Abuse of Rights in International Investment Arbitration

Part I: Introduction

In 2020, an ICSID annulment committee quashed Egyptian billionaire Naguib Sawiris's attempt to revive a $4B claim against Algeria, affirming the *Orascom v Algeria* decision that the original claim, as an "*abuse of rights,*" was barred by inadmissibility. The *Orascom* Tribunal's reasoning mirrored a longstanding tenet of civil law: *le droit cesse où l'abus commence,* or that a right ends where abuse begins. In fact, despite not being articulated in such precise terms, the doctrine has functional equivalents across mixed and common law systems, including reasonableness, abuse of process, or simply, 'good faith.' In recent times, it has increasingly been pressed into service in a transnational domain of law – international investment arbitration ("**IIA**").

The reality of IIA is that the parties are not equally positioned, as individual investors must bring and pursue claims against sovereign states. IIA itself came into existence so that these investors could sue the states directly, instead of having to petition their home states to take up the claim on their behalf. It is worth pointing out that this inter-state intervention often manifested in hostile ways - sometimes even *via* 'gunboat diplomacy.'

This history is what makes the modern-day phenomenon of the 'abuse of rights' ("**AoR**") in IIA especially regressive and alarming. Despite the universal obligation to arbitrate fairly, and in good faith, disputants have frequently used antagonistic tactics under the pretence of invoking their legal rights. For example, it is undeniable that any sovereign state has the right to initiate and continue criminal proceedings within the contours of its domestic law; however, in a slew of cases (*Teinver v. Argentine*, *Quilborax v. Bolivia, Libananco v. Turkey*), Claimants complained of the Respondent State weaponizing these proceedings to harass or intimidate them.

In situations like this one, what should a tribunal do? After all, AoR presupposes that there exists a legal right, as well as some way of operationalizing it that is inherently ill-intentioned. It is understandable why tribunals have been reluctant to sanction the exercise of an entitlement by any party, even when it is seemingly done to vex another. Yet, promisingly, decisions like *Orascom* reveal a growing understanding that such excesses may be curtailed by having reference to the principle of AoR.

This paper traces the evolution of this understanding. **Part II** examines IIA jurisprudence *vis-à-vis* how tribunals have used or supplemented their reasoning with the AoR principle. **Part III** considers and responds to criticisms of the doctrine. **Part IV** endorses a twofold paradigm to regularize its application across IIA. **Part V** offers concluding remarks.

Part II: Jurisprudential Analysis

Generally, AoR is understood to comprise three elements: (i) the existence of a legal right; (ii) its exercise in 'bad faith,' or through sustained deception; and (iii) an underlying intent to annoy, harm, or injure another. A number of acts and omissions may be situated under a definition as wide-ranging as this one, of which tribunals have had predictably varied interpretations. In other words, there is not much uniformity in the way the principle has been identified and applied in IIA.

By way of example, tribunals have frequently cited the doctrine to nullify corporate 'nationality planning' and other forms of structural manoeuvring when they are carried out after investor-

state tensions arise. This is interesting because such claims are usually already barred by non-retroactivity, the applicable definition of investor/investment, and/or a 'denial of benefits' clause. Even so, perhaps intuitively recognizing the unfairness, in addition to the illegality, of allowing a claimant to fabricate jurisdiction, tribunals have invoked AoR to bar the claim. A number of cases have been decided on the strength of this principle, starting with *Phoenix v Czechia* (2009), and continuing in decisions like *Europe Cement v Turkey* (2009), *Hamester v Ghana* (2010), and *Tidewater v Venezuela* (2010).

On the other hand, responses to other abuses of rights have been less consistent and clear-cut. A particularly egregious example is the initiation and continuance of parallel proceedings. Prior jurisprudence demonstrates that tribunals tended to admit claims even when they were concurrently being heard by another forum. The most prominent instance is the *Lauder/CME* saga, wherein two nearly identical claims, arising out of the same dispute and against the same Respondent, were allowed to continue and result in (conflicting) awards. More significantly, the *Lauder/CME* Tribunals explicitly rejected the application of the AoR principle, a sentiment that was largely echoed in IIA in the years that followed. The *Orascom* decision thus represented a surprising shift insofar it was willing to look at the 'larger picture' and bar a duplicative claim on the express basis of Claimant's abusive conduct. However, relative to the long line of contrary prior awards, this legal position remains infirm within IIA.

Indeed, examining the other awards as well as the manner in which tribunals have invoked the AoR doctrine yields more questions than answers. In the above-discussed examples, the offending party was proactively doing something that could constitute abuse - changing its structure, or bringing multiple claims. But can AoR be a basis for the tribunal to take action – for example, to pierce the corporate veil? Implausible though this may seem, the doctrine has been discussed in a handful of awards (*Saluka, Tokios Tokéles, KT Asia)* as a means to extend liability to third persons, often as a supplement to more 'classical' contractual reasoning (such

as 'apparent authority', the third-party beneficiary doctrine, promise & estoppel, etc.) Simply put, tribunals have somewhat heterogeneously applied the doctrine to a variety of factual matrices, deriving the principle from, per *Libananco,* "*…the inherent powers required to preserve the integrity of* [their] *own process*."

Part III: Developing a Uniform Principle

Notwithstanding its non-uniformity, what this survey of IIA jurisprudence reveals is that the <u>substance</u> of the principle has usually found favour with decisionmakers. Conversely, cases where a tribunal's overly-formalistic approach permitted an abuse have been duly criticized, and may even have propelled subsequent tribunals to distinguish their own reasoning, and couch the same in overt AoR language. The best example once again is *Orascom,* where the Tribunal, disregarding the *CME/Lauder* decisions because they had "*attracted wide criticism*," said of the AoR principle,

> "…[it] *has allowed tribunals to apply investment treaties… as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties*."

The Tribunal could thus decline jurisdiction, creating an influential precedent reflected in the decision of the annulment committee, as well as *obiter* discussions by subsequent awards, such as *Eskosol v. Italy*.

However, as use of the doctrine proliferates within IIA, it is correspondingly subject to increased scepticism and scrutiny. Notably, Jan Paulsson in *The Unruly Notion of Abuse of Rights* extensively argues that the principle has no place in IIA, with the thrust of his argument being:

(i) most cases that attract the application of the principle are already covered by other, more concrete rules; and

(ii) the remainder of the cases ought not to be decided with reference to the principle, as it is not an acceptable 'rule of decision' in IIA, and only introduces personal bias and unpredictability into the system.

Before proceeding with a response to this position, it is fair to say that it summarizes and represents the bulk of the criticism directed towards the doctrine.

With respect to the first point (i.e., that other, more well-defined rules supplant the application of the doctrine), Paulsson and others miss a crucial fact: the doctrine, or atleast the notion embodied by it, is itself the starting point for many of these rules. As a 2011 ICC Award opined, "*The rules of good faith and the prohibition against abuse of right are the two sides of the same coin*"; similarly, IIA tribunals have located within the doctrine well-established concepts like abuse of process (*Phillip Morris*), fraud (*Devas*), misuse of corporate personality (*OIEG*), arbitrariness/non-transparency (*Champion Trading*), and so on.

This corroborates the second point: it is unfair, even absurd to dismiss the AoR principle as having no place in international law, including in the subdomain of IIA. A plethora of factors may be cited in support of this position: the ubiquity of the principle across legal systems, its status as a 'general principle of international law' before other fora (including the ICJ, WTO, and PCA), the inherent unfairness of permitting bad-faith conduct because it can be 'technically' justified within the legal paradigm, and the practical consequences of unchecked abusive conduct for the arbitral system overall – all of which (and more) have been comprehensively discussed in seminal awards like *Mobil* and *Phoenix.* These represent a vocal segment of tribunals that have insisted on the application of AoR in IIA, locating it, as *Mobil* stated, "*…within the object and purpose of the ICSID Convention …to preserve its integrity*."

Part IV: Regularizing Application

In a way, the goals of both sides are broadly aligned. Well-meaning tribunals have tried to ensure that the treaty provisions are not used for illegitimate purposes, and when the impugned conduct does not pass the 'smell test,' they have improvised, sometimes in insufficiently reasoned ways - which Paulsson criticizes as the "*muddled thinking and sloppy drafting*" surrounding the application of the doctrine. Preserving the integrity of IIA thus depends on carefully balancing the conflicting considerations of fairness and predictability.

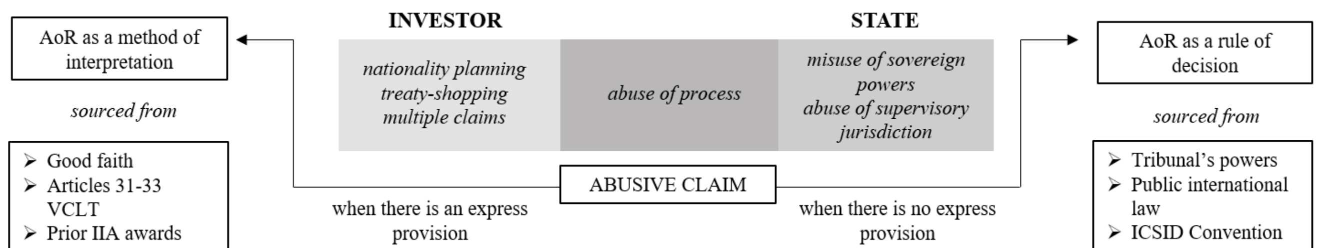
This paper proposes the following paradigm: *first,* AoR should be understood as the use of a legal right for a purpose other than its intended purpose, to the injury of another party. *Second*, AoR should be deployed: (i) as a rule of interpretation when there is a formal substantive or legal rule to which recourse may be had; and (ii) a rule of decision, when no such rule exists.

(i) An idea endorsed by scholars like Birnie, Boyle, and Cheng, using AoR as a rule of interpretation can permit tribunals to situate their decisions within the four corners of the treaty while still taking into account essential values like fairness and good-faith. This can significantly minimize the criticisms of AoR having no textual basis, as well as the dangers of over-expanding AoR jurisprudence.

Consider an example: in the past, a number of tribunals (*ADC, Tokios Tokelés, Saluka, Rompetrol*) have refused to dismiss claims on the basis of fraudulent corporate nationality, citing the absence of any express indication in the relevant provision. However, such a positivist approach excludes a number of important considerations – for instance, many currently extant treaties were drafted before there was a widespread consciousness of 'denial of benefits' clauses. But - borrowing the phrasing used in *Yukos* - when a party's conduct "…[does] *not objectively deserve any protection,*" should even abusive averments be entertained? Or, relying on AoR as an interpretive canon, should phrases like "*substantial interest*" (1982 Panama-US BIT), "*direct and*

indirect control" (1994 Peru-China BIT), or "*real economic activities*" (2001 Austria-Iran BIT) be given a contemporary understanding – one that restrains treaty-shopping?

(ii) Further, in the absence of an express provision, AoR can be used a standalone rule, i.e., the *Mobil* approach should be retained, albeit subject to a higher threshold of scrutiny. Though arbitration is a 'creature of consent,' it is not free of value considerations, and IIA, supported by a sophisticated edifice of treaties, conventions, and national laws, has a reciprocal obligation to consider universal standards, even if they are not expressly applicable to the dispute. When a party's conduct is so unconscionably abusive that it cannot be legitimated, AoR can bar the claim or any part thereof – an approach already endorsed by awards like *Chevron* and *Phillip Morris.*



Part V: Conclusion

In 2017, Professor Gaillard pointed to the sharp proliferation of "*procedural tactics designed to undermine and prejudice* [parties'] *opponents and to increase the chances that their claims prevail;*" in other words, the normalization of abusive conduct as a litigation strategy. Today, these strategies are perhaps even more widespread, and seriously threaten the status of IIA as a legitimate method of settling investor-state disputes. To this end, this paper endorses the application of AoR as an interpretive technique – and in serious, exceptional cases, as a peremptory norm.