Abuse of Rights in International Investment Arbitration

Introduction

Compared to national legal systems, international law is relatively primitive. It is only now that some of the issues heavily debated in national legal systems years ago start entering the international legal discourse. One of these issues is the existence of, and the need for, the prohibition of abuse of rights in international (investment) law. In this context, Jan Paulsson recently argued that the prohibition of abuse of rights "*does not merit recognition as an autonomous category of breach of international law*" [Jan Paulsson, *The Unruly Notion of Abuse of Rights* (CUP 2020) ("**Paulsson**") xiii]. This essay will cautiously suggest the contrary: the prohibition of abuse of rights should be given a chance and should not be disposed of too early.

I. The concept of abuse of rights distinguished from the adjacent concepts

Before addressing the concept (and prohibition) of abuse of rights, it is crucial to delimit the scope of this concept. For instance, one of the concepts adjacent to abuse of rights is abuse of process. While these two concepts stem from the same urge to oppose abusive conduct, they are not identical in their application and effect.

Historically, international investment tribunals referred to these concepts interchangeably, primarily in the context of disputes regarding the claims' admissibility. Tribunals relied on these concepts in the two main scenarios. *First*, they invoked these concepts where the

investor's corporate restructuring was alleged to had been effected for the sole purpose of gaining access to investment treaty arbitration where the dispute with the state had allegedly been reasonably foreseeable [See e.g. *Philipp Morris v Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, paras. 535-584]. *Second*, they utilized the same concepts where multiple entities within the investor's corporate structure had initiated parallel treaty-based (and sometimes also contract-based) arbitrations arising from the same set of facts [See e.g. *Orascom v Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, paras. 539-548].

However, in 2018, the ICJ made "*a distinction*" between abuse of rights and abuse of process and specified that their consequences "*may be different*" [*Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 292 ("**Immunities and Criminal Proceedings**"), para. 146]. The ICJ held that "[a]*n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of* [the] *proceedings*" [*Id*., para. 150]. According to the ICJ, it could "*reject a claim based on a valid title of jurisdiction on the ground of abuse of process*" (i.e. find the claim inadmissible) whereas an abuse of rights was a matter for the merits stage [*Id*., paras. 150-151].

It turns out that, in the world pre-*Immunities and Criminal Proceedings*, international investment tribunals' holdings on the allegations of abusive corporate restructurings and multiple parallel claims were consistent with what the ICJ later named abuse of process. In the world post-*Immunities and Criminal Proceedings*, some international investment

tribunals, in dealing with allegations of abusive corporate restructurings, also based themselves on the ICJ's definition of abuse of process (as opposed to abuse of rights) and cited it with approval [*Gramercy v Peru* (UNCITRAL) Final Award, 6 December 2022, para. 361].

Consequently, this essay will not address the concept (and prohibition) of abuse of process and its application to abusive corporate restructurings and multiple parallel claims on which the law may now be considered relatively well settled. It will deal exclusively with the seemingly more challenging concept (and prohibition) of abuse of rights applicable in the substantive dimension.

II. The prohibition of abuse of rights in general international law: rights under international law may, in principle, be abused

International investment law forms part of international law. Before addressing the prohibition of abuse of rights in international investment law, it is essential to establish that this prohibition exists and serves some useful purpose in general international law. This is particularly so given that, in *Immunities and Criminal Proceedings*, the ICJ held that France still had to establish "*the law*" on which it sought to rely (i.e. it was not apparent for the ICJ that international law prohibits abuse of rights) [*Immunities and Criminal Proceedings*, para. 151]. This section will therefore seek to establish that general international law prohibits abuse of rights and therefore assumes that rights under international law may, in principle, be abused.

The well-known sources of international law referred to in Article 38 of the Statute of the ICJ are: (1) treaties; (2) custom; (3) general principles of law; and (4) judicial decisions and doctrine as subsidiary means for the determination of rules of law. The prohibition of abuse of rights, being the corollary of the obligation to act in good faith, derives from many, if not all, of these sources.

As regards treaties, Article 26 of the Vienna Convention on the Law of Treaties ("**VCLT**") obliges the states to perform treaties in good faith. As regards custom, the VCLT is often itself considered to reflect custom, if not in its entirety, then at least in Article 26 relevant for the purposes of this essay [*The Rainbow Warrior (New Zealand/France)* (1990) XX RIAA 217, para. 75]. As regards general principles of law, tribunals found the principle of good faith to be a general principle of law as well [*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998 (WT/DS58/AB/R) ("**US-Shrimp**") para. 158]. The ICJ summarized that "*the principle of good faith is a well-established principle of international law*" [*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) [1998] ICJ Rep 275, para. 38].

The prohibition of abuse of rights is the corollary of the obligation to act in good faith. In *US-Shrimp*, the Appellate Body of the WTO reasoned that "[o]*ne application of* [the] *principle* [of good faith], *the application widely known as the* abus de droit*, prohibits the abusive exercise of a state's rights*" [US-Shrimp, para. 158]. Basing itself on the same premise, Article 300 of the United Nations Convention on the Law of the Sea ("**UNCLOS**") provides that the states-parties to it "*shall fulfil in good faith the obligations assumed under*

[the UNCLOS] *and shall exercise the rights, jurisdiction and freedoms recognized in* [the UNCLOS] *in a manner which would not constitute an abuse of right*".

The other important takeaway from Article 300 of the UNCLOS is that it evidences that states are generally of the view that treaty rights may, in principle, be abused.

International law knows examples of how this can be the case. In the *Tacna-Arica Question*, the sole arbitrator found that Chile abused the temporary rights it had to the provinces of Tacna and Arica under the Treaty of Ancón when it used its conscription laws "*not so much for the obtaining of recruits … but with the result, if not the purpose, of driving young Peruvians from the provinces*" (although it did not affect the sole arbitrator's ultimate conclusion that the Treaty of Ancón remained in effect and the plebiscite in these provinces still had to be held) [*The Tacna-Arica Question (Chile/Peru)* (1925) II RIAA 921, 941].

This having been established, the question remains how and by whom rights may be abused in the specific context of international investment law and whether this is (and needs to be) prohibited.

III. The prohibition of abuse of rights in international investment law

International investment tribunals have similarly held that "*the notion of abuse of right is a generally accepted principle of general international law*" including "*in its substantive aspect*" [*Okuashvili v Georgia* (SCC Case V 2019/058) Partial Final Award on Jurisdiction and Admissibility, 31 August 2022, para. 272]. However, as an analytical matter, the

establishment of abuse of a right is predicated upon "*the establishment of the right in question*" [*Immunities and Criminal Proceedings*, para. 151].

In the investor-state dichotomy, states do not have many rights. Under international investment treaties, they primarily owe obligations to accord investors and/or their investments some standard of treatment. However, the right to regulate is one of the rights that states maintain to a certain degree, notwithstanding international investment treaties, as a matter of customary international law or these treaties themselves [See e.g. Article 12 of the Norway Model BIT 2015].

Like any right, the right to regulate is capable of being abused. It is for this reason that tribunals have held that "[s]*tates cannot be held liable for economic losses to investors caused by the enactment of* **bona fide** *laws or regulations of general application in the exercise of legitimate regulatory powers*" [*WCV v Czech Republic* (UNCITRAL) Final Award, 26 July 2023, para. 262]. The prohibition of abuse of rights therefore serves as the outer limit to the states' right to regulate.

The question whether investors have rights under international investment treaties is more nuanced. Obviously, states owe obligations to each other under these treaties, and investors benefit from the states' compliance with these obligations. However, the issue whether investors can be considered as holding substantive rights *vis-à-vis* states in their own names under these treaties is not particularly well settled. Some tribunals considered that investors cannot [*ADM v Mexico* (ICSID Case No ARB(AF)/04/05) Award, 21 November 2007,

paras. 168-180]. Others later considered that investors can [*Cargill v Mexico* (ICSID Case No ARB(AF)/05/02) Award, 18 September 2009, paras. 423-428].

Assuming investors hold substantive rights under international investment treaties in their own names, it is easy to see how they can abuse these rights. In one of his articles, the late Emmanuel Gaillard referred to a scenario where an investor would invoke investment treaty standards, e.g. by way of provisional measures, only "*to block on-going investigations against* [him] *by a host* [s]*tate*" (although attributing this scenario to abuse of process, having no benefit of reading *Immunities and Criminal Proceedings* rendered after the article's publication) [Emmanuel Gaillard, Abuse of Process in International Arbitration (2017) 32(1) ICSID Review 17, 26-27]. By way of another example, consider investments which were made legally but which, as time went by, started being used as *façades* for committing illegal activities (e.g. money laundering and terrorism financing) under cover of activated investment treaty protection [See e.g. *Bank Melli Iran and Bank Saderat Iran v Bahrain* (UNCITRAL) Final Award, 9 November 2021, para. 356]. In such extreme cases, if a dispute were to arise and an investor were to invoke investment treaty protection, the prohibition of abuse of rights could help curb the investor's conduct.

The main argument against the prohibition of abuse of rights seems to be that it is too vague and dangerous because the scope of its application is uncertain [Paulsson, 131-134]. This argument is not new to civilian lawyers. In civilian legal systems, vagueness of the prohibition of abuse of rights is intentional and traditionally considered a feature rather than a bug. It serves as a "catch-all" provision reserved for rare cases where other rules of law are

insufficient to sanction the conduct at hand. This is particularly useful in international law which, because of the states' inertia, otherwise develops very slowly. For the same reason, it would be very difficult and impractical, if not impossible, for the states "*to carefully set out*" [*Id*., 132] all contextually meaningful limitations on all international rights susceptible to abuse at once and ahead of time in all possible contexts.

For these reasons, not only the prohibition of abuse of rights merits recognition in international (investment) law but it is already recognized (e.g. as the outer limit to the states' right to regulate), and derecognizing it will not achieve much.

IV. Conclusion

It is often said that arbitration is only as good as the arbitrator. The prohibition of abuse of rights would not bring international (investment) law to any catastrophe (just like it did not bring civilian legal systems to it) provided that tribunals remain cautious towards this prohibition and subject it "*to a high threshold*" [See e.g. *Renco v Peru* (UNCITRAL) Partial Award on Jurisdiction, 15 July 2016, para. 177]. Of this they are already mindful.