Exposé

The General Principle of ‘Abuse of Rights’ and its Application by International Courts and Tribunals

With a Special Focus on its Impact on Treaty Shopping in International Investment Disputes

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Field of Dissertation Public International Law

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1. Overview of the Issue

The last years have seen much discussion with regard to the sources of international law. However, the largest share of scholarly attention was focused on customary international law. In contrast, the other non-treaty source enlisted in Article 38(1) Statute of the International Court of Justice (ICJ) – namely general principles of law – has attracted comparably less attention. Issues connected to the emergence of general principles have usually been treated rather cursorily, despite them being frequently resorted to in judicial practice. Due to their generally abstract nature, general principles allow judges and arbitrators flexibility in addressing issues that might otherwise be unregulated by international law, but in the same vein may raise the suspicion to serve as positivistic fig leaf to introduce considerations not accounted for by law into the judicial decision-making process. More so than any other source of international law, general principles are thus susceptible to serve as a gateway for judicial law-making. As a result, their application highlight the question what role judges should serve on the international stage – whether they impartially discover and apply existing law or play a more active role in contributing to the development of international law in search of ‘just’ resolutions to disputes. While, within domestic law, similar discretionary powers of judges can be objectified through extensive jurisprudence and the harmonizing effect of appellate bodies, these factors are usually lacking in international law. Therefore, and due to the discrepancy between

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2 See, e.g., the references to the general principle of good faith in the ICJ’s most recent judgment, Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica) (Joined Cases) (Judgment) [2015] ICJ, not yet reported, paras 141, 168, 173.

3 See Robert Kolb, ‘Principles as Sources of International Law (With Special Reference to Good Faith)’ (2006) 53 Netherlands International Law Review 1, 7 ['general principles of law [...] are elements of law-creation and law-creativity, inspiring as much the legislator as the law-applier; they are ‘open to value-oriented arguments’].

4 See in this regard the ICJ’s standpoint in Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 18 ['It is clear that the Court cannot legislate, and [...] it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable [...] This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.’].

5 While investment tribunals are concerned with an ever-growing case load, appellate jurisdiction is (yet) lacking. Therefore, any harmonization of jurisprudence requires the – currently present – commitment to do so by arbitrators themselves. However, even where such jurisprudence is coherent in itself (and thus serves as a
2. Current State of Research and Identifiable Issues

This thesis, divided into three complementary parts, sets out to address these underlying concerns by examining specific issues connected with general principles of law in general and the abuse of rights principle in particular. The first part provides a discussion on dogmatic and theoretical underpinnings, particularly their emergence, of general principles of law. The second determines the current legal status and normative content of the ‘abuse of rights’ principle. The third examines how a specific embodiment of that principle, namely ‘abuse of process’, has been employed to deal with cases of treaty shopping in international investment disputes.

As a starting point, the first part discusses the role general principles were intended to play within the framework of the Statute of the PCIJ/ICJ. Already from the outset they were introduced as an instrument for judges to prevent a *non liquet* situation, but at the same time limit their discretionary power by requiring a positivistic foundation. Subsequently, the current status of scholarly writing on the emergence of general principles of law is reviewed. The two contending theories during the drafting process of Article 38 PCIJ Statute were based on positivistic and naturalistic thinking, respectively. As of today, the positivistic position finds overwhelming support among scholars, calling for a comparative analysis of domestic legislation to determine the existence of a general principle of law. However, self-sustaining construct) this not necessarily means that is grounded in positive law where abstract general principles are resorted to.

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7 Namely Article 38(3) Statute of the Permanent Court of International Justice, which was later incorporated verbatim into the ICJ Statute as Article 38(1)(c), see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited, 1953) 19-20.


beyond this general consensus, several issues remain unsolved. Most importantly, it is unclear in how many (if not all) jurisdictions a principle has to be recognized in order to be considered a ‘general principle of law’ and whether its absence – or outright rejection – in the domestic legislation of some countries bars it from reaching that status.\textsuperscript{11} Scholarly opinion shows considerable differences on this issue.\textsuperscript{12} Likewise, it is open what impact it has if a state recognizes a principle in its domestic law but challenge its relevance within international law.\textsuperscript{13} Even when the determination has been made that a principle is generally recognized by states, only such principles that are ‘transposable at the international level’ may amount to general principles of law.\textsuperscript{14} As a result, the principle, when being transformed from domestic law to the international stage, has to undergo two processes of transformation and abstraction:\textsuperscript{15} the first to adjust for differences of the principle as recognized in the various national jurisdictions and the second to account for differences between domestic law and international law.

In its second part, the thesis applies the methodology discussed to the principle of ‘abuse of rights’. The abuse of rights principle is ‘an application of [the principle of good faith] to the


\textsuperscript{12} See, e.g., Hersch Lauterpacht, Private Law Sources and Analogies of International Law (Archon Books, 1970 [reprint from 1927]) 69-70 [‘a principle not belonging to the system of law prevalent in one country, but expressing a rule of uniform application in all or in the main systems’]; South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase; Dissenting Opinion Judge Tanaka) [1966] ICJ Rep 250, 299 [‘the recognition of a principle by civilized nations […] does not mean recognition by all civilized nations, nor does it mean recognition by an official act such as a legislative act’].

\textsuperscript{13} Debatable is whether that state could enjoy the status as persistent objector, similar to customary international law, so that it would not be bound by the principle, cf. Olufemi Elias, ‘Persistent Objector’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (2009). One area where this might become of relevance is international environmental law, where it has been argued that i.a. the ‘precautionary principle’ can be regarded as a general principle of law (For a critical position on that point see Daniel Bodansky, ‘Customary (And Not So Customary) International Environmental Law’ (1995) 3 Indiana Journal of Global Legal Studies 105, 116, fn56). Should that argument find support, it is questionable whether the precautionary principle would apply in relation to the United States, which, although having reflections of it enshrined in its domestic law, has voiced vehement opposition against the principle’s binding nature under international law, see WTO, European Communities: Measures Affecting the Approval and Marketing of Biotech Product – Reports of the Panel (29 September 2006) WT/DS291/R, WT/DS292/R and WT/DS293/R, at 337 paras [7.81]-[7.82].

\textsuperscript{14} Alain Pellet, ‘Article 38’ in Andreas Zimmermann et al. (eds), The Statute of the International Court of Justice: A Commentary (OUP, 2\textsuperscript{nd} edn. 2012) 731, 834.

\textsuperscript{15} Jaye Ellis, ‘General Principles and Comparative Law’ (2011) 22 EJIL 949, 958-959.
exercise of rights. By denying legal protection if a right is exercised for a different end than intended or unduly interferes with the rights of others, the principle (sometimes as abuse of process/procedure), in effect, allows for balancing the competing interests of the beneficiary of a right on the one hand against the interests of the obliged party or the community on the other. This part of the thesis considers the principle’s acceptance in domestic legal orders. While the principle is firmly rooted in countries with a civil law tradition, its grounding in common law is far less certain. It appears clear that common law jurisdictions do not recognize an abuse of rights principle as such. Nevertheless, it has been argued that it may be determined as an underlying rationale reflected in various specific legal principles. In any event, even where a principle is not enshrined in certain domestic legal orders, this might not necessarily be considered as a rejection of that principle, if the “circumstances justifying its application in one system are absent from the other”. As Professor Michael Byers argued “abuse of rights is of limited utility in those legal systems [...] in which the rights themselves have been framed in precise or qualified terms”", such as in common law jurisdictions. Supplemented the positivistic approach, this part will also explore additional dogmatic and theoretical underpinnings of the principle. Most notably,

16 Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Stevens & Sons Limited, 1953) 121; nevertheless, as Bin Cheng indicates, ‘abuse of rights’ is distinct from good faith. While the principle of good faith generally concerns the fulfillment of obligations (and is usually employed to shape otherwise ‘hollow’ procedural obligations), ‘abuse of rights’ is only concerned with the exercise of rights.


18 Although with notable differences under which circumstances it might apply, see, e.g., Austria (Article 1295(2) Civil Code); Canada (Quebec) (Article 7 Civil Code of Quebec); Germany (Article 226 Civil Code); Mexico (Article 1912 Mexican Civil Code); Netherlands (Article 3:13 (New) Civil Code); Philippines (Article 19-21 Civil Code); United States (Louisiana) (Morse v J. Ray McDermott & Co., Louisiana Supreme Court (1977) 344 So.2d 1353 at 1369 (La. 1977)).


22 Ibid., 396 [with further references].
‘abuse of rights’ stems from the general principle of good faith,\(^\text{23}\) which itself is “deeply rooted” in natural law doctrine.\(^\text{24}\) Thus, taking formalistic elements as well as considerations under natural law into account, the first part strives to determine the current legal status and content of the ‘abuse of rights’ principle. Subsequently, the thesis examines how the general principle of ‘abuse of rights’ has been applied by various international courts and tribunals in inter-state disputes. This survey includes a discussion of the case law of the Permanent Court of International Justice (PCIJ), the ICJ, the International Tribunal for the Law of the Sea, as well as the Dispute Settlement Body of the World Trade Organization. However, judicial practice by these bodies on the issue has remained relatively scarce.\(^\text{25}\) In particular the ICJ has remained reluctant to address the legal value and content of ‘abuse of rights’, although parties repeatedly relied on the principle of ‘abuse of rights’ (sometimes as ‘abuse of procedure’).\(^\text{26}\) As a result, the issue was largely left to individual judges’ opinions.\(^\text{27}\) This part ascertains how far international jurisprudence conforms with or departs from the conclusions arrived prior on the content of the principle.

The third part examines how the general principle of abuse of rights (or, in this context, in the form of ‘abuse of process’) is employed by investment arbitrators to address a specific issue, namely treaty shopping. As the nationality of a corporation is usually determined by


\(^{25}\) The PCIJ discussed the principle in two of its cases (*Case concerning certain German interests in Polish Upper Silesia* (*Germany v Poland*) (Merits) (1926) PCIJ Rep Series A No 7, 30; *Case of the Free Zones of Upper Savoy and the District of Gex* (*Switzerland v France*) (1932) PCIJ Series A/B No 46, 167), while the ITLOS was concerned with ‘abuse of rights’ (as enshrined in Art 300 UNCLOS) only in *The M/V “Louisa”* (*Saint Vincent and the Grenadines v Spain*) (Judgment of 28 May 2013) ITLOS Reports 2013, 4.


its place of incorporation,\(^{28}\) companies are able to restructure themselves in order to achieve more favorable protection under investment treaties.\(^{29}\) This practice of ‘nationality planning’ or ‘treaty shopping’, although found to be not \textit{per se} unlawful,\(^{30}\) has become a pertinent issue in investment arbitration.\(^{31}\) In part, as ‘treaty shopping’ potentially creates a considerable issue for the legitimacy of the investment framework,\(^{32}\) as states are obliged to afford protection to corporations without benefiting from additional investments.\(^{33}\) This is most prominently the case where previously purely domestic disputes are ‘internationalized’ by corporate restructuring. Under these circumstances, arbitral tribunals considered the issue under the heading of ‘abuse of process’ (as part of ‘abuse of rights’) and, partly, declined their jurisdiction.\(^{34}\) This part determines how far the jurisprudence of investment tribunals has established conditions for the application of the ‘abuse of process’ principle, and whether it is able to appropriately address the issue of treaty shopping. By drawing on this example, the impact as well as the utilization of general principles in international investment jurisprudence is examined.

\(^{28}\) \textit{Cf. Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)} [1970] ICJ Rep 3, at 42, para 70 [dealing with the issue of diplomatic protection]; Christoph Schreuer \textit{et al.}, \textit{The ICSID Convention: A Commentary} (CUP, 2\textsuperscript{nd} edn. 2009) 281 [‘ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of […] juridical persons’].

\(^{29}\) Christoph Schreuer \textit{et al.}, \textit{The ICSID Convention: A Commentary} (CUP, 2\textsuperscript{nd} edn. 2009) 292.

\(^{30}\) \textit{CME Czech Republic B.V. v Czech Republic}, UNCITRAL Arbitration, Partial Award (13 September 2001) para 419.

\(^{31}\) In part, states have reacted to this problem by inserting ‘denial-of-benefits’ clauses into BITs or other investment treaties (e.g. Article 17(1) Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95), by way of which only corporations with a ‘substantial business activity’ in a state may claim nationality of that state, see Rudolf Dolzer and Christoph Schreuer, \textit{Principles of International Investment Law} (OUP, 2\textsuperscript{nd} edn 2012) 55–56.


\(^{33}\) \textit{Cf. Tokios Tokelés v Ukraine}, ICSID Case No ARB/02/18, Dissenting Opinion (Chairman Prosper Weil) (29 April 2004) para 30.

\(^{34}\) See \textit{Phoenix Action Ltd v Czech Republic}, ICSID Case No ARB/06/5, Award (15 April 2009); Filip Černý, ‘Short Flight of the Phoenix: A Few Thoughts on Good Faith, the Abuse of Rights and Legality in Investment Arbitration’ (2012) 3 Czech Yearbook of International Law 183, 194-202; the ‘abuse of process’ argument against nationality planning/treaty shopping was most recently advanced by Australia in investment proceedings against Philip Morris (\textit{Philip Morris Asia Limited v Commonwealth of Australia}, UNCITRAL, PCA Case No 2012-12, Australia’s Response to the Notice of Arbitration (21 November 2011), paras 30-31). While Philip Morris’ claims were dismissed in late 2015 (see Daniel Hurst, ‘Australia wins international legal battle with Philip Morris over plain packaging’ \textit{The Guardian} (18 December 2015) <http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging> accessed 5 May 2016) it is to date still unclear on which grounds, as the decision has not yet been published.
3. Research Goal and Methodology

The main research questions may thus be summarized as:

*What is the current impact of general principles of law on international judicial practice, as exemplified by the principle of ‘abuse of rights’?*

As already outlined above, the underlying issue of this question remains how far the normative content of general principles is determinable and thus how far this source of law *per se* awards judges with discretionary powers. The argument is made that, although general principles are grounded in positive law, during their process of transforming principles from the domestic to the international sphere, as well as their application to specific disputes, judges and arbitrators necessarily are influenced by considerations beyond purely objective positivism. This concern is enhanced in the case of arbitral tribunals, which, contrary to the International Court of Justice, usually do not reflect a broad number of jurisdictions.\(^3\) Thus, they are more susceptible to bias towards a certain way of legal thinking.

Those issues shall be examined by answering several questions throughout the three parts of the thesis: (1) Which purpose should general principles of law serve within international law? (2) In particular, which purpose should they serve within judicial practice? (3) How are general principles of law formed and how might their existence and content be proven? (4) What is the legal status and normative content of the principle of ‘abuse of rights’? (5) How does judicial practice in inter-state disputes conform or depart from the discernible normative content of ‘abuse of rights’? (7) How is nationality of a corporation determined in international investment law? (8) What challenges does nationality planning pose to investment law framework? (9) How is ‘abuse of rights’/‘abuse of process’ apt to address those challenges?

The methodology employed to address these questions differs throughout the various parts of the thesis. The first part, starting from an examination of the pertinent parts of the

\(^3\) Cf. Humphrey Waldock, ‘General Course on Public International Law’ (1962-II) 106 Recueil des Cours 1, 66 [‘arbitral tribunals […] of one, three or five judges, have probably done no more in most cases than take into account their own knowledge of the principles in which the arbitrators were themselves trained’].
travaux préparatoires to the PCIJ Statute regarding ‘general principles of law’, reviews the scholarly works and pertinent judicial findings with regard to the formation and determination of general principles of law.

In applying the method discussed, the second part undertakes a comparative study regarding the acceptance of the ‘abuse of rights’ principle in various legal orders, by reviewing domestic legislation and, where pertinent, judicial decisions. It then goes on to discuss international jurisprudence in inter-state disputes on the ‘abuse of rights’ and analyze whether it conforms with or departs from the findings.

The third part examines the current treaty framework to establish jurisdiction of arbitral tribunals, in particular the requirement of nationality. Subsequently it reviews the jurisprudence of investment tribunals when concerned with ‘abuse of process’ in the context of treaty shopping.
4. Thesis Outline

1. Introduction

2. The formation of general principles of law
   a. The origins and purpose of general principles
   b. The formation and evidence of general principles

3. The abuse of rights as a general principle of law
   a. Analysis of the legal status and content
      i. Civil law jurisdictions
      ii. Common law equivalents to abuse of rights
      iii. Other jurisdictions
      iv. Natural law considerations
      v. Conclusion
   b. International judicial practice on the abuse of rights principle
      i. The Permanent Court of International Justice and the International Court of Justice
      ii. The World Trade Organization
      iii. Other judicial bodies
   c. Conclusion

4. Abuse of process in international investment law
   a. Nationality of ‘investors’ as requirement to bring investment claims
   b. Nationality planning and treaty shopping
      i. The case for nationality planning/treaty shopping
      ii. The implications for the legitimacy of investment law
      iii. The principle of ‘abuse of process’ as employed by investment tribunals in the context of treaty shopping

5. Conclusion
5. Preliminary Bibliography


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Walock, Humphrey, ‘General Course on Public International Law’ (1962-II) 106 Recueil des Cours 1

6. Case Law

General Case Law

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits) [1926] PCIJ Rep Series A No 7

Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections) [1992] ICJ Rep 240

Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Merits) [1970] ICJ Rep 3

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Aguas del Tunari S.A. v Republic of Bolivia, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005)

Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela, ICSID Case No ARB/00/5, Award (23 September 2003)

Cementownia “Nowa Huta” S.A. v Republic of Turkey, ICSID Case No ARB(AF)/06/2, Award (17 September 2009)

CME Czech Republic B.V. v Czech Republic, UNCITRAL, Partial Award (13 September 2001)

Mobile Corporation and others v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010)

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The Rompetrol Group N.V. v Romania, ICSID Case No ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility (18 April 2008)

Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18, Jurisdiction (29 April 2004)