Abuse of Rights: Should the Investor-State Tribunals Extend the Application of the Doctrine?

by

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Abstract

Maintaining integrity of international investment regime requires the wider application of the abuse of rights doctrine. At the contemporary practice, the investor state Tribunals apply the doctrine to limit the corporate nationality planning. In this thesis, I suggest extending application of the doctrine to three scenarios (1) where an investor misuses the international investment regime; (2) where an investor exercises a right in a bad faith; and (3) where an investor commits misconduct. The extended application of the doctrine guarantees the protection of the international investment regime and corresponds to the origins of the doctrine.
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Introduction

The second half of the 20th century saw the emergence of international investment law.1 In 1969, Germany signed the first Bilateral Investment Agreement (hereinafter ‘BIT’ or ‘BITs’).2 BITs have the purpose of promoting “greater economic cooperation, to stimulate the flow of private capital and economic cooperation, to maintain a stable framework for investment and maximum efficient use of economic resources”.3 Since 1969, the flow of investment has risen quickly.4 In order to secure investments and attract investors, states have adopted new BITs. BITs form the so-called ‘net’ consisting of more than 2000 multilateral and bilateral agreements,5 which frames the international regime of investment protection.

‘Investor’ is defined in BITS and within this definition is the criterion for ‘nationality’, which directs that only investors of a certain nationality enjoy the protection of the international investment regime through the investor-state Tribunals. The investor-state Tribunals are special bodies for adjudication of the investor-state disputes. To enjoy protection of the investor-state Tribunals, investors have undertaken nationality planning measures, which includes: “any measure to organize or reorganize a company, the creation of subsidiaries, incorporation and reincorporation of a company, as well as all other measures undertaken by the board of the directors to change the nationality of the company”.6 As has been mentioned, the criterion of nationality plays a vital role in the architecture of the international investment regime. The regime has a basis on Boden’s theory of sovereignty.7 The theory of sovereignty implies that

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1 Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (Boston: Norwell, 1995) at 1 – 5, 12.
2 Ibid at 24.
5 Dolzer & Stevens, supra note 1 at 25.
only sovereign states have the right to determine an alien presence at their territories. Judge Oda in the *Elettronica Sicula S.P.A case* (hereinafter ‘ELSI case’) has stated that “it is a great privilege to be able to engage in business in a country other than its own”. In the international investment law, the sovereign states determine the nationality of an investor in BITs. Only the investors-nationals of specified states receive the protection of the investments through the investor-state Tribunals. In substance, the practice of nationality planning threatens the main pillar of the international investment regime, namely ‘nationality’. For example, Feldman states that:

“States seek to ensure that investment treaty benefits run to nationals of home States, rather than third States, by requiring claimants to satisfy corporate nationality requirements under the applicable definition of ‘investor’. Some definitions of ‘investor’ require only that a claimant be incorporated in its purported home State to satisfy the nationality test. In such instances, there is considerable risk that companies based in third States will incorporate shell companies in the home State to gain access to investor–State dispute settlement procedures available under the targeted investment treaty”.

To protect the international investment regime and to limit adversary practice of nationality planning, the investor-state Tribunals have introduced the abuse of rights doctrine. The abuse of rights doctrine applies only to the nationality planning issues. In this thesis, I argue that the application of the abuse of rights doctrine has a restrictive character. Mann has suggested that abuse of rights is a widely applied concept. For example, the doctrine pertains that “if the monetary legislation or practice of a country pursues the deliberate purpose of injuring foreigners, this amount to international delinquency”. The international investment law needs a wider application of the abuse of rights doctrine to secure the international investment regime from misuse and misconduct of investors.

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11 Dolzer & Schreuer, *supra* note 4 at 124.
12 Feldman, *supra* note 6 at 289.
13 Frederick A Mann, *The Legal Aspect of Money, with Special Reference to Comparative, Private, and Public International Law* (Oxford: Oxford University Press, 1953) at 476.
In this thesis, I suggest to extend the application of the doctrine to three scenarios: (1) where an investor misuses the international investment regime; (2) where an investor exercises a right in a bad faith; and (3) where an investor commits misconduct. To prove the legitimacy of this thesis, I will examine the approaches taken towards the application of the abuse of rights doctrine in civil law jurisdictions, in international law and in international investment law. In part 1, I focus on the abuse of rights doctrine in civil law jurisdictions; in part 2, I consider the application of the doctrine in international public law; and in part 3, I explore three scenarios when the doctrine applies.

For the purposes of this thesis, I do not make a distinction between the abuse of rights and the abuse of process. However, some scholars have differentiated these two doctrines. For example, Roth has suggested that “a right is misused, not because the duty was violated, but because of the manner the right was exercised”. Hence, the abuse of process relates to the misuse of the procedure. However, I do not consider it essential to draw the line between the abuse of rights and the abuse of process. The abuse of rights doctrine covers the material and procedural misuses of rights.

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14 Feria & Vogenauer, eds, *supra* note 14 at 204.
1 The abuse of rights doctrine in civil law jurisdictions

In this section, I will consider the origins of the doctrine as well as three theories of its application. The civil law acknowledges that an individual right has a social purpose. In accordance with the classic interpretation of John Locke, individual rights include liberty, property and life, etc.\(^{15}\) The civil law aims to protect the social purpose of a right, which often requires limiting individual rights. Civil law restricts individual rights by either the direct norm prohibiting a certain type of conduct or a special norm, namely the abuse of rights doctrine.

To understand the concept of the doctrine, it is necessary to distinguish ‘droit subjective’ from ‘droit objective’\(^{16}\). Droit objective is a legislative prescription in the legal codes of a right, whereas droit subjective is the articulation of how the right is exercised. According to civil law scholars, society determines the content of the right (droit objective) and the way this right operates (droit subjective).\(^{17}\) The right (droit subjective) has its social or economic purpose.\(^{18}\) The community determines the social and economic purposes of rights. The purpose of the right defines the scope of the right. Josserand, the founder of the ‘social purpose of a right’ concept, claims that “the asocial use of an individual right is abusive”.\(^{19}\) Planiol has remarked “the law stops where the abuse begins”.\(^{20}\) To protect the social purpose of the individual right (droit subjective), the civil law has developed the abuse of rights doctrine.

The right could exist only if the community accepts it. American Law Review has noticed “the law [droit objective] acting through Courts protect the things only that a society recognizes as rights”.\(^{21}\) The rights exist only within the society. The society recognizes right of an individual. Josserand, the strongest proponent of the doctrine and the author of social purpose of the right

\(^{17}\) Albert Mayrand, “Abuse of Rights in France and Quebec” (1974) 34:5 La LR 993 at 994.
\(^{18}\) Ibid at 996.
theory, has stepped further by saying that “law is brought into being for the benefit of the community … not for the advantage of the individual”.22

The violation of the social purpose turns into the abuse of a right. In the civil law tradition, the abuse of rights doctrine performs a function of a “corrective device”.23 The corrective device aims to limit the misuse of rights. The misuse of rights threatens to the integrity of the legal system. To protect the integrity of a legal system, the courts apply the abuse of rights doctrine. For example, Josserand has stated as follows “to abuse [a right] is to proceed, intentionally or unintentionally, against the purpose of the institution of which one has misunderstood the finality and the function”.24 He proceeds as follows “the doctrine protects the interests of the community” and “sets the [reasonable] limits to the use of law”.25 Josserand explains “the doctrine constitutes a living and moving theory of great suppleness, an instrument of progress, a method of adapting law to social needs”.26

However, other scholars have criticized the position of Josserand. For example, Planiol has argued that “the doctrine tends to destroy the idea of an individual right”.27 To explain the nature of the doctrine’s application, I will consider, firstly, the historical roots of the doctrine, and, secondly, the main theories of the doctrine’s application.

The scholars agree that the abuse of rights doctrine has appeared in the civil law jurisdictions. However, there is no a unified opinion among scholars on the exact period when and where the doctrine emerged.

Some scholars have argued that the doctrine has been receipted by the continental law systems from the Roman law.28 Some scholars indicate that latin maximum ‘pacta sunt servanda’ is a predecessor of the doctrine. The Roman legal doctrine prescribes that “the exercised of a civil subjective right by breaching the principles of its exercise”.29 The Roman law defines the wide

22 Ibid at 110.
23 Gambaro, supra note 20 at 570.
25 Ibid at 115.
27 Monateri, supra note 24 at 112.
28 Gordley, supra note 26 at 298.
29 Ibid at 290.
recognized maxima *sic utere iure tuo ut alterum non laedas*, “prescribing the exercise of individual rights in such a way that others would suffer no injury...”\(^{30}\) The maximum represents the contemporary understanding of the abuse of rights doctrine. Some civil law jurisdictions perceive ‘no injury to others’ as the key element of the doctrine.\(^{31}\)

The scholars have suggested that the abuse of rights emerged in 16th century.\(^{32}\) “As early as 1577, a wool combmer indulged in singing continuously while working, for the sole purpose of annoying a neighboring attorney. It was held that his songs were more harming than charming and that he had made an abusive use of his right to sing. He was condemned to pay damages”.\(^{33}\)

In this example, scholars identify the elements of intent, harm and excessive exercise of the right. These characteristics correspond to the contemporary understanding of the doctrine in the civil law jurisdictions.

The European scholars point out that the term “abuse of rights” appeared in Prussia around 18\(^{th}\) century.\(^{34}\) Prussia adopted the *Allgemeines Landrecht* where the abuse of rights “covered neither more nor less than the prohibition of acts of nuisance”.\(^{35}\) Sajo has emphasized that the doctrine is a unique legal concept “emerging as a reaction against the absolutism of possessive individualism”.\(^{36}\) The doctrine was a response to the strongest flow of private rights’ concepts at the period of 18th-19th centuries.\(^{37}\) At the current stage of legal development, the civil law countries have categorized the different cases of the doctrine’s application. At the contemporary law, the abuse of rights doctrine applies towards an actor in the following cases:

- An actor exercises the subjective right in bad faith
- An actor disregards the economic and social purpose for which the subjective right has been recognized

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\(^{30}\) *Ibid* at 295.

\(^{31}\) Reid, *supra* note 16 at 367.

\(^{32}\) *Ibid* at 368.

\(^{33}\) *Ibid* at 369.

\(^{34}\) *Ibid* at 371.


\(^{36}\) *Ibid* at 26 – 27.

• An actor exercises the right by exceeding its limits

To summarize the approaches taken in various civil law jurisdictions to the doctrine’s application, I invoke three widely accepted theories namely (1) classical theory, (2) objective theory (3) and socialist theory. Each theory recommends applying the abuse of rights doctrine in case special circumstances occurred.

The classical theory introduces the malicious conduct. The bad faith is a cornerstone of the traditional approach to the abuse of rights. Professor Scheltens has suggested that “classical requirement for abuse of rights was performance of legal action which conferred little or no benefit on the actor, was performed with the intention of injuring another”.

The Netherlands, France and Belgium adhere to the criterion of harmful intent. The French Court of Cassation has found that “a property owner is guilty in having pruned all the trees in the garden, except those bordering the property of his neighbor, with whom he had a dispute”. The judges noted that “the right of property cannot authorized ill-willed behavior, unjustified by any perceptibly useful purpose, which causes damage to others”. The court pays attention to the intent of an actor, before it applies the doctrine. In case, an actor has the intent to injury others in exercising of his or her rights, the court declares the misuse of a right. The misuse of a right is a foundation to apply the doctrine.

The approach of ‘harmful intent’ assigns to a French legal theoretical tradition. For instance, B. Cottier suggests that “in accordance with the conventional theory, upholds the idea of the exercise of rights cannot be described as abusive unless the behavior of the right holder has been deliberately vexatious”. Belgium has adopted similar approach towards the intent because of historical reasons related to the adoption of Napoleon Code of 1804. The Belgian and Dutch Courts have introduced the concept of ‘non-proportionate harm’.

38 Byers, supra note 38 at 392, 394.
39 Ibid at 396.
40 Ibid at 407.
41 Ibid at 418.
42 Council of Europe, Directorat of Legal Affairs, supra note 35 at 32.
43 Ibid at 25.
44 Ibid.
Despite any legal findings, the intent to harm has remained difficult to establish. Some jurisdictions have suggested the tests in order to determine the intent of the actor. “That subjective element may consist of two elements, namely:

(a) a malevolent intention to injure;

(b) some other unjustifiable purpose”.45

In Louisiana the element of bad faith turns into four alternative criteria test.46 “The test includes (1) the right has been exercised for the predominant motive of causing harm; (2) there is no serious or legitimate interest for exercising the right; (3) the exercise of the right is against moral values, good faith, or elementary fairness; and (4) the right is being exercised for a purpose other than that for which it was originally conferred”.47 In Morse v. J. Ray McDermott & Co., the Supreme Court of Louisiana held: The exercise of a right [...] without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of a right that courts should not countenance”.48

The mixed law jurisdictions adopt another approach towards the abuse of rights doctrine. For example, in Scotland “there is ample discussion in the Scots Institutional writers of the role of malice or aemulatio… Bankton also mentions malice as a determining factor in the context of whether one could be permitted to set up a fair or market close to that of another. Clearly the basic principle was that owners could do what they wished with their own property. Bankton they drew a distinction between actions that cause direct damage to a neighbour and those which only ‘deprive of a benefit’. The doctrine aemulatio vicini “encompasses the general principle that no one should exercise what is otherwise a legitimate right in a way that is solely motivated by a desire to cause annoyance to his or her neighbor”.49 Consequently, in Scotland the intent

46 Reid, supra note 16 at 368 – 369; see also: Vernon V. Palmer & Elspeth Christie Reid, eds, Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland (Edinburgh: Edinburgh University Press, 2009) at 244.
47 Ibid.
48 Byers, supra note 38 at 395.
49 Reid, supra note 16 at 367.
merges with the injury. In South Africa, the courts have taken the approach that the “intention to harm is an important but not decisive or essential factor”.

In accordance with the objective theory, “a great inequality between the benefit derive from the exercise of the right and the detriment which accrues to another”. Thus, objective theory encompasses the element of harm which is an effect. Observing the effect, courts determine whether the misuse of a right has occurred. In case, the misuse occurs the court interferes to mitigate a social conflict.

The classical theory distinguishes from the objective theory. The objective theory assesses “the act itself or [above all] its result”, whereas the classical theory focuses on the intent of the right holder. The German, Turkish, Greek, Portuguese, Spanish Civil Codes and others reflect the objective theory of abuse of rights doctrine.

In Germany, the abuse of rights knows two different theories namely internal and external theories of abuse. “The German “external” abuse of rights theory holds that all restrictions are uniquely directed against the owners of the rights and affect merely the exercise of rights and leave the nature of the right intact; as it were, they affect the right only externally. The “internal” theory, on the other hand, insists that the right itself, its immanent nature, controls its very exercise”.

The German Civil Code stipulates “the exercise of the right is unlawful, if its purpose can only be to cause damage to another, Article 226; a person who willfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage, Article 826”. The German Civil Code inserts the ‘public purpose’ element. Nevertheless, the German Civil Code concentrates on the harmful conduct. The Courts will apply to the abuse of rights doctrine in case an actor exercises the rights to harm others rather than enjoy the right.

References:

50 Ibid.
51 Byers, supra note 38 at 415.
52 Council of Europe, supra note 35 at 35.
53 Ibid.
55 Ibid at 1021.
56 Ibid at 1026.
In Switzerland, the courts interpret the objective theory as follows: “a right exercised in such a way as to cause harm to another person constitutes an abuse, if there exists an alternative, but less harmful method of obtaining the same advantage”.  

The socialist theory “condemns any exercise of a right contrary to its social and economic purpose”. Josserand has supported the socialist theory by saying that “the exercise of the right must be governed by its conformity to the social purpose of the rule of law which creates the right”. In Travelers Indemnity Co. v. Hunt decision, the court defines an abuse as “exercise of a right contrary to the aims on account of which said right or power was conferred”. 

Spielman has crystalized two fold formulae for the abuse of rights doctrine in the domestic law. He has suggested that “the theory of abuse of rights is not confined to property-related rights. Its scope is general: the use of rights for an unlawful purpose cannot be tolerated”. The Luxembourg law has accepted these principles. Later, the ‘social purpose’ theory converts to the level of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the Convention”). The European Court of Human Rights (hereinafter ‘ECHR’) has established that teleological interpretation of the Convention. The theological interpretation invokes the object and purpose of the Convention. The ECHR limits the exercise of a right if an actor violates the object and purpose of the Convention. Consequently, the socialist theory implies the theological interpretation of the treaties. The theological interpretation is essential for the correct application of the abuse of rights doctrine. This approach corresponds to the Vienna Convention on the Law of Treaties (hereinafter ‘VCLT’) and Josserand’s theory of ‘purpose of the right’. The VCLT requires considering the purpose of the international treaties.

Non-legal reasoning lies in the socialistic theory as well. For example, Jean Dabin has offered non-legal theoretical basis for the doctrine. In accordance with this view, “abuse of rights may be defined in relation to the violation of the general duty of solidarity and altruism required of all

57 Ibid.  
58 Reid, supra note 16 at 367.  
59 Ibid at 368.  
60 Ibid at 371.  
61 Council of Europe, supra note 35 at 62.  
62 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 at 223 (entered into force 3 September 1953) [ECHR]
men towards their fellows”.63 The non-legal interpretation is utopic, however, it supports the teleological approach and the doctrine of ‘social purpose of a right’. Obviously, there is no ‘duty of solidarity’ in law, however, the nature of the abuse of rights doctrine constitutes the “intercourse of law and morals”.64 The civil law admits the duty of the court to interfere in case of misuse.

The Courts usually invoke the doctrine in the domain of property law or in the relations between neighbors. Consequently, the doctrine has a restrictive application in the national law. After the creation of the European Union (hereinafter ‘EU’), the so called community law has emerged.65 The emergence of community law has affected the abuse of rights doctrine. The doctrine turns out to be an effective mechanism used by the European Court of Justice (hereinafter ‘ECJ’) to interfere into the antitrust legislation, company law, tax law, intellectual property and other fields.66 In the scope of this thesis, I will consider when the ECJ applies the doctrine at the domains of tax law and free movement of goods legislation. Although, the EU law has accepted the abuse of rights doctrine from the civil law jurisdictions, the ECJ has been developing special approach. The ECJ approach incorporates three theories on the doctrine’s application. The abuse of rights doctrine is a principle of European Community Law.67 In the Kofoed decision, the ECJ has referred to the abuse of rights doctrine as:

“the general community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of community law. The application of the Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law”.68

The principle applies to limit the abuse in the spheres of movement of goods and taxation. Adolfo Jiminez has acknowledged that “the scope and boundaries of this principle are as yet

63 Sajo, supra 36 note at 55.
64 Mayrand, supra note 17 at 1001.
65 Ibid.
66 Feria & Vogenauer, eds, supra note 14 at 80 – 84.
67 Ibid.
unclear”. However, the European Community law has developed the double step test for the purposes of movement of goods (Starke case) and (Sweppers-Centro cases) for taxation. In the free movement law, the test includes an analysis of ‘purpose’ and ‘intention’. The ‘purpose’ criterion includes the teleological interpretations of laws and regulations at the countries members of the EU and Community Law.

The European Court of Justice considers the assessment ‘purpose’ of laws and regulations as the objective criterion of the test. Stefan Vogenauer has pointed out “the prohibition of abuse of law further requires that the application of the rule to the facts of the case would be contrary to the purpose, the spirit, the aims and results or the objectives of the rule in question”.

The test determines a subjective criterion as well. The intent is a subjective criterion. Hence, the ECJ invokes the doctrine only against intentional violation of the purpose of the laws and regulations. Stefan Vogenaur has explained that the “requirement is often couched in terms describing the person’s conduct, motives or aims as improper, not bona fide, opportunistic, wrongful or fraudulent”. The European law does not provide a bright line test or a list for the doctrine’s application. The ECJ applies the doctrine to the circumstances of each case.

For the purposes of taxation, the ECJ has expressed its logic on abuse of rights in Cadbury Schweppes case. In Cadbury Schweppers case, the Court has considered the nationality planning for the taxation purposes in EU. The ECJ has relied upon Centros case saying that “setting up a subsidiary for tax reasons in another Member State is not, “in itself”, abuse”.

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72 Ibid.
73 Feria & Vogenauer, eds, supra note 14 at 340.
74 Ibid.
75 ECJ Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, Case C-196/04 [2006] ECR I-8031 at I-8043.
76 Ibid.
In Kefalos case, the ECJ has made an attempt to define the ‘abuse’. In accordance with the decision, “an abuse is to exercise a right in the way to derive an improper advantage manifestly contrary to the objective pursued by the legislator”. In Kefalos case, the ECJ has clearly pinpointed that there is a link between the application of the doctrine and a social purpose of a right.

The doctrine has a potential in the limiting the financial and company abuses. Daniel R. Fischel has concretized that the doctrine might be applied in case of market manipulation. The market manipulations mean “practices that are intended to mislead investors by artificially affecting market activity...such as ...by artificially affecting market activity”. The scholar has indicated that the doctrine applies in the case “the conduct has been legally permissible but in pursue of improper purposes”. Hereby, we can observe the importance of Josserand theory of social purpose of the right for the abuse of rights doctrine.

The EU law has introduced the theory of freedom of establishment. The freedom of establishment means that the corporation or its subsidiary might be incorporated in any country of the EU. Some corporations have started to abuse this principle of company law. In order to limit the abusive conduct, the ECJ has presented the theory of ‘wholly artificial transaction or corporation’. For the purposes of the EU law, the ECJ requires the company to perform the economic activities in the place of incorporation and requires the establishment with a purpose other than tax evasion or ordinance of any benefits. In other words, these purposes should not be sole.

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79 Ibid.
82 Jaminez, supra note 68 at 282.
2 The abuse of rights doctrine in international law

In this section, I will consider the application of the doctrine in the domain of international law. Firstly, I discuss the legal status of the doctrine; then I summarize the approaches of various Courts and Tribunals towards the application of the doctrine; and finally I consider the World Trade Organization (hereinafter ‘WTO’) approach to the abuse of rights and international environmental law approach.

The international law scholars acknowledge the abuse of rights doctrine as a manifestation of good faith principle. For example, Bin Cheng has suggested “the doctrine inserts the requirement of reasonable exercise of the rights”. D’Amato supposes that “good faith covers …narrower doctrine of abuse of rights, which holds that a state may not exercise rights for the sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation”. Bederman has recognized the status of the abuse of rights doctrine as a principle of general international law. Judge Weeramantry has referred to abuse of rights doctrine as “well-established area of international law”.

The VCLT specifies at article 26 that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. The principle of good faith has a number of collaterals in international law, namely estoppel, the abuse of rights doctrine etc. Thus, the principle of good faith and the abuse of rights doctrine are interrelated. In order to understand the nature of abuse of rights, I will examine the meaning of good faith principle in international law.

The principle of good faith means ‘exercise of rights with a proper purpose’ or ‘reasonable exercise of rights’. The reasonable exercise of rights “implies an exercise that is genuinely in

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pursuit of those interests that the right is destined to protect.” ⁹¹ However, international law distinguishes the abuse of rights doctrine from the good faith principle. Lauterpacht and Politis have explained that “an abuse of right is an anti-social exercise of the right”. ⁹² Consequently, the abuse of rights doctrine applies exclusively to the exercise of rights.

In this part, I consider the approaches in legal scholarship to the application of the abuse of rights doctrine. Afterwards, I examine the scenario when the International Court of Justice (hereinafter ‘ICJ’ or ‘the Court’) and other Tribunals have applied the doctrine.

Overall, the international law has no bright line rule in the application of the doctrine. Courts and Tribunals apply the doctrine in various circumstances. In summary, these scenarios encompass two situations (1) where a state exercises a right in an unreasonable manner (for example, Bin Cheng recommends to apply the doctrine if states exercise sovereign rights in “unreasonable manner”; Georg Schwarzenberger has advocated the application of the doctrine to limit the states’ sovereignty). (2) where a state exercises a right to injure another state. The position of harm or injury has a distinct support among scholars. For instance, Hersch Lauterpacht, “the best-known proponent of abuse of rights, argued for a broad interpretation and application of the principle”. ⁹³ Lauterpacht asserted that “only the most primitive societies allow the unchecked exercise of rights without regard to their societal consequences”. ⁹⁴ Lauterpacht's abuse of rights occurs “when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury that cannot be justified by a legitimate consideration of its own advantage”. ⁹⁵ Focarelli suggests that “a state may be thought to have 'abused' one of its rights when it exercises the right in a way it causes unjust harm to another state, or for an end that is different from the one for which the right has been granted (detournement de pouvoir)”. ⁹⁶

Kiss has offered the most-developed approach to the application of the doctrine. In accordance with her opinion, international law prohibits abuse of rights in three situations:

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⁹¹ Cheng, supra note 84 at 80.
⁹² Ibid.
⁹³ Byers, supra note 38 at 395.
⁹⁵ Ibid.
“In the first case, the State exercises its rights in such a way that another State is hindered in the exercise of its own rights and, as a consequence, suffers an injury. Such a situation can result, for example, from the inconsiderate use of a shared natural resource, or a migratory species, or the radio-electronic spectrum... In the second case, the right is exercised intentionally for an end that is different from that for which the right has been created; with the result that injury is caused. This is the concept of *detournement de pouvoir*, well known in administrative practice within States... in the third case, the arbitrary exercise of its rights by the State, causing injury to other States but without clearly violating their rights, can also amount to an abuse of right. In contrast to the preceding situation, bad faith or an intention to cause harm are not necessary to constitute this form”.  

In general, both scholars and judges recognize the special role of the doctrine in the domain of international law. For instance, arbitrator Vigliani in the award declares:

“the theory of abuse of rights is an extremely delicate one, and I should hesitate long before applying it to such a question as the compulsory jurisdiction of the Court. The power to apply some of such principles as that embodied in the prohibition of abuse of rights must exist in the background in any system of administration of justice in which courts are not purely mechanical agencies”.  

As Lord Hobhouse on abuse of rights fairly notes “[the doctrine] can be illustrated but not defined”. The ICJ does not present an exact list of scenario where the doctrine applies. The Court has referred to the doctrine in the following decisions: the United Kingdom in the *Fisheries Jurisdiction Cases*\(^{100}\), Liechtenstein in the *Nottebohm Case*\(^{101}\), Norway in the *Norwegian Loans Case*\(^{102}\), Liberia and Ethiopia in the *South West Africa Cases*\(^{103}\), Belgium in the *Barcelona Traction Case*\(^{104}\), and Australia in the *Nuclear Tests Case*\(^{105}\). Greece referred to an abuse of rights argument in *The Ambatielos Claim*,\(^{106}\) as did Nauru in the *Nauru Case*.\(^{107}\) The

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\(^{97}\) Alexandre Kiss, “Abuse of Rights for Max Planck Encyclopedia of Public International Law” (December 2006), [Alexandre Kiss](blog), online:<opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1371?rskey=zK1bgp&result=1&prd=EPIL>.

\(^{98}\) *Arbitration between Great Britain and Portugal as regards questions relative to the delimitation of their spheres of influence in East Africa (Manica plateau) (Great Britain v Portugal)* (1897), 28 RIAA 283 at 287 (ad hoc Tribunal) (Arbitrator: M. Paul-Honoré Vigliani).

\(^{99}\) *Watkins v Home Office and others* [2006] UKHL 17, [2006] 1 AC 1 (HL(Eng)).

\(^{100}\) *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, [1973] ICJ Rep 1.

\(^{101}\) *Nottebohm case (Germany v Guatemala)*, [1955] ICJ Rep 32.

\(^{102}\) *Case of Certain Norwegian Loans (France v Norway)*, [1957] ICJ Rep 9 at 73.


\(^{104}\) *Barcelona Traction, Light & Power Company, Ltd. (Belgium v Spain)*, [1970] ICJ 3 at 32.


\(^{106}\) *Ambatielos Case (Greece v United Kingdom)*, [1953] ICJ Rep 1.

Court applied the doctrine to stop sovereign misconduct or, in other words, excessive exercise of rights by sovereign states.

In *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa case*, “it was alleged that South Africa had violated its Mandate to govern South-West Africa by misusing its governmental competence. South Africa had allegedly failed in its obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory under Article 2 (2) of the Mandate. The Court stated:

> “An Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization [i.e. the United Nations], in particular in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction”.

In this case, the abuse of rights doctrine applies to the governmental conduct. The Government of South Africa has controlled the territory of South West Africa in accordance with the established system of the UN Mandate. The UN Mandate system authorised a special presence of South Africa’s authorities in the territories South-West Africa.

The Government of South Africa abused the system of Mandate, in particular, the Government had failed to support a social progress. Factually, South Africa used the Mandate to establish its own authority at territory of South-West Africa. The Mandate system had a purpose in appointing states supervisors. The states supervisors, in this very case South Africa, had the obligation to support the economic welfare at the state of Mandate. South Africa violated the purpose of Mandate system. The ICJ applied the abuse of rights doctrine.

In the *Anglo-Norwegian Fisheries Case*, the Court indicated that:

> “the base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must have for the relation between the deviation complained of and what, according to the

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terms of the rule, must be regarded as the general direction of the coast. Therefore, one
cannot confine oneself to examining one sector of the coast alone, except in the case of
manifest abuse; nor can one rely on the impression that may be gathered from a large scale
chart of this sector alone”.

In the *Fisheries case*, Norway drew the sea lines in accordance with its own system of
delimitation, and the UK challenged the Norwegian system. The UK asked the Court to clarify
whether the sea bass lines system satisfies the requirement of international law. The Court
mentioned the abuse of rights doctrine with respect to the potential misconduct of the sovereign
state in the sea shore delimitation.

In the case of *Certain Norwegian Loans*, Judge Reed refused to adjudge the dispute on the basis
of good faith or abuse of rights. The judge indicates “practically speaking; it is, I think,
impossible for an international Tribunal to examine a dispute between two sovereign states on
the basis of either good faith or bad faith or of abuse of law”.

In the *German Interests Case*, the Court implicitly considered the abuse of rights doctrine as a
remedy to limit the sovereign abuse of a state. The Court has indicated the link between the
abuse of rights and the breach of a treaty. “Germany, undoubtedly, retained until the actual
transfer of sovereignty the right to dispose of her property, and only an abuse 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”.

Judge Parra-Aranguren specifically addressed a similar issue in his dissenting opinion.
“Therefore, in principle, Slovakia shall not compensate Hungary on the account of the
construction and putting into operation of “the provisional solution” and its maintenance in
service by Slovakia, unless a manifest abuse of rights on its part is clearly evidenced”.

In *Judgements of the Administrative Tribunal of the ILO upon complaints made against the
UNESCO (Advisory Opinion)*, Judge Read clearly indicated that the Tribunals “could base their

111 *Certain German interests in Polish Upper Silesia*, (Germany v Poland) (1926) PCIJ (Ser A) No 7 at 30.
judgements on abuse of rights only if evidence showed that the Director General had acted in bad
faith, arbitrarily, capriciously, or unconscionably”.

Paul Guggenheim has commented on the abuse of rights application. He argues that the doctrine
applies in two cases:

“first, where a state exercises in bad faith its right to designate the members of a
diplomatic mission, for example, by designating an individual wanted on criminal
charges in the host state and second where a state engages in the economic exploitation of
an international river in a manner harmful to a down-river state. The two acts would,
however, be dealt with in different ways. The receiving state would have no obligation to
recognize the designation of the member of the diplomatic mission, for the act would
simply be void. In contrast, some of the economic exploitation of the river would already
have occurred, with damage being caused, giving it the character of an illegal act and
thus engaging the standard rules of state responsibility”.

The jurisprudence of the Court does not respond to the question of when the court should apply
the doctrine. In the Corfu Channel case, Judge Alvarez has stated that:

“formerly, the misuse of a right had no place in law. Anyone could exercise his rights to
their fullest extent, even if the effect was prejudicial to others; in such cases there was no
duty to make reparation. That is no longer the case: some civil codes, especially those of
most recent dates, expressly forbid the misuse of right in private relations”.

On the question of ‘when should the Court apply the doctrine?’ Judge Alvarez has answered as
follows “the facts must be evaluated in any given case, and the existence of extenuating
circumstances”. Nevertheless, from the jurisprudence of the Court, it is clear that the Court
does not limit the application of the doctrine exclusively to one legal matter. The Court applies
the doctrine to various legal situations. Taking into consideration abovementioned decisions and
legal opinions, I will make the following conclusions on the abuse of rights doctrine in the
domain of international law. Firstly, the doctrine is a part of a good faith principle. The ICJ as
well as distinguished scholars have considered the abuse of rights as a part of a good faith
principle. The good faith principle and the abuse of rights are interrelated.

113 Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against the U.N.E.S.C.O.,
114 Byers, supra note 38 at 407.
115 Corfu Channel case (UK v Albania), [1949] ICJ Rep 36 at 47.
116 Ibid.
Secondly, the doctrine applies to a variety of different legal matters depending on the circumstances of each particular case. For example, in the *Polish Upper Silesia* case the Court recognized the misuse of the right with respect to disposing of property.\(^{117}\) In *Case of Free Zones of Upper Savoy and the District of Gex*, the Court has considered the application of abuse of rights doctrine towards the non-performance of contractual obligations.\(^{118}\) In *Fisheries* case, the doctrine has been applied to the delimitation of the coast.\(^{119}\) The ICJ intervenes “against abuses of discretion by international organizations, though not those by the General Assembly or the Security Council, which can be reviewed only for incompetence”.\(^{120}\) Overall, the Court applies the doctrine to limit sovereign misconduct. Scholars suggest applying the doctrine in case of injury.

Thirdly, there is no bright line rule in the application of the doctrine. The ICJ has never presented the list of cases in which the doctrine applies. The application of the doctrine depends on the judge’s discretion; discretion always means subjectivity in application.

In the second part of this chapter, I will consider the application of the doctrine in other domains of international law, namely international environmental law and international trade law. The process of fragmentation means “the emergence of specialized and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice”.\(^{121}\) The fragmentation of international law plays a very important role for the application of legal principles and doctrines. In accordance with article 38 of the International Court of Justice Statute (hereinafter ‘ICJ’ or the ‘Court’), legal principles and doctrines constitute the sources of international law. The application of the doctrine in these other domains of international law might be an illustrative example for the investor-state Tribunals.

International environmental law takes the approach suggested by Kiss. As has been mentioned, Kiss suggests applying the doctrine in case an injury or harm has been caused by the actions of

\(^{117}\) Certain German interests in Polish Upper Silesia, [*Germany v Poland*] (1926) PCIJ (Ser A) No 7 at 30.

\(^{118}\) *Case of the Free Zones of Upper Savoy and the District of Gex*, [*France v Switzerland*], Order (19 August 1929), PCIJ (Ser A) No 22, 5 at 7, 8.


\(^{120}\) Antony D’Amato, “Good Faith in Encyclopedia of Public International Law” (1992), Antony D’Amato (blog), online: <anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf>.

the state. In *Trail Smelter case*\textsuperscript{122}, the Tribunal recognized the abuse of rights as a principle of law to limit the trans-boundary harm. Later, the international community adopted the Stockholm Principles. In Principles 21 and 22 of the Stockholm Declaration, the community shall limit the conduct of states that cause harm or harmful effects on the neighboring states.\textsuperscript{123} Kiss saw great possibilities for application of the principle with respect to trans-boundary pollution, both in and of itself and as a general principle of law which “the doctrine of abuse of rights not only imposes a limitation upon an absolute sovereignty; it also restricts the doctrine of absolute territorial integrity”.\textsuperscript{124}

Friedmann points out that the principle of abuse of rights “does not say anything on the specific content and the extent of certain rights, such as ownership of land or territory, the use of waters, fishing and the like; it merely says that whatever these rights are, they must not be used in such a manner that its antisocial effect outweigh the legitimate interests of the owner of the right”.\textsuperscript{125} In the environmental law the doctrine is closely interrelated with the concept of good faith. The ICJ in the *Corfu Case*, which is not related to the environmental issues, established the principle that “every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”.\textsuperscript{126}

The WTO recognizes abuse of rights doctrine as a part of the good faith principle. Zoller has described “good faith obligations and prohibitions of abuse of rights as the two sides of the same coin”.\textsuperscript{127} In trade relations, *abuse de droit* applies to stop the protectionism and discrimination. The doctrine plays the role of the gap filling remedy in the international treaties and regulations. In this respect, the doctrine in WTO law is closely interrelated with the original *abuse de droit* in

\textsuperscript{122} *Trail Smelter Case United States v Canada* (1905), 31 ILM 874 at 876 (Ad Hoc Tribunal).


\textsuperscript{126} *Corfu Channel case* (*U.K. v Albania*), [1949] ICJ Rep 61.

civil law jurisdictions. The main role of the original doctrine has always been filling gaps in the legislative regulations.

However, the WTO also does not have a bright line test when to apply the doctrine. Marion Pannizion in his fundamental work ‘Good faith in the Jurisprudence of the WTO’ has researched that “WTO practice has sometimes made use of the notion of abuse de droit as an application of [the] general principle of good faith. First appearance of the doctrine has occurred in Australia – Subsidy case when “the competitive relationship between Chile and Australia had triggered abuse de droit”. In US-Shrimp cases, the abuse of rights doctrine was applied against US turtle protection laws.

In WTO jurisprudence, the abuse of rights doctrine applies towards abusive exercise of rights by states. In US-Schrimp line of cases, the Appellate body has made a notion on good faith interpretation in WTO disputes:

“The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and the general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abuse de droit, prohibits the abusive exercise of the state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say reasonably.’ An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law”.

In all domains within international law, the abuse of rights doctrine provokes much criticism. Scholars usually express their legitimate suspicions that “the doctrine tends to limit the exercise

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129 Ibid.
of rights through notions that even might go as far as to void the rights of their meaning”\textsuperscript{131}. Nonetheless, both international environmental law and international trade law apply the doctrine depending on the circumstances of each case and the scope of this application has remained wide.

\textsuperscript{131} Sajó András, \textit{Abuse: the dark side of fundamental rights} (Utrecht: Eleven International Publ., 2006).
3 The abuse of rights doctrine in international investment law

In this section, I will consider approaches to the application of the abuse of rights doctrine in relation to investor-state Tribunals. Afterwards, I will suggest three scenarios where Tribunals should apply the doctrine.

In contemporary international investment law, the abuse of rights doctrine applies to limit nationality planning.\textsuperscript{132} Nationality planning is common in investor-state arbitration.\textsuperscript{133} Broadly, nationality planning includes any measures undertaken by an investor with the sole purpose to change the nationality of.\textsuperscript{134} Nationality plays a vital role in the domain of the international investment law because it grants protection only to investments made by investors of a certain nationality.

Tribunals look to the definition of ‘investor’ to establish the \textit{ratione personae} (what is the English translation of this term). \textit{Ratione personae} jurisdiction means that a claimant may bring a claim before an international investor-state Tribunal (hereinafter ‘Forum’ or ‘Tribunal’) acting under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ‘ICSID Convention’), the North American Free Trade Agreement (hereinafter ‘NAFTA’) or United Nations Commission on International Trade Law (hereinafter ‘UNCITRAL Rules’ or ‘UNCITRAL’).\textsuperscript{135} These Rules and Conventions are interlocked with BITs in regulation of the investor–state disputes.\textsuperscript{136} The Rules and Conventions determine the procedural requirements for the investor-state arbitrations, whereas BITs imply the substantive rights and procedural rights. In particular, both BITs and Conventions also as UNCITRAL Rules, which contain provisions that guarantee the investor access to the international Forum as a means

\textsuperscript{132} Feldman \textit{supra} note 6 at 286.
\textsuperscript{135} Dolzer & Schreuer, \textit{supra} note 4 at 5.
\textsuperscript{136} \textit{Ibid} at 50, 313.
of protecting his or her investment.\textsuperscript{137} In other words, the definition of investor determines whether an individual or the corporation has \textit{jus standi}.\textsuperscript{138} \textit{Jus standi} is the legal capacity of the person to seek protection for their investment within the framework of the investor-state arbitration.\textsuperscript{139}

By shifting the nationality of their corporation investors can seek most-favourable conditions for BITs.\textsuperscript{140} Generally investors will seek stronger protection for substantive corporate rights and forums with the highest predictability of decision-making.

Tribunals will act predictably if they apply international investment law in a measurable way. For example, the ICSID Tribunals apply the \textit{Salini test} to determine the ‘investment’, whereas UNCITRAL Tribunals consider only the definition of ‘investment’ embedded in the relevant BIT.\textsuperscript{141}

By predicting the patterns of each forum, the corporations can anticipate the outcome of a dispute. Corporation will be able to predict, with some degree of certainty, the chances of a successful verdict and receiving compensation. In addition, predictability the risk corporations are wasting expenses on unsuccessful and costly arbitration. The incentive to reduce costs and to and to win the case triggers the corporations to search for a BIT with a favorable nationality. This practice is widely known as forum and treaty shopping.\textsuperscript{142}

The practice of forum shopping is hazardous and widely criticized.\textsuperscript{143} The commentators of Kluwer International Arbitration Blog have noticed “treaty-shopping may be defined as the process of routing an investment so as to gain access to a BIT where one did not previously exist

\textsuperscript{137} Ibid at 243,245.
\textsuperscript{138} Briggs W. Herberts, “The Barcelona the ius standi of Belgium” (1971) 65 AJIL 327 at 334.
\textsuperscript{139} Ibid.
\textsuperscript{140} Kenneth J. Vandevelde, \textit{Bilateral investment treaties: history, policy, interpretation} (New York: Oxford University Press, 2010).
\textsuperscript{142} Borman, supra note 132 at 365.
\textsuperscript{143} Ibid.
or for gaining access to a more favorable BIT protection”.

Forum and treaty shopping are criticized because these practices undermine the international investment regime. As has been noticed above, the international investment regime grants protection to an investment because of the investor’s nationality. Any maneuvering to a different nationality contradicts the modern regime.

Bernasconi-Osterwalder in a special report on BITs specifies that “those broad definitions, however, have led to situations where investors have attempted to manufacture or alter their nationality specifically in order to obtain rights and protections under particular IIAs”. The investors have started to use the BITs as portals to get the best protection for their investment.

To reduce this practice international investment law suggests two remedies. These remedies are the abuse of rights doctrine and the denial of benefits clause. The denial of benefits clause is a recent invention in international investment law. States will include a denial of benefits clause within a BIT to stop nationality planning. The clause abolishes the procedural right of investor to submit the claim to an investor-state Tribunals.

The abuse of rights doctrine is distinct from the denial of benefits clause. The denial of benefits clause has is a component of a BIT; whereas, the abuse of rights doctrine has been invented in the process of adjudication. Nevertheless the remedies achieve the same purpose of limiting nationality planning. However, the abuse of rights doctrine has a potential for wider application compare to the denial of benefits clause.

Undoubtedly, the abuse of rights doctrine has no basis in the international treaties. The Tribunal in the Rompetrol case has affirmed that “so far reaching a proposition [the abuse of rights doctrine] needs to be backed by some positive authority in the Convention itself, in its negotiating history, or in case of law under it”. When applying the doctrine Tribunals do not

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146 Schreuer, supra note 133 at 526.
147 The Rompetrol Group N.V v Romania, Award of 6 May 2013 ICSID Case No. ARB/06/3.
refer to any specific treaty provision. Rather, in the *Phoenix case, Europe Cement and Cementowina*, the Tribunal affirms the doctrine is a principle of general international law.\(^\text{148}\)

International investment law is an integral part of public international law. International public law has developed a number of remedies to limit misuse of rights, including the abuse of rights doctrine. As has been argued, the abuse of rights doctrine is a manifestation of the good faith principle. Bin Cheng has supported this statement by saying “good faith in the exercise of rights ... means that the State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law”.\(^\text{149}\)

Lauterpacht has suggested that the doctrine has a greater effect in the individualistic systems of law. An individualistic system of law “is apparently one in which the law refuses to interfere with the legally recognized self-assertion and freedom of action of the individual members of the community, even if such conduct is contrary to the principles of justice and social solidarity”.\(^\text{150}\)

International investment law is an example of an individualistic system of law. Many commentators agree “the abuse of rights doctrine is a useful safeguard in relatively undeveloped or over-flexible parts of the legal systems pending the development of precise and detailed rules”.\(^\text{151}\) The international investment law satisfies the above description. Consequently, the doctrine will perform the role of ‘safeguard’ in the domain.

At the current stage, international investment law has exhausted its self-regulatory mechanisms. For example, the BITs contain the definition of investor. The definition of investor introduces the criterion of nationality. The nationality of investors represents the self-regulatory mechanism of the international investment law. The mechanism is reflected in the rule that only investors of a particular nationality get the protection of its investment. However, some investors have explored different tools to change nationality in order to get the protection of the regime. Thus, the investors find the ways to overturn the self-regulatory mechanism of the regime has not been able to react to this misuse. For this purpose, investor-state Tribunals have applied the abuse of

\(^{148}\) *Phoenix Action, Ltd v Czech Republic*, Award of 19 April 2009 ICSID Case No. ARB/06/ at paras 34-38.

\(^{149}\) Bin Cheng, *supra* note 84 at 125.

\(^{150}\) Hersch Lauterpacht, *supra* note 93 at 164.

rights doctrine. The abuse of rights doctrine has become a remedy to limit the abusive conduct of investors, to act on the change of conditions, and to protect the integrity of the individualistic system. Consequently, the doctrine performs two functions. Firstly, the doctrine adjusts the legal system to new conditions. Secondly, the doctrine aims to limit the misuse of rights.

I suggest that the abuse of rights doctrine will remedy the misuse of rights in the following three scenarios: (1) where an investor disregards the economic or social purpose of international investment regime; (2) where an investor exercises his or her right in a bad faith; and (3) where an investor exceeds the limits of the right.

At present, investor-state Tribunals use the abuse of rights doctrine to stop nationality planning. Schreuer has recognized that nationality planning itself does not constitute a violation of international investment law. Borman has suggested “corporate planning is perfectly legal and happens on a large skill. It can be done for multiple reasons, among others, to improve profitability and provide better organization to the company or to benefit from lighter tax regimes”.

However, investor-state Tribunals distinguish between legitimate nationality planning and illegitimate nationality planning. Nationality planning is legitimate if an investor has undertaken nationality planning measures in the anticipation of a dispute and for a valid purpose, such as to protect its investment from the nationalization. Tribunals determine the legitimacy of corporate planning by using either the formalistic or substantive approach. I will consider the application of both approaches in regards to the abuse of rights doctrine in investor-state disputes.

In international investment law, the abuse of rights doctrine applies only towards investors. The rationale of this approach is clear: BITs concern the obligations of states and rights of investors. Moreover, BITs do not restrict investors’ rights. Nevertheless, investors could abuse the rights granted under BITs. BITs usually do not contain any direct clause prohibiting the

152 Autopista Concesionada de Venezuela CA v Venezuela (2001), 6 ICSID Report 419 at para 1, 5; see also: Phoenix Action, supra note 147 at 47.

154 Borman, supra note 132 at 365.

155 Dolzer&Schreuer, supra note 4 at 13-15.
nationality planning. The abuse of rights limit the investors in misusing of rights.\textsuperscript{156} To prevent misuse of rights, the investor-state Tribunals apply the doctrine against investors. International law, international trade law and international environmental law uses the doctrine to limit abusive actions on the part of states. Applying the doctrine exclusively towards investors, the Tribunals disregard the principle of equal arms.

3.1 Formalistic approach

Investor-state Tribunals have developed a formalistic approach to the abuse of rights doctrine. The formalistic approach incorporates an objective criterion of abusive conduct, namely timing of the dispute. The Tribunals in \textit{Phillip Morris v. Australia}\textsuperscript{157}, \textit{Autopista v. Venezuela}\textsuperscript{158} and \textit{Pac Rim Cayman v. El Salvador}\textsuperscript{159} all considered and applied the timing criterion. The timing criterion pays attention to the time of when the dispute commences. If an investor has undertaken nationality planning measures after the dispute has commenced, the Tribunal will apply the abuse of rights doctrine. In such circumstances, the nationality planning measures constitute illegitimate nationality planning, which is an abuse of rights.

In the \textit{Phillip Morris v. Australia case}, Phillip Morris restructured its company: “In February 2011, the claimant investor, Philip Morris Asia Limited (PM Asia), purchased Philip Morris (Australia) Limited (PM Australia), which owns Philip Morris Limited (PML), which owns the intellectual property relevant to the dispute”.\textsuperscript{160} The Australian government argued that Phillip Morris undertook the restructuring in order to submit a claim under the Australia-Hong-Hong Bilateral Investment Treaty\textsuperscript{161} and that this constitutes an abuse of rights. The abusive conduct of Phillip Morris lies in its attempt to get access to the investor-state arbitration through the Australia Hong-Hong BIT. The \textit{Phillip Morris case} is an interesting example of the contradictory nature of an abuse of rights doctrine.\textsuperscript{162} Here, the Australian authorities introduced legislation

\textsuperscript{156} Ibid at 18.
\textsuperscript{157} \textit{Philip Morris Asia Limited v Australia}, UNCITRAL, PCA Case No. 2012-12
\textsuperscript{158} \textit{Autopista Concesionada de Venezuela CA v Venezuela} (2001), 6 ICSID Report 419.
\textsuperscript{159} \textit{Pac Rim Cayman LLC v Republic of El Salvador}, ICSID Case No. ARB/09/12
\textsuperscript{160} \textit{Philip Morris Asia Limited v Australia}, UNCITRAL, PCA Case No. 2012-12.
\textsuperscript{161} Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, signed 15 September 1993, 1748 UNTS 385 (entered into force 15 October 1993).
\textsuperscript{162} Tania Voon, Andrew Mitchellland, James Munro, “Legal Responses to Corporate Maneuvering in International Investment Arbitration” (2013) 1 J Int’l Disp Settlement 1 at 4 – 8.
Plain Packaging Act requiring plain packaging for tobacco products. Phillip Morris argued this legislation infringed its intellectual property investments protected under the Australia Hong-Kong BIT. The Australian Government devalued the investment through the Act. The timing criterion is beneficial for states because Tribunals will not take into consideration the reason why restructuring measures were undertaken by the investor. Having followed the formalistic approach, the Tribunals will consider only when an investor has undertaken the nationality planning measures.

In *Autopista v. Venezuela case*, Venezuela has argued that the Claimant abuses the corporate form by creating a corporate shell. The Tribunal invokes the timing criterion. The Tribunal has stated that ‘the transferee entity had been incorporated eight years before the parties entered into a concession agreement. The transferee has not just been a shell corporation. The Tribunal has evaluated the purpose of nationality planning. The abuse of rights exists when an investor establishes a corporation for the sole purpose of gaining access to international arbitration.

In *Pac Rim Cayman LLC v El Salvador*, “the tribunal analyzed the question of change of corporate nationality as relating to the ‘admissibility’ of the claim”. Ecuador argued the timing criterion was essential in the application of the abuse of rights doctrine. Ecuador asserted that “for a finding of Abuse of Process, the only requirement is that the dispute submitted to arbitration was either “born” or “foreseeable”, and that it was cognizable, before Pac Rim Cayman changed nationality to permit the submission of the dispute to arbitration”. Here the Tribunal found, “harm can arise through a ‘one-time act’, ‘continuing act’ or a ‘composite series of acts’”. “The no harm principle expresses the maxim *sic utere tuo ut alienum non leads*. Closely related to the no harm principle is the abuse of rights doctrine of civil law origins. Contrary to the no harm principle, the precise status of the abuse of rights principle in international law is not entirely clear”.

163 *Ibid* at 1.
164 *Ibid* at 7.
168 *Ibid* at para 2.110.
There are three main criticisms of the formalistic approach. Firstly, the timing criterion does not reflect the initial content of the doctrine developed by civil law jurisdictions. Secondly, the timing criterion restricts the doctrine exclusively to the area of nationality planning. Thirdly, the corporation is an effective remedy to protect the investments.\textsuperscript{170} For the investor, corporate planning remains an effective tool to respond to unfavorable actions of the host state, such as nationalization, or expropriation without compensation. Depriving an investor of the ability to restructure its corporation is contrary to the essence of corporation law.

In addition, the formalistic approach gives an advantage to states in investor-state arbitration. Investors cannot invoke the doctrine against states. Although the state has no rights under BIT, a state is binding to perform the object and purpose of the BITs according to VCLT.\textsuperscript{171} Hence, investor should have an opportunity to invoke the doctrine against state if the latter breaches the object and purpose of BIT. We will advocate this approach at subsection 3.3.3. The doctrine stops the proceedings at the jurisdictional stage, by allowing the Tribunal to reject the \textit{ius standi} of an investor. In accordance with the formalistic approach, the timing is the sole criterion for the Tribunals.

### 3.2 Substantive approach

Some Tribunals have developed the so-called substantive approach in applying the abuse of rights doctrine. The substantive approach implies the criterion of purpose in the nationality planning. Applying the abuse of rights doctrine, Tribunals have examined the purpose of the nationality planning measures. For example, in Mobil case: “the Mobil corporation structured its investment as follows Mobil (Delaware) owned 100\% of Mobil CN Holding (Delaware), which in turn owned 100 \% of Mobil CN Holding (Bahamas), which has a 41 2/3 \% participation in the Cerro Negro Association. (ii) Mobil (Delaware) also owned 100 \% of Mobil Venezolana Holding (Delaware), which in turn owned 100 \% of Mobil Venezolana (Bahamas), which had a

\textsuperscript{170} \textit{Mobil Corporation v Venezuela, Decision of Jurisdiction of 10 August 2010} ICSID Case No. ARB/07/27 at 27 – 47.

\textsuperscript{171} \textit{The Vienna Convention on the Law of Treaties}, 23 May 1969, 1155 UNTS 331, 8 ILM 679 at 26 (entered into force 28 January 1980) [\textit{VCLT}].
50% participation in the La Ceiba Association”. Mobil has incorporated a new entity under the law of the Netherlands in 2005.

Venezuela claimed that restructuring was done long after the investment. Venezuela argued “the disputes were not only foreseeable, but they had been identified and notified to Respondent before the Dutch company was even created”. Venezuela submits before the Tribunal that the only purpose of the restructuring was to get access to the ICSID jurisdiction and to the regime protection. Venezuela based its objections on the abuse of rights stating that “an abusive manipulation of the system of international protection under the ICSID Convention and the BITs”. In case of “abusive manipulation” the Tribunal can refuse to recognize the jurisdiction ratione personae. Consequently, in the Mobil case, the Tribunal observed the substance of the restructuring undertaken by the investor. The Tribunal has noticed that “the aim of the restructuring of their investments in Venezuela through a Dutch holding 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 legitimate goal as far as it concerned future disputes”.

In Europe Cement Investment & Trade S.A. v. the Republic of Turkey the Tribunal noted that “the Respondent's characterization of abuse of process as an issue of “international public interest”, and observed that: It is well-accepted in investment arbitrations that the principle of good faith is a principle of international law applicable to the interpretation and application of obligations under international investment agreements”. The Tribunals took a “mixed” approach in Phoenix v. Czech Republic and Abaclat v. Argentina. In these cases, the Tribunals considered the abuse of rights doctrine as a manifestation of the bona fide principle. The bona fide principle is a widely known principle of good faith, which holds that actors should perform

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172 Ibid at 15.
173 Ibid at 188.
174 Ibid at 205.
175 Ibid at 204.
176 Europe Cement Investment & Trade v Republic of Turkey, Award of 13 August 2009 ICSID Case No. ARB (AF)/07/2; see also: John P. Gaffney, “Abuse of Process' in Investment Treaty Arbitration” (2010) 11 JWIT 515 at 516-518.
177 Abaclat v Argentina, Decision on Jurisdiction And Admissibility of 4 August 2011 ICSID Case No ARB/07/5 at para 642; see also: Phoenix Action, Ltd. v Czech Republic, Award of 19 April 2009 ICSID Case No. ARB/06/ at para 34-38.
their obligations and exercise their rights honestly and reasonably. The Tribunals have introduced different approaches towards good faith and abuse of rights that I will consider in next paragraphs.

In *Phoenix v. Czech Republic*, the Tribunal stated that it is an abuse of rights for a Czech citizen to sell shares owned by his wife to a company incorporated in Israel. The Tribunal considered the following key features of the transaction, including “the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction, and the exact nature of the operation”. Consequently, the *Phoenix* approach constitutes the substantive approach to the abusive conduct. The Tribunal examined not only the issue of timing on the dispute but the true nature of the transaction. The Tribunal determined that the “whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction”. Moreover, “no activity was either launched or tried after the alleged investment was made”. The abuse means “*de´tournement de procédure*”, consisting in the Claimant’s creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled”.

In *Abaclat v. Argentina*, the abuse of rights was found to be an integral part of the good faith principle. In *Abaclat case*, the theory of abuse of rights is “an expression of the more general principle of good faith”.

The material good faith shows the context and the way investment made, whereas the procedural good faith demonstrates the context and the way investor initiates the claim. The abuse of rights doctrine does not need this division. The Tribunal applies the doctrine to both material and procedural abuses, if the Tribunal has established the abusive conduct or misuse of the rights.

*Abaclat v. Argentina case* demonstrates the attempt to extend the application of the abuse of rights doctrine beyond the nationality planning. Argentina claimed that the investor did not

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179 *Phoenix Action, Ltd. v Czech Republic*, Award of 19 April 2009 ICSID Case No. ARB/06/ at para 34-38.

180 *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5 at para 45.

181 Ibid.

182 *Abaclat, supra* note 175 at 101; see also: Feldman *supra* note 6 at 287.
acquire the investment in accordance with good faith, and the initiation of the proceedings was illegitimate.\textsuperscript{183}

The Tribunals in \textit{Phoenix} and \textit{Abaclat} do not invoke the substantive (purpose criterion) and formalistic approaches (timing criterion). In \textit{Phoenix} and \textit{Abaclat}, the Tribunals make the substantive analysis of the case through the prism of good faith. This analysis includes the examining nature of the transactions, the intent and the nature of the operation.\textsuperscript{184} The Tribunals do not look into the purpose of the investors’ actions in opposite to decisions in \textit{Cementowina} or \textit{Mobil}. In summary, the Tribunals follow very controversial approaches in the application of the doctrine. I suggest Tribunals should apply the abuse of rights doctrine in three scenarios outlined below. In this thesis, I will not consider the issue of evidence in the investor-state arbitration

\textbf{3.3 Three scenarios}

\textbf{3.3.1 An actor disregards the economic or social purpose of the regime}

The abuse of rights doctrine aims to limit the misuse of rights. Recall that civil law jurisdictions acknowledge the difference between \textit{droit objective} and \textit{droit subjective}.\textsuperscript{185} \textit{Droit objective} represents the actual legal rules contained in the legislation, whereas \textit{droit subjective} determines the limits of the rights.\textsuperscript{186} The \textit{droit subjective} does not allow exercising rights by exceeding the limits. Civil law systems have developed a specific approach to the rights, whereby each right has a social or economic purpose. The violation of the right’s purpose is tantamount to the misuse of the right. The misuse of a right threatens the integrity of the legal system. Consequently, in a number of civil law jurisdictions the abuse of rights doctrine or abuse de droit is used to prevent the misuse of rights and thus secure the legitimacy of the legal system.\textsuperscript{187}

\begin{flushleft}
\textsuperscript{183} \textit{Ibid}.
\textsuperscript{184} \textit{Abaclat, supra} note 175 at 112; see also: \textit{Phoenix Action supra} note 147 at paras 34 – 35.
\textsuperscript{185} Antonio Gambaro, \textit{supra} note 20 at 566, 570.
\textsuperscript{186} \textit{Ibid}.
\textsuperscript{187} Mayrand, \textit{supra} note 17 at 1012.
\end{flushleft}
The ECJ has accepted the doctrine applies only if the action contradicts the legal purpose of the provision.\textsuperscript{188} The ECJ examines the purpose of the violation of the regulations and rules as an objective element of the doctrine.\textsuperscript{189} For example, in \textit{Emsland-Starke case}, a German company transported goods to Switzerland. In order to receive a refund, the German company immediately returned goods back to Germany.\textsuperscript{190} These actions aimed to benefit the German company in accordance with German legislation. The ECJ found the German company did not violate the letter of the law, but it acted in contradiction to the spirit of the rules and regulations. The regulations have a purpose to encourage the trade of agricultural products between the EU countries.\textsuperscript{191} The German company abused the very purpose of regulations. The ECJ has applied the abuse of rights doctrine. Germany had a right to require for the repayment of undue export fee.\textsuperscript{192}

International public law applies the theory of improper purpose.\textsuperscript{193} The ICJ considered improper purpose in \textit{the Right of Passage over Indian Territory (Merits) case}.\textsuperscript{194} The ICJ has recognized the right of India to regulate the traffic of Portuguese through Indian border. In this case Judge Spender dealt with the theory of improper purpose: “if India had, in fact, purported to regulate and control Portugal's right of passage; it would have been relevant to enquire whether the action taken by India was in reality a regulation or control of the right of passage or was directed to another and different purpose. It would have been relevant to enquire whether it was, in fact, directed to the right of passage as such so as to render it nugatory”.\textsuperscript{195} I suggest to apply the social purpose’ approach in the investor-state arbitration.

The international investment regime has the purpose of facilitating economic growth and development.\textsuperscript{196} The purpose of facilitation of economic growth and development distinguishes the international investment regime from the international trade regime.\textsuperscript{197} The international

\begin{itemize}
  \item \textsuperscript{188} \textit{ECJ} \textit{Emsland-Stärke GmbH v Landwirtschaftskammer Hannover}, Case C-94/05, [2006] ECR I-2622 at I-2630 – I-2632.
  \item \textsuperscript{189} \textit{Ibid} at I -2635.
  \item \textsuperscript{190} \textit{Ibid} at I- 2638.
  \item \textsuperscript{191} \textit{Ibid}.
  \item \textsuperscript{192} \textit{Ibid}.
  \item \textsuperscript{193} \textit{Case Concerning Right of Passage over Indian Territory (Portugal v India)}, [1960] ICJ Rep 6 at 52.
  \item \textsuperscript{194} \textit{Ibid}.
  \item \textsuperscript{195} \textit{Ibid} at 53.
  \item \textsuperscript{196} Dolzer & Schreuer, \textit{supra} note 4 at 11.
  \item \textsuperscript{197} \textit{Ibid} at 18.
\end{itemize}
investment regime considers BITs are *lex specialis*, but BITs do not constitute the sole pillar of the international investment regime. The investment regime has an economic purpose, and thus, the participants of the international investment regime should act in accordance with this purpose. Violation of this purpose is equal to abuse of the regime. The abuse of the investment regime should invoke the responsibility of an actor. In turn, abuse of rights doctrine could be used as a tool to invoke the responsibility of the state. As has been said, BITs legally frame the regime of investment protection.

BITs represent an efficient way to frame the international investment regime and regulate the flows of investment.\(^{198}\) “Appropriate reading of the doctrine finds state responsibility to be engaged whenever a right is exercised in an abusive manner”.\(^{199}\) Schwarzenberger has suggested that the abuse of rights doctrine assists in the interpretation of the fair and equitable treatment: “Governmental officials (acting in any capacity) are not permitted to exercise their authority - whether granted by treaty or existing as a part of the sovereign right to regulate the affairs of their citizens - in an abusive or discriminatory manner… the sign of an ‘abuse of rights is a seemingly arbitrary governmental decision which causes damage to the interests of a foreign investor.. If governmental officials can demonstrate that the decision was made in objective and rational (or perhaps reasoned) manner - rather than for an improper purpose - they will be able to defeat any claim made under this standard. The role of the Respondent Government in any dispute to provide a reasonable explanation for its harmful conduct”\(^{200}\)

To consolidate the international investment law and civil law jurisdictions, I would suggest that the network of BITs play the role of *droit objective* or in other words, normative regulation of the regime. The rights belonging to the investors demonstrate the *droit subjectif*. BITs, the ICSID Convention, NAFTA and the Energy Charter Treaty all have their own object and purpose. All contracting parties to these international instruments are obliged to ensure the object and purpose of the instruments has been followed by the participants. BITs could not cover the whole domain


\(^{199}\) Ibid.

within their particular rules; investors and states might find gaps to squeeze through the regulatory provisions of BITs.

To fill the gaps in normative regulations, I will suggest applying the abuse of rights doctrine in cases where the regime has been misused. In these circumstances, the application of abuse of rights doctrine requires the teleological interpretation from the Tribunals when the rights and obligations of the regime’s participants are not well defined. Garcfa-Amador has explained it as follows “limiting the exercise of rights that are not always well-defined and precise rules in general international law or in the particular instruments which recognize them”.

The participants must act in accordance with the object and purpose of BITs, ICSID, another treaty or an investor-state regime.

### 3.3.2 An actor fails to exercise its rights in good faith

The abuse of rights doctrine is a special manifestation of good faith principle. Following the Tribunals in the Phoenix case and the Abaclat case that abuse of rights doctrine is a part of good faith principle.

The good faith principle has a vague meaning in international law. The principle of good faith is known by its flexibility, relativity and subjectivity towards the factual circumstances of each case.

For example, the ICJ has applied good faith in the Nuclear Weapon Tests case, and recognized its special. In this case, France made a number of unilateral declarations regarding the nuclear weapon tests. The unilateral declarations had an effect of international legal obligation under the position of ICJ.

The ICJ found that the failure of the French authorities to act in accordance with the declaration violates the principle of good faith. In Nauru case, Australia has stated that Nauru brought an action in violation of good faith and improper purpose.

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201 Byers, *supra* note 38 at 395; see also: *Daimler Financial Services A G v Argentine*, Award of 12 August 2012 ICSID Case No. ARB/05/1 at para 174.
202 Abaclat *supra* note 175 at para 642; Phoenix Action *supra* note 147 at paras 34 –35.
203 Cheng *supra* note 84 at 130.
Fitzmauritz and Taylor have commented on good faith as follows “internationally, good faith is presumed, and the State is entitled to rely on the word of another State. Without such a presumption, international intercourse could not continue. The essence of bad faith, then, is the discordance between the stated purpose and the actual reason. It derives from the principle that one cannot be allowed to say one thing at one moment and another at the next, and from the narrower principle that the law can allow no man to 'invoke one reason for exercising his powers when in reality his action is based on another’.”

Many scholars, as well as international Tribunals have recognized that “the determination of the point at which the exercise of a legal right has degenerated into abuse of the right is a question that cannot be decided by an abstract legislative rule, but by the activities of the courts drawing the line in each particular case”. The ICJ expressed the same approach in the Certain German Interests in Upper Silezia case. Consequently, there is no bright-line test dictating when the doctrine of abuse of rights should be applied. The abuse of rights doctrine as part of the bona fide principle is considered through the prism of subjectivity and relativity. ICSID Tribunals have demonstrated “it is necessary to have regard to the principle of good faith”. In Daimler v. Argentina, the Tribunal has acknowledged, “good faith is a fundamental principle of the rule of law”. Consequently, Tribunals should interpret the abuse of rights as an integral element of good faith principle.

However, neither Tribunals nor scholars have developed any test to establish a violation of a good faith principle. As has been argued, the Tribunals have determined the violation of good faith principle depending on the circumstances of each case. For example, in Malicorp v. Egypt, the Tribunal considered that an investor received the investment contract as a result of fraud or corruption. In Atlantic Triton v. Guinea, an investor instituted abusive proceedings to obtain provisional measures through the investor-state arbitration. Only in Inseya v. El Salvador has

206 Norbert Horn, Stefan Kröll, Arbitrating foreign investment disputes (The Hague: Kluwer Law Internat’l, 2004) at 125; see also: Certain German interests in Polish Upper Silesia, (Germany v Poland) (1926) PCIJ (Ser A) No 7 at 33.

207 Ibid.

208 Certain German interests in Polish Upper Silesia, (Germany v Poland) (1926) PCIJ (Ser A) No 7 at 33.

209 Abaclat, supra note 175 at para 647.

210 Daimler Financial Services A G v Argentine, Award of 12 August 2012 ICSID Case No. ARB/05/1 at para 174.

211 Malicorp Ltd. v Egypt, Award of 7 February 2011 ICSID Case No. ARB/08/18 at 71 – 72.

the Tribunal held that good faith principle means the absence of deceit.\textsuperscript{213} In Tecmed \textit{v.} Mexico, the Tribunal stated that “good faith requires reasonableness, consistency and transparency”.\textsuperscript{214} The Tribunals assume that investors and states act in good faith. For example, in Fraport \textit{v.} Phillipinnes, the investor violated domestic legislation by committing various fraudulent acts. However, the investor has exercised its rights in a good faith. The law of the state had no explicit provision on the required conduct. Thus the Tribunal concluded "an investment should not be denied to get a treaty protection".\textsuperscript{215} In Parkerings-Companiet \textit{v.} Lithuania, the state violated a good faith principle by failing to disclose the information under the contract.\textsuperscript{216}

French lawyers consider good faith as a moral concept, or a purely subjective test. Civil law jurisdictions acknowledge that a good faith basis on social solidarity protects “the object and purpose of a transaction against all acts intending or having the effect of depriving it of its use”.\textsuperscript{217}

If a participant in investor-state relations acts in contradiction to the principle of good faith, an actor misuses the regime. The misuse of the regime constitutes abusive behavior. Consequently, to limit abusive conduct, a Tribunal should apply the abuse of rights doctrine. The Tribunals should evaluate whether the system has been misused based on the factual circumstances of each case.

\textbf{3.3.3 An actor has exceeded the limits of the right}

If an investor or state acts in a way that constitutes misconduct, it is not certain that this will lead to a violation of a BIT or another international treaty. For example, in \textit{Lallanne and Ledour cases} “the chief of the customs office at Ciudad Bolivar had refused the shipping of meat cattle which L. Ledour wanted to expedite to French Guyana. The tribunal could establish that the true reason of that refusal was not linked to sanitary or other legitimate motives, but to an intervention of the President of Guyana, who wanted to avoid the shipping because of important private interests in

\textsuperscript{213} Inceysa \textit{v.} El Salvador, Award of 6 August 2006 ICSID Case No. ARB/03/26 at para 53.
\textsuperscript{214} Técnicas Medioambientales Tecmed \textit{v.} Mexico, Award 29 May 2003 ICSID Case No. ARB (AF)/00/2 at 75 – 76.
\textsuperscript{215} Fraport \textit{v.} Philippines, Award of 16 August 2007 ICSID Case No. ARB/03/25 at para 202.
\textsuperscript{216} Parkerings-Compagniet AS \textit{v.} Lithuania, Award of 11 September 2007,ICSID Case No. ARB/05/8 at paras 190, 210.
an enterprise in direct concurrence with that of L. Ledour. The arbitrators, hence, concluded that there had been abuse of authority and held Guyana responsible” 218

The case illustrates that (1) the state or state authorities misused the regime and (2) it did so indirectly. Guyana exercised its powers in an abusive manner by exceeding the limits of powers/rights that it had. Using governmental influence to effect a transaction with the sole purpose to protect the private interests of an enterprise constitutes a wrongdoing.

I suggest applying the abuse of rights doctrine in the case of wrongdoing. In general, the international investment law and international law require all participants to exercise their rights honestly and loyally. Bin Cheng has noticed that “any fictitious exercise of the right for the purpose of evading either the rule of law or a contractual obligation will not be tolerated. Such an exercise of rights constitutes an abuse of rights, prohibited by law” 219

Implicit application of abuse of rights doctrine could be found in a number of cases related to the wrongdoing. For example, in Tribunal in Eureuko v. Poland, the government of Poland decided not to honour privatization agreements. The Tribunal stated that it happened due to “purely nationalistic reasons of a discriminatory character … and interplay of Polish policy” 220 In Rompetrol v. Romania, the Tribunal accepted that “a pattern of wrongful conduct” could lead to a breach of BIT “if it is sufficiently serious and persistent enough to affect the interests of the investor and where the state fails to pay adequate regard to how an investor’s interests ought to be protected” 221

The tribunal linked this obligation to the legitimate expectations of the protected investor” 222 Newcombe suggests that examples of investor misconduct include criminal activity, illegality and fraud in international arbitration, lack of due diligence or human rights violations. 223

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218 Lalanne and Ledour case (1903), 10 RIAA 17 (French Venezuelan Commission).
219 Cheng, supra note 84 at 130.
220 Eureko B V v Poland (2005), 12 ICSID Reports 335 (UNCITRAL).
221 Rompetrol, supra note 146.
222 Rompetrol, supra note 146.
misrepresentations, concealments or corruption or [in other words] amounting to “abusing the system of ICSID protection”.224

An abuse of ICSID protection includes the abuse of proceedings by participants. Participants of investor-state proceedings have a number of rights. For instance, the parties have the right to appoint an arbitrator. This right might be abused by an undue interference, which includes any actions that violate the equality of arms principle.225 The equality of arms principle “is an expression that means that each party must have a reasonable opportunity to defend its interests under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent”. Thomas Walde includes the examples of undue interference within investor-state proceedings such as corruption, or any kind of intimidation of arbitrators, direct or indirect pressure on arbitrators, intimidation of local and international council, experts and witnesses, concealment of documents, illegal surveillance of communications, obstruction of discovery and false testimony, and lifting the confidentiality of the proceedings.226 Once a party commits the abovementioned actions, the equality of arms principle has been undermined.227 I suggest that the Tribunal has a right to restore equality and to stop misbehavior of the party.

To abandon misconduct of the party, the Tribunal should have an opportunity to apply the abuse of rights doctrine. In Mexico v. United States of America, the Tribunal has stated that in the proceedings the parties are required “not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings”.228 The Tribunal should have the rights to secure the integrity of the procedure. In Rompetrol case, the Tribunal questioned the legal basis for the application of the abuse of rights doctrine.229 I suggest that an abuse of rights plays a strategic role in the situation of undue interference. The doctrine could secure the regime of

224 Phoenix, supra note 147 at para 45.
226 Yannaca-Small, supra note 165.
228 Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), [2004] ICJ 1 at 51.
229 Rompetrol, supra note 146.
international investment proceedings. The right of the Tribunal to apply the abuse of rights doctrine to misconduct at the time of proceedings is founded on the inherent power of tribunals to regulate their own procedures.\textsuperscript{230} In addition, the abuse of rights constitutes a principle of international law so it applies as a primarily source according to article 38 of ICJ.

Some authors have suggested incorporating serious misconduct within the BIT, “primarily by the duty of fair and equitable treatment”.\textsuperscript{231} The scholars acknowledge that the “interaction between substantive obligations under an investment treaty and the procedural duty of the state has not been properly identified or explored”\textsuperscript{232}

In my opinion, the wrongdoing of a dispute's participant threatens the integrity of the international investment regime. The abuse of rights doctrine limits misuse of the regime and adjusts the individualistic system of international investment law to counter illegitimate maneuvering. The abuse of rights doctrine represents the remedy to restrict the misconduct of parties in the proceedings.

\textsuperscript{230} Newcombe & Paradell, supra note 218 at 68.
\textsuperscript{231} Schreuer & Dolzer \textit{supra} note 4 at 234.
\textsuperscript{232} Yannaca-Small, \textit{supra} note 165 at 187 – 188.
Conclusions

The abuse of rights doctrine constitutes a unique and effective remedy to prevent the misuse of rights. However, the question of when to apply the doctrine remains. As Shreuer has suggested, the doctrine of abuse of rights should be applied with caution. In this thesis, I have suggested three scenarios namely (1) an investor misuses the international investment regime; (2) an investor exercises a right in a bad faith; and (3) an investor commits misconduct for when the doctrine might be applied in the context of investor-state arbitration. The application of the doctrine in these three situations will secure the international investment regime from misuse and misconduct, which is necessary to protect investments.

Nevertheless, application in these scenarios could be the subject to criticism for at least two reasons. Firstly, the Tribunals have discretionary power, which is not founded on the text of BITs or any other relevant treaty. Secondly, what are the limits in the application of the abuse of rights doctrine in these scenarios? The abuse of rights doctrine applies only in cases where misuse occurs. However, Tribunals might widely interpret what constitutes a misuse of rights, the regime or the system of BITs protection.

The abuse of rights doctrine could play an important role in the international investment law by guaranteeing its stability and safety of the regime. This function could be achieved by applying the doctrine for the following reasons: firstly, the doctrine prevents the misuse of a right. The doctrine increases the effectiveness of investor-state Tribunals’ justice by arming arbitrators with an additional legal remedy to react to non-bona fide actions committed by the investors or states. Thirdly, the doctrine protects the interests of the community by restricting the use of rights only within certain limits prescribed under international law. The abuse of rights doctrine needs more exploration and development in the domain of international investment law. Application of the doctrine exclusively to nationality planning issues seems to be irrational. As has been demonstrated, the doctrine has been applied to limit nationality planning. The Tribunals have followed two approaches to circumvent nationality planning, namely the formalistic and substantive approach.

233 Schreuer, supra 133 at 526–527.
In this thesis, I have shown that the doctrine has another purpose. The doctrine could potentially limit misuse of the international investment regime more broadly, for instance where a participant of investor-state relations commit actions in conflict with the object and purpose of a BIT. The doctrine could be employed as the Tribunals’ response to actions that are not committed not in a good faith. In addition, the doctrine might limit general misconduct committed by investors or states. This thesis demonstrates that the abuse of rights doctrine has a wide application towards different factual circumstances.