

Abuse of Rights in International Investment Arbitration

1. Introduction

It is well understood that the doctrine of abuse of rights prevents parties from exploiting legal rights in ways that undermine their intended purpose, ensuring that arbitration remains a fair and genuine forum for dispute resolution. Since much has been written on theory and cross-jurisdictional understanding of the doctrine, this essay will explore modernising preventive measures that can address abusive practices highlighted herein. By examining these elements critically, the aim is to propose innovative solutions to curb the misuse of investment protections, without violating such rights, while also maintaining the arbitration process's fairness and efficiency.

2. Contextualising Abusive Practices

The doctrine of abuse of rights, while rooted in civil law traditions, has been integrated into both public and private international law perspectives. In international investment law, bilateral investment treaties (BITs) and multilateral agreements often implicitly embody the principle of abuse of rights in the form of protections like fair and equitable treatment and protection from expropriation but are also interpreted to prevent investors from exploiting these protections in bad faith. The interpretation and application of these principles can be contentious, reflecting differing views on the balance between investor protection and State sovereignty. Abuse of rights in investment arbitration has the capacity to be further detrimental as abusive practices open the door to unjust enrichment by essentially, defrauding developing States which can create a deep distrust in foreign investors and may further, lead to restrictive investment regimes.

In international arbitration, this principle ensures that arbitration is not misused for purposes such as harassment, undue delay, or obtaining unjust advantages. Arbitral tribunals often refer to general principles of law, including the abuse of rights in interpreting treaty provisions and procedural rules, ensuring that the arbitration process remains fair and just. However, the application of these principles is not straightforward and can vary significantly between cases, leading to unpredictability, especially in light of the manifestations of abuse of rights discussed here.

First, corporate restructuring to bring claims involves companies altering their structure to fall under the protection of favourable BITs or more favourable provisions under BITs. In *Phoenix Action Ltd v. Czech Republic*, the tribunal found that Phoenix's restructuring was an abuse of rights as it was done solely to gain jurisdiction under the BIT without any substantive investment purpose as Phoenix bought shares in two Czech companies during a time of financial distress and almost immediately initiated arbitration, which the tribunal found to be a clear abuse. Whereas, in *Mobil Corporation v. Venezuela*, the tribunal scrutinized the claimant's restructuring of its investments to gain access to more favourable BIT provisions, ultimately dismissing part of the claims as an abuse of rights.

Second, treaty or forum shopping involves selecting BITs with advantageous terms for bringing claims. In *Pac Rim Cayman LLC v. Republic of El Salvador*, Pac Rim transferred its incorporation from the Cayman Islands to United States to benefit from the CAFTA treaty. The tribunal dismissed the claims on jurisdictional grounds, recognizing the move as strategic rather than genuine, reflecting an abuse of rights.

Third, frivolous and vexatious claims are brought with no genuine legal basis, intending to harass the respondent or delay proceedings. In *ST-AD GmbH v. Bulgaria*, the tribunal

rejected the investor's claims as frivolous and abusive, emphasizing the lack of substantial investment and the dubious motivations behind the claims.

Fourth, parallel proceedings involve bringing the same or similar claims in multiple forums to increase pressure on the respondent State. This tactic can create procedural challenges and lead to inconsistent rulings as illustrated by *Orascom TMT Investments v. Algeria* wherein the investor initiated multiple arbitrations against Algeria in different forums, which the tribunal found to be indicative of an abuse of process.

3. Modernising the Approach to Identifying and Addressing Abusive Practices

Addressing abuse of rights in investment arbitration involves several challenges, particularly in identifying and proving abuse, balancing legal rights and abuse prevention, and managing divergent standards and interpretations. By understanding the manifestations of abuse and implementing robust preventive measures, States and the arbitration community can strike a balance between protecting investors' rights and preserving the integrity of the arbitration process, while deterring and penalizing abusive practices. To mitigate abuse, a multi-faceted approach is essential and involves not only refining legal frameworks and procedural rules but also fostering a culture of responsibility as discussed below.

A. Technology and Data Analytics

Predictive Analytics: Predictive analytics uses data analysis techniques to identify patterns and predict outcomes. In arbitration, this technology can help detect abusive practices by analysing historical data and identifying red flags indicative of potential abuse, such as frequent treaty shopping or a high number of frivolous claims by specific investors. For instance, The Arbitrator Intelligence project collects and analyses data on

arbitrators' decisions and conduct. This data-driven approach provides insights into arbitrators' performance and tendencies, helping parties select impartial arbitrators and promoting accountability. Such transparency can deter abusive practices by making it harder for parties to exploit arbitrator biases or procedural weaknesses.

Blockchain Technology: Blockchain offers a decentralized and immutable ledger for recording and tracking investment agreements and arbitration proceedings. This technology enhances transparency by providing a verifiable and tamper-proof record of transactions and procedural steps. First, blockchain technology ensures that all procedural steps and evidentiary submissions are recorded immutably, preventing parties from submitting altered or manipulated documents to their advantage, especially in parallel proceedings. Second, as regards the verification of claims, blockchain can help verify the legitimacy of claims by providing a clear and unalterable history of the investment and related transactions, thus detecting manipulative practices and ensuring the integrity of the proceedings.

Artificial Intelligence (AI) and Machine Learning (ML): AI and ML can analyse vast amounts of data to identify trends, predict case outcomes, and streamline administrative processes. These technologies can assist arbitrators in reviewing documents, assessing evidence, and identifying inconsistencies or patterns of abuse. For instance, the digital platform adopted by Singapore International Arbitration Centre – the Case Management System, utilizes AI to streamline case administration and provide real-time updates. This technology-driven approach improves efficiency and transparency, allowing arbitrators to focus on substantive issues and reducing the potential for procedural abuses.

In order to realise the above applications, enhancements are necessary. First, data-driven decision making can utilise data analytics to create empirical benchmarks for arbitration decisions and can enhance consistency and objectivity, thereby, discouraging parties from engaging in abusive practices. Second, there is a need for equitable access to technology in order to ensure that all parties have access to advanced technological tools to prevent disparities and reduce the risk of one party exploiting technological advantages to the detriment of fair proceedings.

B. Third-Party Funding and Transparency

In investment arbitration, third-party funding introduces complexities around the potential for abuse of rights. Funders might encourage claimants to pursue aggressive or speculative claims, increasing the risk of frivolous or vexatious litigation. To mitigate these risks, enhancing transparency through mandatory disclosure requirements is crucial. The tribunal's decision in *Philip Morris v. Australia* illustrates the significance herein as the tribunal scrutinized the claimant's restructuring and funding arrangements, ultimately dismissing the claim as an abuse of rights. In the underlying transaction, Philip Morris Asia had acquired shares in Philip Morris Australia only after the Australian government announced its intention to introduce the plain packaging laws. The tribunal found that Philip Morris Asia's restructuring was a strategic move to gain jurisdiction under the BIT, constituting an abuse of rights. This underscores the importance of transparency in third-party funding to ensure claims are pursued in good faith and not as strategic legal manoeuvres.

In this regard, the ICSID Arbitration Rules, 2022 and the UNCITRAL Transparency Rules promote openness in arbitration proceedings and require disclosure of funding

arrangements aligns with the broader goal of transparency, enabling better detection of potential abuses. This transparency allows arbitrators to scrutinize the motivations behind claims and assess any potential influence funders might exert, thus helping to identify and prevent abusive claims. By knowing the funder's identity and the nature of the funding agreement, tribunals can better assess whether a claim is being pursued genuinely or for speculative purposes.

The enhancements required for this measure include first, establishing uniform disclosure standards across major arbitration institutions to standardize practices and ensure consistent scrutiny of third-party funding arrangements, and second, developing comprehensive ethical guidelines for funders to mitigate the risk of funders encouraging abusive claims, as proposed by bodies like the International Bar Association.

Enhancing transparency through mandatory disclosure of third-party funding and leveraging advanced technologies can significantly mitigate the practice of abuse of rights but also ensure that genuine claims are pursued, maintaining the arbitration process as a credible and effective forum for resolving investment disputes.

C. Strengthening Treaty Language

Treaty language can be strengthened to clearly define what constitutes abuse of rights and outline the consequences for such abuses. By carefully drafting and revising investment treaties, states can create clear, precise, and balanced legal frameworks that deter abusive practices while protecting legitimate investments.

First, investment treaties often include broad definitions of "investor" and "investment" which can be exploited by claimants to extend protections beyond the treaty's original intent. Adding qualifying elements to these definitions can help prevent abuse. For

instance, restricting the definition to exclude shell companies or entities with minimal economic activity in the host State can prevent treaty shopping and ensure only genuine investors receive protection. Further, clarifying what constitutes a protected investment, including specific criteria such as duration, economic impact, and contribution to development, can limit the scope for frivolous claims.

Second, establishing clear temporal and substantive thresholds for claims can prevent investors from abusing the arbitration process. Imposing time limits on when claims can be brought ensures that disputes are addressed promptly and prevents stale claims. Many treaties include a “cooling-off period” requiring investors to negotiate with the host state for a specified period before initiating arbitration. This encourages amicable settlement and reduces premature claims. In addition, requiring investors to exhaust local remedies or demonstrate that local remedies are ineffective can filter out unmeritorious claims. For example, the India Model BIT (2016) mandates the exhaustion of local remedies for a period of at least five years before arbitration can be initiated, unless the remedies are evidently futile.

Third, including procedural mechanisms to address abuse of process directly, such as empowering tribunals to award costs against parties that bring abusive claims can help tribunals identify and sanction abusive behaviour. ICSID had applied this in its Arbitration Rules by allowing tribunals to allocate costs based on the conduct of the parties, including any evidence of bad faith or abuse of process.

However, strengthening treaty language must balance specificity with flexibility in a proportionate manner. Overly rigid definitions may limit tribunals’ ability to adapt to diverse circumstances, while vague definitions can lead to inconsistent interpretations.

Rules should be adaptable to the specific context of each case, ensuring that legitimate claims are not unjustly dismissed. Enhancements can safeguard procedural rights, ensuring they have a fair opportunity to present their case. This includes maintaining reasonable timelines for submissions and hearings and allowing sufficient scope for parties to argue the merits of their claims.

4. Conclusion

Abuse of rights in international investment arbitration is a multifaceted issue that demands a comprehensive and proactive approach. Emerging trends and innovative solutions, such as transparency in third-party funding, data analytics, and adapting treaty provisions, offer such proactive avenues for mitigating abuse. Moving forward, policymakers, arbitrators and stakeholders must collaborate to reform investment treaties, promote interface with technology and responsible investment practices. Through collective efforts, international investment arbitration can be bolstered for fair and effective dispute resolution, fostering trust and confidence among investors and States alike. In conclusion, while the challenge of preventing abuse of rights in investment arbitration is significant, it is not insurmountable. With a commitment to fairness and good faith, the international community can ensure that investment arbitration remains a vital and credible forum for resolving genuine disputes and promoting global economic cooperation.