense of claims.

251. Of course, in the hypothetical case that a doctrine of abuse of rights were incorporated in a special treaty on investments, it would be applicable, as *lex specialis*, in accordance with the terms of the treaty.

252. See *Phoenix*, *supra* n. 89; *Mobil*, *supra* n. 132 (quoting Lauterpacht's pronouncement that «[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused». Lauterpacht, *op. cit.*, p. 164.

process) is applicable in investment disputes, it must be a doctrine of general international law, of the kind that scholars have debated since the early 1900s.

In Section II.3.2, we examined the evidence and arguments for the thesis that a general doctrine of abuse of rights is international *lex lata*. It remains to consider how the decisions summarized in the preceding Section III.1 have contributed to the debate on that issue. In this respect, it is undeniable that those decisions have added weight to the argument from authority, that is, the argument that judicial and arbitral decisions, though not binding, should be taken into account as subsidiary means for the determination of international rules of law. But apart from the additional authority, it is pertinent to ask whether the decisions surveyed have added new *substantive* reasons to conclude that the doctrine of abuse of rights satisfies any of the primary criteria for inclusion in the international legal order.

With very few exceptions, notably *Phoenix* and *Mobil*, the decisions surveyed did not seek to explain why the doctrine of abuse of rights should be regarded as international *lex lata*. For the most part, the decisions surveyed relied on earlier decisions and, in particular, on the leading cases, with the occasional appeal to Lauterpacht's sweeping pronouncement that any right can be refused recognition on grounds of abuse. From the standpoint of a critical appraisal of the status of the doctrine, those later decisions are merely *derivative*, because they transfer back to the earlier decisions on which they rely (and to the still earlier decisions on which those earlier decisions rely) the critical question whether the reasons for accepting the doctrine as international law are sound and based on appropriate evidence.

The decisions in *Phoenix* and *Mobil* are distinguished exceptions. In those cases, the tribunals made conscious attempts to articulate a legal basis for an international doctrine of abuse of rights. Let us then examine whether or how much those attempts advanced the case for the doctrine of abuse of rights as international *lex lata*.

In *Phoenix*, the tribunal sought to derive a doctrine of abuse of rights from the international principle of good faith, assuming, without discussion, that this principle applies not only to the performance of international obligations but also to the exercise of international rights[253]. As this assumption is still insufficiently established[254], the *Phoenix* decision added little to the pre-existing case based on the principle of good faith.

In *Mobil*, the tribunal adopted a shotgun approach, invoking for support multiple authorities: municipal-law concepts associated with preventing the

253. See *Phoenix*, at ¶ 107.
254. *Supra*, Section II.3.2.D.

misuse of rights; the international principle of good faith; the incorporation of *détournement de pouvoir* in various special treaties; Lauterpacht's pronouncement; two decisions of the Permanent Court of International Justice; decisions of regional or specialized tribunals; and decisions rendered in earlier investment disputes, including *Phoenix*[255]. From this *mélange* of authorities, which we have generally discussed in Section II.3[256], the tribunal derived no single or coherent international doctrine of abuse of rights, or a single criterion of abuse. It merely concluded that the aim of the exercise is to «give effect to the object and purpose of the ICSID Convention» and to preserve its «integrity»[257]. As no further explanation was given, the tribunal's discussion did not materially advance the general case for an international doctrine of abuse of rights, especially one that might apply in non-ICSID cases.

Apart from the principle of good faith, which was the centrepiece of the analysis in *Phoenix* and will be addressed presently, the authorities cited in *Mobil* do not prove, individually or collectively, that a doctrine of abuse of rights is incorporated in general international law. In particular, *leges speciales* are not evidence of a *lex generalis*, the cited decisions of the Permanent Court (in which that Court referred to «abuse of right» in contexts indistinguishable from bad-faith performance of international obligations) are questionable authority for the expansion of the principle of good faith, and reliance on decisions made in earlier investment disputes merely transfers the problem to the legal bases of those decisions. Further, the reference to municipal doctrines of abuse of rights and *détournement de pouvoir* evokes the argument (which the tribunal left incomplete) that the doctrine of abuse of rights is one of the general principles of law recognized by civilized nations[258]. This argument fails, as already noted, not only because it is not true that all the principal domestic legal orders contain institutions functionally equivalent to the various versions of the doctrine of abuse of rights adopted in the civil-law world, but also because it is logically invalid to infer, from a multiplicity of methods and criteria of restriction of rights, a single general principle of law «recognized by civilized nations» which, *mirabile dictu*, is identical to one, or a composite of several, civil-law doctrines of abuse of rights[259].

For these reasons, it is doubtful that, in the current state of legal affairs, any doctrine of abuse of rights can *independently* satisfy the criteria for incorporation in the international legal order. The question remains, however, whether a doctrine of abuse of rights can be *derived* from the international

255. See *Mobil*, at ¶¶ 169-183. See discussion *supra*, Section III.1.3.B.
256. *Supra*, Section II.3.
257. See *Mobil*, at ¶ 184 (quoting from P. Weil's dissent in *Tokios Tokèles*).
258. *Supra*, Section II.3.2.C.
259. *Id.*

principle of good faith. As noted, it is uniformly accepted that the principle of good faith is part of general international law and that it governs the interpretation of treaties and the performance of international obligations[260]. But does it also govern the exercise of international rights? The evidence at this point is inconclusive, as we have seen, and the discussion in *Phoenix* did not change the terms of that debate. Yet, it must be acknowledged that the argument based on the principle of good faith is relatively stronger than the alternative arguments for incorporation, if only because the open issue is limited to the *content* of the principle of good faith, while the *status* of this principle as part of general international law is beyond question.

To sum up, the multiple decisions surveyed in Section III.1 strengthen the argument from authority but do not alter the substantive reasons for or against recognizing the doctrine of abuse of rights as international *lex lata*. In a matter like this, the burden of proof and persuasion lies with those who claim that a given institution is part of general international law or that a recognized international principle extends beyond its generally accepted boundaries. As things stand, the claim that an international doctrine of abuse of rights can *independently* satisfy the criteria for incorporation in the international legal order has not been made convincingly. The claim that such a doctrine can be derived from the international principle of good faith presents a closer call, but on the totality of the evidence and argument, the claim still deserves a Scottish verdict of *not proven*[261].

As discussed in Section II.1, if the doctrine of abuse of rights is to perform its function, it must be structurally placed in the international legal order in such a way as to control the primary systems that define rights. Yet, just as it is unproven that the doctrine forms part of the international legal order, it is still unproven that the doctrine (whether inserted by treaty, custom, general principles, or as a logical consequence of the principle of good faith) would be structurally placed in a manner capable of controlling all or a broad generality of rights, especially those created by treaties constituting *leges speciales*. For example, why would the doctrine, if inserted by custom or as a general principle of law, modify the material scope of rights conferred by treaty, absent a demonstration that the doctrine is also *jus cogens*? The proponents of the doctrine as *lex lata* and the decisions surveyed in Section III.1 appear simply to assume that an international doctrine of abuse of rights is or would be ca-

260. *Supra*, Section II.3.2.D.

261. As already discussed (*supra*, Section II.3.2.D.), there are circumstances, often found in the operation of treaties, in which a right is exercised within the framework of the performance of an obligation. In such cases, exercising the right in good faith would be indistinguishable from performing the obligation in good faith. Consequently, in such cases it is unnecessary to extend the principle of good faith to the exercise of rights, or to characterize the bad-faith performance of the obligation as an abuse of rights.

pable of controlling all rights, without explaining how or why such a doctrine fits into the structure of the international legal order in such a way as to make that result possible.

In light of these conclusions, the analyses that follow will be framed in conditional terms: if the doctrine of abuse of rights is international *lex lata*, what is the scope of that doctrine and what criterion of abuse does it contain or presuppose? This conditional approach has the advantage that, whether the preceding conclusions are right or wrong, the doctrine of abuse of rights, as applied in investment disputes, can be critically examined on its own terms.

2.3. The Problem of Scope: If the Doctrine of Abuse of Rights Is International *Lex Lata*, to What Rights Does It Apply?

If the doctrine of abuse of rights is *lex lata*, it works as a second-order system that restricts, or authorises adjudicators to restrict, the material scope of *rights*. To understand the normative content of the doctrine, it is therefore necessary to identify its *scope*, that is, the universe of rights to which the doctrine applies. To this end, we must start from asking *whose* rights are included in that universe and *what kind* of rights are so included. In this subsection, we shall first examine these questions and then discuss two related problems: the treatment of *inexistent rights* and the *identification of the right* being abused.

A. Whose Rights Are Subject to the Doctrine of Abuse of Rights?

If the doctrine of abuse of rights is a general doctrine of general international law, then it must apply to rights (of a kind to be discussed later) held by subjects of international law. In the context of investment disputes, which is the main concern of this article, the relevant holders of rights are states and investors.

The international doctrine of abuse of rights applies, first and foremost, to the rights of states. When Lauterpacht proclaimed that «[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused», he was referring to the rights of states in the context of the jurisprudence of the International Court of Justice[262]. It should also be remembered that the international doctrine of abuse of rights was first conceived and designed as a means of restricting the rights of states, including those rights embodied in the concept of sovereignty, in the interest of promoting peace and harmony among nations[263].

262. Lauterpacht, *op. et loc. cit.*, n. 44.
263. *Supra*, Section II.3.2.

In an investment context, the relevant rights of states are those that derive from its sovereignty and those specifically created by treaties concerning investments. As for the latter, treaties on investments typically provide contracting states with rights concerning its relations with the other contracting states, such as jurisdictional rights concerning the settlement of inter-state disputes. In addition, typical investment treaties provide contracting states with rights concerning the treatment of investments. For example, investment treaties usually establish, expressly or by implication, that a contracting state has the right to expropriate an investment upon fulfilling certain conditions, such as a public purpose and prompt payment of compensation calculated according to stated criteria. A treaty on investments may also expressly provide the host state with rights, conditional or otherwise, relating to regulation, taxation, emergency measures, denial of benefits, and other matters concerning the investor or the investment.

While the vast majority of the surveyed cases concern the exercise of rights of investors, a few decisions have applied the doctrine of abuse of rights to the conduct of states, sometimes to find that an abuse had been committed, sometimes to reach the opposite conclusion. For example, in *Saipem v. Bangladesh*, the conduct of the respondent's courts was held to be an abuse of their supervisory rights over an ICC arbitration having its seat in that country[264]. In *Renco v. Peru*, the tribunal considered whether the state abused its right to object to jurisdiction on the ground that the claimant's waiver of other remedies was technically non-compliant with the treaty and, *obiter*, whether the state would abuse its right to allege, in any subsequent arbitration, that the claim was time-barred[265]. In *Yukos v. Russian Federation*[266], the tribunal ruled that the carve-out of «taxation measures» from the application of certain standards of treatment under the Energy Charter Treaty applies only to *bona fide* taxation actions, *i.e.* those motivated by the aim of raising general revenue for the state and not those aimed at achieving an entirely unrelated purpose, such as the elimination of a company or the destruction of a political opponent[267]. Other cases, such as *Antin v. Spain*, have squarely framed the same issue in terms of the doctrine of abuse of rights[268].

264. *Supra*, Section III.1.4.
265. *Id.*
266. *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014) (L. Y. Fortier, presiding, C. Poncet, S. M. Schwebel).
267. *Id.* at ¶¶ 1407, 1431-1438.
268. *Supra*, Section III.1.4. On a rigorous analysis, it is not necessary to resort to the doctrine of abuse of rights to conclude that the carve-out of «taxation measures» under Article 21 of the Energy Charter Treaty refers only to *bona fide* taxation measures. This is one of those instances in which the good-faith exercise of a right (in this case, the right to tax) is indistinguishable from the good-faith performance of a treaty obligation (in this case, the obligation to abide by the standards of treatment imposed by the treaty). See *supra*,

Under contemporary international law, however, states are not the sole subjects of international law or the sole beneficiaries of international rights. Accordingly, an international doctrine of abuse of rights would apply also to rights of other entities and individuals, including rights of investors. The rights of investors will be the primary focus of the discussion that follows.

B. What Types of Rights Are Subject to the Doctrine of Abuse of Rights?

If the doctrine of abuse of rights is international *lex lata*, it certainly applies to the rights created by international law, whether the holders are states or investors. Rights arising from municipal law present a more complex case. From the standpoint of a proceeding governed by international law, municipal-law rights are, in principle, mere facts or, more precisely, conditioning facts to which international law may attach legal consequences. As an exception, an applicable treaty or other rule of international law may, expressly or by clear implication, operate a *renvoi* to municipal law or rights based thereon. In either case, when municipal-law rights are asserted (whether as facts or as legal rights) as antecedents of an international claim, the conduct of the claimant in relation to those municipal-law rights may be relevant to the question whether the exercise of the international right satisfies the criterion of abuse. For example, if an investor asserts a treaty claim that is predicated, among other things, on the acquisition of certain rights under municipal law, the circumstances of the acquisition may be relevant, under the applicable criterion of abuse, to determine whether the assertion of the treaty claim constitutes an abuse of right.

States and investors may have international rights of two kinds: *substantive* and *jurisdictional*. Under a typical treaty on investments, for example, an investor's substantive rights include (i) rights to receive from the host state certain forms of treatment, consisting of state acts or omissions, such as fair and equitable treatment or full protection and security, and (ii) rights to do or not to do certain things in respect of the investment, such as managing the investment or repatriating profits without interference (or without interference of certain kinds or degrees) from the state. Also under a typical treaty, the investor's has jurisdictional rights to submit specified categories of disputes to various means of settlement, including international arbitration.

As the cases surveyed in Section III.1 illustrate, the issue of abuse of rights arises, most frequently, in connection with the investor's jurisdictional right to submit a dispute to international arbitration. This is to be expected, because the respondent state has every incentive to raise the issue of abuse at

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Section II.3.2.D. Therefore, the requirement that «taxation measures» be *bona fide* follows from the obligation to perform the treaty in good faith.

the jurisdictional stage, in the hope of putting an early end to the proceeding. But if the doctrine of abuse of rights is *lex lata* and applies generally to all international rights, it should also apply to the substantive rights of investors, just as it applies to the substantive rights of states. *Dicta* to that effect appear in *Phoenix*[269] and in *Metal-Tech v. Uzbekistan*[270].

Starting with the decision in *Saluka v. Czech Republic*[271], tribunals have frequently used the terms «abuse of process,» «abuse of the arbitral procedure», or «*détournement de procedure*» to refer to situations in which the alleged abuse was related to the proceeding, as distinguished from the merits of the case. This terminology is unfortunate, because it conflates three different kinds of «abuse», which should be clearly distinguished.

The term «abuse of process» is ambiguously used to refer to three different types of conduct: (i) abuse of process *stricto sensu*; (ii) frivolous claims to jurisdiction; and (iii) procedural misconduct.

An abuse of process *stricto sensu* occurs when the claimant meets all of the requirements for submitting an investment dispute to international arbitration, but brings the claim in circumstances that constitute an «abuse» under such criterion of abuse as may be applicable. In this case, the right being abused is the claimant's jurisdictional right to submit the investment dispute to international arbitration. Strictly speaking, this is the only true case of abuse of rights, in the sense that (i) the claimant has a right that can be abused, and (ii) it is a right of the kind that the doctrine of abuse of rights has been designed to restrict.

A frivolous claim to jurisdiction is present when the claimant fails to meet all of the requirements for submitting an investment dispute to international arbitration but brings the claim to arbitration all the same, for example, by using a forged document to make it appear that a missing requirement has been met. In such a case, the claimant in fact has no right to submit the dispute to international arbitration, because it has not met the conditions for that right to come into being. Since the claimant does not have a jurisdictional right, its conduct cannot properly be characterized as an «abuse» of that (inexistent) right. What the claimant has done is to submit a *frivolous* jurisdictional claim, which is not different in kind from submitting a jurisdictional claim based on a frivolous jurisdictional theory or bringing a frivolous substantive claim. The frivolity may result from fraudulent evidence (as in the example) or from a manifest lack of factual or legal support for the claim. In all such cases, the claimant has no right that

269. *Phoenix*, *supra*, n. 89, at ¶ 143.
270. *Metal Tech v. Uzbekistan*, *supra* n. 131, at ¶ 127.
271. *Saluka v. Czech Republic*, *supra*, n. 107.

can be abused. Yet, in all such cases, the arbitral tribunal normally has ample power to reject the frivolous jurisdictional claim and to apply appropriate sanctions, without taking the dubious step of extending the doctrine of abuse of rights to inexistent rights.

Procedural misconduct occurs when the claimant misbehaves in the course of the proceeding, whether or not the applicable requirements for submitting a claim to international arbitration have been met. The respondent may, of course, misbehave in similar ways. Procedural misconduct is, in a sense, an «abuse» of the process (or the procedural rights to file pleadings, submit evidence, etc.), but such misconduct is normally prohibited and punished by the applicable procedural rules and by the tribunal's power to protect the integrity of the proceeding. A tribunal does not need to resort to a doctrine of abuse of rights, with its attendant criterion of «abuse», to suppress and punish any such misconduct.

Accordingly, the term «abuse of process» is best reserved for the first case, that of abuse of a claimant's jurisdictional right to submit a dispute to international arbitration. The doctrine of abuse of rights is unnecessary to deal with the other two cases; the second because an inexistent right can and should be denied effects without any aid from the concept of «abuse», and the third because procedural misconduct can be controlled and sanctioned at a less exalted level. This is not a mere terminological point. In some of the surveyed decisions, the doctrine of abuse of rights was applied to inexistent rights, to rights other than those being asserted, and to nebulous concepts such as the «system of international investment protection»[272]. Let us then examine those practices, starting from a closer look at the problem of «abuse» of inexistent rights.

C. Can the Doctrine of Abuse of Rights Apply to Inexistent Rights?

Abuse of a non-existent right is an oxymoron. The doctrine of abuse of rights prohibits the abuse of *rights*, that is, rights that existed at the relevant time, not rights that had ceased to exist or never existed. The *raison d'être* of the doctrine has been, since its inception, to restrict *rights*, not something else, and certainly not non-rights. Accordingly, it makes no sense to say that a right that does not exist is being abused. Of course, such non-right will be denied recognition and enforcement and will not produce the legal effects of an existent right, for the simple reason that (by definition) the legal consequences attached to rights are not attached to non-rights. In other words, it is unnecessary and conceptually misguided to adopt a doctrine of abuse of rights (with its attendant criterion of abuse) to deny recognition to an undesirable use of a

272. *Hamester v. Ghana*, *supra* n. 184, at ¶ 123.

non-existent right[273]. Therefore, the question whether a right has been abused must be distinguished from the logically prior question of whether that right existed at the relevant time.

This distinction is particularly important in the case of rights arising out of treaties concerning investments, or rights under the ICSID Convention, because those rights are peculiarly *conditional*, in the sense that a putative investor (for example) does not acquire them unless and until it meets the conditions imposed by those treaties for those rights to come into existence. For example, a treaty on investments may require that, to qualify as an investor of a contracting state, a company must not only be established under the laws of that state but also have its principal place of business or substantial business activities within the territory of that state. A company that fails to meet such conditions will not acquire rights under the treaty and hence will not be in a position to abuse them[274].

The same can be said of the conditions for the application of the treaty as a whole or the specific provisions on which the purported rights are based. For example, a treaty on investments may provide for a system of arbitration

273. In 1956, Schwartzenberger made the following observation, which is equally valid today: «Especially when alleged rights are exercised surreptitiously or deceitfully, the typical reason is that one of the facts which constitutes one of the conditions of the exercise of a right does not actually exist. It, therefore, must be manufactured in order to take the act out of the operative field of another rule of international law. Again, it is redundant first to imagine the existence of a right and then to devise, like a *deus ex machina*, its abuse and the prohibition thereof. All that is required is to ignore the pretence and to deal with the case on its true facts». Schwarzenberger, *op. cit.*, *supra* n. 80, at p. 155. This passage is also quoted by Paulsson, *op. cit.*, at p. 87, as part of a longer quotation.

274. The doctrine of abuse of rights should be distinguished from the narrower doctrine of disregard of legal personality, sometimes called abuse of corporate form or «piercing the corporate veil». As the decisions in *Tokios Tokèles* and *ADC v. Hungary* illustrate, the doctrine of disregard of legal personality is often invoked against a company that qualifies for protection under an investment treaty, when the parent or shareholders of that company do not themselves qualify for such protection. *Supra*, Section III.1.2. But the criteria that are used to justify lifting a corporate veil (fraud, evasion of legal requirements, protection of third parties, non-observance of corporate formalities, etc.) are typically narrower than the criteria associated with a doctrine of abuse of rights. A discussion of the doctrine of disregard of legal personality, including the issue whether it is only a doctrine of municipal law or also a doctrine of international law and the issue whether the *Tokios Tokèles* case was correctly decided, would exceed the scope of this article. See, *e.g.*, Hanotiau, Bernard, *Complex Arbitrations, Multiparty, Multicontract, Multi-Issue* (Wolters Kluwer, 2020); Brekoulakis, Stavros, «Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories», (2017) 8 *Journal of International Dispute Settlement* 610; Brekoulakis, Stavros, *Third Parties in International Commercial Arbitration* (Oxford University Press, 2011). An expansive application of the doctrine of abuse of rights could very well swallow the doctrine of disregard of legal personality, as a more general criterion of «abuse» would swallow and displace the narrower grounds invoked to justify the piercing of a corporate veil.

of investment disputes, but that system usually applies only prospectively, *i.e.* to disputes that arise after the treaty becomes applicable[275]. Accordingly, in the typical case of a non-retroactive treaty, an investor that generally qualifies for protection under the treaty will not have a jurisdictional right to submit to arbitration disputes that arose before the treaty became applicable. If the investor does not have any such jurisdictional right, the abuse of that right is an impossibility.

In *Phoenix* and several other cases that followed, the tribunals took the view that an investment resulting from an acquisition or corporate reorganization was «abusive» when made for the purpose of submitting a pre-existing dispute to arbitration under a suitable treaty. As we shall discuss in the next subsection, this amounts to saying that the claimant abused its right to submit the (pre-existing) dispute to arbitration under the treaty because it had acquired the investment for that purpose. In those cases, however, the investor had no right to submit the (pre-existing) dispute to arbitration under the treaty, because the treaty applied, *ratione temporis*, only to future disputes. It was therefore unnecessary as well as conceptually unsound for those tribunals to resort to a doctrine of abuse of rights to dismiss the claim, when an analysis of the application of the treaty *ratione temporis* led (or would have led) to the same result. The situation was different in *Pac Rim* and other similar cases, because the tribunals chose, for purposes of the doctrine of abuse, a dividing temporal line that did not coincide with the dividing line for the purposes of the application of the treaty *ratione temporis*[276].

Often a tribunal is faced with multiple objections to jurisdiction or admissibility based on different legal theories, including abuse of rights or abuse of process. For example, in *Europe Cement v. Turkey*[277] and *Cementownia v. Turkey*[278], the tribunals declined jurisdiction on the ground that the claimants had failed to establish ownership of the investment, but needlessly went on to discuss the application of the doctrine of abuse of rights as an alternative ground, in one case, and a counterfactual hypothesis, in the other[279]. In such cases, the tribunal would be well advised either not to reach the issue, invoking adjudicatory economy, or preferably to dismiss the defence of abuse of rights on the ground that the doctrine cannot apply once it is established that the claimant does not have the right alleged to have been abused. If the tribunal decides,

275. Vienna Convention on the Law of Treaties, Art. 28 («*Non-retroactivity of treaties*. Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty with respect to that party»).
276. *Pac Rim*, *supra*, n. 140; see *supra*, Section III.1.3.C, and discussion *infra*, Section III.2.4.B.
277. *Europe Cement v. Turkey*, *supra* n. 174.
278. *Cementownia v. Turkey*, *supra* n. 179.
279. *Supra*, Section III.1.4.

however, that the claim should also be dismissed on the alternative grounds of abuse, any such decision would be *obiter*, because it would be based on a counterfactual condition: *if* the claimant had the jurisdictional right it asserts (which in the assumed circumstances it does not), *then* it would have abused that right. A *dictum* of this kind, which could and should have been avoided, usually serves no purpose other than signalling the tribunal's endorsement of the doctrine of abuse of rights and its application of the criterion of «abuse» to a particular conduct it finds reprehensible. As Schwarzenberger once observed, in such situations all that is required is to deal with the case on its true facts[280].

Even less defensible is the choice of treating the issue of abuse of rights as a threshold matter. In *Transglobal v. Panama*[281], the tribunal addressed the objection of abuse of process first «because the existence of abuse of process is a threshold issue that would bar the exercise of the Tribunal's jurisdiction even if jurisdiction existed»[282]. This way of proceeding fully obviates (and avoids) the logically prior issue of whether the claimant had a right that could be abused. This approach elevates the doctrine of abuse of rights to the position of an exclusive rule of decision, to the detriment of any more specific provisions of law governing the tribunal's jurisdiction.

The practical effect of applying the doctrine of abuse of rights when it is unnecessary to do so or in substitution of more specific rules is to allow the chosen criterion of abuse, which cannot be but general, to absorb or displace the more specific requirements contained in the other applicable rules. Thus the doctrine of abuse of rights becomes less of a tool of last resort for correcting unwanted rigidities in specific rules and more of an all-purpose, first-resort tool for imposing results dictated by the criterion of abuse – a bludgeon displacing a scalpel.

D. What Is the Right Being Abused?

The decisions surveyed do not apply the chosen criterion of abuse to the same type of *conduct* nor do they identify the same thing as the *object* of the abuse. In these respects, some decisions are consistent with the tenets and logic of the doctrine of abuse of rights; others are not. A clear understanding of these issues is important to assess the application of the doctrine on its own terms.

Let us first consider the *object* of the abuse. Although all decisions surveyed profess to apply or at least to entertain an international doctrine of abuse

280. *Supra*, n. 273.
281. *Transglobal v. Panama*, *supra* n. 202.
282. *Id.* at ¶ 100.

of *rights*, not all of them agree that the object of the abuse must be a (real or purported) *right*. Some decisions state that the claimant's conduct abused the «system» or the «system of international investment protection»[283]. Unless those statements are merely rhetorical, they involve a conceptual error. First, there is no such thing as a (single) «system of international investment protection». The sole system of international investment protection that counts in a particular case is that contained in the relevant treaty. Of course, it is appropriate to ask, for the purposes of applying the proper criterion of abuse, whether a particular exercise of rights under the treaty (such as asserting a claim) is consistent with the treaty, interpreted in accordance with the Vienna Convention on the Law of Treaties. But it is incorrect to postulate an overarching general «system», invented by arbitrators or scholars, to which the exercise of rights under the relevant treaty must conform on pain of being considered abusive[284]. Second, the doctrine of abuse of rights concerns the abuse of *rights*, not the abuse of a construct such as a «system» of international investment protection. A doctrine of abuse of such a «system» would present even greater difficulties than the doctrine of abuse of rights to be recognized as international *lex lata*.

Neither have the surveyed decisions been consistent on the *type of conduct* that has been judged to be abusive. In *Phoenix* and other decisions, that conduct consisted of, or was related to, the *making of the investment*[285]. For example, the criterion of abuse was applied to the act of acquiring an investment from a prior owner or restructuring a group of related companies so that the claimant should emerge as a putative investor under a selected treaty. In other cases, such as *Philip Morris v. Australia*, the conduct deemed abusive was related to the *assertion of rights* under a particular treaty[286]. The claimant asserts jurisdictional rights by submitting a claim to arbitration under the treaty, and it asserts substantive rights by basing the claim on the substantive provisions of the treaty.

From a conceptual standpoint, applying the doctrine of abuse of rights to the assertion of rights under the treaty (the *Philip Morris* approach) is more consistent with the internal logic of the doctrine than applying it to the making of the investment (the *Phoenix* approach). It bears repeating that the doctrine at issue concerns the abuse of *rights*. From the standpoint of international law, the making of an investment may or may not be the exercise of a right. In most cases, it will be a fact to which international law attributes legal

283. *Hamester v. Ghana*, *supra* n. 184, at ¶ 123.
284. It is easy to see the connection between the idea of a «system of international investment protection» and a teleological criterion of abuse, as discussed in the next subsection.
285. *Supra*, Section III.1.3.
286. *Supra*, Section III.1.4.

consequences. Fact or right, the investment becomes internationally relevant at the point the investor asserts international rights which are conditioned, among other things, on the investment. This is not to say that the making of the investment is or should be exempt from scrutiny under the applicable criterion of abuse. In many cases, though not all, the circumstances in which the investment was made or acquired will be among those to be considered in applying the criterion of abuse to the assertion of rights under the treaty.

The conceptual and practical differences between the *Philip Morris* and the *Phoenix* approaches are best illustrated by a hypothetical case. Let us assume, for the purposes of this illustration and without prejudice to our later analysis of the criterion of abuse, that the applicable doctrine of abuse of rights is that articulated in *Pac Rim*. Let us further assume that an investor foresees a future adverse state measure as highly probable and imminent and, in anticipation of the resulting dispute, changes the structure of its investment to bring that dispute, as well as any other dispute that may arise in the future, under the protection of a suitable treaty. Under the doctrine of *Pac Rim*, that is an improper purpose. Now let us suppose that the change of structure is completed, the foreseen measure is taken, and the dispute arises, but for whatever reason the investor refrains from submitting it to international arbitration under the treaty and otherwise from asserting substantive rights in that respect. On this hypothesis, there can be no issue of abuse of rights or abuse of process, because in the end the investor did not initiate any process or assert any substantive rights in respect of that dispute.

Let us now add a few facts to our hypothetical case. Suppose that, at some later time, a different, unforeseeable, post-restructuring dispute arises between the investor and the host state. Under the principles accepted in *Pac Rim* and all the other decisions that have addressed this issue since *Phoenix*, a change of structure is proper and effectual in respect of such post-restructuring disputes. Accordingly, there is no reason under the logic of the doctrine for denying the investor its right to submit the new dispute to international arbitration under the treaty or to assert the respective substantive rights, even though the original, unrealized purpose of the change of structure of the investment was «improper». This illustration shows that the abuse of rights cannot be predicated solely on the making of the investment without contradicting the internal logic of the doctrine. While the circumstances surrounding the investment may be relevant to the application of the criterion of abuse, the abuse (if any) will depend on the way the investor eventually exercises the international rights it has acquired[287].

287. Professor Fukunaga has argued that, in a case of abuse of process, what is abused is not the claimant's «specific» right to bring a dispute to arbitration (which the abuse prevents the claimant from acquiring), but the «general» right to investment arbitra-

The preceding hypothetical case also shows that the doctrine of abuse of rights can be applied as a blunt instrument, to disqualify a whole course of conduct just because one aspect of it is deemed abusive or, more precisely, potentially abusive. If in our hypothetical case the investment were tainted forever by an original, *unrealized* improper purpose, then the doctrine would prohibit an exercise of rights that is perfectly consistent with its tenets.

Another example of the application of the doctrine as a blunt instrument is the decision in *Orascom v. Algeria*, in which the tribunal ruled that it is abusive for an investor who controls several entities in a vertical chain of companies to sue the host state multiple times in relation to the same investment, the same measures, and the same harm, and dismissed the claim before it on that basis[288]. This blunt approach should be contrasted with the more nuanced one adopted in *Ampal-American v. Egypt*.[289] In the latter case, the tribunal held that pursuing the same claim in two parallel proceedings is not abusive (because jurisdiction is uncertain), but an «abusive» situation arises when one tribunal accepts jurisdiction over the claim – at which point the claimant should have the option of avoiding any abuse by pursuing the claim in that proceeding and withdrawing it in the other[290]. This surgical approach better heeds Lauterpacht's admonition that the doctrine of abuse of rights should be wielded with «studied restraint»[291].

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tion provided in the applicable investment agreement. Fukunaga, Yuka, «Abuse of Process under International Law and Investment Arbitration», (2018) 31(1) *ICSID Review* 181. «In other words, an investor's abusive attempt to acquire its own right to investment arbitration is the abusive *use* of the general right to investment arbitration under an investment agreement». *Id.* at 195 (emphasis in the original). One difficulty with this view is that it extends the object of abuse, not to inexistent rights, but to the abstract category of «general rights». Just as it is impossible to use or misuse a right one does not have, it is impossible to use or misuse an abstract general concept that refers, at best, to a class of rights one does not have. It is indeed possible to «abuse» a right to acquire another right (*e.g.*, an abusive exercise of a stock option), but that right to acquire is, in Fukunaga's terminology, a «specific» right. For example, if the right to acquire a particular stock is exercised abusively, it adds nothing but conceptual clutter to say that what is really abused in that case is the bundle of generic rights embodied in the concept of stock. The practical effect of this theory is to shift the object of abuse to an abstraction, akin to the «system of international investment protection», and to use that shift to justify excluding investment disputes from general principles on jurisdiction developed by other judicial and quasi-judicial bodies. See *id.* at p. 210.

288. *Orascom v. Algeria*, *supra* n. 207.
289. *Ampal-American v. Egypt*, *supra* n. 237.
290. *Supra*, Section III.1.4. and n. 237.
291. Lauterpacht, *op. et loc. cit.*, *supra* n. 44.

2.4. The Problem of the Criterion of Abuse: If the Doctrine of Abuse of Rights Is International *Lex Lata*, What Is the Criterion of Abuse?

A. The Applicable Criterion of Abuse

An arbitral tribunal is not free to choose a criterion of abuse from a menu of available criteria or from the criteria adopted by the municipal legal orders with which the members are familiar. If the doctrine of abuse of right is international *lex lata*, the criterion of abuse forms part of it; it is a component of its prescriptive content. Therefore, the criterion of abuse to be applied under an international doctrine of abuse of rights must be established with the same rigour as the doctrine as a whole.

The decisions surveyed in Section III.1 have dealt with the problem of the criterion of abuse in different ways. Some decisions, such as *Phoenix*; *Pac Rim*; *Tafneft v. Ukraine*; *Quiborax v. Bolivia*; *ST-AD v. Bulgaria*; *Metal-Tech v. Uzbekistan*; and *Energoalians v. Moldova*, appear to have accepted, expressly or by implication, that the applicable criterion of abuse is *bad faith*[292]. In other decisions, including *Mobil*, *Tidewater*, and *Ampal-American v. Egypt*, the tribunals indicated that a finding of abuse should take into account «all the circumstances of the case» or equivalent concepts[293]. In a smaller number of decisions, among them *Orascom v. Algeria* and *Saipem v. Bangladesh*, the tribunals invoked a teleological criterion of abuse, considering abusive the exercise of a right for purposes other than those for which the right was established[294]. Many other decisions failed to articulate or apply any criterion of abuse, relying instead on the way the question of abuse had been resolved in earlier cases involving comparable fact patterns.

The strongest reason for using *bad faith* as the criterion of abuse is that the principle of good faith is the most plausible (or least implausible) legal basis for an international doctrine of abuse of rights. If the doctrine can be derived from the international principle of good faith, the criterion of abuse can be no other than the opposite of good faith, *i.e. bad faith*. On this hypothesis, no independent legal basis would be needed for the criterion of abuse, which would be just as well founded as the doctrine as a whole. In this respect, decisions such as *Phoenix* and *Pac Rim* are internally consistent and analytically sound.

A criterion of abuse that merely refers to «all the circumstances of the case», *without more*, presents two serious difficulties. The first is that such a criterion requires a legal basis, which decisions such as *Mobil* and *Tidewater*

292. *Supra*, Section III.1.4.
293. *Supra*, Section III.1.
294. *Supra*, Section III.1.1. and Section III.1.4.

failed to provide. The second difficulty is that, by itself, «all the circumstances of the case» is not much of a criterion: a tribunal can examine all those circumstances, but such an examination will be useless without a guiding principle to separate the relevant from the irrelevant and to weigh the relevant towards a conclusion. The missing guiding principle is, precisely, a criterion of abuse. «All the circumstances» may be the *right way to apply* a criterion of abuse, and it is certainly the right way to apply the criterion of bad faith, as well as other standards that may govern investment disputes, but it is unworkable as a stand-alone criterion of abuse, except as a «criterion» that amounts to leaving a determination of abuse to the tribunal's unbounded discretion.

The teleological criterion, which appears to have been applied only in a small minority of decisions, also suffers from the fatal defect of lack of sufficient foundation. The tribunals that have invoked this criterion have offered no legal basis therefor, other than the tribunals' *ipse dixit* and a single citation to a single author[295]. This is plainly insufficient for any claim of this kind, let alone a criterion that is mired in controversy.

Of the three criteria of abuse just discussed, bad faith is the only one for which a coherent legal case can be put forward. To reiterate, the most plausible (or least implausible) case for an international doctrine of abuse of rights is that it can be logically derived from the principle of good faith, *if* this principle indeed extends to the exercise of rights. Therefore, if the doctrine of abuse of rights is international *lex lata*, the applicable criterion of abuse can be no other than *bad faith*.

Bad faith is the opposite of good faith. This looks like a truism but is not, because many tribunals go into linguistic contortions to avoid using the expression «bad faith» to characterize a party's conduct. Euphemisms aside, the relevant criterion of abuse is, in the hypothetical scenario we are considering, bad faith. As discussed in Part II, bad faith is a subjective criterion of abuse; it refers to the motives, state of mind, and more generally the subjective conduct of the holder of the right[296]. Because bad faith is a broad criterion, it can fairly be taken to encompass other (more specific) subjective criteria of abuse commonly applied in civil-law countries: sole intention to harm another party, absence of self-interest, choice of a harmful alternative when a non-harmful one is available, and, as a practical matter, flagrant disproportion between the harm caused and the benefit obtained[297]. These more specific subjective criteria can be regarded as *badges of bad faith*, that is, circumstances that can be

295. *Supra*, Section III.1.3.D.
296. *Supra*, Section II.2.3.
297. *Supra*, Section II.2.3.

taken as evidence of bad faith, unless the weight of the other relevant circumstances should point in the opposite direction.

If bad faith is the applicable criterion of abuse, it is an element of any claim or defence based on an alleged abuse of rights, and as such it must be proved by the party alleging it. The need to prove bad faith in a particular case is sometimes denied on the basis of the statement in *Philip Morris v. Australia* that «the notion of abuse does not imply a showing of bad faith»[298]. The context shows, however, that this statement was not an evidentiary point; it was a rejection of bad faith as a criterion of abuse. More precisely, the tribunal in that case did not apply bad faith or any other general criterion of abuse. It adopted instead an «objective test» based on prior decisions, modified to accommodate the tribunal's own preferences concerning the required degree of foreseeability of future disputes[299]. As an evidentiary matter, if the doctrine of abuse of rights derives from the principle of good faith (an issue that the tribunal in *Philip Morris v. Australia* ignored), the criterion of abuse must be bad faith, and bad faith cannot be assumed; it must be proved.

The approach adopted in *Philip Morris v. Australia* is remarkable for broader reasons, which go to the way the doctrine of abuse of rights is sometimes applied, as distinguished from the way it was conceived and designed to be applied. In that case and several others, the tribunals bypassed the difficult problems of the legal status of the doctrine and the criterion of abuse and, instead of applying the doctrine of abuse of rights as intended (on the basis of a general criterion of «abuse»), they applied specific rules of decision based in part on extrapolation from fact patterns found in earlier decisions, in part on sheer invention. Notice that those later tribunals were in a position to create and apply «objective» tests, while paying lip service to the doctrine of abuse of rights, only because earlier tribunals had grappled with the difficult problems of the status of the doctrine and the criterion of abuse and, had analysed those fact patterns, correctly or incorrectly, under a criterion of abuse they considered to be applicable.

To rely on earlier cases to construct «objective» tests begs the question of whether the early cases were correctly decided. At the same time, that question is made irrelevant, because the criterion of abuse and other elements of the doctrine are superseded by the «objective» tests. Accordingly, the approach followed in cases such as *Philip Morris v. Australia* has the effect of replacing the doctrine of abuse of rights, *qua* general doctrine based on a general criterion of abuse, with a set of arbitrator-made rules to be applied, common-law

298. *Philip Morris v. Australia*, *supra* n. 196, ¶ 539, followed by *Strabag v. Poland*, *supra* n. 240, ¶ 6.9.
299. *Supra*, Section III.1.4.

fashion, according to the similarity of fact patterns. So does a quintessential civil-law doctrine metamorphose into the kind of judicial rulemaking typical of the common-law.

The approach just described is, for better or for worse, something very different from the doctrine of abuse of rights, as conceived by proponents such as Josserand, Politis, and Lauterpacht. It remains to be seen whether the original doctrine of abuse of rights, which in the last two decades has enjoyed so much influence in the field of investment disputes, is now on course to be replaced by arbitrator-made specific rules.

B. The Application of the Criterion of Abuse

In the remainder of this subsection we shall critically examine the application of the doctrine of abuse of rights as it was originally conceived, that is, as a general doctrine applicable on the basis of a general criterion of abuse. To this end, we shall assume that the criterion of abuse is bad faith and that tribunals must apply it on a case-by-case basis, in light of all the relevant circumstances of the case. Under these assumptions, it is not possible to determine, in the abstract, whether in the context of a specific investment dispute a specific course of conduct implies bad faith or not. The most we can do is to explore the question whether certain courses of conduct are, in typical circumstances, abusive *per se*, in the sense of being *necessarily* motivated by bad faith. Because space does not permit considering all the typical fact patterns found in the surveyed decisions, we shall discuss only the making of investments through corporate structuring and restructuring, as an example of how those fact patterns should be analysed.

In *Phoenix*, the tribunal took the view that investors are free to structure their investments to obtain treaty protection prospectively, but they may not change that structure retrospectively, once the host state has taken the measures from which the investor claims to have suffered damage[300]. This general idea, *i.e.* that the «legitimacy» of a change of structure depends on whether it purports to apply prospectively or retrospectively, was later endorsed, with certain differences, in *Mobil*, *Pac Rim*, *Tidewater*, and many other decisions[301]. The differences concern the kind of event that serves as the dividing line between prospective and retrospective effects. In *Phoenix*, that event was, in effect, the *state measure* alleged to have caused damage. In *Mobil* and *Tidewater*, the dividing line was the time when the *dispute* came into being[302].

300. *Supra*, Section III.1.3.A.
301. *Supra*, Section III.1.3.
302. *Supra*, Sections III.1.3.B and III.1.3.D. The issue of the timing of the dispute often appears in the form of the question whether an acknowledged pre-restructuring dispute is in fact the *same dispute* as an acknowledged post-restructuring dispute. To answer this ques-

In *Pac Rim*, the tribunal considered both the timing of the state measure and the timing of the dispute and then addressed the issue of a potential gap between the two[303].

The idea that seeking retrospective effects is improper but seeking prospective effects is not was soon modified by introducing an exception based on the *foreseeability* of the state measure or the dispute. The relevance of foreseeability, first suggested in *Aguas del Tunari v. Bolivia*, became a fully developed theory in *Tidewater* and *Pac Rim*, and that theory was later adopted, with some changes, in *Philip Morris v. Australia*[304]. The common thread of those decisions is the following proposition: if the state measure or dispute on which the claim was based was foreseeable (to a certain degree to be discussed presently) at the time the investment was structured or restructured, then (i) the making of the investment was «illegitimate» in respect of such measure or dispute and/or (ii) the assertion of resulting treaty rights was abusive. In *Pac Rim*, and perhaps in some of the other cases as well, this proposition was meant to work as a *presumption* which could be rebutted by other considerations[305]. The proposition stated above can be called the *foreseeability exception* to the more general theory that it is not improper to seek treaty protection in respect of future state measures and/or future disputes.

The introduction of the foreseeability exception raises two questions: (i) what is the relevant kind or degree of foreseeability of the future dispute or state measure? and (ii) is that degree of foreseeability *sufficient*, as a matter of fact or a matter of law, to conclude that the investor acted in bad faith or to create a presumption in that regard?

Let us look first into the relevant kind or degree of foreseeability. The semantic reference of «foreseeability» varies along a spectrum. The foreseeability of a future state measure, or that of a future dispute arising therefrom, is a matter of degree or, more precisely, a combination of factors that are themselves

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tion, tribunals have developed different criteria of identity of disputes, among them those set forth in *Lucchetti v. Peru* and *Jan de Nul v. Egypt*. See *Empresas Lucchetti S.A. et al. v. Republic of* Peru, ICSID Case No. ARB/03/4, Award (7 February 2005) (T. Buergenthal, presiding, B. Cremades, J. Paulsson), at ¶ 50; *Jan de Nul NV et al. v. Egypt*, ICSID Case No. ARB/04/13 (G. Kaufmann-Kohler, presiding, P. Mayer, B. Stern), Decision on Jurisdiction (16 June 2006). The question of the criterion of identity of disputes exceeds the scope of this article.

303. *Supra*, Section III.1.3.C.

304. *Supra*, Section III.1.

305. «In the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances […]». *Pac Rim*, *supra* n. 140, at ¶ 2.99.

matters of degree, among them the degree of *specificity* of the state measure, the degree of *probability* that it will be adopted, and the degree of *imminence* of the measure relative to the time taken as reference. Let us take, as an example, the foreseeability of future state measures. It is certainly foreseeable, in the most generic sense, that a state (any state) may take measures against foreign investors. Less generically, it is foreseeable that a particular state government that has announced or taken measures adverse to foreign investors in the past may take or continue to take such measures in the future. More particularly, in some circumstances it may be foreseeable that a given state government might take, at some point in the future, a particular measure (such as expropriation) against a particular investor. Still more particularly, at some point it may be foreseeable, with a very high degree of probability, that the state will expropriate a particular investment. Even more particularly, it may be foreseeable at some point that the state will expropriate the investment on a particular future date or otherwise imminently. Many more examples could be given to mark other points in the spectrum.

It is often said that foreseeability must be *reasonable*[306]. If a qualification of this kind is meant to mark a single point in the spectrum, the attempt is doomed to failure. At each of the points used as examples, the state measure may or may not be reasonably foreseeable, that is, foreseeable from the standpoint of a reasonable investor. Whether it is or not will depend on *all* the circumstances, including the specificity of the state measure, the degree of probability that it will be adopted, the degree of imminence of the adoption, and additional factors such as the *setting* in which the issue arises and the *purposes* of the foreseeing. For example, a given degree of foreseeability may be reasonable in some settings but not in others or for some purposes but not for others. What is reasonably foreseeable may not be the same when it comes to negotiating an investment contract, or drafting disclosures to satisfy the requirements of securities laws, or introducing sensitivities in a discounted-cash-flow calculation, or taking political-risk insurance, or devising the original structure of an investment, or deciding to change that structure, or planning to reinvest, or choosing to liquidate an investment. It is not possible to conflate all of those factors into a notion of reasonableness applicable to all cases.

A related mistake is to adopt a relatively *generic* concept of foreseeability. The generic foreseeability of state measures against investors is the *raison*

306. See *Tidewater*, *supra* n. 160, ¶¶ 145-146 («At the heart […] of this issue is a […] question of timing as to when the dispute […] arose or could reasonably have been foreseen»). As already noted, however, the decision in *Tidewater* also required that the measure be imminent. See *id.*, at ¶ 194. In *Philip Morris v. Australia*, *supra* n. 196, ¶ 554, the tribunal followed the same approach, leaving out the qualification of imminence («a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure that may give rise to a treaty claim will materialize»).

d'être of the whole corpus of international law aimed at protecting investors. Treaties on investments are concluded, *inter alia*, because at least one contracting state seeks, on a reciprocal basis, to protect its nationals who invest in the other contracting state from generically foreseeable adverse state actions and to provide the means for international adjudication of the resulting disputes. The same is true of investment agreements. It makes no sense to charge an investor with bad faith for foreseeing the risks from which investment treaties are designed to protect it.

By contrast, the decisions in *Pac Rim* and *Tidewater* applied concepts of foreseeability that fall in the *highly specific* range of the spectrum. In *Pac Rim*, the tribunal considered the effects of a corporate restructuring in relation to three kinds of state acts: one-time acts, composite acts, and continuous acts[307]. Only in the case of continuous acts did the tribunal introduce a foreseeability exception to the principle allowing a restructuring to have prospective effects. That exception was based on a highly specific criterion of foreseeability: «In the Tribunal's view, the dividing line occurs when the relevant party can see an actual dispute or can foresee a *specific* future dispute as a *very high probability* and not merely as a possible controversy»[308]. In *Tidewater,* the tribunal first endorsed a standard of «reasonable foreseeability», but in fact it applied that standard to require a *specific*, *imminent* state measure. The tribunal found that at the time the investment was restructured there was «no reasonable prospect that *such a nationalisation* was *imminent*»[309].

One conclusion to be drawn from the preceding discussion is that an argument for the foreseeability exception (whatever it might be) cannot equally accommodate all degrees of foreseeability. The more general the degree of foreseeability taken as relevant, the less plausible the argument that the mere foreseeability of a future state measure or dispute implies bad faith or creates a presumption of abuse.

Yet, all degrees of foreseeability, even those falling in the highly specific part of the spectrum, raise the second question: is any given degree of foreseeability *sufficient*, as a matter of fact or a matter of law, to conclude that the investor acted in bad faith or to create a presumption in that regard? So far, the decisions applying the foreseeability exception have answered this question in the affirmative, but they have failed to explain why that is so. No serious attempt appears to have been made to demonstrate that the foreseeability of a future adverse state action, or a future dispute arising therefrom, somehow converts the investor's frame of mind into one of bad faith. As we shall see,

307. *Supra*, Section III.1.3.C.
308. *Pac Rim*, *supra* n. 140, at ¶ 2.99 (emphasis added).
309. *Tidewater*, *supra* n. 160, at ¶ 194 (emphasis added).

the point is not self-evident. Nor is it enough to say, using an oft-repeated formula, that to seek treaty protection for a foreseeable future dispute is to seek protection «to which the investor is not entitled», because the same can be said of seeking protection for *unforeseeable* future disputes, a goal which is generally accepted as «legitimate».

On a rigorous analysis, it does not seem plausible that the foreseeability of a future dispute or state measure could be *sufficient by itself* to make the investor's conduct abusive, without regard to the other circumstances of the case bearing on the existence or non-existence of bad faith.

Let us first consider the badges of bad faith identified earlier, starting from sole intention to harm. Assume that an investor restructures its investment solely or primarily to obtain the protection of a treaty from future adverse state measures or future disputes arising therefrom, including in particular certain future measures and disputes which are foreseeable at the time of the investor's actions. Whatever the relevant degree of foreseeability, it cannot be inferred, without more, that the change of structure was carried out with the sole intention of causing harm to the state. On the contrary, precisely because (by hypothesis) the adverse state action was foreseeable, there is every reason to think that the change of structure was a *defensive* measure, aimed at seeking protection from an anticipated adverse state action which might (in the abstract) breach the state's obligations under the treaty. It is difficult to see why a defensive action must *necessarily* entail bad faith. It cannot be bad-faith conduct *per se* to pick up a shield in anticipation of a swordsman's attack, even if doing so makes the attacker's task more difficult. To use another analogy, drawn from a state's right of self-defence under general international law: If state A foresees an armed attack by state B or such an attack is foreseeable, it cannot be seriously argued that state A would be acting in bad faith and abusing its right of self-defence if it were to take *defensive* measures, such as entering into a treaty of collective defence with other states or, having done so, exercising its right to seek assistance under the treaty in the event the attack materialises.

For the same reason, it cannot be seriously argued that the investor had no interest in securing the protection of a treaty on investments. Nor is it possible to contend that the investor chose a course of action that caused harm to the state while other harmless courses of action were available. The international protection granted by treaties on investments cannot be compared with the (usually) less favourable protection offered by the state's own law applied by its own courts. Otherwise there would be no investment-protection treaties in the first place.

As for the more general notions associated with the concept of good faith (honesty, forthrightness, truthfulness, cooperation, fairness, reasonableness,

etc.), they cannot be said to be violated by a purely defensive action, such as seeking the protection of a treaty on investments in anticipation of a future adverse state measure. Nor can it be argued that the defensive action at issue fails to respect the state's reasonable expectations, if that is a relevant consideration. A state that intends to take adverse measures against an investor cannot reasonably expect that the investor will wait meekly for its fate, and refrain from taking such defensive measures as are otherwise lawful and available. To use an earlier analogy, a state planning an armed attack on another state has no reasonable expectation that the intended victim will refrain from taking protective actions authorized by international law.

To conclude, when an investor seeks the protection of a treaty on investments against a foreseeable future state measure, or a foreseeable dispute arising therefrom, such foreseeability, whatever its degree, is not sufficient in itself to make the search for such protection improper or the exercise of the resulting treaty rights abusive. In particular, there is no good reason to think that in those circumstances the investor has *necessarily* acted in bad faith or, in other words, that foreseeability implies either bad faith *per se* or a presumption to that effect. On the contrary, the good or bad faith of the investor must be determined not by applying a one-size-fits-all foreseeability rule, but by individually examining the good or bad faith of the investor in light of *all* the circumstances of the case.

IV. CONCLUSIONS

The international doctrine of abuse of rights has always played a controversial and uncertain role in inter-state disputes, and both the Permanent Court of International Justice and the International Court of Justice have handled it with great care, ambivalence, and restraint. Since the turn of the XXI century, however, arbitral tribunals presiding over investment disputes have enthusiastically and uncritically embraced the doctrine, with little or no debate or dissent.

The international version of the doctrine was first conceived as a means of restricting the rights of states. Yet, thus far in the jurisprudence of investment disputes, the doctrine has been applied almost exclusively to restrict the rights of investors. This may or may not be an accident. The doctrine of abuse of rights took hold in investment disputes more or less contemporaneously with the emergence of a new school of thought which held, rightly or wrongly, that the international protection of the rights of investors had gone too far and those rights had to be curtailed. Historians will judge whether the simultaneous occurrence of these events was a mere coincidence or the doctrine of abuse of rights was consciously adopted and used as a tool to restrict the rights

of investors, putting off the question of applying it also to the rights of states. In any case, it seems clear that, from the standpoint of the proponents of an international doctrine of abuse of rights, applying it to the rights of investors amounted to picking a low-hanging fruit, in a setting in which the respondent states had a short-term incentive to cheer or at least to acquiesce.

Tribunals presiding over investment disputes have not always applied the doctrine of abuse of rights consistently or in accord with the elements or internal logic of the doctrine. They have sometimes applied it, incongruously, to the «abuse» of inexistent rights, or as a substitute for other, more specific, rules of decision, or as a threshold matter, preventing the examination of any specific rules that might apply. Whenever the doctrine is applied in substitution for an applicable special rule, especially one contained in a treaty, the criterion of abuse, which cannot be but general, will displace the specific arrangements made by the authors of the special rule. Just as bad money drives out good money, a general criterion of abuse, which necessarily involves a good deal of arbitral discretion, can end up swallowing special rules reflecting carefully constructed policy compromises. To allow the doctrine of abuse of rights to become a tool of first resort amounts to throwing by the board Lauterpacht's admonition that the doctrine should be wielded with studied restraint.

The criterion of abuse is another element of the doctrine of abuse of rights which arbitral tribunals have not always approached in a manner consistent with the purpose and logic of the doctrine. The point of a doctrine of abuse of rights, as originally conceived, is to restrict (or to allow adjudicators to restrict) a generality of rights on the basis of a general criterion of «abuse». While some decisions articulated a general criterion, usually that of bad faith, not all of them attempted to apply that criterion to the circumstances of the case, in the sense of *demonstrating* (as distinguished from postulating) that the criterion was satisfied in those circumstances. On the contrary, most decisions have relied on similarities between the facts of the case and fact patterns that earlier decisions had found to be «abusive», whether or not those earlier decisions had correctly applied an appropriate criterion of abuse or even mentioned it. As a result, the application of a general criterion of abuse is gradually being replaced by the application of more specific arbitrator-made rules based on repeated fact patterns, in the style of common-law adjudication. The advocates of a pure doctrine of abuse of rights may have reason to view this development with alarm; the opponents of the doctrine with a measure of relief; and those of us who are wary of arbitrators inventing general rules, as one more ground for concern.

The future of the doctrine of abuse of rights in investment disputes is uncertain. The trend towards paying lip service to the doctrine while applying specific arbitrator-made rules on the basis of a similarity of fact-patterns may

well continue. Yet, sooner or later the internal logic of the doctrine will require, as a few decisions have acknowledged, that it be applied to the rights of states, including rights to raise particular objections to a tribunal's jurisdiction and rights concerning the merits of a dispute, such as the right to tax, the right to regulate, or the right to make non-discriminatory distinctions. Then, respondent states and their advocates might well develop second thoughts about the wisdom of the doctrine and force a re-examination of the bases on which it has been accepted.

Whenever the doctrine of abuse of rights is re-examined, it is to be hoped that scholars, arbitrators, and advocates will heed the critics, and rethink the issues from a fresh, rigourous, long-term perspective. To paraphrase Schwarzenberger, sweeping doctrines enhance the *elegantiae juris gentium*, but a dose of analytical rigour and cool-headed restraint may produce better results[310].

310. Schwarzenberger, op. cit., supra n. 80, at p. 165 («Sweeping doctrines enhance the elegantiae juris gentium. A dose of Palmerstonian realism, however, appears to produce better results»).