Abuse of process

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A. Introduction

Abuse of process has become a commonplace allegation in proceedings before international courts and tribunals,[1] particularly in investment arbitration. Whereas the International Court of Justice (ICJ) has so far always rejected claims of abuse of process, they have proven to be successful in some investment cases. Before exploring the differences between Investor–State Dispute Settlement (ISDS) and ICJ cases, it is first necessary to explain what is meant by 'abuse of process' and to discuss its—still controversial—legal status. **1**

The notion of abuse of process can be regarded as a subcategory of the broader doctrine of abuse of rights (*abus de droit*) which refers to the unreasonable exercise of a right 'for an end different from that for which the right was created'[2] and to the injury of another subject.[3] The two pillars on which this doctrine is based (a formal entitlement, and an improper purpose) reflect its social ordering function including in the procedural context of abuse of process. As Kolb's commonly cited definition underscores, abuse of process consists of 'the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights are established'[4] and especially 'for a fraudulent, procrastinatory **2**

[1] For an overview of allegations of abuse of process in different interstate adjudicative mechanisms, see, AD Mitchell and T Malone, 'Abuse of Process in Inter-State Dispute Resolution' in H Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2018) (hereafter Mitchell and Malone).

[2] A Kiss, 'Abuse of Rights', Max Planck Encyclopedia of International Law (2006) para 1.

[3] See also more generally, M Lemey, *L'abus de Droit En Droit International Public* (LGDJ 2021) (hereafter Lemey).

[4] R Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 998 (hereafter Kolb).

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or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for purposes of pure propaganda'.[5]

3 Even though the ICJ considers that 'a distinction has been drawn between abuse of rights and abuse of process',[6] the expression 'abuse of process' has not been applied in a systemic and rigorous manner. It is thus not surprising that procedural abuses have been labelled, even in the same decision, as 'abuse of rights',[7] 'abuse of procedure',[8] '*détournement de procedure*',[9] or 'abuse of the international investment protection regime'.[10]

4 This lack of terminological rigour echoes to some extent the blurred and even controversial legal status of the abuse of rights doctrine. Leaving aside the scholarly debate as to its contested existence,[11] this doctrine is closely related to other fundamental principles of international law. This is clearly the case for the principle of good faith, but there is a debate as to whether the doctrine of abuse of rights just 'flows' from this principle[12] or is 'supplemental to the principle of good faith' in that 'it provides the threshold at which a lack of good faith gives rise to a violation of international law'.[13] Moreover, the principle of due process or the doctrine of estoppel could be invoked in circumstances that are similar to those potentially giving rise to an abuse of process.[14]

5 Leaving aside the legal nature and pedigree of the abuse of process doctrine, litigants in international dispute settlement mechanisms have raised abuse of process claims that have not been rejected as such by international courts and tribunals.[15] Thus, the question is no longer whether abuse of process can be regarded as a fully fledged and independent general principle,[16] but rather to determine what are its scope and effects, and to understand why the threshold for admitting an abuse also depends on the adjudicative mechanism concerned.[17] In that regard, an apparent difference exists between investment tribunals and other international courts and tribunals, the former having proven to be more inclined to accept abuse of process claims under certain conditions.

6 This entry first examines how the abuse of process doctrine has been applied in general international law (Section B) and then how it has been shaped in investment arbitration

[5] ibid 904.

[6] *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) (Preliminary Objections) [2018] ICJ Rep 292, 335, para 146 (hereafter ICJ, *Immunities and Criminal Proceedings*).

[7] *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 143 (hereafter *Phoenix*).

[8] ibid para 94.

[9] ibid para 143.

[10] ibid para 151. See also *Mobil Corporation, Venezuela Holdings, B.V., et al v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Jurisdiction, 10 June 2010, para 169 (hereafter *Mobil Corporation*).

[11] J Paulsson, *The Unruly Notion of Abuse of Rights* (CUP 2020).

[12] Mitchell and Malone (n 1) paras 7–8.

[13] M Byers, 'Abuse of Rights: An Old Principle, a New Age' (2002) 47 McGillLJ 389, 411 (hereafter Byers).

[14] Mitchell and Malone (n 1) paras 9–10.

[15] For an overview of cases in which the doctrine of abuse of process has been applied by courts and tribunals, see Sections B and C.

[16] M Forteau, 'General Principles of International Procedural Law' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2018) para 36 (pointing out that international courts and tribunals 'identified procedural "principles" without indicating that they constitute, as such, general principles of law in the strict meaning of the term').

[17] M Lemey, 'Incidental Proceedings before the International Court of Justice: The Fine Line between "Litigation Strategy" and "Abuse of Process"' (2021) 20 LPICT 5, 6 (hereafter Lemey).

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jurisprudence (Section C). It explains the divergences and the limited judicial dialogue between interstate courts and investment tribunals (Section D).

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B. Application in general international law

I. The applicability of the abuse of process doctrine

International courts and tribunals have no express power in their statutory instruments to remedy an abuse of process. The only explicit exceptions are the dispute settlement mechanisms envisaged by the United Nations Convention on the Law of the Sea (UNCLoS) and the European Court of Human Rights (ECtHR). UNCLoS provides that in the context of preliminary proceedings of specific disputes concerning the rights of coastal states, the Court or the tribunal 'shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded'.[18] Likewise, according to the European Convention on Human Rights (ECHR), the Court shall declare inadmissible any individual application if it considers that it constitutes an 'abuse of the right of individual application'.[19] While not referring explicitly to abuse of procedure, the World Trade Organization (WTO) Dispute Settlement Understanding (DSU) also includes a provision suggesting that the adjudicative system shall not be used for an end different from that for which the right was created when it states that 'all Members will engage in these procedures in good faith in an effort to resolve the dispute'.[20] **7**

The significance of these provisions should not, however, be overstated for two main reasons. **8**

First, international courts and tribunals have considered, even in the absence of any provision on the matter in their statutory instruments, that they had the power to remedy an abuse of process, either on the basis of a general principle or as part of their inherent powers.[21] The ICJ for instance recognized this power implicitly when it considered that the objection to admissibility must be rejected since the defendant's conduct 'does not amount to an abuse of process'[22] without giving, in that case, further details about the applicable standards governing the characterization of such abuse. **9**

Second, even when applying a specific provision explicitly referring to procedural abuse in UNCLoS or in the ECHR, international courts and tribunals have interpreted the idea of abuse of process in light of 'its ordinary sense according to general legal theory—namely, the harmful exercise of a right for purposes other than those for which it is designed'.[23] **10**

Allegations of abuse of process have significantly increased before the ICJ[24] over the last years. Various types of alleged abuses have been raised. For instance: initiating a claim too quickly under the optional clause,[25] using the Court with an artificial request as a means **11**

[18] UNCLOS, Article 294(1).
[19] ECHR, Article 35(3)(a).
[20] WTO DSU, Article 3(10).
[21] Mitchell and Malone (n 1) para 18; L Tattersall and A Khan, 'Taking Stock: Abuse of Process within the International Court of Justice' (2020) 19 LPICT 229, 230 (hereafter Tattersall and Khan). On the concept of inherent powers and how they are related to general principles of law, see C Brown, *A Common Law of International Adjudication* (OUP 2007) 67.
[22] *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Preliminary Objections) [1992] ICJ Rep 240, para 38.
[23] ECtHR, *Zhdanov and others v Russia*, No 12200/08, Judgment, 16 July 2019, para 79.
[24] Kolb (n 4) 998–99; Tattersall and Khan (n 21) 231–34.
[25] *Right of Passage over Indian Territory* (*Portugal v India*) (Preliminary Objections) [1957] ICJ Rep 125, paras 147–48.

of exerting political pressure,[26] or an undue request for provisional measures.[27] However, such claims have proven to be unsuccessful given the very high threshold for characterizing abuse.

II. Applicable standards governing abuse of process claims

12 It is only in recent decisions that the World Court has attempted—probably insufficiently—to make more explicit the standards governing claims of abuse of process. In *Immunities and Criminal Proceedings*, the ICJ clarified for the first time that 'a distinction has been drawn between abuse of rights and abuse of process'[28] to the extent that 'an abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings'.[29] While the issue of the burden of proof does not raise any particular difficulties (it lies with the party making the allegation),[30] the required standard of proof raises more specific concerns.

13 In *Immunities and Criminal Proceedings*, the Court considered that a claimant having established a valid title of jurisdiction should not be barred at the jurisdictional stage 'without clear evidence that its conduct could amount to an abuse of process'[31] and that 'it is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process'.[32] Unfortunately, the ICJ had confined itself to noting that 'such evidence has not been presented to the Court' and that it did not 'consider the present case to be one of those circumstances'.[33]

14 So far, the Court's guidance on the abuse of process doctrine 'lacks any real substance'.[34] The ICJ has refrained from specifying evidentiary standards, and many questions remain unanswered. It did not, for instance, indicate whether an abuse of process implies bad faith and how the parties'—predominant or not—motivations should be assessed when instituting proceedings.[35] Eventually, the lack of clarity in the ICJ's jurisprudence on the matter also leads parties to raise this objection more frequently, as could be witnessed over the past few years.[36]

15 No relevant and useful guidance can be found in the context of interstate disputes under UNCLoS. In the *South China Sea Arbitration* case, the arbitral tribunal only briefly stated that an abuse of process can be found 'in only the most blatant cases of abuse or harassment'.[37]

[26] *Border and Transborder Armed Actions* (*Nicaragua v Honduras*) (Jurisdiction and Admissibility) [1988] ICJ Rep 69, para 51.

[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Provisional Measures) [1993] ICJ Rep 325, para 19.

[28] *Immunities and Criminal Proceedings* (n 6) 292, 335, para 146

[29] ibid 336, para 150.

[30] With regard to the abuse of rights doctrine, the PCIJ considered that the 'misuse' of a right 'cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement'. See *Certain German Interests in Polish Upper Silesia* (Merits) (1926) PCIJ Series A, No 7, 30.

[31] *Immunities and Criminal Proceedings* (n 6) 292, 336, para 150.

[32] ibid.

[33] ibid.

[34] Tattersall and Khan (n 21) 240.

[35] Lemey (n 17) 23–24.

[36] ibid 10.

[37] The South China Sea Arbitration (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013-19, Jurisdiction and Admissibility, 29 October 2015, para 128.

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In other cases, the UNCLOS tribunals either rejected[38] or made no explicit determination[39] with regard to abuse of process allegations.

The ECtHR has considered that abuse of procedure is an 'exceptional procedural measure'[40]— **16** echoing to some extent the 'exceptional circumstances' standard in the jurisprudence of the ICJ. Such abuse occurred in several instances,[41] for example where the application is knowingly based on untrue facts,[42] where the applicant uses vexatious, insulting, threatening or provocative language,[43] or where the applicant had lodged a succession of ill-founded and querulous complaints, creating unnecessary work which was incompatible with the Court's real functions.[44]

Most of the allegations of abuses before the ECtHR concern what could be labelled as 'procedural misconducts' rather than abuses of a given adjudication mechanism.[45] They differ significantly in nature from those raised before the ICJ and other interstate courts and tribunals. The latter are mainly related to the use of incidental proceedings, the absence of a genuine link between the subject matter of a dispute and the scope of consent to the jurisdiction, the circumvention of specific jurisdictional requirements or situations of forum shopping or parallel proceedings.[46] The Strasbourg Court's jurisprudence is therefore of limited interest to shed light on the commonly accepted standards governing the abuse of process doctrine under general international law. However, investment arbitration has proven to be an interesting laboratory in which arbitral tribunals have had the occasion to refine the doctrine. **17**

C. Application in international investment law

I. Applicability and evidentiary standards

The major instruments governing investment arbitration proceedings do not make explicit **18** reference to the 'abuse of process' or 'abuse of rights' doctrines. This is the case for instance of the International Centre for Settlement of Investment Disputes (ICSID) Convention and its arbitration rules. The doctrine, whatever its label, has thus been applied in investment arbitration without any explicit textual basis, primarily as an expression of the general principle of good faith.[47]

[38] See, eg, *Southern Bluefin Tuna* (*New Zealand–Japan, Australia–Japan*), Jurisdiction and Admissibility, 4 August 2000, RIAA, Vol XXIII, 1, 46, para 65.

[39] See, eg, *Chagos Marine Protected Area Arbitration* (*Mauritius v United Kingdom*), PCA Case No 2011-03, Award, 18 March 2015, paras 198, 219–21.

[40] ECtHR, *Mirolubovs and others v Latvia*, No 798/05, Judgment, 15 September 2009, para 62 (available in French and Russian only).

[41] For an overview, see European Court of Human Rights, *Practical Guide on Admissibility Criteria* (Council of Europe 2022) 52–56.

[42] ECtHR, *Varbanov v Bulgaria*, No 31365/96, Judgment, 5 October 2000, para 36.

[43] ECtHR, *Zhdanov and others v Russia*, Nos 12200/08, 35949/11, and 58282/12, Judgment, 16 July 2019, para 80.

[44] ECtHR, *Petrovic v Serbia*, No 56551/11, Decision, 18 October 2011. See also ECtHR, *Zambrano v France*, No 41994/21, Decision, 21 September 2021, para 36–37.

[45] On this distinction, see H Ascensio, 'Abuse of Process in International Investment Arbitration' (2014) 13 ChinJIntL 763, 767 (hereafter Ascensio).

[46] Lemey (n 17) 11–21; Tattersall and Khan (n 21) 234–52.

[47] *Phoenix* (n 7) para 143; *Abaclat and Others v Argentina*, ICSID Case No ARB/07/5, Jurisdiction and Admissibility, 4 August 2011, para 646; *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Respondent's Jurisdictional Objections, 1 June 2012, para 2.47.

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19 The abuse of process objection has been mainly formulated in two different ways.[48] Initially, the doctrine has only been applied to determine the existence of a *bona fide* investor or a *bona fide* investment when assessing the jurisdiction *ratione personae* or *ratione materiae* of the arbitral tribunal pursuant to an investment treaty.[49] It is only subsequently that abuse of process has been treated autonomously 'as a distinct objection,[50] not in relation to the definition of an investment or of an investor.[51] Some tribunals have considered that in the context of an ICSID arbitration, rejecting an application solely on the basis of abuse of process would be a "proposition of a very far-reaching character" which would need "to be backed by some positive authority" in the Convention itself, in its negotiating history, or in the case-law under it.'[52] This is perhaps why in recent investment treaty practice, some states have decided to clarify this matter and have included in investment agreements 'abuse of process' as a ground for challenging the admissibility of investors' claims.[53] However, even though the normative basis of abuse of process has been debated,[54] that debate seems now closed in light of the recent decisions.[55]

20 The general evidentiary standards governing abuse of process allegations in investment arbitration do not differ from those of the ICJ decisions. Given the principle of good faith, 'a claimant is not required to prove that its claim is asserted in a non-abusive manner'.[56] A tribunal will not presume an abuse,[57] and therefore the burden of proof lies with the party making the allegation. With regard to the standard of proof, investment tribunals have underlined, even before the World Court in *Immunities and Criminal Proceedings*, that given the seriousness of the allegation, 'the threshold for a finding of abuse of process is high' and that the evidence of abuse will be affirmed only 'in very exceptional circumstances'.[58] An abuse of process does not imply bad faith.[59]

21 Allegations of abuse of process have been raised in investment arbitration for very different reasons, including procedural issues such as: non-payment of securities for costs;[60] frivolous claims and fraudulent conduct;[61] undue requests for disqualification of arbitrators:[62] for

[48] J Viñuales, 'Defence Arguments in Investment Arbitration' (2020) 18 ICSID Rep 42.

[49] Ascensio (n 45) 778.

[50] ibid 779.

[51] See, eg, Pac Rim, para 2.1.

[52] *The Rompetrol Group N.V. v Romania*, ICSID Case No ARB/06/3, Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para 115.

[53] See, eg, Slovakia–United Arab Emirates BIT (2016), art 17(2)(b) (underlining that the investor's claim shall be dismissed if the 'investment has been made through an abuse of process under the Host State's laws and Regulations'); EU–Vietnam Investment Protection Agreement (2019), art 3(27)(2) (referring to a 'conduct amounting to an abuse of process').

[54] JP Gaffney, '"Abuse of Process" in Investment Treaty Arbitration' (2010) 11 JWIT 515, 518.

[55] In this regard, see *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Annulment, 17 September 2020, paras 302–08.

[56] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (UNCITRAL) PCA Case No 34877, Interim Award, 1 December 2008, para 139.

[57] *Renée Rose Levy and Gremcitel S.A. v Republic of Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, para 186 (hereafter *Renée Rose Levy and Gremcitel*).

[58] *Renée Rose Levy and Gremcitel* (n 57) para 186. See also *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL) PCA Case No 2012-12, Jurisdiction and Admissibility, 17 December 2015, para 539 (hereafter *Philip Morris*).

[59] *Philip Morris* (n 58) para 539.

[60] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Jurisdiction and Liability, 28 April 2011, para 224.

[61] *Europe Cement Investment & Trade S.A. v Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award, 13 August 2009, para 180; *Cementownia 'Nowa Huta' S.A. v Republic of Turkey*, ICSID Case No ARB(AF)/06/2, Award, 17 September 2009, para 159.

[62] *AS PNB Banka and Others v Republic of Latvia*, ICSID Case No ARB/17/47, Decision on the Proposal to Disqualify Messrs James Spigelman, Peter Tomka, and John M Townsend, 16 June 2020, para 107.

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interim measures;[63] for the production of documents;[64] and regarding simultaneous applications for pursuing revision and annulment proceedings in parallel.[65] However, to better shed light on the substance of the doctrine, it is more relevant to focus the analysis on abuses of the investment arbitration system as a whole, and not just situations of procedural misconduct within the arbitral process.[66] In that regard, two types of issues have shaped the doctrine in investment arbitration, namely, first, cases of parallel proceedings and overlapping claims, and, second, cases of corporate restructuring and forum shopping.

II. Situations of parallel proceedings

22 With regard to parallel proceedings in the context of overlapping claims, *Orascom* is an interesting precedent. The respondent considered that the claim was inadmissible under the doctrine of abuse of process (labelled as 'abuse of rights' in this award) because the investor used his group of companies to introduce several parallel and overlapping arbitration proceedings against the same respondent State at different levels of the chain of companies. The tribunal considered that while 'structuring an investment through several layers of corporate entities in different states is not illegitimate' in itself, an investor who controls several entities in a chain of companies may nonetheless commit an abuse 'if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state'.[67] In the tribunal's view, this would entail the 'exercise of rights for purposes that are alien to those for which' investment treaties were established and allowing 'such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve'.[68]

23 In *Ampal*, the tribunal had to face a situation with four parallel arbitrations with essentially 'the same factual matrix, the same witnesses and many identical claims'.[69] It considered that the situation may look abusive but noted that only one claim was 'a double pursuit of the same claim in respect of the same interest'[70] and that other claims did not generate a situation of abuse of process since they concerned 'distinct tranches of the same investment'.[71] The development of parallel arbitrations arising out of the same factual matrix is not 'desirable' but it cannot as such be characterized as abusive, all the more when the respondent has declined claimants' offers to consolidate the proceedings.[72] As pointed out in *Orascom*, what matters is mainly to avoid 'claims involving the same economic damage be adjudged twice'.[73]

[63] *Sergei Viktorovich Pugachev v The Russian Federation* (UNCITRAL) Interim Award, 7 July 2017, para 107.
[64] *Aguas del Tunari v Republic of Bolivia*, ICSID Case No ARB/02/3, Procedural Order No 1, para 14.
[65] *Dan Cake (Portugal) S.A. v Hungary*, ICSID Case No ARB/12/9, Applicant's Request for the Continued Stay of Enforcement of the Award, 25 December 2018, para 58.
[66] Ascensio (n 45) 767. On procedural misconducts, see Abba Kolo, 'Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal' (2010) 26 ArbIntl 43.
[67] *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Final Award, 31 May 2017, para 542 (hereafter *Orascom*).
[68] ibid para 543.
[69] *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Jurisdiction, 1 February 2016, para 328 (hereafter *Ampal*).
[70] ibid para 331.
[71] ibid para 329.
[72] *Ampal* (n 69) para 329. See also *Orascom* (n 67) para 547.
[73] *Orascom* (n 67) para 542, fn 835.

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III. Situations of corporate restructuring

24 Situations of abuses of process have mainly concerned cases of corporate restructuring carried out with the purpose of gaining access to the protection granted under an investment treaty. The initial structuring and even the subsequent restructuring of an investment made with the view of obtaining procedural guarantees under an investment agreement do not constitute in themselves abusive conduct. A tribunal stated that 'this was a perfectly legitimate goal as far as it concerned future disputes'.[74] Strategies of treaty shopping, even by incorporating letterbox or shell companies, are thus possible to the extent that they are not prohibited under investment agreements, for instance when they deny the benefit of the treaty protection to investors without substantial business activities in their home State.[75] They are also possible to the extent that they do not constitute an abuse of process, also labelled as an 'abuse of corporate form' or an 'abuse of legal personality'[76] in the decisions.

25 The *Phoenix* tribunal was the first to dismiss a request at the jurisdictional stage because of an abuse of process. It considered that 'a corporation cannot modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, after damages have occurred'.[77] It attempted to unveil 'the true nature of the operation' which was in its view made 'to gain access to ICSID jurisdiction to which the initial investor was not entitled'[78] and the 'unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty'.[79]

26 The criteria for abuse of process have been refined in subsequent decisions. *Philip Morris v Australia* incorporated previous jurisprudential developments.[80] The tribunal found that 'the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute'.[81] Different foreseeability tests have been implemented in the decisions,[82] resting 'between the two extremes [of] … a very high probability and not merely a possible controversy'.[83] The *Philip Morris* tribunal considered that a dispute is foreseeable 'when there is a reasonable prospect … that a measure which may give rise to a treaty claim will materialise'.[84] Also, as to the motives behind the restructuring, it is necessary to establish its 'main and determinative'—and not necessarily the sole and exclusive—reason is the intention to bring a claim under the investment agreement.[85]

[74] *Mobil Corporation* (n 10) para 204.
[75] H Wehland, 'Forum Shopping: Investment Arbitration' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (2020) paras 29–33.
[76] *Mobil Corporation* (n 10) para 176.
[77] *Phoenix* (n 7) para 92.
[78] ibid para 140.
[79] ibid para 142.
[80] *Inter alia*, *Tidewater Inc et al v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Jurisdiction, 8 February 2013, para 184; *Mobil Corporation* (n 10) para 204; *Renée Rose Levy and Gremcitel* (n 57) para 184; Pac Rim, para 2.99; *Lao Holdings N.V. v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Jurisdiction, 20 February 2014, para 70.
[81] *Philip Morris* (n 58) para 539.
[82] For an overview, see Jorun Baumgartner, *Treaty Shopping in International Investment Law* (OUP 2016) 222–27.
[83] *Philip Morris* (n 58) para 554.
[84] ibid para 554.
[85] ibid para 584.

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With regard to the chronological sequence of the events, a more recent award contemplated a different type of abuse of corporate form. The arbitral tribunal admitted that there is an abuse of process when a shell corporation that did not have any economic and administrative activity (eg, no meetings of the general assembly or board of directors) for years before the dispute is suddenly reactivated just after the institution of proceedings in order to meet the nationality requirement of the claim.[86] Cases of abuses of corporate form may therefore go beyond situations of corporate restructuring. **27**

D. Explaining the divergence between general international law and international investment law

At first glance, there seems to be a convergence as to the main legal standards applicable to abuse of process allegations in investment arbitration and in other international courts and tribunals. In both contexts, there is no longer a debate as to the existence and applicability of the doctrine by international courts and tribunals without any explicit textual basis. In both contexts, the burden of proof lies with the party making the allegation, the threshold for a finding of abuse of process is high, and the evidence of abuse will be affirmed only in exceptional circumstances. However, international courts and tribunals, and first and foremost the ICJ, have proven to implement vague standards in the context of interstate disputes. So far, the ICJ and International Tribunal for the Law of the Sea (ITLOS) rejected all abuse of process allegations. **28**

I. A reluctance to rely on the ISDS jurisprudence

There could have been some fruitful interaction and dialogue on the matter between investment tribunals[87] and the ICJ given—perhaps not the similarity but at least—the analogy of situations where allegations of abuse have been made. Arguably, the divergent orientations taken by the ICJ and investment tribunals could be explained by the specificity of the disputes and/or by other factors. **29**

Precedents of corporate restructuring in investment arbitration may be compared to the situation contemplated in *Immunities and Criminal Proceedings*. It is thus not a surprise that France relied in its pleadings before the ICJ on the approach of investment tribunals.[88] In both cases, the alleged abusive conduct stems from the transformation of the legal status of an entity, person, or asset (changing the nationality of a corporation, transforming a private residence into diplomatic premises, granting someone an eminent political position) to ensure the application of a legal regime (an investment agreement, the 1961 Vienna Convention on Diplomatic Relations (VCDR), head of State immunity) potentially playing a specific role at the jurisdictional stage.[89] Investment tribunals underlined that when assessing an abuse of process allegation, they have 'under general international law as well as under ICSID case **30**

[86] *Capital Financial Holdings Luxembourg S.A. v Republic of Cameroon*, ICSID Case No ARB/15/18, Award, 22 June 2017, paras 362–65.

[87] See, C. Ceretelli, 'Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?' (2020) 11 JIDS 47 (hereafter Ceretelli).

[88] ICJ, CR 2018/2, 19 February 2018, para 26.

[89] Ceretelli (n 87) 55.

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law' to take 'into account all the circumstances of the case'[90] and review for instance the timing of the investment and 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 restructuring.[91] In *Immunities and Criminal Proceedings*, the ICJ refrained from carrying out an extensive examination of all the circumstances but nonetheless considered that there was no 'clear evidence that [Equatorial Guinea's] conduct could amount to an abuse of process'.[92]

31 In my view, the ICJ's stance on the matter relied less on insufficient evidence than on what it considered to be the dual nature, procedural and substantive, of the rights allegedly abused. France's objection has been considered only in relation to the 1961 VCDR[93] which constituted the basis of one of Equatorial Guinea's substantive claims—namely, the legality of granting diplomatic status to a private residence in these particular circumstances. In that regard, the Court considered 'that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits'.[94] In that regard, the issue at stake is at first sight different from the one envisaged in the context of a corporate restructuring since the assessment of the evidence surrounding the restructuring, taken separately, concerns exclusively the effectiveness of a procedural right—gaining access to arbitration—and does not play a role at the merits stage.

32 The World Court, therefore, relies on a stringent procedure/substance divide narrowing the possibility of opening an examination of the abuse of process allegation at the jurisdictional stage. This view has not been shared by all the members of the Court. In a detailed and convincing dissenting opinion, Judge Donoghue, following more the approach of investment tribunals, considered that there was conclusive evidence that the purpose of the sequence of actions taken by the applicant is 'manifest' and that this case 'is such an exceptional circumstance'.[95] She noted eventually that the Court 'should not have allowed itself to be used' by the applicant 'to preserve the integrity of its judicial function'.[96]

33 With regard to parallel proceedings, it has been suggested that the abuse of process doctrine, as implemented by investment tribunals in the context of overlapping claims concerning the same tranche of investment and the same economic damage, should inspire the ICJ to better regulate situations of parallel litigation.[97] The United Arab Emirates (UAE) raised an abuse of process allegation in the context of Qatar's simultaneous proceedings before the Court and the Committee on the Elimination of Racial Discrimination for a violation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The UAE more specifically considered that by prosecuting these two procedures simultaneously and by failing to respect the principle *Electa una via non datur recursus ad alteram*, Qatar was 'abusing the Convention's complaints mechanism process and its rights under the Convention'.[98] The CERD Committee, however, rejected the exception without

[90] *Renée Rose Levy and Gremcitel* (n 57) para 186.
[91] *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v The Republic of Panama*, ICSID Case No ARB/13/28, Award, 2 June 2016, para 103.
[92] ICJ, *Immunities and Criminal Proceedings* (n 6) para 150.
[93] The ICJ found that it lacked jurisdiction under the Palermo Convention—*Immunities and Criminal Proceedings* (n 6) para 118.
[94] *Immunities and Criminal Proceedings* (n 6) para 151.
[95] *Immunities and Criminal Proceedings* (n 6) 292, Dissenting Opinion of Judge Donoghue, 387, para 18.
[96] ibid para 19.
[97] Ceretelli (n 87) 60–63.
[98] CERD, Admissibility of the Inter-state communication submitted by Qatar against the United Arab Emirates, CERD/C/99/4, 30 August 2019, para 20.

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any reference to the abuse of process doctrine.[99] Likewise, the ICJ rejected the argument at the interim measures stage,[100] and the respondent did not pursue the allegation during the preliminary objections.[101] Qatar's claims have been considered by some authors as an abusive multiplication 'of identical proceedings' entangling the respondent 'in expensive, time-consuming procedures' with a risk of conflicting interpretations of the same treaty.[102] However, it is clear that the ICJ is not ready to use the abuse of process doctrine as a tool to regulate situations of *lis pendens*.

II. Possible considerations of judicial policy

34 The reluctance of the ICJ and other interstate tribunals to dismiss a claim on the ground of the abuse of process doctrine may be explained by considerations of judicial policy. One must resist the temptation of an idealistic vision of interstate proceedings deprived of any abusive behaviour, procedural harassment, or intent to instrumentalize international justice.[103] This was Judge Donoghue's core argument when she highlighted the necessity to 'preserve the integrity' of the Court's judicial function: 'the Court allows the case to proceed to the merits, as if this is yet another disagreement about the nuances of the régime of diplomatic immunity.'[104]

35 First, the reluctance to dismiss an abusive claim in interstate proceedings may be explained by the nature of the parties and its impact on the number of proceedings. Investment tribunals and the ECtHR are respectively accessible to a vast number of private claimants whose behaviour may differ in some cases from those of States' representatives.[105] Besides, in *Immunities and Criminal Proceedings*, Equatorial Guinea used that argument to consider that 'cases in the investment field, being cases brought by private persons against States, are inherently very different, and we would say cannot serve as precedents for inter-State proceedings'.[106] Conversely, interstate courts are available to a structurally limited number of claimants and have to adjudicate a limited number of cases compared with the number of ISDS cases introduced each year. If they apply less stringent standards and eventually start dismissing claims on the ground of abuse of process, they also risk having states no longer consent to their jurisdiction.[107]

36 Second, the reluctance of interstate courts may be due to the pejorative connotation of an abuse of process accusation.[108] Indeed, 'international courts and tribunals have to presume that states act in good faith' and 'to do otherwise would call the honour of states into question'.[109] This is what Equatorial Guinea suggested in *Immunities and Criminal Proceedings*

[99] ibid para 51.
[100] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v United Arab Emirates*) (Provisional Measures) [2019] ICJ Rep 361, 369–70, para 25.
[101] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v United Arab Emirates*) (Preliminary Objections) [2021] ICJ Rep 71, 87, para 39.
[102] Ceretelli (n 87) 66.
[103] Lemey (n 17) 288.
[104] *Immunities and Criminal Proceedings* (n 6) 292, Dissenting Opinion of Judge Donoghue, 387, paras 18–19.
[105] Lemey (n 3) 304; Tattersall and Khan (n 21) 253.
[106] ICJ, CR 2018/3, 20 February 2018, para 10.
[107] Lemey (n 3) 305; Mitchell and Malone (n 1) para 21.
[108] Lemey (n 17) 26.
[109] Byers (n 13) 412.

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when it stated that 'France once again calls into question the motives of Equatorial Guinea in a manner that is unacceptable in international relations'.[110]

37 Third and lastly, the reluctance of interstate courts, and mainly the ICJ, may also be explained by other extra-legal considerations. The ICJ is not just an adjudicative mechanism, it has also played a significant role in the peaceful settlement of disputes as the principal judicial organ of the United Nations. Upholding a complaint founded on the abuse of process doctrine at the early admissibility stage could not only lead the Court to call into question the honour of the claimant, but also 'risk introducing political and diplomatic factors into the judicial process, impede international relations, and increase the danger of escalation'.[111] Interestingly, one of Nicaragua's counsel in several cases before the ICJ even admitted that even if some of Nicaragua's requests before the World Court 'could … be seen as unwarranted, not to say abusive, the recourse to the ICJ has been no doubt a means to ease the tension between the two States [in dispute]' and 'the Court has been able to find balanced and appeasing solutions'.[112]

E. Conclusion

38 Over the past years, interstate courts, investment tribunals, and other international adjudicative bodies have contributed to shaping the abuse of process doctrine in general international law. The controversies surrounding its existence as a general principle, its genealogy and its autonomy now have less relevance. The main issue in the current practice of international adjudicative bodies mainly concerns the substance of the doctrine. The threshold for a finding of abuse of process is high and it is only in 'exceptional circumstances' that a court or tribunal will reject a claim on such grounds. However, although investment tribunals had many occasions to refine the evidentiary standards applicable to allegations of abuse of process in cases of abuse of corporate form or of parallel proceedings, interstate courts and tribunals have chosen to use very vague standards, and have refrained from relying on what could have been regarded as instructive and relevant investment arbitration precedents. To date, the ICJ and ITLOS have rejected all abuse of process allegations submitted before them.

39 In this entry, it has been suggested that these variations in the application of the doctrine and the ICJ's reluctance may be explained by various reasons, including the nature of parties, the specificity of interstate proceedings, and the necessity to maintain the accessibility of a courtroom playing an important role in the peaceful settlement of disputes. One may also look at things from a different perspective and attempt to explain why investment tribunals have chosen to adopt more refined standards and uphold abuse of process allegations, most of the time just as an additional ground for inadmissibility. One possible explanation would be envisaging the doctrine as one of many regulation tools to correct the anomalies of—and eventually to sustain—an investment treaty system facing an increasing backlash. As pointed out in *Orascom*, the resort to the abuse of process doctrine 'has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties'.[113]

[110] ICJ, CR 2018/3, 20 February 2018, para 8.
[111] Byers (n 13) 412.
[112] Alain Pellet, 'Introduction from the Podium' in Edgardo Sobenes Obregon and Benjamin Samson (eds), *Nicaragua Before the International Court of Justice—Impacts on International Law* (Springer 2018) 31.
[113] Orascom (n 67) para 547.

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On balance, there are possibly many extra-legal considerations that have also influenced **40** how the abuse of process doctrine has been implemented over the past years, and this may explain its variability depending on the needs and constraints weighing on the adjudicative mechanism at stake.

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