Volume 27 Number 2 2026 pp.124-132 www.usask.ca/esteyjournal

The Estey

Journal of International Law and Trade Policy

Abuse of Rights in International Law

Halil Rahman Basaran

Faculty of Law, Istanbul Sabahattin Zaim University, Istanbul, Turkey

Abstract

Abuse of rights means "discrimination" and "arbitrariness" in the exercise of rights. The prohibition of abuse of rights reflects the legitimate expectations of participants in a special legal regime. In two special legal regimes – the World Trade Organization regime and the international investment regime – the concept of abuse of rights protects special public interests, namely, foreign trade and foreign investment.

Keywords: abuse of rights, arbitrariness, discrimination, exercise of rights, international investment arbitration, international investment law, international law, public interest, special legal regime, World Trade Organization.

1. Introduction

The doctrine of abuse of rights does not concern the "existence" of rights; it concerns the "exercise" of rights.[1] The doctrine evaluates whether a right is exercised in an improper manner or not. This paper argues that if a right is exercised in a "discriminatory" and "arbitrary" manner, there exists an abuse of right.

The second section of this paper attempts a clarification of the notion of abuse of rights. The third section elaborates upon the need for caution in respect of abuse of rights in general international law. The fourth section looks at special legal regimes. Then the paper concludes by underlining the role of “discrimination” and “arbitrariness” in defining abuse of rights.

2. Some Clarifications about Abuse of Rights

No legal right is absolute.[2] Indeed, the doctrine of abuse of rights highlights the relativity of rights.[3] “The extent of the exercise of a right must, therefore, be fixed, not by reference to the benefit which is conferred on the individual, but in its relation to the social complex as a whole.”[4] A certain right would be preferred to another in terms of its importance for the community. A public interest may override a private interest in assessing the validity of the exercise of a legal right.[5] Public interest is most visible in special legal regimes. A special legal regime is a community with special origins, as indicated in its founding treaty.

The founding treaty’s provisions shall not be abused. Treaty provisions shall not be used to cover up discriminatory and arbitrary measures and acts that are not *bona fide*. If a state engages in an arbitrary discrimination, that state’s mere adherence to the letter of the founding treaty of the special regime cannot avert the state’s liability. Such liability is required by the public interest inherent to the special legal regime.

By contrast, abuse of rights does not operate in general international law.[6] The International Court of Justice (ICJ) has never applied abuse of rights to a dispute before it.[7] Arguably, the ICJ believes that “the presumption in the case of acts *prima facie* legal is that motive is irrelevant.”[8] Evaluation of the motive behind a lawful act would be too subjective an endeavor on the part of the ICJ. If it were to do so, the legal security stemming from existing international legal rights may be jeopardized.[9]

To this day, in the eyes of the ICJ, no state has ever brought compelling evidence to demonstrate another state’s abuse of rights. One needs compelling evidence to demonstrate that the right-holder state has acted with the sole motive to damage another state.[10] If and when such a demonstration ever succeeds, the doctrine of abuse of rights will gain capability in terms of challenging positive international law.[11] The doctrine will be able to invoke the misuse of an existing right due to the presence of malicious motives that led to unreasonable injury to another state.[12]

The application of abuse of rights is most plausible within a special regime[13] as states are closely interconnected within a special legal regime. The injury stemming from the exercise of a right assumes a particular meaning due to the social dimension that reigns in the special legal regime. Thanks to the emphasis on the social dimension of the special legal regime, mere compliance with the letter of law does not avert a state's liability for its acts. Besides, the supervising agency of the special legal regime – e.g., a tribunal – would favor the social exercise of law.[14]

The counter argument is this: second-guessing rules of positive international law shall not be institutionalized via analysis of a right-holder state's motives. Otherwise the reliability of law as a normative system would be jeopardized. The claim of abuse of rights shall be handled cautiously.[15] Indeed, such caution has been the norm in general international law. Tellingly, *Judge Sebutinde,* in his separate opinion in the *Immunities and Criminal Proceedings* case, indicated:

> **Abuse of rights** is a controversial claim, which should only be made in **exceptional** and **compelling** circumstances … the **threshold** for a finding of abuse of rights is **high**, as a court or tribunal will obviously not presume an abuse and will affirm the evidence of an abuse only in **very exceptional** circumstances.[16] (emphases added).

This caution with regard to abuse of rights in general international law deserves further elaboration.

3. The Cautionary Approach to Abuse of Rights in General International Law

There are various reasons to be cautious about abuse of rights. First of all, the doctrine of abuse of rights questions a certain component of the principle of good faith: obeying positive rules of international law.[17] The doctrine pierces the veil of legality, discloses a certain malignance behind the lawful act. The doctrine maintains that the lawful act leads to an unconscionable effect on the legal right of someone else.

The second reason for caution in respect of the doctrine of abuse of rights has to do with the status of international courts or tribunals; there is a concern that international courts or tribunals could be too powerful thanks to the doctrine.[18] Any international court or tribunal that engages in the abuse of rights analysis would potentially be able to look at the motive behind the invocation of a formal international right.[19] An international court or tribunal would invalidate an act by speculating about the state of the mind of a government. This would give considerable power to international courts and tribunals.

The application of the doctrine of abuse of rights would represent a shift of legal rights of the subjects of international law from their "private and autonomous domain into the social field".[20] The social analysis of law consists in an examination of the effects of the exercise of the rights on other rights. If those effects are found to be unnecessary, then the international court or tribunal would invalidate the act. Such interpretation necessarily would involve more intervention from international courts or tribunals into transactions between the subjects of international law. Arguably, such intervention is suitable only in special legal regimes where states, international organizations and individuals are closely interlinked by common origins.

The third reason for caution has to do with the fact that the doctrine of abuse of rights constrains national sovereignty.[21] A sovereign state may not exercise its legal rights due to its effects on the legal rights of other subjects of international law. In particular, if the injury caused to another legal right is found to be manifest and unjust, then that would be deemed anti-social and an abuse of right would be deemed to exist.[22] In special legal regimes, arguably, such manifest and unjust injury would be expressed through notions such as "discrimination", "arbitrariness" and "lack of *bona fide* conduct".

A sovereign state is second-guessed in exercising its legal rights for the sake of the protection of another state, an international organization or an individual. This is a social interpretation of rights rather than an individualist one.[23] While national sovereignty embodies the individualist dimension of international law, abuse of rights aims at protecting the social dimension of international law. Such social protection is most propitious in special legal regimes.

4. Special Legal Regimes

The World Trade Organization (WTO) regime and the international investment regime have special origins:[24] facilitating the cross-border movement of goods, services and capital. The origins of both special legal regimes involve a certain "balance of rights and obligations as struck by their framers".[25] This balance requires the intervention of the concept of abuse of rights into special legal regimes. Yet, the prohibition of abuse of rights is not a straightforward task even in special regimes. In *Antin v. Spain*, the international investment arbitral tribunal stated:

> It is well established in international law that an abuse of right claim is subjected to a high threshold of proof.[26]

Hence, this paper argues that the notions of "discrimination" and "arbitrary conduct" are being utilized to achieve the same effect as abuse of rights in both international investment regime and the WTO regime.[27] These notions should be regarded as facilitators of the doctrine of abuse of rights. Since it is difficult to define and apply abuse of rights, it is convenient to invoke "discrimination" and "arbitrariness" to achieve a result equivalent to abuse of rights. Thus, in the *Saluka* case, the investment arbitration tribunal implied abuse of rights:

> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their

> regulatory powers, they adopt in a **non-discriminatory** manner **bona fide** regulations that are aimed at the general welfare.[28] (emphases added).

Similarly, in the *Philip Morris Brands Sàrl. v. Oriental Republic of Uruguay* case,[29] the investment arbitration tribunal held:

> As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate. (emphases added).

In *Antin v. Spain*, there was found to be neither "discrimination" nor "arbitrary conduct" on the part of Spanish state in applying its national tax measures to the foreign investment. Spain did not use its right to impose taxation contrary to the origins of the international investment regime, nor did it disappoint the legitimate expectations of the foreign investor. Spain engaged in a *bona fide* conduct vis-à-vis the foreign investor.

By contrast, in *Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body of the WTO struck down a measure of the United States, which abused the right to protect environment. The Appellate Body qualified the motive of the United States as "discriminatory" and "arbitrary", which was ultimately found to be inimical to international trade as protected by the special regime of the WTO:

> What we have decided in this appeal is simply this: although **the measure of the United States** in dispute in this appeal serves **an environmental objective** that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes **arbitrary** and unjustifiable **discrimination between Members of the WTO,** contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of **arbitrary or unjustifiable discrimination between countries** where the same conditions prevail or **a disguised restriction** on international trade. As we emphasized in United States – Gasoline, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and **respect the rights of other Members under the WTO Agreement**.[30] (emphases added).

All in all, being a member of the special legal regime, a government shall not "discriminate" against foreign trade and foreign investment and shall not act in an "arbitrary" manner. Otherwise, that would constitute an abuse of rights and the *prima* *facie* lawful acts of the government would be invalidated by the agency of the special legal regime.

5. Conclusion

There is no indication from the international community that it wishes to apply the prohibition on the abuse of rights in general international law. Rather, the prohibition of abuse of rights has become part of only special legal regimes. Special legal regimes are the communities where the legitimate expectations of members from each other are high. The intertwining of states within special legal regimes by common origins are so strong that members are legitimately expected to exercise their rights in a special social dimension.

The special social dimension is evident in the WTO regime and the international investment regime. In both regimes, the concept of abuse of rights protects special public interests, namely, foreign trade and foreign investment. Members of special legal regimes shall admit the examination of their motives in exercising their rights in the light of those public interests. In special legal regimes, such motives are expressed through “discrimination” and “arbitrariness”.

Endnotes

[1] Letizia Lo Giacco, *Exercising Discretion Against the General Interest: Unearthing the Doctrine of Abuse of Rights in Public International Law,* Presented at the ASIL International Theory Workshop 27 June 2024, Grotius Centre for International Legal Studies, Leiden University, Grotius Center Working Paper Series, no.2024/107-PIL, 21 June 2024. p.5: “It is though worth underscoring that while good faith as a general principle of law could be used as a source of legal obligation, the doctrine of abuse of rights would have nothing to do with ascertaining the existence of a legal right or obligation. Its application would rather hinge on the **performance of rights** as well as **of obligations** previously ascertained.” p.8: “The very doctrine of abuse of rights presupposes the **application** of a primary norm, the **performance** of which ought to be assessed against the doctrine of abuse of rights.” *(emphases added).*

[2] H.C.Gutteridge, Abuse of Rights, The Cambridge Law Journal , 1933, Vol. 5, No. 1 (1933), p.27,32.

[3] Ian Bronwlie, *Principles of Public International Law,* Oxford University Press, Seventh Edition, New York, 2008, p.445.

[4] H. C. Gutteridge, Abuse of Rights, The Cambridge Law Journal , 1933, Vol. 5, No. 1 (1933), p.28.

[5] Ibid., p.41: The utmost example of the preponderance of the public interest over private interests took place in the Soviet Union law where all private interests – civil laws – were deemed to be subordinate to the interests of the community and the Soviet State. That is a reflection of the theory of relativity of rights where the economic and social purpose of the Soviet community were deemed to dominate the individual rights.

[6] Martins Paparinskis, book review of *The Unruly Notion of Abuse of Rights*, Jan Paulsson, Cambridge University Press, 2020, in Arbitration International, 37, 2021, p.388: “Paulsson concludes (‘The Vanishing Prospect’) by restating the main claim: abuse of rights is a concept familiar to civil lawyers but **not** accepted in **public international law**—**nor should** it, due to

unpredictability costs and the danger of pushing international adjudicators (too far) into law-making and associated perceptions of arbitrariness and bias (pp 132–33).” *(emphases added)*.

[7] *Certain Iranian Assets*, paras.92-93. Oscar M. Garibaldi, *Abuse of Rights in Investment Disputes: A Critical Analysis*, Revista de Arbitraje Comercial y de Inversions, 2021, p.62: “The Permanent Court of International Justice and its successor the International Court of Justice have approached the subject of abuse of rights with a great deal of caution…. **Neither Court has ever applied a doctrine of abuse of rights,** though both have intimated, **obiter**, that such a **doctrine might be applicable** in an appropriate case.” *(emphases added)*.

[8] Ian Bronwlie, *Principles of Public International Law,* Oxford University Press, Seventh Edition, New York, 2008, p.445.

[9] N. Politis, *Le Problème Des Limitations de La Souveraineté et La Théorie de L’Abus des Droits Dans Les Rapports Internationaux, Recueil des Cours / Académie de Droit International de La Haye* **-** *1925,* Librairie Hachette, Paris, 1926, p.83.

[10] *Certain Iranian Assets*, para.93.

[11] Hersch Lauterpacht, *The Development of International Law by the International Court,* Stevens & Sons, London, 1958, p.164: ‘[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint.’ Freya Baetens, *Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?,* EJIL Talk, 15 October 2019, p.5.

[12] Politis, p.92.

[13] e.g., United Nations Convention on the Law of the Sea, Article 300: States Parties shall fulfil in good faith the obligations assumed under this Convention and shall **exercise** the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an **abuse of right**. (*emphases added*). European Convention on Human Rights, Article 17 (Prohibition of **Abuse of Rights**), Nothing in this Convention may be interpreted as implying for any State, group or person any right to **engage in any activity** or **perform any act** aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. (*emphases added*).

[14] The supervising agency of the World Trade Organization, The Appellate Body, favors such social exercise of law. e.g. World Trade Organization, Report of the Appellate Body, *UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, para.158: 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 a 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 *abus de droit*,** prohibits the abusive exercise of a 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. *(emphases added).*

[15] Indeed, such caution exists in the application of abuse of rights in domestic legal systems. *See* H. C. Gutteridge, Abuse of Rights, The Cambridge Law Journal , 1933, Vol. 5, No. 1 (1933), p.43: “The conversations which I have had with continental lawyers have left me with the impression that **'abus de droit '** (abuse of rights) is regarded as **a dangerous expedient**, which should only be utilized to prevent **manifest injustice.”** *(emphases added).*

[16] Separate Opinion of Judge Sebutinde, *Immunities and Criminal Proceedings*, Equatorial Guinea v. France, International Court of Justice, para.34. Accessible at https://www.icj-

cij.org/sites/default/files/case-related/163/163-20201211-JUD-01-04-EN.pdf (accessed on 20/12/2024).

[17] Filip Cerny, *Short Flight of the Phoenix: A Few Thoughts on Good Faith, the Abuse of Rights, and Legality in Investment Arbitration*, Czech Yearbook of International Law, p.186**:** "The conceptual borders of good faith coextend with those of legality, a term which represents the other side of the same coin, in that **legality itself presupposes acting in good faith**, i.e. according to and within the limits of given rules……(*emphasis added*).

[18] Martins Paparinskis, book review of *The Unruly Notion of Abuse of Rights*, Jan Paulsson, Cambridge University Press, 2020, in Arbitration International, 37, 2021, p.388: "Paulsson concludes ('The Vanishing Prospect') by restating the main claim: abuse of rights is a concept familiar to civil lawyers but **not** accepted in **public international law—nor should** it, due to **unpredictability** costs and the danger of pushing international adjudicators (too far) into law-making and associated perceptions of arbitrariness and bias (pp 132–33)." *(emphases added)*.

[19] Politis, p.80,93.

[20] Vera Bolgár, *Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 La. L. Rev. (1975), p.1016,1024.

[21] Steven Reinhold, *Good Faith in International Law*, UCL Journal of Law and Jurisprudence, 2, p.49,53. (Abuse of right in international law is about the interdependence between states; it is about not encroaching on the right of another state while exercising a right.).

[22] Letizia Lo Giacco, *'Exercising Discretion Against the General Interest: Unearthing the Doctrine of Abuse of Rights in Public International Law'*, Presented at the ASIL International Theory Workshop, 27 June 2024, Grotius Centre for International Legal Studies, Leiden University, Grotius Center Working Paper Series, no.2024/107-PIL, 21 June 2024, p.16-17: "As Kolb observes, 'the intervention of the judge must be limited to cases of manifest abuse' for findings that a state acted in bad faith may actually be detrimental to the activity of courts in the international legal order. This also appears in line Kiss's position in relation to the implementation of the prohibition of abuse of rights: '[i]t seems that the fact of injury resulting from an abuse of rights is a fundamental element in the implementation of that principle.' This becomes particularly pressing when the abuse is manifest and a state is gravely injured by the abuse of rights by another state, particularly with a view to preserve and even reaffirm the normative function of the law." *(underline added)*.

[23] Politis, p.80.

[24] WTO treaties are accessible at https://www.wto.org/english/docs_e/legal_e/legal_e.htm (accessed on 21/12/2024). International investment treaties are accessible at https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ and at https://investmentpolicy.unctad.org/international-investment-agreements (accessed on 21/12/2024).

[25] Bernard Hoekman & Petros C. Mavroidis, *Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?*, EUROPEAN UNIVERSITY INSTITUTE, ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES, GLOBAL GOVERNANCE PROGRAMME WORKING PAPER NO. RSCAS 2020/06 (2020), p.12.

[26] ANTIN INFRASTRUCTURE SERVICES LUXEMBOURG S.à.r.l. and ANTIN ENERGIA TERMOSOLAR B.V. v. Spain, ICSID CASE No. ARB/13/31, Award, 15 June 2018, para.317. Accessible at https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf (accessed on 28/09/2024).

[27] *Philip Morris Brands Sàrl. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10 /7, Award, 8 July 2016, para.306. ANTIN INFRASTRUCTURE SERVICES LUXEMBOURG S.à.r.l. and ANTIN ENERGIA TERMOSOLAR B.V. v. Spain, ICSID CASE No. ARB/13/31, Award, 15 June 2018, para.322. World Trade Organization, Report of the Appellate Body, *UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, para.186.

[28] *Saluka Investments B.V. v. The Czech Republic,* Permanent Court of Arbitration, Partial Award, 17 March 2006, para.255. Accessible at https://pcacases.com/web/sendAttach/880 (accessed on 28/09/2024).
[29] *Philip Morris Brands Sàrl. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10 /7, Award, 8 July 2016, para.305.
[30] World Trade Organization, Report of the Appellate Body, *UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, para.186.