The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration

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The abuse of process doctrine is a recognized principle of public international law that prohibits the exercise of a procedural right in contravention of the purpose for which that right was established. This doctrine has been applied in context of investment arbitration where investors manipulate their corporate structure to gain access to jurisdiction after a dispute has become foreseeable. However, while abuse of process has become synonymous with corporate restructuring in investment arbitration, the doctrine is by no means limited to that application. Indeed, more recently, the doctrine has gained momentum as a mechanism to address the problem of multiple and successive arbitrations filed by investors against Sovereigns. This trend culminated in the Orascom v. Algeria decision, recently affirmed by an ad hoc Committee on annulment, that dismissed an investor’s claim ‘in relation to the same investment, the same measures and the same harm’. The application of abuse of process in this context, however, remains unsettled. After review, this article concludes that when an investor initiates multiple arbitrations for the sole purpose of maximizing the chances of success, investment tribunals should consider abuse of process as a means to protect the legitimacy of their proceeding and the Investor-State Dispute Settlement system as a whole.

Keywords: abuse of process, parallel proceedings, treaty interpretation, res judicata/collateral estoppel, lis pendens

1 INTRODUCTION

An abuse of process can occur when a procedural right is exercised in ‘contradiction with the goal pursued’ in the establishment of that right. In other words, it can be an abuse of process to exercise a legitimate right in a manner that is contrary to the object and purpose of the system that provided for the existence of that right. The theory of abuse of process is ‘an expression of the more general principle of good faith’. In this

2 Ibid.
regard, abuse of process has proven to be a difficult subject to define the limits of as it seeks to police conduct that is by definition not prima facie illegal. The 2004 Report of the International Law Association (ILA) described the purpose of abuse of process this way:

it is necessary for a court to prevent a misuse of its procedure in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people. The doctrine rests upon the inherent power of the court to prevent a misuse of its procedures even though a party’s conduct may not be inconsistent with the literal application of the procedural rules.

Thus, an abuse of process is an ‘abuse of rights’ in the specific context of procedural rights. Whereas an ‘abuse of right’ more generally refers to improper exercise of any legal right, abuse of process narrowly focuses on the improper exercise of procedural rights.

Abuse of process has gained prominence as a recognized principle of international law, and, in particular, as an applicable defence to the admissibility of a claim in the field of investment arbitration. Abuse of process has emerged as a respondent-State’s primary defence when an investor manipulates its corporate structure to gain jurisdiction before an investment tribunal after a dispute has become foreseeable. However, the abuse of process doctrine is not derivative of this context and is certainly not limited to the issue of corporate restructuring. Rather, the doctrine of abuse of process is broad enough to cover any abusive manipulation of a legitimate procedural right: ‘in the words of Sir Hersch Lauterpacht, “there is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused”.’

Recently, the extension of the doctrine has been debated as a tool to combat multiple and successive arbitrations against the same party in relation to the same circumstances and financial harm. The apex of this trend was evident in the investment case, Orascom TMT Investments S.a.r.l. v. People’s Democratic Republic of Algeria, Investor-State Dispute Settlement system (ICSID) Case No. ARB/12/35, Award, dated 31 May 2017. This investment arbitration was chaired by Professor Gabrielle Kaufmann-Kohler. In this case, the tribunal was confronted with a problem that is becoming increasingly more common in the field of investment arbitration.

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arbitration — the use of multiple and successive arbitrations against the same host-State ‘in relation to the same investment, the same measures and the same harm’. As investors continue to develop new tactics to maximize their chances of success, the legal doctrines of lis pendens and res judicata as applied in international law have certain limitations that often reduce their effectiveness at barring the abuse of multiple proceedings. In some cases, arbitrators have stretched, manipulated, or reinterpreted the application of those traditional preclusion doctrines to apply in controversial circumstances. In the Orascom case, however, the tribunal was confronted with a factual situation where the prior litigation involved separate claimants and was resolved by a settlement, and thus, there was no final and binding award upon which even a tenuous application of the preclusion doctrines could apply. Yet, it was nevertheless clear that the litigation before that tribunal was abusive. Thus, the tribunal deliberately extended the doctrine of abuse of process beyond corporate restructuring to bar claims for the same economic harm where claimants have already prosecuted their claim in another forum with similar substantive due process and procedural protections. Whether this represents a landmark decision or a wayward outlier remains very much open for debate.

2 ABUSE OF PROCESS IN INTERNATIONAL ARBITRATION

2.1 AN ACCEPTED PRINCIPLE OF PUBLIC INTERNATIONAL LAW

The principle that every legitimate procedural right must be exercised in good faith is the foundation of the abuse of process doctrine in public international law. This doctrine derives its recognition in international law from its acceptance as a legal principle in ‘most national legal systems [which] constitute[s] a primary source of international law’. Both common law and civil law jurisdictions recognize the principle that procedural rights must be exercised in good faith. Accordingly, abuse of rights is recognized as a general principle of international law.

For instance, Article 2 of the Swiss Civil Code states that ‘[e]very person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right is not protected by law’. The Swiss Civil Procedure Code, Article 52, also requires all ‘those who participate in proceedings must act in good faith’. Similarly, the German Civil Code (BGB) includes provisions regarding the requirement to exercise lawful rights in good faith. Article 226 of the BGB provides that ‘[t]he exercise of a right is not permitted if

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8 Orascom v. Algeria, supra n. 7, para. 542.
10 Swiss Civil Code (Dec. 1907, Status as of 1 Jan. 2018), Art. 2 (emphasis added).
its only possible purpose consists in causing damage to another. German courts have applied the abuse of rights doctrine codified in Article 226 in circumstances where the lawful right is exercised ‘with no regard for the legitimate interests of the other parties’ and where the exercise of rights is ‘carried out maliciously’. Likewise, under the French Civil Code, Article 1382 provides liability where “[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”. Although the French Civil Code does not include a provision on abuse of rights as directly as the Swiss Code or BGB, the courts of France have nevertheless interpreted the broad language of Article 1382 to include the abusive exercise of rights. The Court of Cassation, by way of example, held as early as 1937 that ‘even the legitimate exercise of the rights of ownership will generate liability if the resulting inconvenience to third parties goes beyond the ordinary obligations toward neighbors’.

In contrast, common law systems have typically not codified abuse of rights or abuse of process as a standalone legal doctrine as civil law systems have. However, common law systems have used a variety of legal theories to protect against the abusive use of rights, most notably good faith, unclean hands, and public policy. As Sir Hersch Lauterpacht noted, ‘[t]he [common law] torts as crystalized in various systems of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights’. Of particular relevance, discussed in greater detail infra, the doctrines of res judicata and collateral estoppel are examples of common law doctrines that bar the use of legitimate rights when the exercise of those rights violate the public policy goals of finality and protection from successive or abusive litigation.

In addition to recognition throughout many national legal systems, the world’s most distinguished international legal bodies have likewise recognized the application of abuse of rights as general principle of public international law. For instance, the Appellate Body of the World Trade Organization (WTO) has confirmed that abuse of rights is a general principle of international law. In the 1998 Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, the WTO

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12 German Civil Code, Art. 226 (last amended 2013).
14 French Civil Code, Art. 1382 (consolidated version as of 19 May 2013).
15 Bolgár, supra n. 13, at 1017.
16 Ibid., at 1021–1022.
17 Byers, supra n. 9, at 595.
19 Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48 (1897) (the court observed that the general principle of res judicata ‘is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society’).
considered whether the use of certain United States’ trade mechanisms under the 1994 GATT Treaty were reasonably exercised. In this matter, the WTO considered whether Article XX, which prohibits ‘arbitrary’, ‘unjustifiable’, or ‘disguised’ measures, is tantamount to the recognized doctrine of abus de droit (‘abuse of right’):

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.

In that paragraph, the WTO cited to Bin Cheng’s, General Principles of Law as Applied by International Courts and Tribunals, where Professor Cheng argues that the bona fide exercise of a right must occur in the ‘furtherance of the interests which the right is intended to protect’ and that the ‘exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable’. Professor Cheng concludes that the abusive exercise of a right would constitute a breach of the treaty that provides for the right.

The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have both recognized the principle of abuse of rights. Notably, during the 1920 PCIJ Procès-Verbaux meetings with the Committee of Jurists, the principles of ‘abuse of right or that of res judicata’ were both acknowledged as general principles of international law to be applied by judges of the PCIJ. Likewise, the ICJ, in the Case Concerning Rights of Nationals of the United States of America in Morocco, held the French Republic to be in breach of its obligations for ‘abuse in the exercise’ of rights not ‘exercised reasonably and in good faith’.

21 Ibid., para. 158 (emphasis added).
22 Ibid., citing Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 125 (Stevens and Sons, Ltd., 1953), Ch. 4.
23 Ibid.
26 Ibid., at 212.
Finally, this principle is also enshrined as a matter of customary international law, as provided in the Vienna Convention on the Law of Treaties (‘Vienna Convention’).\(^ {27}\) Specifically, Article 31 of the Vienna Convention provides that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.\(^ {28}\) Thus, it derives from Article 31 that the exercise of a right embodied in international law must be exercised in good faith. The exercise of a right in ‘good faith’ means that the right shall comport with the ‘object and purpose’ of the treaty. Conversely, it follows that the exercise of a right in a manner or for a use that conflicts with the ‘object and purpose’ for which the right was created does not deserve protection under the law.\(^ {29}\)

Thus, it is widely supported that abuse of rights is accepted as a principle of international law that can likewise be utilized as an applicable doctrine in the field of investment arbitration.\(^ {30}\)

### 2.2 Emergence in Investment Arbitration

While the abuse of process doctrine has been widely accepted in international law since at least 1920,\(^ {31}\) the use of the doctrine in the context of investment arbitration is relatively recent. Although the ICSID Convention was established in 1966 for the purpose of settling investment disputes between sovereign States and the investors of other contracting States, investment arbitration was used sparingly until the turn of the millennia. From 1972 (when the first ICSID case was registered) through 2001, there were less than 100 cases registered with ICSID.\(^ {32}\) From 2001 through 2010, ICSID registered over 200 cases.\(^ {33}\) Since 2011, ICSID has registered at least thirty or more cases per year.\(^ {34}\) Moreover, these figures do not include a significant number of additional investment arbitrations that proceeded ad hoc or were supervised by other institutions. Accordingly, the use of abuse of process as an applicable legal theory in investor-State arbitration has largely developed in the last eighteen or so years.

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28 Ibid., Art. 31.
30 Abacat v. Argentine, supra n. 3, para. 646.
31 Ricci-Busatti, supra n. 24.
33 Ibid.
34 Ibid.
From the outset of this expansion of the ISDS, respondent-States have raised abuse of process as a defence to investors’ claims by urging tribunals to reject their jurisdiction where investors manipulated, in the host-State’s opinion, the object and purpose for which the host-State entered into investment treaties. In a series of cases between 2001 and 2005, the governments of Venezuela, Ukraine, and Bolivia each asserted that the corporate structure or ownership of the claimant amounted to an abuse of process. In each case, the respondent-State failed to convince the tribunal of the existence of an abuse of process, but these cases nevertheless set the stage for the development of the theory for use in the ISDS system.

First, in Autopista v. Venezuela, a case decided in 2001, the claimant restructured its investment in Venezuela by transferring 75% of its shares from a Mexican company to a company registered in the United States. Because Mexico was a non-contracting state with no protected rights for Mexican nationals investing in Venezuela, jurisdiction in the investment arbitration relied upon the US nationality of claimant. Venezuela argued that the restructuring of corporate ownership between a Mexican national and a US national was an abuse of the procedural rights under the treaty in order to gain access to ICSID jurisdiction. The tribunal in this case acknowledged that the exercise of a procedural right would be abusive if it was ‘contrary to the text and purpose of the [ICSID] Convention’. However, the tribunal concluded that whether or not such an abuse occurred is dependent on the facts. In this case, the transfer of the shares took place years before the dispute and even after the claimant had directly requested and had obtained approval for the transfer from Venezuela. Considering these facts, the tribunal concluded that the transfer of ownership did ‘not constitute an abuse of the Convention purposes’. While it may be taken for granted that a factual history like the one in Autopista v. Venezuela would likely not give rise to an abuse of process challenge today, that it was raised in this instance is demonstrative of the novel use of abuse of process in investment arbitration in the early 2000s. More notably, however, is the fact that the tribunal accepted abuse of process as an applicable legal doctrine within the context of an investment dispute. Specifically, the tribunal recognized the principle that corporate restructuring that is ‘contrary to the text and purpose of the [ICSID] Convention’ should be prohibited.

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36 Ibid., para. 47.
37 Ibid., para. 55.
38 Ibid., (emphasis added).
39 Ibid., paras 22–34.
40 Ibid., para. 126.
41 Ibid., para. 55 (emphasis added).
Likewise, in 2005, the Ukraine alleged that the initiation of an investment arbitration by Ukrainian nationals through a Lithuanian company was an abuse of process. In this case, *Tokios Tokelés v. Ukraine*, it was undisputed that Tokios Tokelés – an entity organized under the laws of Lithuania – was 99% owned by Ukrainian nationals. Thus, the Ukraine government took the position that the purpose of the Ukraine-Lithuania BiLateral Investment Treaty (BIT) was to encourage foreign investment and that ‘to find jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which … would be inconsistent with the object and purpose of the ICSID Convention’. However, as in the *Autopista v. Venezuela* case, the claimant in *Tokios Tokelés v. Ukraine* had been incorporated in Lithuania long before the investment, let alone the dispute, arose in the Ukraine. Accordingly, the tribunal concluded that:

the Claimant’s status as a juridical entity of Lithuania is well established under the laws of both Lithuania and Ukraine and well known by the Respondent. The Claimant manifestly did not create Tokios Tokelés for the purpose of gaining access to ICSID arbitration.

The majority opinion was issued over the dissent of the tribunal president, Prosper Weil, who argued that an investment ‘in Ukraine by Ukrainian citizens with Ukrainian capital’ does not comport with the ‘object and purpose’ of the ICSID Convention or the ISDS system.

Notably, it is clear that both the majority and the dissent accepted that an abuse of process occurs when a right is exercised in contravention to the ‘object and purpose’ of the treaty – the disagreement was determining when a claimant had so abused a right. While the rationale of the dissent is compelling, it ultimately focused only on the ‘object and purpose’ of the treaty and not the conduct of the claimant which was allegedly ‘exercising’ the right in an abusive manner. In contrast, the majority focused on whether the motive of Tokios Tokelés was for the ‘purpose of gaining access’ to jurisdiction, i.e., whether the motive behind the exercise of claimant’s right was abusive. Indeed, in both *Autopista v. Venezuela* and *Tokios Tokelés v. Ukraine*, the tribunals (or the majority therein) were clearly more concerned with the motives – as evidenced by the temporal aspects of a claimants’ corporate restructuring – rather than the nationality of the controlling

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42 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004), para. 22.
shareholder(s) or ultimate source of capital. In another case decided in 2005, the tribunal addressed this distinction directly.

In *Aguas del Tunari v. Bolivia*, a consortium that was 55% owned by a US entity acquired a public utility concession agreement in September 1999. Months after entering into the concession agreement, in November 1999, the US entity created a joint venture with an Italian company where the joint venture was structured through a Dutch subsidiary so that ownership passed through the Dutch company to the Bolivian investment. The restructuring was done with the consent and approval of the Bolivian government. In particular, the government noted that because the restructuring ‘has to do with tax requirements outside Bolivia’, there was ‘no reason why approval [for the restructuring] should not be granted’. When the arbitration arose jurisdiction was established through the Netherlands-Bolivia BIT. The respondent sought dismissal on the grounds that the Dutch joint venture was a ‘mere shell’ corporation with no business activity and no control over the host-State investment.

However, despite the fact that the tribunal found that the joint venture was not a ‘mere shell corporation’ the tribunal also clarified that:

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\text{[I]} \text{t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.}
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Thus, the tribunal in *Aguas del Tunari v. Bolivia* acknowledged that claimants are entitled to manipulate their corporate form for various legitimate reasons, including taxation and even ‘substantive’ legal protection in the form of BIT protection that the claimant did not procure at the inception of the investment.

In each of these three early cases, tribunals were presented with different factual circumstances where the form of the claimants’ corporate structure was considered an abuse by the host-State. However, in each case the tribunals (at least by majority) concluded that the motive of the claimant in restructuring its investment did not evidence an abusive manipulation.

The first investment tribunal to dismiss a case on the basis of abuse of process was the tribunal in *Phoenix v. Czech Republic*, decided in 2009. The result and factual scenario from that case provide an insightful contrast with the decision from

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51 *Ibid*.
Tokios Tokelés v. Ukraine. Like Tokios Tokelés v. Ukraine, the claimant in Phoenix v. Czech Republic was owned by a Czech national.\textsuperscript{54} The Czech national incorporated the claimant, Phoenix Action, Ltd., in Israel and caused it to acquire the ultimate investment in the Czech Republic.\textsuperscript{55} Thus, in both cases the claimant initiating the investment arbitration against the host-State was controlled by a national of that host-State. However, the factual similarities end there.

In Phoenix, the shares in two domestic Czech entities were transferred to the claimant, an Israeli corporation, \textit{only after} the Czech companies had become embroiled in domestic disputes and litigation with the public authorities, including criminal proceedings.\textsuperscript{56} For instance, the police raided the offices of one of the Czech businesses in April 2001.\textsuperscript{57} Only afterwards did the claimant register the Israeli company in October 2001 and that company acquired all interests in Czech companies on 26 December 2002.\textsuperscript{58} The claimant informed the Czech Republic of the existence of an investment dispute a little more than two months after its acquisition of the Czech companies.\textsuperscript{59}

These domestic proceedings were the subject of the alleged treaty violations and the Czech Republic alleged that the sole purpose of the restructuring was to gain jurisdiction under the relevant BIT.\textsuperscript{60} The tribunal agreed and concluded that the purpose of the restructuring was to bring an investment treaty claim under the Israel–Czech Republic BIT:

\begin{quote}
The evidence indeed shows that the Claimant made an “investment” not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic … The unique goal of the “investment” was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty.\textsuperscript{61}
\end{quote}

The conclusion of the tribunal is therefore that the Claimant’s initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration.\textsuperscript{62}

It is the duty of the tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.\textsuperscript{63}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{54} \textit{Phoenix Action, Ltd. v. Czech Republic}, ICSID Case No. ARB/06/5, Award (15 Apr. 2009), para. 22.
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} Ibid., paras 22–33.
\item \textsuperscript{57} Ibid., para. 33.
\item \textsuperscript{58} Ibid.
\item \textsuperscript{59} Ibid., paras 32–33.
\item \textsuperscript{60} Ibid., para. 34.
\item \textsuperscript{61} Ibid., para. 142.
\item \textsuperscript{62} Ibid., para. 143.
\item \textsuperscript{63} Ibid., para. 144.
\end{enumerate}
\end{footnotesize}
Thus, in contrast to each of the prior cases where an abuse of process was alleged, the result in Phoenix v. Czech Republic is attributable to the motive of the claimants’ corporate manipulation.

In each of the prior cases, the tribunals had determined that the claimants’ restructuring had been completed long before the eventual dispute arose and had been done for ‘legitimate’ purposes. The Aguas del Tunari v. Bolivia tribunal, for example, decided that the restructuring of an investment to obtain more favourable legal protection could be a legitimate exercise of rights. However, the decision in Phoenix examined the exercise of these rights in the context of good faith:

[T]he principle of good faith governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.

Thus, the temporal evidence led the tribunal to conclude that the motive of corporate restructuring was for the sole purpose of obtaining jurisdiction under a BIT after a dispute had already arisen and that motive did not comport with the obligation to act in good faith.

Likewise, the tribunal in Mobil v. Venezuela was presented with a similar objection to jurisdiction approximately a year later. Mobil, a corporation registered in the United States, first invested in Venezuela in the late 1990s. After a series of concerning amendments to the tax law in May and August 2006, Mobil inserted a Dutch shell company into its ownership structure in November 2006. Thereafter, in 2007, Venezuela nationalized Mobil’s investments that resulted in claims by Mobil against Venezuela arising out of the tax and expropriatory measures. The tribunal framed the abuse of process issue like this:

Such restructuring could be “legitimate corporate planning” as contended by the Claimants or an “abuse of right” as submitted by the Respondents. It depends upon the circumstances in which it happened.

The tribunal found, ‘upon the circumstances in which it happened’, that the restructuring of the investment in order to procure investment treaty protection after a dispute has arisen results in an abuse of process. Therefore, the tribunal dismissed Mobil’s tax claims where the measures predated the insertion of the

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64 Aguas del Tunari v. Bolivia, supra n. 48, para. 330(d).
65 Phoenix v. Czech Republic, supra n. 54, para. 107.
67 Ibid., para. 21.
68 Ibid., paras 30–35.
69 Ibid., para. 191.
Dutch shell. However, the tribunal accepted jurisdiction over the claims for expropriation where the government measures occurred after the restructuring. In the context of the abuse of process doctrine as applied today, the facts in Phoenix v. Czech Republic and Mobil v. Venezuela would more likely be considered in the context of ratione temporis. The jurisprudence constante that subsequently developed would consider a pre-existing dispute to fall outside of a tribunal’s jurisdiction – the establishment of protection under a treaty after the dispute has arisen would mean that the tribunal lacked jurisdiction over the claim. Thus, the type of corporate restructuring examined in Phoenix and Mobil would not constitute an abuse of process because there was no legitimate right to jurisdiction which could be abused. However, in the context of examining the evolution of the abuse of process doctrine in investment arbitration, these decisions remain landmarks that established an investment tribunal’s authority to dismiss abusive claims. This evolution was subsequently crystalized in cases from 2012 through 2015.

First, in Pac Rim Cayman v. El Salvador, the tribunal acknowledged that an abuse of rights affects the admissibility of a claim rather than the tribunal’s jurisdiction ratione temporis over the claim. In Pac Rim v. El Salvador, the claimant alleged that the purpose of the restructuring was multifaceted, and not done solely for the purposes of gaining treaty protection. The tribunal disagreed. However, the analysis of the Pac Rim v. El Salvador tribunal clarified that the restructuring of an investment’s nationality to gain treaty protection ‘touches not only upon the Abuse of Process issue, but also the Ratione Temporis issue’. The tribunal concluded that the doctrine of abuse of process was ‘materially different’ from the issue of ratione temporis which implies the non-retroactivity of international treaties. The Pac Rim v. El Salvador tribunal concluded that an investment tribunal lacks jurisdiction if the act, omissions, or measures at issue took place after the treaty protection sought became applicable to the claimant.

This clarification goes to the heart of abuse of process – if the claimant is not entitled to treaty protection because they fail to establish jurisdiction ratione temporis then one cannot, by definition, abuse a right since no right exists. An abuse of process, it follows, must occur before the measures at issue ‘crystallize’ the dispute but nevertheless at a time when the claimant anticipates ‘an actual dispute...
or can foresee a specific future dispute as a very high probability and not merely a controversy.\textsuperscript{77} Moreover, the tribunal clarified that abuse of process, again by definition, means that the tribunal is seized with jurisdiction, but that the tribunal should not exercise its jurisdiction as a result of the abusive exercise of a legal right.\textsuperscript{78} In other words, an abuse of process does not lead to a lack of jurisdiction but rather a lack of admissibility.

This understanding was solidified in Phillip Morris v. Australia. Decided in 2015, the Phillip Morris tribunal confirmed the evolution of the abuse of process doctrine’s application in investment law and, specifically, in the context of corporate restructuring:

> The abuse is subject to an \textit{objective test} and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute. Although it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute if the dispute already exists, then a tribunal would normally lack jurisdiction \textit{racione temporis}.\textsuperscript{79}

The evolution and acceptance of the abuse of process doctrine in investment arbitration has been dramatic – from the divided tribunal in Tokios Tokelés to the Phillip Morris tribunal’s bold statement that abuse of process can be identified through an ‘objective’ test. As demonstrated, this evolution has largely taken place in the context of corporate restructuring. However, while the abuse of process doctrine in investment arbitration has largely become synonymous with corporate restructuring, there is no basis to suggest that a broader application of the theory cannot be extended to address the exercise of rights in other contexts that are equally abusive to the object and purpose of the ISDS system.

\section*{3 Abuse of Process Doctrine Extended to Combat Multiple and Successive Arbitrations}

Indeed, as the abuse of process doctrine was developing into a recognized jurisprudence between 2012 and 2015, the doctrine was also quietly emerging as a mechanism that could address additional concerns arising from use of multiple and successive arbitrations filed by investors. Under this new strand of the theory, proponents argue ‘a claimant will commit an abuse of process when it initiates more than one proceeding to resolve the same or related dispute in order to maximize its chances of success.’\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{77} Ibid., para. 2.99.
\item \textsuperscript{78} Ibid., para. 2.107.
\item \textsuperscript{79} Phillip Morris Asia Ltd. v. Commonwealth of Australia, UNCITRAL PCA Case No. 2012–12, Award on Jurisdiction and Admissibility (17 Dec. 2015), para. 539 (emphasis added).
\item \textsuperscript{80} Gaillard, supra n. 4, at 6.
\end{itemize}
The United Nations Commission on International Trade Law (‘UNCITRAL Commission’) identified concurrent arbitration proceedings as an ‘increasingly important’ issue:

At its forty-sixth session (Vienna, 8–26 July 2013), the Commission considered work that could be recommended in the field of international arbitration. In that context, it was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief.81

In its first Secretariat Note published in 2014 on this topic, the UNCITRAL Commission identified several of the detrimental effects that result from multiple and successive claims, along with ‘options’ that should be examined to remedy the problem. The UNCITRAL Commission listed three significant issues that arise from concurrent proceedings, in brief they are: (1) the waste and unfairness of a State having to defend multiple proceedings based on the same measures and same economic damage; (2) the risk of multiple recovery; and (3) the risk of inconsistent jurisprudence.82 The UNCITRAL Commission concluded that these risk factors could, if left unchecked, create ‘dissatisfaction for users of investment treaty arbitration’.83 Notably, however, the UNCITRAL Commission did not at first list abuse of process among the list of potential legal mechanisms that could be utilized to ‘reduce the negative consequences that can result’ from multiple and successive proceedings.84 Rather, the UNCITRAL Commission was focused on res judicata, lis pendens, and consolidation of proceedings.85 However, after the Working Group was established and began its work, abuse of process quickly gained support as an applicable solution.

In the subsequent April 2015 Secretariat Note, the Committee raised the potential application of the abuse of process doctrine to successive claims over the same dispute:

The facts leading to investor-State disputes may give rise to investment treaty arbitration, as well as to other proceedings between the same or closely related parties regarding those facts before other tribunals, domestic courts, specialized international forums, [etc.] As the rights of investors may be protected under different types of instruments, some investors tend to initiate proceedings in different forums to ensure that their rights are taken into

82 Ibid. paras 16–18.
83 Ibid. para. 19.
84 Ibid. para. 20.
85 Ibid. paras 21–34.
account or to maximize their chances of success; that situation may lead to abuse of process by investors, an effect that was obviously not foreseen by States when concluding investment treaties.  

The 2015 Note more thoroughly identified the scenarios that result in harm and defined that harm to include ‘an effect’ that was not foreseen by States. In other words, concurrent proceedings contradict the object and purpose for which States ratify investment treaties. While the 2015 Note first identified abuse of process as a potential solution, it stopped short of adopting it as a recommendation to arbitral tribunals.

However, the 2016 Note took a further step in its support for the doctrine of abuse of process, recommending ‘that an arbitral tribunal might, depending on the circumstances, consider … assessing if there was an abuse of rights’.  

In the final Note, in March 2017, the Commission addressed the consequence of an abuse of process arising out of multiple and successive claims. The 2017 Note concluded, ‘[a] ground upon which an arbitral tribunal could dismiss abusive claims is the prohibition of abuse of process, a generally recognized international law principle’.

Despite this trend identified by the UNCITRAL Commission, counsel and arbitrators appear more likely to argue and accept the more established defence of res judicata when applicable. The extent, therefore, to which abuse of process continues to emerge as a defence to multiple and successive claims likely depends on the limits of the preclusion doctrines.

3.1 GAP BETWEEN RES JUDICATA AND ABUSE OF PROCESS

The harm to the legitimacy of the ISDS system arising from multiple and successive arbitrations is best illustrated in the contradictory decisions of Lauder v. Czech Republic and CME v. Czech Republic. In these two cases, a US national, Mr Lauder, invested in the Czech Republic before later structuring his investment through a Dutch corporation. After a dispute arose, Mr Lauder brought two investment disputes against the Czech Republic under two different treaties arising

89 Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award (3 Sept. 2001); CME Czech Republic B. V. v. Czech Republic, UNCITRAL, Partial Award (13 Sept. 2001).
90 Lauder v. Czech Republic, supra n. 89, paras 1–10.
91 CME v. Czech Republic, Partial Award, supra n. 89, para. 2.
out of the same facts and circumstances. The legal claims and relief sought were substantially identical as between the two cases.

The *Lauder v. Czech Republic* arbitration was initiated in 1999, and brought under the United States-Czech Republic BIT.\(^\text{92}\) The *CME v. Czech Republic* arbitration was initiated in February 2000 under the Netherlands-Czech Republic BIT.\(^\text{93}\) The multiple and successive cases proceeded in parallel and were decided on the merits within ten days of one another. First, on 3 September 2001, the *Lauder* tribunal issued its final award finding that ‘none of the actions or inactions of the [government] caused a direct or indirect damage to Mr Lauder’s investment’.\(^\text{94}\) As such, the *Lauder* tribunal found that the claimant was entitled to no recovery of damages. In an astonishing reversal of fortunes, on 13 September 2001, the *CME* tribunal issued its Partial Award holding the Czech Republic liable for breaching every treaty obligation alleged against the government: ‘the destruction of CME’s investment after the termination of the Service Agreement on 5 August 1999 was the consequence of the [government’s] actions and inactions’.\(^\text{95}\) The 2001 *CME* Partial Award led to a subsequent 2003 Award on quantum that ordered the Czech Republic to pay the claimant USD 269 million.\(^\text{96}\)

In addition to its merits defences, the government had objected to the jurisdiction of the *CME* tribunal on the grounds of abuse of process; ‘[I]t is an abuse of the Bilateral Investment Treaty regime for Mr Lauder, who purportedly controls CME, and, subsequently, CME to bring virtually identical claims under two separate treaties’.\(^\text{97}\)

In a single paragraph, a majority of the *CME* tribunal dismissed the Czech Republic’s abuse of process objection with a series of seemingly unrelated rationales. First, the *CME* tribunal placed the blame squarely on the Czech Republic for any potential abuse, focusing on the respondent’s refusal to consolidate the two cases.\(^\text{98}\) On this basis, the tribunal seemed to suggest without reference to any authority that a respondent-State has the duty to cure a claimant’s abusive exercise of its rights. Second, the tribunal mused that the prospect of multiple remedies arising from the ‘same facts and circumstances’ does not deprive a claimant of jurisdiction under a respective treaty.\(^\text{99}\) This rationale clearly misunderstands the distinction between jurisdiction and admissibility. As discussed *supra*, an abuse of process can only occur once a tribunal is seized with jurisdiction; in contrast, a

\(^\text{92}\) *Lauder v. Czech Republic*, supra n. 89, para. 11.

\(^\text{93}\) *CME v. Czech Republic*, Partial Award, supra n. 89, para. 2.

\(^\text{94}\) *Lauder v. Czech Republic*, supra n. 89, para. 313.

\(^\text{95}\) *CME v. Czech Republic*, Partial Award, supra n. 89, para. 575.

\(^\text{96}\) *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award (14 Mar. 2003), para. 620.

\(^\text{97}\) *CME v. Czech Republic*, Partial Award, supra n. 89, para. 302.

\(^\text{98}\) Ibid.

\(^\text{99}\) Ibid.
finding of abuse of process goes to the admissibility of a claim. Finally, the CME tribunal noted that ‘[a] possible abuse by Mr Lauder in pursuing his claim under the US Treaty’ does not affect the jurisdiction of the CME tribunal. The CME tribunal’s final justification relied on the shaky grounds that if any ‘possible’ abuse occurred, it occurred through Mr Lauder’s pursuit of his claims in the Lauder arbitration. The CME tribunal provided no additional explanation of how the arbitration filed first in time could result in the abusive manipulation of rights but not the subsequent, redundant set of claims filed in the second arbitration.

Criticism of the Lauder/CME ‘fiasco’ is abundant and well documented. Jeremey Carver, counsel to the Czech Republic in these cases, aptly stated that the Lauder/CME decisions ‘brings the law into disrepute, it brings arbitration into disrepute—the whole thing is highly regrettable’. More neutral commentators agreed by noting that ‘any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness’. In other words, inconsistent decisions arising out of the same circumstances and legal questions undermine the legitimacy of the ISDS system.

In this regard, the Lauder/CME fiasco is also illustrative of the gap between the preclusion doctrine of res judicata and abuse of process. In CME, the Czech Republic raised the abuse of process doctrine because it believed that the preclusion doctrines of lis pendens and res judicata were inapplicable. Indeed, the Czech Republic had argued that ‘[s]eeking the same remedy again is a plain abuse of process; and it conflicts with the spirit, if not with the letter, of the res judicata principle’. In other words, respondent’s counsel conceded that the public international law doctrine of res judicata did not prevent this type of abusive conduct.

Under international law, the doctrine of res judicata has traditionally applied when three conditions are met: first, that the object of the claim is identical; second, that the cause of action is identical; and third, that the parties in both proceedings are identical. These requirements are often referred to as the ‘triple identity test’. According to the triple identity test, a successive claim is not barred by the preclusion doctrine if any one of the three ‘identities’ is not established. For instance, in Lauder/CME, there was no identity of parties and no identity of cause of action. This approach, of course, ignored completely that Mr Lauder and

102 Ibid., at 1583.
103 CME v. Czech Republic, Partial Award, supra n. 89, para. 304 (emphasis added).
104 CME v. Czech Republic, Final Award, supra n. 96, para. 199.
105 Ibid., para. 432.
CME shared the same financial interest in the investment despite being distinct juridical persons. Likewise, the cause of action was not identical because the legal claims derive from separate international treaties – again, despite the fact that the separate treaties provided similar if not identical legal protection. Indeed, the CME tribunal acknowledged that the ‘substance [of the Lauder arbitration] dealt with the same dispute that is the object of these proceedings’.\(^{106}\)

In its strictest application, the triple identity test can result in overly formulaic – even absurd – results that do not comport with the expectation of sovereigns when entering into investment treaties. This rigid approach to res judicata has itself become subject to much criticism and debate. Indeed, tribunals have more recently begun to apply a ‘flexible’ approach to the triple identity test. For instance, Mr Veeder, Q.C., as the chair of the tribunal in Apotex Holdings v. United States, noted that international tribunals are increasingly ‘aware of the risk that if they use too restrictive criteria of “object” and “grounds,” the doctrine of res judicata would rarely apply; if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds)’ the doctrine would be easily evaded.\(^{107}\) Other investment tribunals have begun to recognize the broader common law doctrine of collateral estoppel as a general principle of public international law.\(^{108}\)

However, a ‘flexible’ approach to the res judicata, and/or the application of collateral estoppel, in the arena of investment arbitration remains controversial.\(^{109}\) For instance, the investment tribunal in Petrobart v. Kyrgyzstan tersely dismissed the respondent-State’s collateral estoppel argument, defining it as the ‘American doctrine of collateral estoppel’ before concluding that the tribunal ‘fails to see the relevance of this purely American statutory procedural doctrine’.\(^{110}\) Setting aside for the present purposes that collateral estoppel is neither a statutory nor procedural doctrine in American law, the Petrobart v. Kyrgyzstan decision is instructive to the degree that it represents the adverse view some civil law practitioners hold of the doctrine’s application in public international law.

Moreover, the preclusion doctrines, in any form, require a final judgment and thus do not prevent a claimant’s pursuit of multiple and successive parallel claims before a final resolution is reached in one of the claims. Indeed, no investment

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106 Ibid., para. 25.
108 Rachel S. Gryenberg, Stephen M. Gryenberg, Miriam Z. Gryenberg, & RSM Production Corp. v. Grenada, ICSID Case No. ARB/10/6, Award (10 Dec. 2010), para. 7.1.2.
arbitration has suspended a pending claim on the explicit basis of *lis pendens*. Therefore, the lack of a settled legal principle to address multiple and successive arbitrations against sovereign States has become a noteworthy problem.

3.2 Utility of Abuse of Process Begins Where Res Judicata Ends

One of the first cases to recognize the application of abuse of process in the context of multiple proceedings also illustrates the intersection between abuse of process and the preclusion doctrines of res judicata and collateral estoppel. In *Grynberg & RSM Production Corporation v. Grenada* (‘*Grynberg v. Grenada’*), an ICSID tribunal was confronted with investment claims after the claimants had brought and lost contract claims against the government arising out of the same factual circumstances and financial interests. The claimants had executed an agreement that provided certain rights to apply for and obtain a petroleum exploration license.\(^\text{111}\) This contract, somewhat uniquely, included a dispute resolution clause that provided for ICSID administration of contractual disputes. Thus, the first dispute, *RSM v. Grenada*, was administered by ICSID but included only contract claims. In the contract case, the ICSID tribunal ‘declare[d] that the Respondent did not breach any of its obligations towards the Claimant under their Agreement’.\(^\text{112}\)

After its contractual claims failed, RSM and its three shareholders (Rachel, Stephen, and Miriam Grynberg) submitted a new dispute to ICSID pursuant to the United States-Grenada BIT. The essence of the second arbitration was 'that Grenada breached a number of its Treaty obligations to Claimants by reason of its dealing with Claimants in relation to a written agreement [the petroleum exploration contract]’.\(^\text{113}\)

In these circumstances, the application of res judicata was very much in doubt. The triple identity test was not met – the second arbitration included individual claimants that were not included as parties in the first arbitration.\(^\text{114}\) Perhaps more significantly, the legal claims in the first arbitration were contract claims whereas the claims in the second arbitration were treaty claims.\(^\text{115}\) Therefore, there was no identity of the parties and no identity of the cause of action.

In response, Grenada argued that the tribunal should dismiss the claims on the basis of collateral estoppel, or alternatively, abuse of process.\(^\text{116}\)
argued that the power to dismiss the claims on the basis of abuse of process derived from the tribunals ‘inherent power to do so to protect the integrity of its own process’. While no investment tribunal had yet exercised that inherent power in the context of successive claims, the government noted that ‘commentators … have accepted that successive proceedings should be dismissed under the doctrines of abuse of process or abuse of rights, even where the requirements of res judicata may not be met’.118

Ultimately, the tribunal concluded that ‘the doctrine of collateral estoppel (or issue estoppel) is now well-established as a general principle of law applicable in the international courts and tribunals such as this one’.119 On the basis of collateral estoppel, the Grynberg v. Grenada tribunal dismissed the claimants’ claims in their entirety. This decision remains influential in the on-going debate about the application of collateral estoppel in investment arbitration.120

However, less frequently discussed, the tribunal continued its analysis after its conclusion on collateral estoppel and briefly addressed the abuse of process defence. In its decision, the tribunal decided that the initiation of the successive investment claims was ‘an improper attempt to circumvent the basic principles set out in [the ICSID] Convention Article 53’.121 Although not expressly using the term ‘abuse of process’ in the analysis, the discussion fell under the decisions subheading: ‘Fork in the Road Clause/Abuse of Process’.122

Article 53 of the ICSID Convention provides that ‘[t]he Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention’.123 It therefore appears that the tribunal concluded that the second arbitration was an abusive attempt to circumvent the ‘binding’ nature of the first ICSID decision, even though claimants did not bring their investment claims in that proceeding. By doing so, the Grynberg v. Grenada tribunal appears to be the first investment tribunal to acknowledge the application of abuse of process in the context of successive claims.

After Grynberg v. Grenada, the next investment tribunal to accept the abuse of process doctrine as a defence to the admissibility of treaty claims also did so by connecting the ‘abusive conduct’ to the ICSID Convention rules. In Ampal v. Egypt, the parties were engaged in a complex web of at least six arbitrations, four

117 Ibid., para. 4.6.16.
118 Ibid., para. 4.6.17.
119 Ibid., para. 7.1.2.
120 Zarra, supra n. 29, at 129.
121 Grynberg v. Grenada, supra n. 108, para. 7.3.7.
122 Ibid., para. 7.3.
123 ICSID Convention, Regulations and Rules, s. 6, Recognition and Enforcement of the Award, Art. 53 (2006).
commercial and two investment arbitrations. In its Decision on Jurisdiction, the tribunal considered the respondent-State’s objection that the parallel investment claims were an abusive attempt to maximize claimants attempt to recover from the same factual circumstances and the same financial interest. There was no dispute that the triple identity test was not met and res judicata was not raised as an objection on admissibility.

In what can only be described as a tepid embrace of the abuse of process doctrine, the tribunal concluded that:

while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals.

The abuse of procedural rights was again connected with the ICSID Convention rules, this time Article 26. Article 26 of the ICSID Convention provides that the claimant is ‘deemed [to] consent to such arbitration to the exclusion of any other remedy’.

Thus, the tribunal concluded that according to Article 26:

Once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID. This principle operates from the moment of valid consent.

While the Ampal v. Egypt tribunal concluded that the double pursuit of the same financial interest ‘crystallizes’ an abuse of process, the tribunal appeared reluctant to adopt its own conclusion and refused to dismiss the claims. In fact, the tribunal went out of its way to ‘make it very clear’ that the application of the abuse of process doctrine in this matter is ‘in no way tainted by bad faith’. Rather, the tribunal advanced the position that it is ‘perfectly reasonable’ for a claimant to initiate multiple claims in an effort to establish jurisdiction, but that once it establishes jurisdiction before a competent forum, the claimant should dismiss the redundant claims. Therefore, rather than dismissing the abusive claims, the tribunal ordered the claimant to ‘cure’ its abuse by choosing which claims before each tribunal it wished to dismiss.

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125 Ibid., para. 313.
126 Ibid., para. 331 (emphasis added).
127 ICSID Convention Rules, Art. 26 (emphasis added).
128 Ampal v. Egypt, supra n. 124, para. 337.
129 Ibid., para. 331.
130 Ibid., paras 331–339.
131 Ibid., para. 334.
The decision of the tribunal, however, clearly conflicts with its own rationale. Under Article 36 of the ICSID Convention, a claimant’s ‘consent’ to arbitrate is perfected at the time it submits its request for arbitration. The *Ampal v. Egypt* tribunal’s reasoning that it is ‘perfectly reasonable’ to initiate multiple claims against a State until a tribunal has accepted jurisdiction does not comport with its own understanding of Article 26: ‘[o]nce consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum’. In other words, it is clear that once a claimant has submitted a request for arbitration, it cannot, under the ICSID Convention, initiate any parallel claims arising out of the same circumstances and seeking the same financial interest.

### 3.3 A LANDMARK DECISION OFFERS A PATH FOR THE EMERGING DOCTRINE

Recently, in 2017, a tribunal chaired by Professor Gabrielle Kaufmann-Kohler articulated the most clear and convincing argument to date for the extension of the abuse of process doctrine as a defence against multiple and successive claims in investment arbitration. The tribunal in that case, *Orascom TMT Investments S.a.r.l. v. People’s Democratic Republic of Algeria*, established a clear standard – that the initiation of multiple proceedings ‘in relation to the same investment, the same measures and the same harm’ are inadmissible in investment arbitration as an abuse of process.\(^{132}\)

In *Orascom*, the claimant’s investment in the host State was a mobile telecom subsidiary in Algeria.\(^{133}\) At the relevant times, a vertical corporate ownership structure existed between three corporate entities all controlled by a single shareholder.\(^{134}\) The claimant was Orascom TMT Investments S.ar.l (OTMTI). That company owned Orascom Telecom Holdings S.A.E. (OTH) which subsequently owned Orascom Telecom Algerie S.P.A. (OTA).\(^{135}\) All three companies were controlled by a single shareholder and it was not disputed that OTMTI was the ultimate owner of OTA – the subsidiary doing business in Algeria and against whom the alleged government measures were taken.\(^{136}\) The claimant alleged that numerous government measures taken against its subsidiary (OTA) had severely damaged OTMTI’s financial interests in its investment.

The claimant’s arbitration, before the *Orascom* tribunal, under the auspices of the Belgium-Luxembourg-Algeria Investment Treaty, was one of three notified

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132 *Orascom TMT Investments S.à.r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017), para. 542 (emphasis added).
133 Ibid., para. 6.
134 Ibid., para. 9.
135 Ibid., paras 4–8.
136 Ibid.
disputes arising out of the same facts and occurrences. In November 2010, OTH
had notified Algeria of a dispute under the Egypt-Algeria BIT.137 Thereafter,
OTH filed its Request for Arbitration in April 2012 after the six-month waiting
period.138 The claimant, OTMTI, notified Algeria of a dispute on 14 April 2012,
and filed its Request for Arbitration in October 2012.139 Therefore, the first
dispute had been notified by OTH – not OTMTI. The Third Notice was sent
by an additional subsidiary of the claimants (‘Weather Investments I’).140 Weather
Investments I also notified Algeria of a dispute in November 2010, but did not
follow through with filing an arbitration.141

Thus, three disputes were notified and two concurrent arbitrations existed.
The first arbitration by OTH was a Permanent Court of Arbitration (PCA)
arbitration and the second arbitration, by OTMTI, was administered by ICSID.
The factual circumstances in Orascom were also distinct from any previously
discussed case because the OTH arbitration concluded by settlement. The OTH
arbitration was settled with Algeria on 18 April 2014; that settlement was thereafter
recorded by the PCA tribunal as a Consent Award on 15 March 2015.142 Despite
the settlement, however, the Orascom arbitration proceeded until it was resolved by
a Final Award on 31 May 2017 – nearly two years after the settlement between
OTH and Algeria.

Despite these difficulties, the Orascom tribunal, after comparing the three
disputes, noted that ‘the companies giving notice and the investment treaties
invoked are different, but it is notable that the three notices concern the same
measures or events’.143 The Orascom tribunal continued that ‘while the … the legal
bases for the claims [the BITs] are different, the dispute being notified in the three notices is
effectively one and the same’.144 Finally, the Orascom tribunal, after examining the
economic relief requested in both arbitrations, determined that ‘to the extent
OTH would have restored its company value through arbitration proceedings
under the BIT, all of the companies higher up the corporate chain, including
the Claimant, would have been made whole as well’.145

Moreover, the Orascom tribunal rejected OTMTI’s argument that the settle-
ment was irrelevant because the respondent, the Republic of Algeria, was not
technically a party to the settlement, noting that the settlement itself read: ‘all

137 Ibid., para. 488(c).
138 Ibid., para. 488(c)(f).
139 Ibid., paras 16–17.
140 Ibid., para. 485(d).
141 Ibid.
142 Ibid., para. 485(j).
143 Ibid., para. 486 (emphasis added).
144 Ibid., para. 488 (emphasis added).
145 Ibid., para. 498.
claims that have been raised in the [OTH] Arbitration by [OTH], on the one hand, and the Algerian State, on the other hand, have been finally settled.\textsuperscript{146}

Thus, the \textit{Orascom} tribunal concluded that it faced identical disputes that resulted in the same economic harm, \textit{but} between different parties with different legal claims. More significantly, the claimant’s subsidiary, OTH, had reached a settlement of those identical disputes giving rise to the same economic harm with respondent Algeria.\textsuperscript{147} The settlement was between OTH and a state-owned enterprise.

This scenario created a procedurally complex problem that was outside the scope of even the most flexible approaches to res judicata or collateral estoppel. Res judicata could not apply because there was no reasoned final award. Moreover, even if the Consent Award could arguably suffice as a final award, a strict application of the triple identity test would fail because the claimants were different and the treaties were different – thus the legal causes of action were not identical.

Indeed, claimant OTMTI argued that the preclusion doctrines were inapplicable and, thus, there could be no bar to its claims on jurisdiction or admissibility:

\begin{quote}
Indeed, in the Claimant’s opinion, the three conditions for res judicata, i.e. identity of parties, identity of subject matter or relief sought, and identity of legal grounds or causes of actions, are not satisfied. There is no identity of parties, as the Claimant is not a party to either the OTH Arbitration or the Settlement Agreement, and Algeria is not a party to the Settlement Agreement. There is no identity in the relief sought, as the relief sought in the PCA Arbitration was in excess of U.S.$16 billion, whereas approximately U.S.$4 billion is sought by OTMTI in this arbitration … Finally, there is no identity of causes of action, as the OTH Arbitration involves a dispute under the Egypt-Algeria BIT, while this arbitration arises under the BLEU-Algeria BIT.\textsuperscript{148}
\end{quote}

However, the \textit{Orascom} tribunal clearly recognized that the claimants’ effort to seek duplicative relief ‘in relation to the same investment, the same measures and the same harm’ would run afoul of the object and purpose of investment treaty protection and would, therefore, be abusive to the State.

To address this abuse, the \textit{Orascom} tribunal found it appropriate to extend the application of the abuse of process doctrine to encompass the filing of multiple disputes ‘to recover for essentially the same economic harm’.\textsuperscript{149} The \textit{Orascom} analysis began with determining that the object and purpose of investment treaties is not served by allowing an investor to repeatedly seek relief in multiple forums for the same economic harm:

\begin{footnotes}
\textsuperscript{146} \textit{Ibid.}
\textsuperscript{147} \textit{Ibid.}, para. 520.
\textsuperscript{148} \textit{Ibid.}, para. 454.
\textsuperscript{149} \textit{Ibid.}, para. 543.
\end{footnotes}
Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entitle the exercise of rights for purposes that are alien to those for which these rights were established.\(^\text{150}\)

The \textit{Orascom} tribunal recognized that the doctrine of abuse of rights is a ‘general principle applicable in international law’\(^\text{151}\) that has commonly been applied in situations where ‘an investment has been restructured to attract BIT protection at a time when a dispute with the host state had arisen or was foreseeable’.\(^\text{152}\)

In doing so, the tribunal connected the application of abuse of process in the context of corporate restructuring, with its use to prevent multiple and successive claims. While recognizing that investors have a legitimate right to restructure their investments to gain greater legal protection, investors abuse their right to legal protection under a treaty when they initiate multiple claims, under multiple legal instruments, arising out of the same circumstances and seeking the same financial interests. In other words, it is an abuse for an investor to ‘impugn the same host state measures and claims for the same harm at various levels of the [corporate] chain in reliance on several investment treaties concluded by the host state’.\(^\text{153}\)

Significantly, in support of this principle, the \textit{Orascom} tribunal cited to the \textit{Grynberg v. Grenada} ICSID case – and its reliance on collateral estoppel – a derivative of res judicata. In note 835, the \textit{Orascom} tribunal connects the application of abuse of process to the need to fill the void where res judicata and collateral estoppel cannot be applied:

\begin{quote}
One could also refer to Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Company v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010, Exh. RL-75, which although in a different context (treaty claims v. contract claims) and based on a different legal theory (collateral estoppel or issue preclusion known to common law jurisdictions), essentially relies on the same rationale of avoiding that claims involving the same economic damage be adjudged twice.\(^\text{154}\)
\end{quote}

This is the crux of the \textit{Orascom} decision, and of the potential for the emerging abuse of process doctrine – that procedural manipulations of the investment treaty

\begin{footnotes}
\item[150] Ibid., para. 543 (emphasis added).
\item[151] Ibid., para. 541 (citing Robert Kolb, \textit{Part Three Statute of the International Court of Justice, Ch. II Competence of the Court, General Principles of Procedural Law}, in \textit{The Statute of the International Court of Justice: A Commentary} 904 (A. Zimmermann et al. eds, Oxford University Press, 2d ed. 2012)).
\item[152] Orascom v. Algeria, supra n. 132, paras 540–541.
\item[153] Ibid., para. 542.
\item[154] Ibid., para. 542, n. 835 (emphasis added).
\end{footnotes}
system should not trump the recognized objectives of avoiding multiple claims and
double recovery. By stating it ‘relies on the same rationale’ as the Grynberg decision
in its discussion on abuse of process, the Orascom tribunal is clearly linking the need
for an extension of the abuse of process doctrine to cases where the doctrines of res
judicata and collateral estoppel may be inapplicable as a result of procedural
manipulation. As if to erase any doubt of this intention, the Orascom tribunal
concluded by acknowledging that its approach differs from some tribunals in the
past, and in particular:

The tribunals in CME v. Czech Republic and Lauder v. Czech Republic allowed the claims
under different investment treaties to proceed, despite the fact that both sets of proceedings
were based on the same facts and sought reparation for the same harm. The tribunals then
reached contradicting outcomes, which was one of the reasons for which these decisions
attracted wide criticism.155

Thus, although the Orascom case presents a far more complicated procedural
narrative then in many disputes where the traditional preclusion doctrines may
apply, the controlling rationale in Orascom is clearly intended to address similar
concerns as those which res judicata and collateral estoppel are intended to bar.
The conclusion that an investor should not be allowed to abuse the invest-
ment treaty system to bring successive claims for identical economic harm should
not be a wildly controversial doctrine.

4 WILL ABUSE OF PROCESS CONTINUE TO EMERGE AS A
DEFENSE TO MULTIPLE AND SUCCESSIVE CLAIMS?

The decisions in Grynberg v. Grenada and Ampal v. Egypt recognize that the pursuit
of multiple and successive claims could result in an abuse of process under public
international law. The subsequent decision of the Orascom tribunal has the potential
to crystalize a clear standard applicable to abuse of process in the context of
multiple arbitrations in a similar way that the decision in Pac Rim Cayman v. El
Salvador helped refine the application of abuse of process in the context of
corporate restructuring.

However, the decisions of investment tribunals do not make public interna-
tional law; rather their decisions reflect public international law as promulgated
through the tribunal’s members. Whether the Orascom decision proves to be a
landmark decision, or an outlier distinguished on the grounds of a particular set of
unique facts, largely rests on the decisions of the next tribunals confronted with
successive claims. As those tribunals confront this issue, the recent decision of the
ad hoc Committee rejecting claimant’s application for annulment should provide

155 Ibid., para. 547.
further grounds for future tribunals to rely on the principle set forth in the Orascom award and understand that the principle rests on solid grounds.\footnote{Orascom TMT Investments S.à.r.l. v. People’s Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Decision on Annulment (17 Sept. 2020).} In September 2020, the ad hoc Committee considering Orascom’s application to annul the award concluded: ‘The Tribunal relied on an established legal concept under international law and it did not invent any new legal concept in this regard.’\footnote{Ibid., para. 316 (emphasis added).}

The Committee identified that:

OTMTI’s abuse appears to be confined to bringing a claim in full knowledge of the fact that a previously controlled entity, acting in concert, had already brought a claim in respect of the same measures … In other words, claimants who are aware of their lack of standing act abusively.\footnote{Ibid., para. 314.}

Further, in another award issued in September 2020, a distinguished tribunal recognized, albeit briefly, that ‘abuse of process’ is applicable in the context of successive treaty claims. In Eskosol v. Italy, multiple shareholders of the same investment initiated separate proceedings.\footnote{Eskosol S.p.A. in Liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award (4 Sept. 2020).} The respondent argued in the second case that being subject to multiple arbitrations arising out of the same investment was abusive. In deciding this claim, the tribunal acknowledged that abuse of process is ‘related’ to preclusion doctrines like res judicata and collateral estoppel.\footnote{Ibid., para. 264.} However, that tribunal quickly dismissed the application of abuse of process in that case because ‘the fact remains that [both claimants] are not the same party, either formally or in essence’.\footnote{Ibid., para. 265.}

The Eskosol v. Italy tribunal distinguished the facts before it from those in Orascom and RSM, to conclude that each claimant had a legitimate right to have its claims heard. In coming to this conclusion, the tribunal focused on the fact that there was no concerted action and no ‘deliberate maneuvering by [claimant] in order to have a proverbial “second bite at the apple.”’\footnote{Ibid. (emphasis added).}

For these reasons, the conclusion of the tribunal in Eskosol v. Italy only serves to confirm the approach in Orasom, as recited by the annulment Committee, which highlighted the motive of a claimant that brings ‘a claim in full knowledge’ of its abusive conduct.\footnote{Orascom v. Algeria, Decision on Annulment, supra n. 156, para. 314.}
5 CONCLUSION

Investment arbitration has been subject to much criticism by those who have come to view ISDS as a system that benefits the investors of wealthy nations at the expense of developing nations, rather than as a mechanism to promote foreign direct investment. While many of the current criticisms are misinformed, the risk to the legitimacy of the ISDS system of multiple and successive claims, as identified by the UNCITRAL Commission *supra*, remains a particularly relevant problem to address. The ISDS system relies on States to provide consent to arbitrate with yet unknown investors – if arbitrators enable abusive conduct by investors in the cases before them, the long-term effects on the system could be devastating. Indeed, some sixteen years after the *Lauder/CME* debacle, the *Orascom* tribunal justified, in part, the application of abuse of process in their case by referencing the criticism of those contradictory decisions.

Abuse of process is not the only tool available to address the abuse of multiple and successive arbitrations. The preclusion doctrines of res judicata and collateral estoppel certainly have a place, perhaps the preeminent place, in this area. Certain reforms to the drafting of treaties could also address this problem. The inclusion of denial of benefit clauses and fork in the road provisions in treaties can reduce the opportunity for abuse of process to occur. However, in the event that an abuse of process has occurred, investment tribunals should not be reluctant to promote the doctrine as a means to protect the legitimacy of their proceeding and the ISDS system as a whole. In the future, tribunals should look to the *Orascom* decision to establish a consistent jurisprudence that the initiation of multiple proceedings ‘in relation to the same investment, the same measures and the same harm’ are inadmissible as an abuse of process.