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TABLE OF CONTENTS

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THE PRINCIPLE OF CLEAN HANDS IN INTERNATIONAL INVESTMENT ARBITRATION:
WHAT IS THE EXTENT OF INVESTMENT PROTECTION IN INVESTOR-STATE DISPUTES?

by Agata Zwolankiewicz

V. INTRODUCTION

In the last decade, the investor-state dispute settlement system has been subject to criticism. It is mainly due to the fact that the standard of protection under investment treaties significantly tips the scales in investors' favor. Such a tilted protection mechanism has been referred to as "asymmetric treaties." It creates an unbalanced investment law regime under which two-thirds of the cases are settled or lost by states.[1] However, despite the vast protection of investors, it is not unlimited. One of the bars to having a dispute resolved by arbitral tribunal in investor-state arbitration proceedings is the illegality of the investment. It is understood as the non-conformity of the investment with the laws and regulations of the host state. There is a prevailing view that the illegality of the investment would deprive the investor of a treaty protection to a certain extent.[2] The illegality can influence the jurisdiction of the tribunal and the admissibility of the claim, as well as have negative consequences with regard to the merits of the case, such as resulting in a reduced compensation.[3] The more contentious issue, which is a subject of this article, present in both legal writing as well as case law refers to the presence of the so-called principle of clean hands in the international investment law regime.

[1] Frank J Garcia, *The Case Against Third-Party Funding in Investment Arbitration*, INV. TREATY NEWS, July 20, 2018, https://iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/.

[2] See e.g. Zachary Douglas, The Plea of Illegality in Investment Treaty Arbitration, 29 ICSID REVIEW 155, 155 (2014); Jarrod Hepburn, In Accordance with Which Host State Laws? Restoring the Defence of Investor Illegality in Investment Arbitration, 5 J. INT'L DISP. SETTLEMENT 531, 532 (2014); Sam Luttrell, Fall of the Phoenix: A New Approach to Illegality Objections in Investment Treaty Arbitration, 44 U. OF W. AUSTL. L. REV. 120, 127 (2019).

[3] Douglas, *supra* note 2, at 155.

As explained further, the clean hands principle concerns one of the prerequisites the party seeking relief has to comply with. Therefore, if a party has "unclean hands," i.e. if the party has engaged in a certain type of a wrongdoing (including but not limited to fraud, misrepresentation, violation of state's laws and regulations) related to its own claim, the clean hands doctrine will prevent that party from benefiting from its own unlawful behavior.

International investment law lacks consensus as to whether the illegality of the investment and "unclean hands" relate to separate notions and whether there is any overlap between them.[1] The lack of uniformity in the approach of legal scholars and arbitral tribunals makes it even more difficult to define the notion and scope of the clean hands principle. It also hinders the process of establishing a recognized principle of international law on which the investment tribunals should rely when deciding a dispute between an investor and a host state.

This article constitutes an attempt to gather the existing relevant concepts and approaches to the principle of clean hands presented in the awards rendered by arbitral tribunals in investment disputes. It is necessary to provide the potential grounds for application of this principle by arbitral tribunals and indicate the possible scenarios in which such a defense can be raised. The inconsistency in legal writing and case law raises a question whether the status of the clean hands principle should be regulated in a more explicit manner. Given that there is no consensus whether it constitutes a general principle of international law or whether its application can be derived from the legality requirement included in the treaties, more clarity is desired in its application by tribunals. That is especially relevant insofar as the unclean hands of an investor can potentially lead to different results–the investment can be deprived of protection under the treaty due to the lack of jurisdiction or inadmissibility of the claim, or such a behavior can be of importance with relation to the merits of the case. The current lack of consistency in arbitral awards contributes to prevailing confusion among both investors and states. A certain degree of clarity

[1] Marcin Kałduński, Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration, 4 POLISH REV. OF INT'L & EUR. L. 69, 69-74 (2015).

could be achieved through explicit differentiation in definitions included in BITs; however, such would only resolve the issue with regard to the treaties concluded in the future. Adopting a unanimous approach to clean hands principle is especially desired as the legitimacy of investor-state dispute settlement has been called into question. One of the allegations as to the malfunctioning of the system is the lack of consideration of human rights infringements in the investor-state arbitration. As it is the state's obligation to uphold rights contained in international human rights instruments, it is a very difficult task to hold an investor responsible for such actions. However, given that some international corporations have economic power and influence that is far greater than some small countries, it has been advocated that violations of internationally recognized human rights should be acknowledged in the arbitral proceedings. Even though the international human rights instruments do not impose obligations directly upon investors, application of the clean hands principle would prevent the investors from getting off scot-free.

VI. THE CONCEPT OF THE CLEAN HANDS DOCTRINE

A. *Introductory Remarks.*

The clean hands principle relates to the requirement of proper conduct by the party seeking relief. It consists in the notion that "if some form of illegal or improper conduct is found on the part of the investor, his or her hands will be "unclean," his claims will be barred and any loss suffered will lie where it falls."[2] Therefore, the aim of such a defense is to safeguard a party from the potential legal injury resulting from the other party benefiting from its own illegal or improper conduct.[3] In the application of that doctrine, tribunals have been resorting to the use of Latin maxims such as *ex delicto non oritur* action ("an action does not arise from fraud") and *ex turpi causa non oritur* ("from a dishonorable cause an action does not arise").[4] Taking all

[2] Aloysius Llamzon, Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State of the "Unclean Hands Doctrine in International Investment Law: Yukos as Both Omega and Alpha, 30 ICSID REV. 315, 316 (2015).

[3] Kałduński, *supra* note 4, at 69.

[4] Patrick Dumberry, State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award, 17 J. OF WORLD INV. & TRADE 229, 230 (2016).

the factors into consideration, it has been pointed out in legal writing that the doctrine of clean hands in the international investment law context can also be regarded as an emanation of the principle of good faith.[5]

The principle of clean hands has its roots in Roman traditions. It has been derived from several rules existing at that time: *ex turpi causa non oritur action* ("an action does not arise from a dishonorable cause"); *nemo auditur propriam turpitudinem allegans* ("no one can be heard to invoke his own turpitude"); and *nemo ex suo delicto meliorem suam conditionem est facit* ("no one can perfect his condition by a crime").[6] Therefore, due to its Roman roots, the doctrine has been widely adopted in civil-law jurisdictions. Nonetheless, common law tradition has also upheld the principle, deriving it from a positive defense based on equity.[7]

With time, the principle gained additional recognition in the field of international law. It was relied upon in the case between *Netherlands v. Belgium* concerning the diversion of water. The dispute was commenced by Belgium's actions undertaken to create Albert Canal. Belgium in its defense was alleging that it was in fact the Netherlands that first breached the existing 1863 treaty between the parties concerning the regime of diversions of water of the River Meuse by constructing and completing an additional canal, a lock and barrage at Borgharen. The court addressed the clean hands issue by referring to the notion of equity:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, "[e]quality is equity;" "[h]e who

[5] Marcin Kałduński, *The Element of Risk in International Investment Arbitration*,13 NON-STATE ACTORS & INT'L. L. 111, 122 (2011).

6 Mariano de Alba, Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration, 12 Brazilian J of Int'l. L. 322, 323 (2015).

7 Jamal Seifi & Kamal Javadi, The Consequences of the Clean Hands Concept in International Investment Arbitration, 19 Asian Y.B. of Int'l. L. 122, 126 (2013).

> seeks equity must do equity."[8]

The court's reasoning was followed in the prominent dissenting opinion of Judge Stephen Schwebel adjudicating a case relating to the military and paramilitary activity in and against Nicaragua. Judge Schwebel perceived the clean hands principle as the fundamental principle of law: "[The Court] has also failed to draw the correct legal conclusions from those facts which it gives some sign of recognizing, as by failing to apply against Nicaragua that fundamental general principle of law so graphically phrased in the term, 'clean hands'" (emphasis added).[9] The International Court of Justice so far has not relied upon that principle; however, it has not questioned its existence as a binding principle of law either.[10] Thus, the lack of an affirmative endorsement of the principle by the International Court of Justice makes it more difficult for arbitral tribunals to apply the principle in investment cases. Despite the confusion, it constitutes a common defense raised by the parties in the proceedings.[11] Tribunals have approached the defense in various ways as to its existence, scope and definition.

One of the controversies surrounding the scope and concept of the clean hands doctrine concerns whether it relates to solely the initial stage of the investment–its making–or also the post-establishment performance. It has been found that the prevailing weight should be given to the wording of the treaty–whether it refers only to the establishment phase or subsequent actions of the investors.[12] However, the

[8] E.g. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25.

[9] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep., 14, 285–86 (Schwebel, J., dissenting).

[10] Monika Diehl, *Legality of Investments and Investors' Actions in the Context of the Yukos Case*, 24 ARB. BULL. 122, 124 (2016).

[11] *E.g.* South American Silver, Ltd. v. Bolivia, Permanent Court of Arbitration, Award, ¶ 14 (Nov.22, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf; Hesham Talaat M Al-Warraq v.Indonesia, (UNCITRAL) Final Award, ¶ 161–64 (Dec. 15, 2014), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

[12] *E.g. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1.

case law is not consistent in this manner. The views on the doctrine depend on whether the issue refers to the illegality as such or unclean hands. In the first situation, it was noted that it is only necessary to examine whether the investment was made in conformity with the laws and regulations at the time of its establishment.[13] It has been argued with regard to the issue of the clean hands principle, especially in the context of violation of human rights, that the actions of the parties should also impact the protection under the treaty during the post-establishment phase of the investment[14] (see infra § II(C)).

B. *Grounds for Application.*

Arbitral tribunals have been approaching the doctrine of clean hands in a twofold manner—on the one hand applying the principle under the provisions of certain bilateral investment treaties (hereinafter BITs), and on the other, as a general principle of international law.[15]

With regard to BITs as grounds for application of the clean hands principle, some treaties require that any investment is made in compliance with the laws and regulations of the host state.[16] That has also been referred to in legal writing as the legality requirement.[17] Some scholars even point out that even if a treaty does not have an explicit reference to the investment being made in accordance with the laws and regulations of the host state, such can be interpreted from its preamble or

[13] E.g. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25.

[14] Dumberry, *supra* note 7, at 230.

[15] de Alba, *supra* note 9, at 324.

[16] *E.g.* Art. 1 Bosnia and Herzegovina-Malaysia BIT (1994): "The term "investments" referred to in paragraph 1 (a) shall only refer to all investments that are made in accordance with the laws, regulations and national policies of the Contracting Parties."; Art. 1 Iran, Islamic Republic of-Japan BIT (2016) "the term "investment" refers to every kind of asset, invested directly or indirectly by an investor of a Contracting Party in the Territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party"; Art. 8.1 Comprehensive Economic and Trade Agreement (CETA) "covered investment means, with respect to a Party, an investment made in accordance with the applicable law at the time the investment is made.

[17] Luttrell, *supra* note 2.

provisions governing the rights and obligations of the parties.[18] In *Phoenix Action, Ltd. v. The Czech Republic*,[19] the tribunal held that "the conformity of the establishment of the investment with the national laws—is implicit even when not expressly stated in the relevant BIT."[20] If tribunals find that an investor failed to comply with the BIT requirements, they would most typically deny the jurisdiction to hear the dispute under the reason that it would simply not qualify as an investment under the treaty regime.[21] Therefore, the investment in that case would be deprived of the substantive protection under BIT.

It seems that under the requirement of the investment being made in accordance with the laws and regulations of the host state, most cases concerned the issue of illegality as such. As pointed out in legal writing, "in accordance with the law" constitutes a manifestation of the principle of clean hands.[22] In the view of Patrick Dumberry, "when these tribunals are deciding whether or not an investment is protected under a BIT containing a legality requirement clause, they are in fact applying the clean hands doctrine."[23] As the relation between the scope of the clean hands principle and the legality requirement has remained unclear (*see infra* ¶ II(C)), it has not been prejudged whether the requirement contained in BITs of making the investment in accordance with the laws and regulations of the host state relates only to the issue of legality of the investment or also the requirement of clean hands of an investor. Following the view that puts an equation mark between illegality and unclean hands,[24] or the approach that perceives the clean hands doctrine as a broader term than, but includes, the requirement of the legality of investment, such an expression in a treaty would constitute grounds to apply that defense.

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[18] Diehl, *supra* note 13, at 124.

[19] Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5.

[20] Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 101 (Apr.15, 2009).

[21] de Alba, *supra* note 9, at 325

[22] Kałduński, *supra* note 4.

[23] Dumberry, *supra* note 7, at 235.

[24] Kałduński, *supra* note 4.

In the lack of such a requirement in the treaty, it has been indicated that the clean hands principle can be applied by investment tribunals as a general principle of law.[25] Aleksandr Shapovalov argues that the clean hands principle is similar to the principle of good faith and "to the rule prohibiting one from benefiting from his/her own wrongful conduct, which is also considered by some scholars to be a general principle of law."[26] The approach presented by Shapovalov is quite uncommon. He argues that despite the clean hand principle and the prohibition against a party benefiting from its wrongful conduct being similar, they are distinct. The majority of scholars and tribunals, on the other hand, refer to the meaning of the clean hands principle as the rule prohibiting a party from benefiting from the wrongful conduct, and thus perceiving it as a synonym.[27] However, it has been commonly agreed that the clean hands principle does not fall under general customary international law.[28] "The principle … (*inadimplenti non est adirnplendurn*) is so just, so equitable, so universally recognized that it must be applied in international relations …"[29]. Thus, even though the principle does not fall under general customary international law, the authors argued the doctrine of clean hands constitutes a source of law that can be applied by international tribunals in line with Article 38 (1)(c) of the ICJ Statute ("the general principle of law recognized by civilized nations") and therefore enables the arbitral tribunals to refer to it in investor-state arbitration.[30].

Some tribunals adopted the view that the principle of clean hands constitutes a

[25] Douglas, *supra* note 2, at 156.

[26] Aleksandr Shapovalov, Should a Requirement of "Clean Hands" Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate, 20 AM. U. INT'L L. REV. 829, 839 (2005).

[27] de Alba, *supra* note 9, at 323; Douglas, *supra* note 2, at 167; Dissenting Opinion of Judge Schwebel, *supra* note 12, at 75.

[28] Filip Balcerzak, Investor – State Arbitration and Human Rights 146 (Brill, 2017).

[29] Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 16–17 (1984).

[30] Patrick Dumberry & Gabrielle Dumas-Aubin, When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration 13 J. OF WORLD INV. & TRADE 349, 364 (2012).

general principle of international law.[31] However, reliance on this doctrine by investment tribunals has not been devoid of controversies.[32] In some of the cases, tribunals explicitly rejected the possibility of applying a doctrine of clean hands. For example, in *South American Silver v. Bolivia*, the tribunal rejected the application thereof.[33] It stated that firstly, the treaty itself does not include any reference to the clean hands principle.[34] Secondly, it proceeded with addressing the existence of the clean hands doctrine in the form of a general principle of law.[35] Ultimately, the tribunal found that Bolivia did not provide sufficient evidence to prove that this doctrine is widely recognized between the states.[36] Similarly, in *Glencore Finance v. Bolivia*, in its procedural order, the tribunal found that the application of the clean hands principle remains uncertain and it will have to not only "determine its status, but also lay out its contours."[37]

Another basis that has been invoked with regard to the application of the clean hands principle in practice was reliance on the violation of international public policy.[38] In *World Duty Free Company Limited v. The Republic of Kenya*, the tribunal denied its jurisdiction to decide on a dispute based on the claimant's "unclean hands."[39] The claimant was involved in the act of bribery, which violated international

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[31] *See*, *e.g.*, Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug.27,2008) ¶ 144 46; Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (Aug.2, 2006) ¶ 240-42; Hesham Talaat M Al-Warraq v. Indonesia, *supra* note 14, Final Award, ¶ 646 47; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (Jun.18, 2010) ¶ 124, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf.

[32] Balcerzak, *supra* note 30.

[33] South American Silver, Ltd., Award, ¶ 346.

[34] *Id.* ¶ 441.

[35] *Id.* ¶ 439-53.

[36] *Id.* ¶ 453.

[37] Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, Permanent Court of Arbitration, Procedural Order No 2, ¶ 47 (Jan. 31, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw9491.pdf.

[38] de Alba, *supra* note 9, at 326.

[39] World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

public policy in the view of the tribunal. Similarly, the tribunal in *Al-Warraq*[40] held that since the claimant's actions were prejudicial to the public interest, they fell under the scope of clean hands doctrine, by which the tribunal emphasized the relation the clean hands principle and international public policy. It has been, therefore, argued that application of the clean hands principle through transnational public policy could help to avoid the controversies concerning the unsettled status of the clean hands principle as a general principle of law.[41]

Therefore, as demonstrated in legal doctrine and case law, despite a lack of clarity as to the status of that principle in the regime of international investment law, tribunals have attempted to find grounds on which it can be applied—either as an explicit requirement included in BITs or through other means such as a general principle of law or international public policy.

C. *Temporal Scope.*

There is a prevailing view that the requirement of an investor to act in accordance with the clean hands principle should cover both the establishment of the investment phase as well as subsequent performance of an investor (as opposed to the legality requirement which covers merely the establishment stage).[42] As observed by Dumberry,[43] the first indication as to the temporal scope of legality and the principle of clean hands was made by the arbitral tribunal in the *Yukos* case.[44] It stated that the scope of the legality requirement is limited to the establishment phase, noting that any post-establishment wrongdoing allegations should be made under the principle of clean hands operating as a general principle of law. The view that the legality requirement should pertain to the admission stage with regards to the jurisdiction has been widely accepted in legal writing and case law since establishing

[40] Hesham Talaat M Al-Warraq v. Indonesia, supra note 14.

[41] Lodovico Amianto, The Role of "Unclean Hands" Defences in International Investment Law, 6 MCGILL J. DISP. RES. 1, 23 (2019).

[42] Dumberry, *supra* note 7; Kałduński, *supra* note 4, at 99.

[43] Dumberry, *supra* note 7 at, 240.

[44] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227.

the investment in violation of host's laws and regulations deprives the investment project of the investment status under the treaty.[45] Aloysius Llamzon and Anthony Sinclair argued that subsequent illegality of the investment could have an impact on the merits of the case; however, it would not deprive the tribunal of its jurisdiction[46] (even though the tribunal in the *Yukos* case indicated that the illegality of the investment should be assessed with regard to the initial stage and any subsequent infringement should be alleged under the principle of clean hands).

The same rationale applies to violations of human rights. It does not deprive the investment of its status under the treaty but rather impacts the admissibility of the claim or plays a role with regard to the merits of the dispute.[47] Moreover, as argued, the clean hands principle should have an impact on the admissibility of the claim (see further *infra* § III).

D. *Specific Cases of Violation of the Clean Hands Principle*

There is no explicit definition of the notion of "unclean hands" in the investment law context. The unclear approach to the principle of clean hands as a general principle of law makes it even more difficult. As already indicated, the operation of the clean hands doctrine is controversial not only in terms of its substance but, most importantly, its existence. The wording of BITs requirement for the investment to *be made in accordance with the laws and regulations of the host state* does not resolve the issue. What makes it even more complicated is the fact that not all violations of laws and regulations of the host state lead to the deprivation of protection under the investment treaty. Nonetheless, BITs do not provide any standard for the assessment of the infringement and its impact on the protection.[48] A certain guidance in the

[45] See, e.g. Aloysius Llamzon and Anthony Sinclair, Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES (Albert Jan van den Berg (ed) Kluwer 2015); Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, supra note 16.

[46] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, ¶ 345 (Aug. 16, 2016).

[47] Llamzon & Sinclair, *supra* note 49, at 528–29.

[48] de Alba, *supra* note 9, at 327.

subject matter can be derived from one of the awards—*Teinver v. Argentine Republic*.[49] The tribunal stated that an illegal investment can be a result of the lack of proper consent to sign a contract, fraud in a tender procedure, corruption or failure to meet public procurement requirements. Nonetheless, this enumeration is not helpful with regard to situations in which there is a need to assess whether the investor's behavior that is on its face in conformity with the law should be protected under the treaty or not.[50] In fact, the tribunal in *Teinver v. Argentine Republic* shed more light on what types of violations may amount to the illegality of the investment as such. However, as illustrated in a greater detail hereinbelow, the concept of the illegality of the investment constitutes only one of several examples of the clean hands principle. The author will argue that the scope of illegality overlaps with the clean hands principle, as the latter one is a broader concept and also covers wrongdoings other than non-conformity with the host state's laws and regulations.

1. Infringement of Human Rights

The issue whether arbitral tribunals should take into account human rights infringements committed by investors has been a subject of debate.[51] One of the controversies concerns the relation between the illegality of the investment as such and the unclean hands. In legal writing, it has been advocated that tribunals, whilst deciding on an investment dispute, should take into consideration human rights violations, provided that the relevant BIT contains a broadly worded dispute resolution clause and whether these violations relate to the investment in question.[52] Otherwise, it could be argued that in case the tribunal found violations of human rights, it went beyond the scope of its powers, which creates a risk of setting aside. Examining potential human rights violations committed by an investor in another country or another investment project would be a step too far taken by tribunals as

[49] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A., supra note 15.

[50] Diehl *supra* note 13, at 126.

[51] *See e.g.* Dumberry, *supra* note 7; Kałduński, *supra* note 4; Balcerzak, *supra* note 30.

[52] Dumberry & Dumas-Aubin, *supra* note 32, at 367

the actions undertaken by an investor elsewhere are likely not relevant to the subject matter of the dispute.[53] Additionally, not all kinds of violations of human rights should deprive an investor of a treaty protection. Serious violations directly related to the investment should result in the lack of jurisdiction, whereas minor infringements could have an impact on the merits phase of the proceedings, the amount of awarded compensation, etc.[54] That is due to the fact that in the former situation, the wrongdoing may lead to the investor's project not qualifying as an investment within the meaning provided for in the treaty.

On the other hand, it has been argued that there is no general binding obligation for an investor to protect human rights. It has been suggested that since international investment law or international agreements do not impose obligations upon investors to comply with provisions concerning human rights, it would be at the host states' discretion whether to impose such a requirement.[55] A point was made to the contrary stating that under the principle of clean hands, in cases of a violation of fundamental human rights, an investor's claim should be found inadmissible even if the obligation to comply with international human rights was not implemented in domestic law.[56] It was noted, however, that if one was to perceive protection of fundamental human rights as a general principle of international law or a norm of a *jus cogens* nature, referral to the doctrine of clean hands would be unnecessary.[57] The effect would be the same.

Despite the issue being commented on in legal writing, human rights violations constituting one of the types of unclean hands remains in the theoretical field as investment tribunals have not yet been concerned with the issue of human rights abuses.[58] Interestingly, in *South American Silver v. Bolivia*, the tribunal, on the one

[53] *Id.*

[54] Kałduński, *supra* note, 4 at 97–98.

[55] *Id.* at 98.

[56] Balcerzak, *supra* note 30, at 147.

[57] *Id.*

[58] Kałduński, *supra* note 4, at 97.

hand, that the clean hands doctrine invoked by Bolivia was not explicitly referred to in the BIT and does not constitute a general principle of international law nor international public policy, and thus the respondent's defense in this regard failed. On the other hand, the tribunal concluded that there is no need to expressly refer to the protection of human rights to secure its compliance:

> The Tribunal cannot understand that the mere absence of a sacramental formula to expressly refer to human rights or to the protection of the communities may lead to the conclusion that the Reversion was not conducted in a social benefit related to the internal needs of Bolivia.[59]

Despite rejecting the application of the principle of clean hands, the tribunal held that given the circumstances relating to the investment, reversion of mining concessions by Bolivia amounted to a lawful expropriation that satisfied a public purpose and entailed a social benefit.

2. Corruption

One of the most frequently invoked examples of violation of clean hands principle concerns the case of corruption. Having regard to the particularities of international investment law, corruption would essentially include an existing (or yet to be formed) relationship between a foreign investor and a public official of the host state and un undisclosed payment made in the expectation of a favourable public decision.[60] The application of that principle is based on the notion that since corruption is of a consensual nature (as investors and host state officials are involved most typically in an uncoerced act of bribery), it would be unfair to shift the consequences solely on one party involved in the act.[61] What must be underlined is that due to its bilateral nature, corruption issues can be raised by both an investor and a state.[62] Nonetheless, corruption claims have been raised by investors far less frequently than

[59] South American Silver v. Bolivia, supra note 14 ¶ 561.

[60] Llamzon & Sinclair, *supra* note 49, at 460.

[61] Aloysius P Llamzon, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 215 (Oxford: Oxford University Press, 2014).

[62] Llamzon & Sinclair, *supra* note 49, at 463.

host states since in most situations it would also implicate the involved investors.[63] It has been emphasised that corruption or bribery is a very particular subcategory of an investor's behaviour which violates the legality requirement existing in the BIT (expressly included or implicit).[64] Even though corruption concerns can be raised by both an investor and a host state, their behaviour will lead to different legal consequences. In case an investor bases its claim on the host state's wrongdoing in the form of corruption/extortion, the tribunal will deal with it at the merits phase. The situation is more complicated with regard to the potential investor's misconduct—it can be an issue for jurisdiction, admissibility or merits given the particular circumstances of the case under consideration.[65] It can be argued that with regard to corruption, its consequences can be twofold. On the one hand, if corruption occurred at the admission stage and constituted a violation of laws and regulations of the host state, it could lead to finding the investment illegal and thus deprive the tribunal of its jurisdiction. On the other hand, if corruption occurred at the post-establishment phase, it would fall under the clean hands doctrine and, therefore, pertain to the admissibility of claims or merits of the dispute.

The majority of legal systems prohibit corruption, and it has severe consequences.[66] As corruption and bribery are condemned by the international community, the investors' defense consisting in the lack of knowledge of national regulations as an excuse for their wrongdoing cannot be "credibly pleaded in case of in case of corrupt behaviour."[67] It is also highly unlikely that an investor would successfully assert that such a breach of a host state's laws and regulations concerned

[63] *Id.*

[64] Marc Bungenberg, *et al.*, INTERNATIONAL INVESTMENT LAW: A HANDBOOK 577 (München: Beck, 2015).

[65] Utku Cosar, Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 539 (Kluwer Law International 2015).

[66] de Alba, *supra* note 9, at 327.

[67] Bungenberg, *supra* note 69, at 578.

a mere formality.[68] With regard to corruption allegations, tribunals have also relied on the good faith principle in lieu of explicitly naming it as the principle of clean hands. They have done so by arguing that the host state corruption defense should fail as the state was not behaving in line with good faith principle—either due to the fact that its state officials were involved themselves in the wrongdoing or corruption was pursued by the state's government as a tool of retribution and persecution.[69] Bribery was also found to constitute a violation of public policy in one of the leading investment arbitration cases in the subject matter—*World Duty Free v. Kenya.*[70] In that case, the tribunal declared its lack of jurisdiction on the basis that the investor's behaviour did not meet the legality requirement.

In general, with regard to the consequences of corruption and the temporal scope, Dumberry has argued that in the case of a serious violation of a host state's laws and regulations, such as bribery, tribunals should find a claim inadmissible not only in the establishment phase but also in the post-establishment phases of the investment.[71]

3. Fraud or Misrepresentation

Fraud or misrepresentation committed by an investor has been rarely discussed in legal writing. Nonetheless, in the context of foreign investment, fraud is understood as a wilful misrepresentation by an investor in order to convince the state's officials to act in a certain manner.[72] The rationale behind depriving an investor of protection is that the state would never have approved its project having known the truth. The majority of cases concerning fraud or misrepresentation resulted in the lack of jurisdiction of the tribunal to decide upon the dispute. It was caused either by the violation of legality requirement, domestic laws or international public policy. However, as noted in legal writing, fraud and misrepresentations can

[68] *Id.*

[69] de Alba, *supra* note 9, at 331.

[70] World Duty Free Co. Ltd., supra note 43, at ¶ 157.

[71] Dumberry, *supra* note 7, at 231.

[72] de Alba, *supra* note 9, at 328.

also have an impact on the admissibility of claims or the merits of the case, depending on the circumstances.[73] In the *Inceysa* case, the tribunal was concerned with the issue of fraudulent misrepresentations and non-disclosures made by the investor during the public bid process for obtaining concessions for mechanical inspection services.[74] The tribunal took into consideration the intent of the investor to make the fraudulent misrepresentations and found that such a behaviour constituted a violation of the good faith principle. Further, the tribunal relied on Latin maxims such as *nemo auditur propriam turpitudinem* and found that the investor cannot benefit from the treaty protection since "nobody can benefit from its own fraud."[75] Ultimately, the tribunal found that Inceysa was deprived of the treaty protection because the investment did not comply with the legality requirement under BIT.[76] *Inceysa v. El Salvador* constitutes an interesting example where the tribunal did not distinguish between the legality requirement and the principle of clean hands as such (even though the tribunal did not expressly refer to the wording "the principle of clean hands" but rather Latin maxims) and examined whether the investment was illegal due to the violation of the aforementioned principles. The Tribunal not only accepted the application of the clean hands doctrine but also equated it with the legality requirement.

In *Plama v. Bulgaria*, the tribunal applied the principle of clean hands "indirectly," relying on the Latin maxims. The respondent was alleging that the claimant made several misrepresentations and the investment was "the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares."[77] The tribunal made an important distinction that if the illegality impacts an instrument that is extraneous to the investor-State

[73] Llamzon & Sinclair, *supra* note 49, at 472–73.

[74] Inceysa Vallisoletana S.L. v. Republic of El Salvador, *supra* note 34.

[75] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (English translation), ¶ 242 (Aug. 2, 2006). *supra* note 34.

[76] *Id.* ¶ 337.

[77] *Id.* ¶ 128–29.

arbitration agreement, the alleged illegality will not raise an issue of jurisdiction but can be dealt with at the merits stage.[78] Thus, even though the tribunal recognized its jurisdiction to hear the case, it found the investor's claims inadmissible due to the violation of the clean hands principle. In the case at hand, the tribunal relied on the principle *nemo auditur propriam turpitudinem allegans* and international public policy:

> The Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle nemo *auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy.[79]

Involvement in fraud and misrepresentations made by the investor impacted the admissibility of its claim.

4. Legality as a Manifestation of the Principle of Clean Hands

It has been argued that the "investment made in accordance with law" clause can be regarded as a "manifestation of the principle of clean hands."[80] The doctrine of clean hands would thus be perceived as of dependent character, enshrined in the obligation of the state to make investments in accordance with the law—the plea of legality could result in lack of jurisdiction or inadmissibility of claims.[81] Therefore, the view that perceives the legality requirement as a manifestation of clean hands principle would in fact imply that the two notions have no separate meanings. The view presented by Marcin Kałduński that the clean hands principle in fact refers to the implicit legality requirement was criticised in legal writing.[82] The statement that the legality requirement is a manifestation of clean hands doctrine has been repeated by legal scholars; however, the meaning of these two concepts was not clearly distinguished. Some scholars have underlined that the legality requirement was a

[78] Luttrell, *supra* note 2, at 125.

[79] *Id.* at 143

[80] Kałduński, *supra* note 4, at 81.

[81] *Id.* at 96.

[82] Amianto, *supra* note 45, at 6.

"narrower" embodiment of the clean hands principle.[83] It has also been argued in legal writing that these two notions remain conceptually distinct from each other.[84] It remains unclear whether the doctrine of clean hands should have a broader scope of application than the legality requirement (both explicitly mentioned in the treaty itself and as an implicit requirement) or even whether they do exclude each other. The case law in this regard does not provide much guidance as the application of the clean hands doctrine as such was contested in some of the cases.[85] However, despite the general lack of consensus whether the doctrine of clean hands should be applicable, some tribunals have separately assessed the illegality and unclean hands objections raised by states.[86] That approach illustrates that tribunals have been treating these claims as separate notions, even though in some cases—*e.g. American Silver v. Bolivia*—tribunals have rejected the application of the clean hands doctrine.

American Silver v. Bolivia concerned the issue of an unlawful expropriation of the investment by Bolivia due to backlash from the local communities inhabiting the area. The respondent raised two assertions concerning the inadmissibility of the investor's claim. First, that the investor violated the principle of clean hands, and, second, the investment was illegal.[87] The illegality of the investment constituted an objection to the jurisdiction of the tribunal, and alternatively to the admissibility of the claims pursued by the investor. The claimant contested the application of the clean hands doctrine in the investor-state dispute settlement context and argued that no violations occurred during the admission of investment.[88]

Ultimately, the arbitral tribunal sided with the claimant, finding that the BIT did

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[83] Rahim Moloo, A *Comment on the Clean Hands Doctrine in International Law* [2010] U. OF DURHAM STUDENT L.J. 39, 46 (2010).

[84] Amianto, *supra* note 45, at 8.

[85] E.g. South American Silver v. Bolivia, supra note 14.

[86] *See, e.g., id.*; *Hesham Talaat M Al-Warraq v. Indonesia*, *supra* note 14; Copper Mesa Mining Corporation v. Republic of Ecuador, Permanent Court of Arbitration, Award, ¶ 5.54, 5.60, (Mar.15, 2016), *available at* https://www.italaw.com/cases/4206.

[87] South American Silver v. Bolivia, supra note 39 ¶ 348-61.

[88] *Id.* at 393, 412.

not contain any reference to the clean hands doctrine, nor did it constitute a general principle of law. In the tribunal's view, "Bolivia did not submit sufficient evidence to establish that the clean hands doctrine enjoys the required recognition and consensus among the States to reach the status that Bolivia attributes to it."[89] Despite rejection of the principle of clean hands, the tribunal's decision is relevant to differentiate of differentiation between the scope of illegality and unclean hands.

Violation of host state's legal provisions was serving as one of the examples where the principle of clean hands could deprive the investment of protection in cases of deliberate and fundamental infringement[90]. It was recognized that not all violations of host state's provisions would lead to the application of clean hands principle and render the investment illegal. The tribunals have been denying pleas of illegality of the investment based on "technical violations" and "minor errors"[91]. In one of the cases, *Metalpar v. Argentina*, the Tribunal found that incompliance with company registration procedure (which itself impose certain sanctions) cannot deprive the investor of protection under the treaty as such a measure would be disproportionate.[92] Therefore, only violations amounting to a serious infringements should lead to the lack of tribunal's jurisdiction and, in other instances, have a potential impact on the merits of a dispute.

5. The Host State's Wrongdoing

One of the possible scenarios in which the principle of clean hands can be applied relates to the wrongdoing of the host state. In *Georg Gavrilovic & Gavrilovic d.o.o. v. Republic of Croatia*, Croatia objected to the tribunal's jurisdiction alleging that the claimants acquired the investment in irregular bankruptcy proceedings.[93] The tribunal ultimately concluded that the state's own officials were involved in the

[89] *Id.* at 445.

[90] de Alba, *supra* note 9, at 329.

[91] Douglas, *supra* note 2, at 156.

[92] Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic, ICSID Case No, ARB/03/5, Decision on Jurisdiction, ¶ 84 (Apr. 27, 2006).

[93] Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39.

process.[94] Therefore, by contributing to the violation of its own laws and regulations, the state breached the principle of good faith and "it cannot take the advantage of that breach to challenge the jurisdiction of an international tribunal."[95] In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, the Tribunal being concerned with the issue of fraud concluded that: "principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[96] Most typically, the investors' allegations concerning the host states' misconduct concern: extortion/solicitation of corrupt payments, host state misrepresentation of investment terms or conditions, other illegal conduct.[97] It has been underlined in legal writing that unlike other types of misconduct, "it always takes two to tango" with regard to corruption.[98] Burdening an investor with negative consequences without taking into consideration the contributory fault of the host state and depriving the investment of treaty protection would unjustly favor the state's wrongdoing. Thus, the application of the principle of clean hands in this regard prevents the host state from benefiting from its own misconduct and shifting the responsibility onto an investor.

VII. CONSEQUENCES OF UNCLEAN HANDS

There are various potential legal consequences of the unclean hands of a party. The tribunals' decisions in this regard mostly depend on the wording of the treaty and particular circumstances of the case. Even though predictability and consistency of arbitral awards are desired in international investment arbitration, it is necessary to maintain room for flexibility as there are a number of factors that arbitrators are faced with to properly assess the legal consequences of the wrongdoing of either an

[94] Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, ¶ 296 (Jul.26, 2018).

[95] Luttrell, *supra* note 2, at 128.

[96] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, supra note 50, ¶ 346.

[97] Llamzon & Sinclair, *supra* note 49, at 530.

[98] Bungenberg, *supra* note 69, at 586.

investor or a host state.[99]

Taking into consideration the reasoning of arbitral tribunals and emerging views in legal writing, the specific type of misconduct of a party resulting in its unclean hands will also have a significant impact on the outcome of a dispute. Llamzon and Sinclair argue that the unclean hands of an investor may lead to three possible scenarios: (i) a lack of jurisdiction; (ii) the inadmissibility of the claim; or (iii) an impact on the merits of the case. With regard to the investors' allegations that host states were engaged in certain wrongdoing and, therefore, it is the host state that has unclean hands, these matters will be dealt with by tribunals in the merits.[100] That is due to the fact that under majority of investment treaties the claims can be brought solely by the investors and the possibility of counterclaims is quite limited.[101] Thus, any actions undertaken by the host state will not impact the investor's possibility to bring the claim.

A. *Lack of Jurisdiction*

The lack of jurisdiction of the tribunal in an investment dispute consists in a situation in which "the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim."[102] To put it simply, jurisdiction of the tribunal concerns whether the tribunal is competent to hear the dispute an investor submitted to it.[103] It has been argued that the illegality of the investment (the so-called "narrower embodiment of the principle of good faith") should result in the lack of jurisdiction either because it does not qualify as an investment (*ratione materiae*) or that there is no consent of the state to submit the dispute to arbitration (*ratione voluntatis*).[104] One of the examples of how a violation of a host state's laws and regulations may result in the lack of jurisdiction is through an abuse of process.[105]

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[99] Cosar, *supra* note 70, at 549.

[100] Llamzon & Sinclair, *supra* note 49, at 537.

[101] Bungenberg, *supra* note 69, at 1122.

[102] Llamzon & Sinclair, *supra* note 49, at 523.

[103] Bungenberg, *supra* note 69, at 1220.

[104] Llamzon & Sinclair, *supra* note 49, at 529; Balcerzak, *supra* note 30, at 148.

[105] Emily Sipiorski, Good Faith in International Investment Arbitration 193 (Oxford University

Several arguments have been made to justify the jurisdictional implications of the illegality of the investment. Firstly, as already mentioned, the consent to arbitrate investment disputes of the host state does not extend to disputes concerning the investments that were established with the violation of its own laws and regulations. Secondly, the tribunal has to consider general principles of law such as the good faith principle and the clean hands doctrine which should guide the tribunal in declining its jurisdiction. And lastly, the tribunals are under the obligation to respect the integrity of the national law of the host state and thus decline its jurisdiction "upon a successful plea of illegality."[106] However, only the illegality at the outset of the investment will affect the jurisdiction of the arbitral tribunal, as any unlawful behaviour at the post-establishment phase will not be a matter of a jurisdictional challenge but rather a question for the merits.[107] That is because unlawful behaviour at the establishment stage can result in the investment project not being qualified as an investment within the meaning of the treaty.

Therefore, concluding the findings concerning the lack of jurisdiction of the arbitral tribunal as the consequence of a violation of the clean hands principle, there are several points that must be emphasized. First, only the wrongdoing on the investor's part rendering the investment illegal can result in the lack of jurisdiction of the tribunal as the wrongdoing of the state would be dealt with at the merits stage. Second, the wrongdoing of investors would need to amount to a serious violation of the legality requirement (included expressly in BITs or as a general principle of law) to deprive the investment of treaty protection. Third, the violation of a host state's laws and regulations would have to occur at the admission phase of the investment; otherwise, it would be an issue for the merits of the case.

B. *Inadmissibility of Claims*

Inadmissibility of the claim is a different legal consequence of the unclean hands of an investor. It concerns "the power of the tribunal to decide a case at a particular

Press, 2019).

[106] Douglas, *supra* note 2, at 156.

[107] *Id.*

point in time in view of possible temporary or permanent defects of the claim."[108] With regard to the admissibility of the claims, the tribunal is concerned with particular claims whereas with jurisdictional objections, the tribunal's general competence to hear the dispute is involved. Even if the tribunal has the jurisdiction to hear a dispute, it will not adjudicate the merits of the case—in that way inadmissibility resembles the lack of jurisdiction of the arbitral tribunal as in both instances the claim will be dismissed prior to the analysis of the merits.[109] As observed by scholars, the instances of unclean hands of investors (other than the illegality of the investment)[110] should raise a question of the admissibility of a claim.[111] In particular, violations of international human rights which were not implemented into domestic legal orders should preclude the treaty protection of the investment.[112] It has been submitted that violations of human rights should result in the inadmissibility of an investor's claim "precisely because of its unacceptable behaviour."[113] Another example of an investor's wrongdoing that should result in the inadmissibility of a claim concerns corruption.[114] It has been nonetheless underlined that if an investor procured its investment through corruption violating the treaty containing an "in accordance with the law clause," the tribunal would actually lack the jurisdiction *ratione materiae* to hear the dispute.[115] Cosar proposes that in the case that the treaty does not contain an "in accordance with law" clause, tribunals could still deny the investors treaty protection by dismissing the claim as inadmissible, *e.g.* in cases concerning the Energy Charter

[108] Bungenberg, *supra* note 69, at 1213.

[109] Fabio G Santacroce, Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterization of Preliminary Issues in International Arbitration, 33 ARB. INT'L 539, 540 (2017).

[110] Llamzon & Sinclair, *supra* note 49, at 529.

[111] Balcerzak, *supra* note 30, at 147.

[112] *Id.*

[113] Dumberry & Dumas-Aubin, *supra* note 32, at 362.

[114] Cosar, *supra* note 70, at 546.

[115] *Id.* at 541.

Treaty which does not contain a legality requirement.[116] However, that is not necessarily always the case. Despite the lack of an express legality requirement in some BITs, the tribunal may still declare its lack of jurisdiction on account of the investment being made illegally, assuming that such a requirement is made implicit in the treaty. In *Phoenix Action Ltd. v. Czech Republic*, the tribunal underlined that it is not necessary to include an express clause requiring the investment to be made "in accordance with the law of the host state" in the text of the treaty as it can be implied from the principle of good faith.[117] Therefore, one can conclude that the illegality of the investment at the establishment phase should result in the lack of jurisdiction– both as a violation of a BIT requirement and a violation of a general principle of law, and other instances of the unclean hands of the investor. For example, infringement of human rights and corruption should result in the admissibility of the claim. Furthermore, as opposed to the temporal scope of the plea of the lack of jurisdiction of the tribunal, which relates to the admission stage of the investment, the inadmissibility of the investors' claims relates to a broader temporal scope. As found in *Al-Warraq v. Indonesia*,[118] the clean hands doctrine is applicable in the case of the investors' wrongdoing throughout the lifespan of the investment.

C. *Merits*

Even if the tribunal does not decline its jurisdiction to hear the dispute and find the claim admissible, the unclean hands of both an investor and a host state may have an influence over the merits of the case.[119] These situations are mostly divided into two categories. First category includes the host states' misconduct consisting of corruption, fraud or breach of the investors' legitimate expectations, and other types of illegal behaviour of the host state. Secondly, certain actions of the investors may not have a direct impact on jurisdiction or admissibility of the claim but rather be the issue for the merits. Such would include the investors' misconduct during the post-

[116] *Id.* at 545.

[117] Phoenix Action Ltd. v. Czech Republic, supra note 22, at 106

[118] Hesham Talaat M Al-Warraq v. Indonesia, supra note 14.

[119] Seifi & Javadi, *supra* note 10, at 124.

establishment phase of the investment, as opposed to its admission, or modification of the domestic law of the host state after the establishment of the investment.[120] For example, the incompliance with the host state's laws and regulations occurring after the establishment phase in *Yukos* resulted in the reduction of the damages owed to claimants by 25% due to their violation of tax law of the host state.[121]

In *Mamidoil*, the tribunal initially rejected the jurisdictional objections, later on to find that non-compliance with the law of the host state by the claimant had an impact on the merits phase of the dispute.[122] Albania raised that the tribunal lacked jurisdiction because the investor failed to procure the required permits which made the investment illegal. Nonetheless, the tribunal found this argument to be more appealing at the merits stage of the proceedings and even though it acknowledged its jurisdiction, it rejected the claimants' claim concerning violation of fair and equitable treatment standard as: "Claimant is not entitled to rely on the perpetuation of its activities in illegal circumstances and cannot claim a violation of legitimate expectations with respect to the illegal operation of the tank farm."[123]

VIII. CONCLUDING REMARKS

Even though the clean hands principle has gained some attention from arbitral tribunals, its status has remained outside of the attention of legal scholars with relatively few articles written about it.[124] The increasing number of arbitral awards may ignite a much needed change with regard to providing more clarity to the status of this principle. On the one hand, the existence and functioning of the principle of clean hands in practice (and even in theory) has been a subject of debates. Legal scholars and arbitral tribunals not only differ with the approach to the scope thereof

[120] Llamzon & Sinclair, *supra* note 49, at 530

[121] Yukos Universal Limited (Isle of Man) v. The Russian Federation, supra note 48.

[122] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24.

[123] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 716 (Mar. 30, 2015).

[124] Ori Pomson, The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry, 18J WORLD INV & TRADE 712, 712–13 (2017).

but the issue goes much further—its very existence has been questioned.[125] The differentiation between the principle of clean hands and the legality requirement (either explicitly included in treaties or derived from the general principles of law) constitutes one of the underlying reasons for lack of consistency in the approach to the wrongful behaviour of either an investor and a state. Thus, there is a need for more clarity in this regard. On the other hand, however, it is an extremely difficult task to adopt a uniform approach to the issue of the clean hands principle as a whole. The legal consequences largely depend on the type of the misconduct, its temporal scope, and relevant factual circumstances of the case.

In the author's view, it is essential to establish uniform grounds for the application of the clean hands doctrine and simultaneously afford flexibility to tribunals concerning potential consequences of its application. It would be incorrect for the clean hands principle to be equated with the issue of illegality of the investment. As indicated hereinabove (see § II(C)), the clean hands doctrine conveys several distinctive types thereof, including the violation of host state's laws and regulations. However, the differentiation between these two frequently mixed concepts is needed due to several reasons. The clean hands doctrine extends to both investors and states as the wrongdoing of the state's officials, for which the host state is responsible, may result in dismissal of its allegations and ultimately have an impact on the merits of the case. For example, in a case where the state's officials are voluntarily involved in the act of corruption, the wrongdoing will most likely not result in the lack of jurisdiction of the arbitral tribunal. As both parties are equally involved in the act, it would be unfair to burden only one party with the negative consequences and deprive the investment of its treaty protection. Moreover, the clean hands principle relates to a broader temporal scope than the legality requirement. The latter one will only be assessed at the time of the establishment of the investment, whereas under the clean hands doctrine, investors and states' wrongdoing may have an impact on the merits of the case (admissibility of investor's claim) throughout the whole lifespan of an investment. Lastly, specific types of unclean hands will result in different legal

[125] See e.g. South American Silver v. Bolivia, supra note 14.

consequences. Whilst the illegality of the investment at its initial stage will result in the lack of jurisdiction of the tribunal, other examples of the investors and states misconduct could have an impact either on the inadmissibility of the claim or the merits of the case.

In conclusion, more clarity with regard to the status of the principle of clean hands would benefit the investor-state dispute settlement system, however, there is a need for room for flexibility as to the legal consequences of the wrongdoing. As for now, the tribunals have been differing in their approaches, questioning the application of this principle in the international investment law context, which creates undesired confusion and unpredictability of the awards and, as a result, undermines the legitimacy of the system.

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Table of Contents

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