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The Role of "Unclean Hands" Defences in International Investment Law

Lodovico Amianto

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The Role of "Unclean Hands" Defences in International Investment Law

Lodovico Amianto*

In the last decade, the rapidly expanding field of investment law has suffered a major setback, in the shape of a legitimacy crisis. One of the main arguments put forth by the detractors of the investor-state dispute settlement (ISDS) mechanism is that the system empowers corporations of powerful nations while turning a blind eye to their human rights and environmental violations abroad. In this context, the old maxim that "he [or she] who comes into equity must come with clean hands" is to be viewed as a useful corrective, capable of a meaningful contribution in restoring the image of fairness of the ISDS system and, in turn, its legitimacy. To assess the feasibility of this observation, the necessary starting point is to discuss the complex and multifaceted problems surrounding the nature and the grounds for application of the clean hands doctrine in international law. While some have argued that the doctrine may apply as a general principle of law or as an implicit legality requirement or even pursuant to the concept of transnational public policy, others have firmly maintained that clean hands should not be considered by international tribunals under any of these three grounds. Thus, in an attempt to rationalize the discussion, this paper will dedicate its first three sections to analysing how the clean hands doctrine may come into play in the investor-state arena. In the last section, it is contended that - especially in this time of legitimacy crisis - it is of paramount importance that arbitrators do not condone investors' misconduct during the performance of the investment. In this vein, a strong argument can be made that a serious violation of law, in particular, a serious violation of human rights, entails a violation of transnational public policy, hence resulting in a bar for the admissibility of the investor's claims.

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Au cours de la dernière décennie, le domaine du droit de l'investissement, en pleine expansion, a subi un revers majeur : il est aux prises avec une crise de légitimité. L'une des critiques avancées par les détracteurs contre le mécanisme de règlement des différends entre investisseurs et États est que ce système confère un pouvoir aux entreprises des grandes puissances mondiales tout en restant aveugle aux violations des droits humains et environnementaux qu'elles commettent à l'étranger. Dans ce contexte, la vieille maxime selon laquelle « quiconque veut l'équité doit avoir les mains propres » doit être considérée comme un correctif utile, susceptible d'apporter une contribution significative au rétablissement de l'image d'équité du mécanisme de règlement des différends entre investisseurs et États et, ainsi, de sa légitimité. Pour évaluer la faisabilité de cette observation, le point de départ est une discussion sur les questions complexes et multifacettes entourant la nature et les motifs d'application de la doctrine des mains propres en droit international. Certains ont soutenu que la doctrine peut s'appliquer en tant que principe général de droit, en tant qu'exigence implicite de légalité ou même en vertu de la notion d'ordre public transnational. D'autres ont fermement soutenu que les tribunaux internationaux ne devraient pas considérer la doctrine des mains propres comme étant applicable sur la base de ces motifs. Ainsi, dans une tentative de rationaliser la discussion, les trois premières sections de cet article sont consacrées à l'analyse de la façon dont la doctrine des mains propres peut entrer en jeu dans l'arène où s'opposent investisseurs et État. La dernière section montre qu'il est d'une importance primordiale que les arbitres ne tolèrent pas l'inconduite de l'investisseur pendant l'exécution de l'investissement, surtout en cette période de crise de légitimité. Dans cet ordre d'idée, un argument important peut être fait en faveur de l'exclusion de la recevabilité des demandes de l'investisseur lorsqu'il est à l'origine d'une violation grave de la loi, en particulier d'une violation grave des droits de l'homme, sur la base d'une violation de l'ordre public transnational.

I. ORIGINS: An introduction

Originally, in private Roman law, when the concept of synallagma was still nebulous and ill-defined, the reciprocal obligations of a contract were considered separately, leading to the unfair result that the party in breach could nonetheless legally oblige the other to perform.[1] The need for a more balanced and ultimately fairer system led the classical Roman jurists to develop the maxim *inadimplenti non est adimplendum* (there is no obligation to perform in favor of those who do not perform) and the famous *exceptio non adempleti contractus*[2] (objection for lack of performance of the contract). This objection was considered an *exceptiones quae ipso jure insunt actioni*, or in more familiar words, an objection which denied the right to bring a claim, a negative requirement for the cause of action.[3]

The concept that the generality of the law, coupled with its rigidity, might create even more injustice is not unique to the civil law tradition. Admittedly, in the common law tradition, the "Aristotelian idea that the law would fail due to its generality" led to the development of an entire body of norms, the branch of equity.[4] The idea of a court of equity and, in particular, of equitable defense, is indeed rooted in the aim to mitigate the distortions of common law stemming from an "unconscientious use of rights."[5] One of the most important equitable defences that has been developed by the tireless work of the Court of Chancery and its successors is the maxim of "clean hands." This principle requires that "he [or she] who comes into equity must come with clean hands."[6] Similar to *exceptio non adimplendi contractus*, the clean hands doctrine was developed as a means to avoid an opportunistic claimant profiting from its wrongdoing because "allowing a plaintiff with unclean hands to recover in an action creates doubts as to the

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* Lodovico Amianto is a fifth-year law student at the University of Turin Faculty of Law (Italy). Amianto's main area of interest is investment and commercial arbitration, and his dream is to work and research in this field. He has participated in two international competitions; the Willem C Vis International Commercial Arbitration Moot Court and the Philip C Jessup International Law Moot Court.

1 Ferdinando Mackeldey, *Corso di Diritto Romano: volume primo introduzione e parte generale* (Fratelli Ferrario: Milano, 1866) at 159; Laura Solidoro Maruotti, Salvatore Puliatti & Andrea Lovato, *Diritto Privato Romano* (Turin: Giappichelli, 2017) at 499.

2 Edward et al Poste, *Gai Institutiones or Institutes of Roman Law* (Oxford: Clarendon Press, 1904) at 559.

3 Mackeldey, *supra* note 1 at 159; Giuseppe Grosso, *Il sistema romano dei contratti*, 2nd ed (Turin, IT: Giappichelli, 1950) at 240; M Talamanca, "Vendita in generale (diritto romano)" in *Enciclopedia del diritto* (Milano, IT: Giuffrè, 1993) at 374—75.

4 T Leigh Anenson, "Announcing the Clean Hands Doctrine" (2018) 51:5 UC Davis L Rev 1827 at 1839.

5 Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines" (1914) 27:3 Harv L Rev 195 at 226.

6 *Everet v Williams* [1725] (Ex) reported in (1893) 9:3 LQ Rev 197; See also Gerald Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" in Académie de Droit International, ed, *Recueil des Cours*, t 92, vol II (Leyde, NL: AW Sijthoff, 1957) 5.

justice provided by the judicial system."[7]

Hundreds of years after the developments of the concept of clean hands, an international tribunal, the Permanent Court of International Justice (PICJ), was called to resolve, once again, a case where an opportunistic claimant was seeking "justice." In the *Diversion of Water from the Meuse* case, the Netherlands filed a unilateral application asking the court to adjudge that Belgium's decision to create the Albert Canal violated the 1863 treaty concerning the regime of diversions of water of the river Meuse. In response, Belgium filed a counterclaim alleging that with the erection of the Juliana Canal, the Bosscheveld Lock and the Borgharen barrage, the Netherlands had itself breached the 1863 treaty. After analyzing each submission, the PCIJ considered that no breach of the 1863 treaty had occurred and rejected both parties' claims.

Of particular interest to our discussion is the reason given by Judge Hudson who, while concurring, stated that the PCIJ should have immediately dismissed the Netherland's requests because:

> 'Equality is equity;' 'He who seeks equity must do equity.' It is in line with such maxims that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper ... A very similar principle was received into Roman Law ... The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation.[8]

Judge Anzilotti went even further in his dissent,[9] and Judge Schwebel considers this case the consecration of the principle of clean hands in international law.[10]

Nonetheless, the international community and, in particular, the International Court of Justice (henceforth "ICJ"), have yet to recognize the principle as forming part of international law.[11] In the case concerning

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7 *Kendall-Jackson Winery Ltd v Superior Court*, 90 Cal Rptr (2d) 743 at 749 (CA Cal 1999).

8 *Case Concerning the Diversion of Water from the Meuse (Netherlands v Belgium)* (1937), PCIJ (Ser A/B) No 70 at para 323. [*Water from the Meuse*].

9 *Ibid* at para 210 ("I am convinced that the principle underlying this submission (inadimplenti non est adimplendum) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute" at para 210).

10 Stephen M Schwebel, "Clean Hands in the Court" [1999] 31 Studies in Transnational Leg Policy 74 at 75; See also, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Dissenting Opinion of Judge Schwebel, [1986] ICJ Rep 159 at paras 240, 259 [Schwebel, Dissenting Opinion, *Military and Paramilitary Activities in and against Nicaragua*].

11 Stephen M Schwebel, "Clean Hands" in *Max Planck Encyclopaedia of Public International Law* at 4; See also J Dugard, Sixth Report on Diplomatic Protection, ILC, 57th sess, UN Doc A/CN.4/546 (2004) at 6.

Certain Iranian Assets, the ICJ refused once again to take a firm position on the status of the clean hands doctrine, limiting itself to note that reciprocity in the violation is a necessary precondition for the application of the doctrine.[12]

Even so, an interesting practice followed by several international investment tribunals has allowed a return to the discussion concerning if and how the clean hands doctrine should be applied in the international arena.[13] While there is little doubt that the doctrine of unclean hands has found expression at the international level, "its status and exact contours are subject to debate and have been approached differently by international tribunals."[14] Accordingly, in its recent decision on bifurcation, the *Glencore* tribunal emphasized that to rule on the Respondent's objection on clean hands, it not only has "to accept this principle and determine its status, but also lay out its contours."[15]

The aim of this paper is to discuss some of the main unresolved issues surrounding the relevance of the "clean hands" doctrine in international law, and to better determine its contours. The essence of the mystery of the clean hands doctrine is the ground for its application, a spectrum that ranges from implicit treaty requirement to general principle of law to a part of transnational public policy.

After framing the discussion, I will begin my analysis by examining Kałduński's statement that the clean hands doctrine has no separate meaning from the implicit legality requirement. Having determined that in the international context the clean hands doctrine is practically and conceptually distinct from an implicit legality requirement, I will lay down the contours of the doctrine. In this distinguishing exercise I will take particular care to define the points of overlap between the "in accordance with the law" provisions and the doctrine.

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12 *Certain Iranian Assets (Islamic Republic of Iran v United States of America),* Preliminary Objections, [2019] ICJ Rep at paras 120—22 [*Certain Iranian Assets*]; See also *Avena and Other Mexican Nationals (Mexico v United States of America),* [2004] ICJ Rep at paras 45—47 [*Avena*]; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya),* Preliminary Objections, [2017] ICJ Rep at para 142 [*Somalia v Kenya*]; Ori Pomson, "The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry" (2017) 18:4 J World Investment & Trade 712 at 717; Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989 – Supplement, 2005: Parts One and Two" (2006) 76 BYBIL 1 at 37 [Thirlway, "Law and Procedure of the ICJ"].

13 Rahim Moloo, "A Comment on the Clean Hands Doctrine in International Law" (2010) Inter Alia: U of Durham Student LJ 39; Andrea K Bjorklund & Lukas Vanhonnaeker, "Yukos: The Clean Hands Doctrine Revisited" (2015) 9:2 Diritti umani e diritto internazionale 365 at 366—67 [Bjorklund & Vanhonnaeker, "Yukos"].

14 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (6 December 2016), ICSID, Case No ARB/12/14 and 12/40 at 493 [*Churchill Mining PLC*].

15 *Glencore Finance (Bermuda) Limited v The Plurinational State of Bolivia*, PCA 2016-39, UNCITRAL Procedural Order No 2, 31 January 2018 at para 47 [*Glencore*]; William Kirtley & Thomas Davis, "Cleansing the (Un)clean: The Ongoing Saga of the Clean Hands Doctrine" (8 September 2018), online (blog): *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2018/09/08/cleansing-the-unclean-the-ongoing-saga-of-the-clean-hands-doctrine/>.

This will allow me to quickly arrive at the crucial question: if we are to rule out the possibility that the clean hands doctrine is an implicit treaty requirement, on which ground would the doctrine apply? My answer is twofold. On one hand, I will advocate that part of the clean hands doctrine is already recognized as a principle of international law.[16] Since, however, only a portion of the principle of clean hands has been recognized as having this status, I will explore whether the notion of truly international public policy could constitute a valid ground for the application of the clean hands doctrine in international law. In this vein, I propose that a strong argument can be made that a serious violation of law, in particular a serious violation of human rights, entails a violation of transnational public policy, resulting in a bar for the admissibility of the claim.

Secondly, I will support the claim that given the legitimacy crisis facing ISDS, arbitrators should not condone investors' misconduct during the performance of the investment, especially if connected to human rights abuses that, for their nature, are most likely to inflame the public opinion. To do so, as a valid alternative to the application of the clean hands doctrine, arbitral tribunals should resort to the notion of transnational public policy which may become a useful tool to preserve ISDS' image of fairness and democracy.

II. THE NATURE OF CLEAN HANDS: Is the legality requirement a manifestation of the clean hands doctrine or the clean hands doctrine itself?

A. Kałduński's position

It is a settled issue in investment law that States may condition investors' access to procedural and substantive rights under a bilateral investment treaty (BIT) upon fulfilment of express undertakings:[17]

> [I]t is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection. One such common condition is an express requirement that the investment comply with the internal legislation of the host State.[18]

16 International Court of Justice, *Statute of the International Court of Justice*, 18 April 1946 [*ICJ Statute*].

1717 Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award" (2016) 17:2 J World Investments & Trade 229 at 239 [Dumberry, "State of Confusion"]; Bjorklund & Vanhonnaeker, "Yukos", *supra* note 13 at 369.

18 *Gustav O Hamester GmbH & Co KG v Ghana*, (18 June 2010), ICSID Case No ARB/07/24 [*Hamester*].

Indeed, there have been numerous instances where an investment tribunal has been called to apply, mostly as a jurisdictional objection, a legality requirement provision. In *Inceysa*, the tribunal was faced with that question and determined that the "in accordance with the law" provision embodied in the Spain-El Salvador BIT was a "necessary condition for an investment to benefit."[19] Since the dispute stemmed from an illegal investment, it fell outside of the consent to arbitrate granted by the parties.[20]

Notably, during the assessment of *Inceysa's* misbehavior, the tribunal referred to a vast number of Latin maxims such as "*nemo auditur propiam turpitudinem allegans"* (no one can be heard to invoke his own turpitude),[21] *"ex dolo malo non oritur actio"* (an action does not arise from fraud) and *"nemini dolos suusprodesse debet"* (nobody must profit from his own fraud),[22] and concluded that the investor's conduct fell within their scope of application.

Recently, several other investment tribunals that have been confronted with similar questions have referred to analogous maxims in respective awards. These expressions, which have a strong historical and, most of all, logical connection with the *exceptio non adimpleti contractus,* have led several scholars to maintain that the "in accordance with the law" requirement is in fact a disguised expression of the clean hands doctrine.[23] Interestingly, Kałduński has gone even further, declaring that "the principle of clean hands does not have an autonomous character and that it is enshrined in the obligation to make investments in accordance with law."[24]

I struggle to concur with this declaration. In my view, there is little doubt that the "in accordance with the law" provision is an expression of clean hands. However, two recent decisions[25] suggest not only that the doctrine remains conceptually distinct from the legality requirement, but also that the two have a different scope of application *ratione temporis*.

B. Hesham Talaat M Al-Warraq v Indonesia

19 *Inceysa Vallisoletana SL v El Salvador*, (2 August 2006), ICSID, Case No ARB/03/26 [*Inceysa*].

20 *Ibid* at para 207.

21 Nelson Enonchong, "Effects of Illegality: A Comparative Study in French and English Law" (January 1995) 44:1 Intl & Comparative LQ 196 at 202.

22 *Inceysa*, *supra* note 19 at para 240.

23 Patrick Dumberry & Gabrielle Dumas-Aubin, "When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration" (2012) 13:3 J World Investment & Trade 349 at 357 [Dumberry & Dumas-Aubin, "Human Rights Violations"]; Moloo, *supra* note 13 at 46; Dumberry, "State of Confusion", *supra* note 17 at 230—31; Bjorklund & Vanhonnaeker, "Yukos", *supra* note 13 at 369.

24 M. Kałduński, "Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration" (2015) 4:2 Polish R of Intl and European L 69 at 96.

25 *Hesham Talaat M Al-Warraq v Indonesia*, UNCITRAL, 15 December 2014 [*Al-Warraq*] and *Copper Mesa Mining Corporation v The Republic of Ecuador* (2016) PCA [*Copper Mesa*].

In *Hesham Talaat M Al-Warraq v Indonesia*, a Saudi Arabian individual, Mr. Al-Warraq (Claimant) accused Indonesia (Respondent) of repeatedly violating the *Agreement on Promotion Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference* (henceforth "OIC Investment Agreement"). The Claimant's arguments mainly concerned the fashion in which the Indonesian judicial system had conducted its criminal investigations and trial *in absentia*.

The Respondent countered with a twofold defense. First, referring to the legality provision enshrined in Article 9 of the OIC Investment Agreement[26] the Respondent contended that the claims should have been dismissed on a jurisdictional basis.[27] Specifically, it maintained that by "perpetrat[ing] criminal offences in relation to his role in Bank Century, for which he was duly convicted by a competent court,"[28] the Claimant had forfeited the right to invoke protection under the OIC Investment Agreement. Should this first argument fail, the Claimant's claims were nonetheless inadmissible because by engaging in illegal practices, such as money laundering, it had requested assistance from the tribunal with "unclean hands."[29]

After establishing that the Claimant had engaged in six different types of fraud during the performance of the investment,[30] the tribunal concluded that by breaching Article 9 the claim was inadmissible.[31] The tribunal continued, stating that "[t]he Claimant's actions were also prejudicial to the public interest."[32] Most importantly, "[t]he Tribunal thus found that the Claimant's conduct fell within the scope of application of the 'clean hands' doctrine" and decided, once again, that due to the applicability of the clean hands doctrine, the claim was inadmissible.[33]

This decision's implications are twofold. Firstly, the Respondent opted for clearly distinct and alternative arguments concerning the significance of Article 9 of the OIC Investment Agreement and of the clean hands doctrine. Following this division, the tribunal, after having decided the inadmissibility of the claim based on the legality requirement, it ruled on the applicability of the clean hands doctrine concluding *ex novo* that the claim was inadmissible. Indeed, two scholars have argued that the tribunal's view was that "the claim was inadmissible as a result of the application of

26 *Al-Warraq*, *supra* note 25 at para 155.
27 *Ibid* at para 11.
28 *Ibid* at para 159.
29 *Ibid* at paras 161—62.
30 *Ibid* at paras 634—40.
31 *Ibid* at para 648.
32 *Ibid* at para 647.
33 *Ibid.*

Article 9 *and* [emphasis added] the clean hands doctrine."[34] Most likely, the decision concerning the clean hands doctrine was obiter. However, the *Al-Warraq* tribunal award seemed to take the position that a conceptual division between the in "accordance with the law provision" and the clean hands doctrine exists.

A second interesting finding, which is relevant to this paper later on, is that the tribunal seems to have detected a strong correlation between the applicability of the clean hands doctrine and prejudice to the public interest stemming from the Claimant's wrongdoing.

C. Copper Mesa v Ecuador

The reading of the clean hands doctrine as a conceptually distinct obligation is supported by the *Copper Mesa* tribunal's findings. In April 2008, Ecuador's Constituent Assembly passed legislation known as the "Mining Mandate", which established that the Respondent's mineral resources had "to be exploited to suit national interests" and further provided for the termination "without economic compensation" of mines concessions where no prior referendum had been conducted.[35] Two mining concessions revoked as a consequence of this law belonged to the Canadian investor Copper Mesa Mining Corporation Exploration (Claimant), which filed a notice of arbitration under the Canada-Ecuador FIPA.[36] Ecuador (Respondent) objected to the tribunal's jurisdiction on the basis of several alternative arguments. Among other things, the Respondent submitted that, firstly, the Claimant's investments had not been made or operated in accordance with Ecuadorian law as required under Article I(g) of the Canada-Ecuador FIPA and, alternatively, that the Claimant approached the court with "unclean hands."[37]

The tribunal began its analysis with the decision on jurisdiction and admissibility of the claim, summarizing the parties' positions on the two relevant jurisdictional objections under different titles "D: Legality of Ownership" and "E: Unclean Hands." This neat separation was also repeated in the subsequent decision of the tribunal: "Illegalities" and "Clean hands."

In the analysis of clause I(g) of the Canada-Ecuador FIPA,

34 Dumberry, "State of Confusion", *supra* note 17 at 258; See also Andrew Newcombe & Jean-Michel Marcoux, "Hesham Talaat M Al-Warraq v Republic of Indonesia: Imposing International Obligations on Foreign Investors" (2015) 30:1 ICSID Rev - Foreign Investment LJ 525 at 530.

35 *Copper Mesa*, *supra* note 25 at para 1.110.

36 *Ibid* at para 1.111; see also *Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion a nd Reciprocal Protection of Investments*, Canada and Ecuador, 29 April 1996, E101522 - CTS 1997 No 25 (entered into force 6 June 1997) [Canada-Ecuador FIPA].

37 *Ibid* at para 5.4.

the tribunal, in line with several prior decisions,[38] adopted a narrow understanding of the standard "in accordance with the law" provision, confirming that it merely concerns the phase during which the investment is made, and does not extend to subsequent operations.[39]

Then, the tribunal went on to assess the clean hands' objection.[40] Interestingly, although it had already covered the issue of illegalities in the making of the investment, the tribunal felt compelled to return to the question and reiterated that none of the Claimant's activities amounted to unclean hands when it acquired the concession.[41] Subsequently, while agreeing with the Respondent's position that the Claimant's post-acquisition conduct fell under the scope of the clean hands doctrine, the tribunal considered that it was more appropriate to connect this argument to the merits phase, because, in accordance with the majority of scholars,[42] "unclean hands is not a jurisdictional objection, but rather an objection to the admissibility."[43]

Leaving the implications stemming from the conclusion of the case to further on in this paper, I would like now to return to whether the clean hands doctrine is considered a different concept from the legality requirement. Admittedly, the *Copper Mesa* tribunal's findings hint again at an affirmative answer. This conclusion is not only supported by the tribunal's decision to address the questions of illegalities and unclean hands in clearly distinct parts of the award, but also from the fact that it rendered substantively different judgements on each question.

Most importantly, in deciding on the applicability of the legality requirement and of the clean hands doctrine, the tribunal respectively referred to different facts. In assessing the consequences of clause I(g) of the Canada-Ecuador FIPA, the tribunal strictly confined its analysis to the establishment of the investment. Instead, when determining the applicability of the clean hands doctrine, the tribunal not only assessed the facts which led to the establishment of the investment, but also referred to other facts which occurred in the post-establishment phase.

In summation, the tribunal's suggestions on the contours of the clean hands doctrine are threefold. Firstly, the clean hands doctrine is

38 *Hamester*, *supra* note 18; *Inceysa*, *supra* note 19; *Yaung Chi Oo Trading Trading Pte Ltd v Myanmar*, (31 March 2003), ICSID, Case No ARB/01/01 [*Yaung Chi Oo*]; *Ioannis Kardassopoulos v Georgia*, Decision on Jurisdiction (6 July 2007), ICSID , Case No ARB/05/18 [*Kardassopoulos*]; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, (16 August 2007), ICSID, Case No ARB/03/25 [*Fraport I*].

39 *Copper Mesa*, *supra* note 25 at para 5.54.

40 *Ibid* at paras 5.60—5.67.

41 *Ibid* at para 5.60.

42 Moloo, *supra* note 13 at 45.; Bjorklund & Vanhonnaeker, "Yukos" *supra* note 13 at 369; Dumberry, *supra* note 17 at 233; AP Llamzon & AC Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct," in Albert Jan van den Berg, eds, Legitimacy: Myths, Realities, Challenges, (Alphen van den Rijn, NL: Kluwer Law International, 2015).

43 *Copper Mesa*, *supra* note 25 at para 5.62.

a separate legal concept from the legality requirement, and they should be dealt with in distinct parts of the award. Secondly, the temporal scope of application of the clean hands doctrine may overlap with the legality requirement in the making of the investment phase, while remaining a different concept. This fact may well be explained by the structure of clean hands as a principle of international law, which often has the tendency to overlap with treaty provisions while remaining a definite and separate entity.[44] Finally, to what concerns the post-establishment phase, only the clean hands doctrine may apply. Therefore, it seems reasonable to conclude that the legality requirement and the clean hands doctrine are not only theoretically different concepts, but they also have a different temporal scope of application *ratione temporis*.[45]

If we are to rule out the possibility that the clean hands doctrine is enshrined in the obligation to make investments in accordance with the law, only two grounds of application remain available, namely, as a general principle of international law and international public policy. These two possibilities are analyzed thereafter.

III. THE LEGAL STATUS OF THE CLEAN HANDS DOCTRINE AS A PRINCIPLE OF INTERNATIONAL LAW

A. A general overview

While there is no universally accepted definition of what a general principle of international law consists of,[46] this concept has generally been understood as encompassing those "rules on which there is international consensus to consider them as universal standards."[47] The underlying function of general principles is to reflect the inherent dynamism of international law by acknowledging the "creative role of the judiciary."[48] However, this creative force is not boundless. Not every principle recognized by domestic or international tribunals is elevated to this status under international law, but only those which obtained a "twofold confirmation of the concurrent teachings jurisconsults of authority and of the public conscience of civilized

44 James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 33.

45 Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the theory* (Boston: Brill, 2017) at 135.

46 United Nations, *Statute of the International Court of Justice* (18 April 1946), art 38(1)(c); Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2019) at 108 [Thirlway, "Sources of International Law"].

47 *Inceysa*, *supra* note 19 at para 227; Charles T. Kotuby Jr. & Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, (Oxford: Oxford University Press, 2017) at 2.

48 Daniel P O'Connell, *International Law* (London: Stevens, 1965), at 39; James Crawford, *supra* note 44 at 34.

nations."[49] Accordingly, the decisions of national and international tribunals, along with the writings of prominent publicists, are the most useful sources for ascertaining whether a legal principle is, or is in the process of becoming, part of international law. [50]

As previously discussed in the introduction, the clean hands doctrine not only forms part of the legal consciousness of both civil and common law jurisdictions,[51] but has also been extensively referred to as a general principle of international law by the relevant literature and case law. The 1937 PCIJ case concerning the diversion of the Meuse River, for instance, was regarded by Judge Schwebel as the most notable application of the doctrine in modern international law.[52] The dissenting opinion of Judge Anzillotti[53] and the concurrent opinion of Judge Hudson[54] explicitly endorsed the principle as fair to the extent that it should form part of international law. Several investment tribunals, albeit not using the words "clean hands," have expressly recognized the Latin maxim *nemo auditur propiam turpitudinem allegans,* which better expresses the concept of clean hands as a general principle of law.[55] In the more recent *Fraport II*, the tribunal upheld that:

> Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, … or, absent an express provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine.[56]

Admittedly, this corpus of opinions and decisions might, *prima facie*, seem conclusive for the recognition of the clean hands doctrine as a principle of international law.

Nonetheless, several distinguished scholars have concluded that the doctrine has not reached this status yet. Judge Crawford, in turn quoting Rousseau,[57] found that "it is not possible to consider the clean hands theory

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49 Permanent Court of International Justice, *Procès-verbaux of the Proceedings of the Committee* (June 16th–July 24th 1920) at 324; Giorgio Gaja, "General Principles of Law" in *Max Planck Encyclopedia of Public International Law* at 2.

50 Cherif M Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11:3 Mich J Intl L 768 at 769.

51 T Leigh Anenson, *supra* note 4 at 1839; Mackeldey, *supra* note 1 at 159; *Water from the Meuse*, *supra* note 8 (dissenting opinion of Judge Hudson).

52 Schwebel, Dissenting Opinion, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10.

53 *Water from the Meuse*, *supra* note 8 (dissenting opinion of Judge Anzillotti).

54 *Ibid* (concurrent opinion of Judge Hudson).

55 *Inceysa*, *supra* note 19 at para 243; *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction (8 February 2005), ICSID, Case No ARB/03/24 at para 141 [*Plama*].

56 *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, (10 December 2014), ICSID, Case No ARB/11/12 at para 328 [*Fraport II*].

57 Charles Rousseau, *Droit international public*, t 5 (Paris: Sirey 1983) at 177 («il n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier général» at 177).

as an institution of general customary law."[58] In his report, John Dugard, ILC Special Rapporteur diplomatic protection, emphasizes that "the evidence in favor of the clean hands doctrine is inconclusive."[59] More openly, the *Yukos* final award declared that "'unclean hands" does not exist as a general principle of international law that would bar a claim by an investor, similarly to the Claimants in this case.[60]

This instantly raises the question: How is it possible that the opinions on the status of the doctrine are so profoundly divergent? Predictably, the answer is rooted in the nature of the principle. Similar to the principles of good faith[61] and equity,[62] the clean hands doctrine is a broad concept which regroups in itself a large number of rules, only some of which form part of international law.[63] For this reason, it is particularly important to include a differentiated discussion on the legal status of the clean hands doctrine, in order to determine which rules might have or have not been recognized as principles of international law.

B. The fragmentation of the clean hands doctrine

To allow for a differentiation between the various rules that comprise the broader concept of clean hands, it is appropriate to analyze some possible scenarios where different forms of the doctrine might appear.

a. "*Ex delicto non oritur actio*"

The first scenario is constituted by what has also been termed "claims tainted by illegality."[64] This concerns cases where a Claimant is invoking protection of its rights which, in turn, were obtained from the beginning through unlawful means. Under such circumstances, the clean hands doctrine will come into play in the form *"ex delicto non oritur actio"* (an action does not arise from fraud), operating as a bar for the claim.[65] The idea behind this first form of the clean hands doctrine is well-depicted by the *Eastern Greenland* case, where the PCIJ rejected Norway's claims by stating

58 International Law Commission, *Second Report on State Responsibility*, by Mr James Crawford, Special Rapporteur UN Doc A/CN.4/498/Add.2, April 1999, at para 336.
59 Dugard, *supra* note 11 at 6.
60 *Yukos Universal Limited v Russian Federation*, PCA AA 227, UNCITRAL, 18 July 2014 [*Yukos*].
61 Clayton P Gillette, "Limitations on the Obligation of Good Faith" (1981) 1981:4 Duke LJ 619 at 646.
62 Francesco Francioni, "Equity in International Law", *Max Planck Encyclopedia of Public International Law* at 1—2.
63 Pomson, *supra* note 12 at 714—16.
64 *Ibid* at 720.
65 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (New York: Cambridge University Press, 1953) at 155.

that "an unlawful act cannot serve as the basis of an action at law."[66]

The scenario in which an investor obtains its right to claim via an unlawful act is fairly common in the investment arena. For instance, in *Inceysa*, the investor managed to secure its concession contract by committing fraud in the public bidding process.[67] Similarly, in *Plama*, the investment was "the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorise the transfer of shares."[68] *Inceysa* and *Plama*, along with several other tribunals, agreed that in these circumstances the investor was deprived of its right to claim under the BIT because, since the investment was made in violation of the law, it triggered application of the legality requirement.[69] Interestingly, these tribunals often added that the claim was inadmissible because it went against the maxim *"ex dolo malo non oritur actio"* as well.[70]

This can indeed be described as the point of overlap between the legality requirement and the clean hands doctrine. This is natural because, seeing it from a temporal perspective, it is during the establishment of the investment that the investor usually obtains its potential rights to claim under the BIT provision. If the investor commits wrongdoing in the establishment phase, it not only violates the legality requirement, but also obtains the right to claim under the BIT via an unlawful act, thus involving the clean hands doctrine.

However, while a point of overlap exists, it is not a complete one. The legality requirement applies on a temporal basis, fixed at the making of the investment. Instead, the clean hands doctrine applies every time there is a claimant obtaining its right to claim as a consequence of its unlawful act. As witnessed in the *Al-Warraq* decision, this might also happen during the lifespan of the investment and is thus not limited to the establishment phase. Here, the investor's claims of denial of justice referred to a criminal prosecution which had been brought against him as a consequence of his behavior during the life of the investment.[71] The *Copper Mesa* tribunal stated that in "*Al-Warraq v Indonesia* … the claim, as a cause of action, was directly based from the beginning upon the claimant's own illegal act," suggesting that it was precisely for this reason that the *Al-Warraq* tribunal had applied the clean hands doctrine in that specific case.[72]

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66 *Legal Status of Eastern Greenland (Denmark v Norway)* (1933), PCIJ (Ser A/B) No 53 at para 308 [*Eastern Greenland*].

67 *Inceysa*, *supra* note 19 at paras 230—245.

68 *Plama, supra* note 57 at paras 128—29.

69 *Hamester, supra* note 18 at 123—24; *Phoenix Action, Ltd v The Czech Republic*, (15 Apr. 2009), ICSID Case No ARB/06/5 at para 101 [*Phoenix Action*]; *SAUR International SA v Republic of Argentina*, Décision sur la compétence et sur la responsabilité (6 June 2012), ICSID Case No ARB/04/4 [*SAUR*].

70 *Inceysa*, supra note 19 at paras 235—237.

71 *Al-Warraq*, *supra* note 25 at paras 158—62.

72 *Copper Mesa, supra* note 25 at para 5.66.

The conclusions are twofold. First, it is true that the several judgments to which I previously referred[73] are a clear expression of the recognition of the clean hands doctrine as a principle of international law. Nonetheless, they only refer to the specific scenario in which the Claimant obtained its right to claim under the BIT, both during the establishment or the post-establishment phase, via an unlawful act. Second, there is widespread consensus that when the Claimant's cause of action is directly based from the beginning on the Claimant's own illegal act during the establishment of the investment,[74] during the performance of the investment[75] and/or in totally different instances,[76] the claim should be found inadmissible. As a result, it is safe to assume that the clean hands doctrine, in its form *ex delicto non oritur actio,* is a general principle of international law.

b. "*Nemo auditur propriam turpitudinem allegans*"

A different scenario could involve a Claimant, who has themselves engaged in unlawful activities but this time only related to subject matter of the case, alleging that a Respondent committed some form of illegalities.[77] This scenario can be better visualized with the following example. Imagine a mining corporation that has obtained its concession legally. However, during the performance of the investment, it resorts to private security forces, who then commit several human right violations. Imagine also that the government of the host state decides to expropriate the mining company's concession as part of a general plan aimed to nationalize key resources. In that context, the mining company's cause of action would only be related to its wrongdoing, and not directly based from the beginning on that mining company's own illegal act.

In my opinion, this situation would refer to the clean hands doctrine in a form well-depicted by the maxim *nemo auditur propriam turpitudinem allegans* (no one can be heard to invoke his own turpitude[78]). Distinguishable from the aforementioned maxim, the principle *nemo auditur propriam turpitudinem allegans* presupposes a broader scope of application, which does not require a total overlap of the Claimant's *turpitudinem* (illegality) and the cause of action.

Concerning this second scenario, the cases referred to in support of the recognition of the clean hands doctrine seem of scarce relevance, because the factual scenarios involved are entirely based on the Claimant's illegal acts.

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73 *Al-Warraq*, *supra* note 25; *Copper Mesa*, *supra* note 25.
74 *Plama, supra* note 57; *Inceysa*, *supra* note 19.
75 *Al-Warraq*, *supra* note 25; *Copper Mesa*, *supra* note 25 at para 5.66.
76 *Eastern Greenland, supra* note 68.
77 Pomson, *supra* note 12 at 723 (This situation has been termed "Unlawful Conduct Relating to the Subject-Matter of the Case" at 723).
78 Nelson, *supra* note 21 at 202.

They were not merely related to it. There are only two exceptions: *Yukos* and *Copper Mesa*. Their significance will be explored in the subsequent section.

c. *Yukos: the last word on the legal status of clean hands? (In the form nemo auditur propriam turpitudinem allegans)*

i. Yukos

The *Yukos* tribunal,[79] solely composed "of the most highly qualified publicists of the various nations,"[80] centrally addressed the question of the legal status of the clean hands doctrine in its broader formulation, concluding that it cannot be considered a source of international law. The *Yukos* award is critically analyzed in this section.

Before diving into the description of the judgment, three preliminary remarks are necessary. First, the Russian Federation's appointed arbitrator was Judge Schwebel, a highly educated American lawyer, famous for his strenuous defense of both the US positions and the clean hands doctrine in the Nicaragua case.[81] Second, of the 579 pages comprising the *Yukos* final award, the tribunal took 397 words to declare that the clean hands doctrine could not be considered a principle of international law. Third, the decision was unanimous.

Of the seven paragraphs that compose the section of the award dedicated to the clean hands doctrine, the first two paragraphs are merely introductory.[82] In the third paragraph, the tribunal framed the threshold as one of "certain level of recognition and consensus" without elaborating further.[83] Only at this point did the tribunal analyze seven international cases[84] and, while acknowledging that the "*exceptio non adimpleti contractus* and *ex iniuria ius non oritur* [principles] had been endorsed by the PCIJ and the ICJ", the decision reported the doubts of Judge Simma as to existence of the *exceptio non adimpleti contractus* principle in the present day.[85] Only in the sixth paragraph did the tribunal take a position on the merits, stating that the "Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of 'unclean

79 The panel was composed of Hon L Yves Fortier (Chairman), Dr Charles Poncet (appointed by the private parties) and Judge Stephen M Schwebel (appointed by the Russian Federation).
80 *ICJ Statute*, *supra* note 16 at art 38(1)(d).
81 Schwebel, Dissenting Opinon, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10.
82 *Yukos*, *supra* note 62 at paras 1357—58.
83 *Ibid* at para 1359.
84 *Water from the Meuse*, *supra* note 8 (concurrent opinion of Judge Hudson) and see dissenting opinion of Judge Anzillotti; *Eastern Greenland, supra* note 68.
85 *Application of the Interim Accord of 13 December 1995 (the Former Yugoslav Republic of Macedonia v Greece)*, [2011] ICJ Rep 695 at 703–04 [*the Former Yugoslav Republic of Macedonia v Greece*].

hands,'"[86] concluding in the final paragraph that, therefore, "'unclean hands' does not exist as a general principle of international law."[87]

ii. Al-Warraq and Niko: valid alternatives to Yukos?

Admittedly, this laconic decision is not problematic per se. It is quite understandable that an investment tribunal did not engage in a thorough analysis of the status of the clean hands doctrine.[88] However, the lack of a more structured discussion, coupled with the non-binding nature of the arbitral decision, have led P. Dumberry to argue that it is unlikely that the *Yukos* award will constitute the final word on the status of the clean hands doctrine. In particular, he argues that two awards – *Niko* and *Al-Warraq* – which seemingly found differently from *Yukos* – may attract the attention of future tribunals more than the *Yukos* decision.[89] O. Pomson, critiquing P. Dumberry, argues that neither of the two cases reported by P. Dumberry constitute a valid alternative decision to *Yukos*.

While O. Pomson convincingly diminishes the value of the *Niko* award in this context, he is not fully successful in doing the same with the *Al-Warraq* decision.[90] Although he puts forth a strong argument[91] by highlighting that the *Al-Warraq* tribunal mistakenly relied on Judge Crawford's works to validate the idea that the clean hands doctrine was a principle of international law, Crawford has also previously advocated for the opposite conclusion.[92] Yet, the *Al-Warraq* tribunal also referred to Lord Mansfield in *Holman v Johnson* to support its decision on the clean hands doctrine,[93] and as emphasized by the ICJ in the *Jurisdictional Immunities case*, "state practice of particular significance is to be found in the judgements of national courts."[94] To be clear, it is not the present author's opinion that the *Al-Warraq* decision is flawless. However, this decision is not so poor in quality so as to not exercise any persuasive influence over future tribunals.

Ultimately, what both P. Dumberry and Ori Pomson fail to see is that the *Al-Warraq* decision does not fall under the category of unlawful conduct relating to the subject matter of the case. Thus, the *Al-Warraq* decision is simply not at odds with the *Yukos* decision. As previously discussed, in *Al-Warraq*, the claimant's cause of action was entirely based from the beginning upon the claimant's own illegal act. Differently, in *Yukos,*

86 *Yukos*, *supra* note 62 at para 1362.
87 *Ibid* at para 1363.
88 Dumberry, *supra* note 17 at 249.
89 *Ibid* at 254—57.
90 Pomson, *supra* note 12 at 723—26.
91 *Ibid* at 725.
92 Crawford, International Law Commission, *supra* note 60 at para 336.
93 *Holman v Johnson* [1775], 98 ER 1120 (KB).
94 *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, [2012] ICJ Rep 99 at 123 [*Jurisdictional Immunities of the State*].

the unlawful conduct was merely related to the subject matter of the case, indicating that the clean hands doctrine appeared in its broader formulation, *nemo auditur propriam turpitudinem allegans*. That *Al-Warraq* and *Yukos* reached different conclusions is explained by the fact that they were deciding on different principles of international law.

iii. Copper Mesa

Referring to the discussion entertained in a previous section of this paper,[95] I would like to return to *Copper Mesa*, a subsequent decision to *Yukos* that has been considered by one author as recognizing, albeit implicitly, the clean hands doctrine in its broader formulation.[96] In the section devoted to jurisdiction objections,[97] the tribunal refused to apply the clean hands doctrine as a bar to admissibility and reframed the plea " under analogous doctrines of causation and contributory fault."[98]

The tribunal gave various reasons for holding this opinion. First of all, the question concerning the applicability of the clean hands doctrine could not have affected the jurisdiction of the arbitral tribunal, but only the admissibility of the claim.[99] Second, the tribunal agreed with the Claimant's view that the Respondent was estopped from raising the argument for failure to act in a timely manner.[100] It follows logically that if the Respondent State had acted in a timely manner precluding the argument of estoppel, it would have been able to successfully render the Claimant's claims inadmissible via the clean hands doctrine.[101]

Interestingly, however, the tribunal decided to reframe the Respondent's plea on the clean hands doctrine for a third, crucial reason:

> [t]he Tribunal also notes that this is … not a case where an essential part of the Claimant's claim is necessarily founded upon its own illegal acts or omissions … In other words, this case is materially different from cases such as … *Al-Warraq v Indonesia* where the claim, as a cause of action, was directly based from the beginning upon the claimant's own illegal act.[102]

Consistently with *Yukos* and the aforementioned distinction amongst the two different manifestations of the clean hands doctrine, the *Copper Mesa* tribunal noted that since the Respondent's illegal acts were merely connected to the subject matter of the case, the clean hands doctrine was inapplicable

95 See section 2.3.
96 Fontanelli, *supra* note 45 at 135.
97 *Copper Mesa*, *supra* note 25 at paras 5.21—5.22.
98 *Ibid* at para 5.65.
99 *Ibid* at paras 5.63—5.64.
100 *Ibid* at paras 5.63—5.64.
101 Fontanelli, *supra* note 45 at 135.
102 *Copper Mesa*, *supra* note 25 at para 5.66.

in its broader formulation.

Conclusively, from an analysis of the relevant jurisprudence, in the light of the fragmentation of clean hands, it is possible to conclude that no international forum has ever applied the clean hands doctrine when the illegalities are merely related to the cause of action. Furthermore, I find it appropriate to reiterate the apt observation made by several scholars that an in-depth analysis, which assesses the existence of a general state's practice, has also yet to be made by an international forum.[103] Thus, the last word on the clean hands doctrine is yet to be written. Arguably, however, as the law stands today, the clean hands doctrine, in its manifestation *nemo auditur propriam turpitudinem allegans,* is not a principle of international law.

IV. TRULY INTERNATIONAL PUBLIC POLICY: A viable substitute for "unclean hands" defenses?

A. Truly international public policy and the clean hands doctrine

Generally, public policy reflects "the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community … and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."[104] This broad connotation of public policy has been further divided by scholars and tribunals into three different categories; national public policy, international public policy and transnational or truly international public policy.[105]

Specifically, the first two categories of public policy concern the essential national interests of a particular state.[106] The difference between the two is that only the "really fundamental conceptions of legal order in the country concerned" participate in informing the notion of international public policy.[107] On the other hand, the third category, termed truly international public policy, is of "universal application … comprising fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred

103 Bjorklund & Vanhonnaeker, "Yukos", *supra* note 13 at 369; Pomson, *supra* note 12.

104 Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry, NY: Oceana, 1978) at 532; See also Klaus Peter Berger, *International Economic Arbitration* (Boston: Kluwer Law and Taxation Publishers, 1993) at 670.

105 Margaret Moses, "Public Policy: National, International and Transnational" (12 November 2018), online (blog): *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/>.

106 Martin Hunter & Gui Conde E Silva, "Transnational Public Policy and its Application in Investment Arbitrations" (2003) 4:3 J World Investment 367 at 367.

107 Julian DM Lew, "Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals" (Paper delivered at the Hugo Grotius lecture, CEU Instituto Universitario de Estudios Europas Madrid, 2016) at 21; See also *Mir Kazem Kashani et al v Tsann Kuen China Enterprise Co, Ltd et al*, 13 Cal Rptr (3d) 174 (CA, Cal 2004).

to as 'civilised nations.'"[108] Thus, unlike national and international public policy, the concept of transnational public policy does not depend on the particular interests of an individual state; rather it connotes "an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora."[109]

While the concept of transnational public policy has originally developed in the framework of international commercial arbitration,[110] commentators advocate for the application of transnational public policy also in the context of treaty-based claims. In that respect, some advocate that ICSID tribunals have not only the possibility, but the obligation to prevent the enforcement of any arrangement which is contrary to a principle of transnational public policy[111] because "ignoring or tolerating illegality in such situations can be seen as contributing to distortion and suppression of competitive forces as well as discouragement of future investment."[112] This requirement is considered of paramount importance in the ICSID arbitration system, since the *Washington Convention*, unlike the *New York Convention*, does not provide for the review of the award at the place of arbitration.[113]

In recent years, several ICSID tribunals were confronted precisely. with the question of whether the conduct of the investor in engaging in bribery and corruption might have been in violation of public policy and - should it be so - what consequences such a violation might entail. Maintaining that corruption violates transnational public policy, the tribunals in *World Duty Free v Kenya*,[114] *Metal-Tech v Uzbekistan*[115] and *Spentex v Uzbekistan*[116]

108 International Law Association Committee on International Commercial Arbitration, "ILA Final Report On Public Policy, Delhi, 2002" at para 43; See also Jacob Dolinger, "World Public Policy: Real International Public Policy in the Conflict of Laws" (1982) 17:2 Texas Intl LJ 167 at 167.

109 *World Duty Free Company Limited v Kenya*, (4 October 2006), ICSID, Case No ARB (AF)/00/7 at para 139 [*WDF v Kenya*].

110 Hossein Fazilatfar, "Transnational Public Policy: Does It Function from Arbitrability to Enforcement" (2012) 3 City UHKL Rev 289 at 289; Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration", in Pieter Sanders, ed, *Comparative Arbitration Practice and Public Policy in Arbitration* (New York: Kluwer Law International, 1987) at 259.

111 Christoph Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press 2009) at 566 —67; Hunter & Silva, *supra* note 102.

112 Richard H Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators" (2003) 4:2 J World Investment, 239 at 249.

113 Bernardo Cremades, "Corruption and Investment Arbitration", in G Asken et al, eds, *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (Paris: ICC, 2005) at 212–13; Stephen Jagusch, "Issues of Substantive Transnational Public Policy", in Devin Bray and Heather L Bray, eds, *International Arbitration and Public Policy* (New York: Juris, 2015) at 42.

114 *WDF v Kenya*, *supra* note 113.

115 *Metal-Tech Ltd v Republic of Uzbekistan*, (4 October 2013), ICSID, Case No ARB/10/3 [*Metal-Tech*].

116 *Spentex Netherlands BV v Republic of Uzbekistan*, (27 December 2016), ICSID, Case No ARB/13/26 [*Spentex*].

unswervingly dismissed all investor claims. Leaving momentarily aside the harsh doctrinal debate which arose in connection with these decisions, what is to be pointed out here is that transnational public policy has been explicitly recognized by investment tribunals, and that the violation of public policy has consistently resulted in the decision to dismiss all the investor requests. The present author believes that the underlying rationale of these decisions is well-depicted in the iconic choice of Judge Lagergren to disqualify himself as not having the authority to rule on his own jurisdiction in a case where both parties had engaged in blatant forms of corruption.[117] Aiming to protect the integrity of the arbitral system, the sole arbitrator delivered a very clear message stating that parties engaging in corruption "must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes."[118]

Admittedly, the concept of protecting the legal system, demonstrated by a rapid dismissal of the claim, brings us back not only in terms of legal mechanism, but also in terms of rationale, to the clean hands doctrine. Not surprisingly, some scholars - in particular Bjorklund and Vanhonnaeker - have noted a strong correlation between the use of transnational public policy and the clean hands doctrine,[119] especially in the context of investment arbitration.[120] This is further evidenced by several decisions. For example, the *Plama* tribunal stated:

> [T]he 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.[121]

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117 *Argentine Engineer v British Compan*y, Award, ICC Case No. 1110, 1963, (1996) 21 YB Comm Arb 47.

118 *Ibid* at 52.

119 Bjorklund & Vanhonnaeker, "Yukos", *supra* note 13 at 373—77; Dumberry, "State of Confusion", *supra* note 17 at 244—45; 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" (2015) 30:2 ICSID Review 316 at 321 [Llamzon, "Yukos Universal"].

120 *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, Bangladesh Oil Gas and Mineral Corporation*, Decision on Jurisdiction (19 August 2013), ICSID Case No ARB/10/11 and ARB/10/18 at paras 431—33 [*Niko*] ("It is widely accepted that the prohibition of bribery is of such importance for the international legal order that it forms part of what has been described as international or transnational public policy" at para 431).

121 *Plama*, *supra* note 57 at para 143; See also *Inceysa*, *supra* note 18 at para 252 ("not to exclude Inceysa's investment from the protection of the BIT would be a violation of international public policy, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that Inceysa's investment is not protected by the BIT because it is contrary to international public policy" at para 252).

In *Al-Warraq*, the tribunal articulated this relationship in an even clearer fashion, affirming:

> The Claimant's actions were also prejudicial to the public interest. The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement.[122]

Remarkably, this unveils the possibility of applying the clean hands doctrine while avoiding the question surrounding its legal status in international law. Accordingly, the object of the inquiry would move from being whether the clean hands doctrine existed as a general principle of law to whether specific conduct on the part of the investor can be deemed in breach of transnational public policy. More accurately, the question would become "can virtually any type of wrongdoing of an investor in the making or performance of the investment be assessed in light of international public policy, or are only certain types of illegal conduct prohibited?"[123]

The answer to this question heavily depends on what transnational public policy embodies. In the words of Pierre Lalive, what is necessary to recognize a principle as belonging to the purview of truly international public policy is "a widespread, if not universal consensus, or as possessing, owing to their importance, a particular force and a particular imperative nature."[124] Since my aim is to frame this discussion in the context of human rights, the question is, do human rights norms have such importance and widespread recognition?

B. Conduct prohibited by transnational public policy

a. *Jus cogens*

Jus cogens norms, if they existed,[125] would belong to transnational public policy.[126] This is also confirmed, albeit in obiter, in the *Phoenix Action* decision where the tribunal asserted:

> To take an extreme example, nobody would suggest that ICSID protection

122 *Al-Warraq*, *supra* note 25 at para 647.
123 Bjorklund & Vanhonnaeker, "Yukos", *supra* note 13 at 374.
124 Lalive, *supra* note 114 at 289.
125 Mark Weisburd, "The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina" (1995) 17:1 Michigan J Intl L 1 at 1; Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?" (2008) 18:5 Eur J Intl L 853 at 854—55.
126 International Law Association, *supra* note 104 at para 43; Jagusch, *supra* note 117 at 27; Kreindler, *supra* note 116 at 239.

> should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.[127]

Although this finding is difficult to rebut, it remains of limited practical relevance, provided that it is unlikely that an investor would engage in such egregious violations. Surely, however, this represents a bottom line from which none are allowed to depart.

b. Human rights and the serious or manifest violation of law

Human rights norms have often been considered to inform the notion of transnational public policy. European Union law, for instance, has developed an interesting supranational form of public policy - usually termed regional public policy - encompassing values and fundamental principles that are uniformly shared by the different Member States, such as the principle of non-discrimination and the protection of human rights.[128] Similarly, the Milan Court of Appeals held that transnational public policy covers a "body of universal principles shared by nations of similar civilisation, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions."[129]

In addition, there has been a convergence of arbitral decisions[130] and scholars[131] who agree that if an investor engages in "clear" or "manifest" illegality, the tribunal should be compelled to find the claim to be

127 *Phoenix Action*, *supra* note 71 at para 78.

128 Elena R Pineau, "European Union International Ordre Public" (1994) 3 Spanish YB Intl L 43 at 43; Lew, *supra* note 103 at 21.

129 *Allsop Automatic Inc v Tecnoski snc*, Court of Appeal of Milan, Italy, 4 December 1992, (1997) 21 YB Comm Arb 725 at 726; Jagusch, *supra* note 117 at 26.

130 *Inceysa*, *supra* note 19 at para 257 ("because Inceysa's investment was made in a manner that was clearly illegal, [...] the disputes arising from it are not subject to the jurisdiction of the Centre" at para 257); *Phoenix Action, supra* note 71 at para 102; *SAUR*, *supra* note 71 at para 308 ("The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law").

131 Dumberry, "State of Confusion", *supra* note 17 at 245; Dumberry & Dumas-Aubin, "Human Rights Violations", *supra* note 23 at 369; Kałduński , *supra* note 24 at 98—9; Moloo, *supra* note 12 at 51; Michael Polkinghorne and Sven-Michael Volkmer, "The Legality Requirement in Investment Arbitration" (2017) 34:2 J Intl Arb 149 at 164; Saar A Pauker, "Admissibility of claims in investment treaty arbitration" (2018) 34:1 Arb Intl at 64 ("joining that issue to the merits may be preferred, unless the gross illegality is so manifest that there is no sense in wasting the parties' resources in having the merits been dealt with." at 64); Zachary Douglas, "Plea of Illegality in Investment Treaty Arbitration" (2014) 29:1 ICSID Rev 155 at 180 ("if a plea of illegality to the effect that the investor has violated a ground of international public policy is successful ... [and] has a prima facie basis, the tribunal should use its case management powers to ensure that it is determined in a preliminary phase of the arbitration" at 171).

inadmissible.[132] Since tribunals have consistently adopted this approach for cases involving misrepresentation and corruption, it has been firmly argued that they should, *a fortiori*, find the same for violations of human rights.[133] This is simply because "these are precisely the kind of investments not worthy of protection under a BIT."[134]

On the other hand, the *Glencore* tribunal in its decision on bifurcation has been rather skeptical of this argument.[135] The *Copper Mesa* tribunal was also confronted with this question. Here, the Respondent State objected to the jurisdiction of the tribunal on the basis that the Claimant had committed severe violations of Ecuadorian law, including human rights violations. The tribunal rejected this position, explaining that the argument of a manifest violation of law was inherently flawed due to the conceptual hurdles in distinguishing between minor and non-minor violations of law.[136]

Therefore, while it is apparent that the argument on a serious violation of law in the human rights context has been approached inconsistently, it seems that a strong argument can also be made in its favor. On the other hand, noting these divergent approaches, it merits further discussion which implications might stem from the acceptance of the argument that a serious violation of law, and in particular of human rights, entails the dismissal of an investor's claim. As a result, I will dedicate the final part of the paper to examining the advantages and disadvantages for the ISDS system as a whole that may be derived from the acceptance of this argument.

V. SERIOUS VIOLATIONS OF HUMAN RIGHTS AS A BAR FOR THE ADMISSIBILITY OF THE CLAIM

In this final section of the paper, I will discuss the *Copper Mesa* tribunal's decision to reject the argument of the existence of a serious violation of law and human rights, and the consequent decision to reframe the plea on clean hands as a matter of contributory fault. I argue that the tribunal's decision, albeit legally correct, could raise doubts as to the integrity of the ISDS system. Conversely, I will demonstrate that the application of transitional public policy as a bar for the admissibility of the claim - or the use of the clean hands doctrine - could have prevented the emergence of such

132 Carolyn B Lamm, Hansel T Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in Miguel Angel Fernandez-Ballester & David Arias, eds, *Liber Amicorum Bernardo Cremades* (Madrid: La Ley, 2010) 699 at 720.

133 Dumberry, "State of Confusion" *supra* note 17 at 245; Patrick Dumberry & Gabrielle Dumas-Aubin, "The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law" (2013) 10:1 TDM 1 at 9 [Dumberry & Dumas-Aubin, "The Doctrine of Clean Hands"].

134 Dumberry & Dumas-Aubin, "The Doctrine of Clean Hands" *supra* note 137 at 9.

135 *Glencore*, *supra* note 15 at para 47.

136 *Copper Mesa*, *supra* note 25 at para 5.56.

doubts.

I will then turn to the assumption that arguments on the inadmissibility of the claim in cases involving serious violations of law are to be accepted. At this conclusive stage, I will address the potential benefits that might stem from this approach and the possible critiques which might be brought against it.

A. Copper Mesa and Contributory Fault

a. The decision to reject the argument based on a serious violation of law

The *Copper Mesa* tribunal rejected the Respondent's argument to dismiss the claim on the ground of the existence of a serious violation of law for two main reasons. Firstly, it was rejected because, "however tailored, [it] would still leave a significant lack of clarity as to the exact dividing line between minor and non-minor violations of the local law."[137] Secondly, the tribunal agreed with the Claimant's view that the Respondent was estopped from raising this argument. This resulted from the fact that Claimant's conduct openly took place in Ecuador between 2005 and 2007, yet "such a complaint surfaced for the first time after the commencement of this arbitration."[138]

For these reasons, the *Copper Mesa* tribunal decided to consider the investor's misconduct under the doctrine of causation and contributory fault, deeming this choice to be more balanced in the circumstances of the case.[139] During the assessment of damages, relying on *MTD v Chile*,[140] *Occidental v Ecuador*[141] and *Yukos*, the tribunal determined that it had a "wide margin of discretion"[142] in deciding the quantum of the investor's misconduct, as it was an "essentially factual"[143] issue. Basing its decision on such premise, the tribunal concluded that the investor had contributed 30% to the damage it suffered, because "[o]n the facts of th[e] case, it could be no less."[144] This decision must be critically assessed.

b. Critiques of *Copper Mesa*

137 *Ibid* at para 5.56.
138 *Ibid* at para 5.63.
139 *Ibid*, at para 5.65.
140 *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile,* (25 May 2004), Award, ICSID Case No ARB/01/07 [*MTD v Chile*] (in particular it relies on the words "a corresponding margin of estimation" at para 101).
141 *Occidental Petroleum Corporation Occidental Exploration And Production Company v The Republic Of Ecuador,* (5 October 2012), Award, ICSID Case No ARB/06/11 [*Occidental v Ecuador*] at para 670 (in particular it relies on the words "a wide margin of discretion in apportioning fault").
142 *Copper Mesa*, *supra* note 25 at para 6.96.
143 *Ibid*.
144 *Ibid* at para 6.102.

i. Excess of discretion

Although I must recognize that this decision is positive per se because, in concert with two other recent decisions,[145] it is part of an increasing trend of investment tribunals dealing openly with the question of investors' human rights abuses, the tribunal's wide discretion is somewhat disturbing. Thirty could be the correct percentage. However, 50% could have been appropriate as well, as would 1% or 99%. This very much depends on the criteria operated, which, in this case, is not explicit and remains in the obscure zone of the tribunal's margin of discretion.

Admittedly, this is not due to the tribunal's unwillingness to elaborate on a more objective standard, which, even if still partially subjective, would at least give a yardstick against which to assess the genuineness of the decision. Rather, the issue is the standard itself. What the tribunal needs is a mechanism to be able to convert, somehow objectively, a given human rights violation into a monetary sum, which, in turn, would represent the reduction of the investor's chances to profit from its investment. Practically, giving an appearance of objectivity to such a device is unfeasible, especially in the context of investment law where human rights jurisprudence is close to non-existent, thus leaving as the only solution the virtually absolute discretion of the tribunal.

ii. Lack of protection of the integrity of the system

Another point, which is at least questionable, concerns the tribunal's rationale for the dismissal of the Respondent's argument that a serious violation of law rendered the claim inadmissible. While rejecting this argument, the *Copper Mesa* tribunal ironically proposed an example of what could have been considered a non-serious violation:

> For example, an employee of the investor cycling to work in the dark without a rear light (in contravention of local traffic laws) should not deprive that investor forever of its arbitral remedy under the Treaty.[146]

The tribunal was, however, unable to clearly define an example of the concept of a serious violation, and for this reason dismissed the Respondent's objection. Some hundreds of pages later, in the assessment of damages, the tribunal describes Copper Mesa's actions in Ecuador as follows:

> By December 2006, by the acts of its agents in Ecuador, the Claimant …

145 See *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic Of Uruguay,* (8 July 2016), Award, ICSID Case No Arb/10/07 [*Philip Morris v Uruguay*]; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina,* (8 December 2016), Award, ICSID Case No ARB/07/26 [*Urbaser SA*].

146 *Copper Mesa*, *supra* note 25 at para 5.56.

> resort[ed] to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands. ... The Claimant's decisions ... remain both unexplained and inexplicable to the Tribunal, save as a sustained act of folly... Their resort to subterfuge and mendacity aggravated those acts. The consequences could have led to serious injury and loss of life.[147]

In addition to the tribunal's description of the events, as noted by JCAP[148] (Justice and Corporate Accountability Project) and reported by an Ecuadorian human rights organization (INREDH),[149] from 2004 to 2006, numerous legal complaints were initiated against activists who opposed the mine project in the Junín area. Some 42 people were charged with serious crimes, yet no disclosure related to arrests or legal complaints ever occurred and the charges were eventually dismissed.[150] Moreover, a leading activist opposed to the mining project was assaulted by nineteen heavily armed individuals, which purportedly included individuals affiliated with Copper Mesa.[151] Amnesty International reported the event, calling for the protection of local activists.[152]

The present author fails to see how such egregious conduct could not have be considered as a clear example of a serious violation of law. Hence, the tribunal's argument to reframe the plea because a definition of serious violation of law "however tailored, would still leave a significant

147 *Ibid* at paras 6.99—6.100.

148 Justice and Accountability Project (JCAP), "The Canada Brand: Violence and Canadian Mining Companies in Latin America (2016) Osgoode Legal Studies Research Paper No 17 at 92—95.

149 Fundación Regional de Asesoría en Derechos Humanos (INREDH), "Intag: Una Comunidad Luchando por la Vida" (2007), online: <https://www.alainet.org/es/active/18728>.

150 Verónica María Yuquilema Yupangui, "Construyendo caminos de resistencia, de lucha y de vida: Desde Intag hasta Tundayme", in Adriana Bravin & Lúcia Fernandes, Sara Rocha eds, *Different ways of saying no: expressions of mining and oil environmental conflicts in Portugal and South America* (Coimbra, PT: University of Coimbra, 2017) 94 at 102; Observatorio Latinoamericano de Conflictos Ambientales, "Protesta por persecución gubernamental al investigador y ambientalista Carlos Zorrilla" (27 Dec 2013), online: <http://olca.cl/articulo/nota.php?id=10394>; Salva La Selva, "Javier Ramírez: ¡Al fin libre!" (17 Feb 2015), online: <https://www.salvalaselva.org/exitos/6354/javier-ramirez-al-fin-libre>.

151 Carlos Zorilla, "Update New Version of 21 Reasons" (23 April 2015) DECOIN online (blog): <https://www.decoin.org/2015/04/update-new-version-of-21-reasons/>; and Wildlife Community Network, "Ecuadorian Mountain Villagers Sue a Canadian Mining Company" (6 September 2009), online (blog): <http://www.wildlife1.com/forum/topics/ecuadorian-mountain-villagers?commentId=2236968%3AComment%3A198558>.

152 See Amnesty International, "Amnesty International Report 2008 - Ecuador" (28 May 2008) Amnesty International Report online: *Amnesty International* <https://www.refworld.org/docid/483e27874b.html> and Amnesty International, "Urgent Action: Fear for safety of environmental activists" Urgent Action UA 334/13 online (pdf): <https://www.amnesty.org/download/Documents/12000/amr280042013en.pdf>.

lack of clarity as to the exact dividing line between minor and non-minor violations of the local law"[153] is not particularly persuasive, at least in the present case.

Thus, it appears to me that the sole well-grounded argument put forth by the tribunal to prefer the doctrine of contributory fault to a more clear-cut solution is to consider the question of estoppel. For years, the Respondent neglected its duty to protect its citizens from human rights abuses; undisputedly both parties were at fault. Conclusively, it seems that the tribunal's decision to prefer the doctrine of contributory fault to an outright dismissal of the investors claims is legally justified. It would be, however, myopic to confine the analysis of the genuineness of the decision to a purely legal and autonomous sphere without considering the wide-ranging implications stemming from it.

First of all, it is necessary to acknowledge that the context which provides the background for the decision is that of a "legitimacy crisis."[154] A major concern identified by manifold scholars is that the ISDS system discourages governments from using their sovereign legislative powers to enact regulations aimed at the protection of the environment and public health, in a phenomenon known as "regulatory chill."[155]

Another significant criticism that has been moved against the ISDS system is arbitrators' lack of consideration of human rights norms.[156] In the report on the promotion of a democratic and equitable international order,

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153 *Copper Mesa*, *supra* note 25 at para 5.56.

154 Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73:4 Fordham L Rev 1521 at 1523, 1585, 1601; see also Jane Kelsey, "The Crisis of Legitimacy in International Investment Agreements and Investor-State Dispute Settlement" (9 January 2018) ISDS Platform online: <https://isds.bilaterals.org/?the-crisis-of-legitimacy-in>; Julius Cosmas, "Legitimacy Crisis in Investor – State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward" (2014) 4:11 Intl J Scientific & Research Publications 1 at 1—3 and Stephan W Schill, "Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework" (2017) 20:3 J Intl Econ L 649 at 652.

155 Kyle Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009) at 217—27; Gus Van Harten & Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2016) 12:6 Osgoode Legal Studies Research Paper No 26 at 1; Todd Allee & Andrew Lugg, "Do BITs Reflect the Interests of Powerful States?" (March 2016) Annual Meeting of the International Studies Association (ISA) Atlanta, Georgia at 7; Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018) 7:2 Transnat'l Envtl L 229; Lise Johnson, Lisa Sachs & Jeffrey Sachs, "Investor-State Dispute Settlement, Public Interest and US. Domestic Law" (2015) Columbia Centre on Sustainable Investment CCSI Policy Paper at 5.

156 F Francioni, "Access to Justice, Denial of Justice, and International Investment Law", in PM Dupuy, F Francioni & EU Petersmann, eds, *Human rights in International Investment Arbitration* (Oxford: Oxford University Press, 2009) at ch 4, 14; Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60:1 Intl & Comp LQ 573 at 575—77; Jean-Michel Marcoux, *Investment Law and Globalization Foreign Investment, Responsibilities and Intergovernmental Organizations* (New York: Routledge, 2019) at 53—54.

the independent expert Alfred-Maurice de Zayas maintained that "[a]mong the major threats to a democratic and equitable international order is the operation of arbitral tribunals that act as if they were above the international human rights regime."[157] Correspondingly, the Parliamentary Assembly of the Council of Europe has emphasized the shortcomings of the existing ISDS mechanisms from both a human rights and rule of law perspective.[158]

Accordingly, as also noted by the Columbia Center for Sustainable Investments (CCSI), the *Copper Mesa* decision, along with others,[159] can further exacerbate the human rights concerns related to the ISDS and the general sense of discomfort towards the entire system.[160] This is because the *Copper Mesa* tribunal "has put a hefty price tag on the [government's] failure to protect the investor in the face of actions taken by human rights defenders."[161] As a result of the decision, it is evident how governments, due to high sums at stake in investment cases, are incentivized to prioritize the security of the investor to the well-being of their citizens calling for human rights protection.

Moreover, the *Copper Mesa* award is burdened by a significant "image problem." Put simply, it lets the public picture that, at the end of the day, and despite the tribunal acknowledging that Copper Mesa engaged in such unspeakable behavior, it was nonetheless awarded with US$ 20 million plus interest. Therefore, it is easy to see how this decision might generate odium against that tribunal and, eventually, against the entire system. Besides, the decision of the tribunal to resort to the doctrine of contributory

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157 United Nations General Assembly (UNGA), "Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas" (July 2015) Report of an Independent Expert UN Doc A/70/285 at para 15. Iconically, the rapporteur stated: "[t]he manifest abuse of rights by investors is so brazen that one could imagine that one day the military-industrial complex might invoke investor–State dispute settlement when a country decides to reduce or terminate the production of anti-personnel landmines or cluster bombs because contrary to international humanitarian law, thus "expropriating" expected profits of the arms industry" at para 29.

158 Mr Pieter Omtzigt, Netherlands (Group of the European People's Party Report Committee on Legal Affairs and Human Rights), Parliamentary Assembly of the Council of Europe (PACE), "Human rights compatibility of investor–State arbitration in international investment protection agreements" (05 January 2017) Doc. 14225.

159 See Columbia Center on Sustainable Investment, "Impacts of the International Investment Regime on Access to Justice" (September 2018) Roundtable Outcome Document at 12 [CCSI, "Access to Justice"] and *Bear Creek Mining Corporation v Republic of Peru* (30 November 2017), Award, ICSID Case No ARB/14/21 *[Bear Creek Mining Corp]*; see also James Anaya, Special Rapporteur on the rights of indigenous peoples, "Report on the situation of indigenous peoples' rights in Peru with regard to the extractive industries" (3 July 2014) UN Human Rights Council Report UN Doc A/HRC/27/52/Add.3.

160 Columbia Centre on Sustainable Investment, "Input to the UN Working Group on Business and Human rights Regarding Guidance on Human Rights Defenders and the Role of Business" (March 2018) [CCSI, "Human Rights Defenders"] online (pdf): http://ccsi.columbia.edu/files/2016/05/Input-regarding-guidance-on-human-rights-defenders-and-the-role-of-business-REV.pdf>.

161 *Ibid.*

fault – which, upon closer analysis, increasingly resembles a procedural sweetener rather than a strong condemnation of human rights violations - cannot prevent the emergence of serious doubts as to the integrity and legitimacy of ISDS.

Indeed, the avoidance of such feelings was precisely the reasons why a more clear-cut solution, such as the clean hands doctrine, was devised; "to protect the court against the odium that would follow its interference to enable a party to profit by his own wrongdoing."[162] The crucial point is that courts applying the clean hands doctrine act to protect themselves and their image of fairness and justice, and not the opposing party.[163] Considering the skepticism that surrounds the world of investor-state arbitration, tribunals should be strongly driven by the aim to protect the integrity of the system, as a return to gun-boat diplomacy and a more politicized system is less than advisable. Particularly, tribunals should be extremely careful in cases involving human rights violations, that, for their nature, are the most likely to generate retorsion and rage among the general public.

For these reasons, the most appropriate solution for the case would have been to find the claim inadmissible due to the application of the clean hands doctrine, or by resorting to the use of transnational public policy, due to the serious violations of human rights perpetrated by the Claimant during the lifespan of the investment. To be clear, it is not being contended that the public policy exception could be used in place of the clean hands doctrine for every violation of law committed by the investor to dismiss his claims. This would likely entail draconian consequences. Yet, I am of the opinion that resorting to the old trick of the inversion of the burden of proof may produce the intended results. Specifically, my argument is that a human rights violation always amounts to a serious violation of law, unless the Claimant is able to demonstrate that it amounted to a non-serious violation, or in the words of the *Copper Mesa* tribunal, that it was "an accidental or isolated incident."[164] I believe that such a "zero tolerance" approach in cases involving human rights abuses is a key element to re-affirming the importance and the legitimacy of the ISDS system.

A similarly strict approach, which has led to a consistent strand of claims being rejected on the basis of admissibility, is currently being followed in cases involving corruption. The present author acknowledges that this approach has generated distortions in the system that have often raised criticism. I will now address these critiques, devoting the final part of the paper to arguing why they cannot so easily be exported to cases where the tribunal rejects a claim as a consequence of a serious or manifest violation of law.

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162 *North Pacific Lumber Co v Oliver*, 596 P.2d 931 (SC Or 1979) at 939—40 [*North Pacific Lumber Co*].

163 Anenson, *supra* note 4 at 1842—43.

164 *Copper Mesa*, *supra* note 25 at paras 6.99–6.100.

B. Potential critiques of a "zero tolerance" approach

a. Critiques applied to the world of corruption

To explore the potentially negative repercussions of a consistent strand of decisions which have rejected claims on the basis of admissibility, I will now analyze the critiques that a "zero tolerance" approach[165] has generated in the field of corruption among various scholars[166] and judges.[167]

A fitting example is the famous *World Duty Free* case ("*WDF*"). In that case, the Claimant alleged a vast number of serious violations of the 1989 agreement for the construction, maintenance and operation of two duty-free complexes at Nairobi and Mombasa airports (henceforth "Agreement").[168]

The issue of corruption arose as a consequence of an overly diligent report of the damages suffered by the investor, where the Claimant included a US$2 million "personal donation" made by the CEO and ultimate owner of the entire shareholdings of World Duty Free Company to Mr. Daniel Arap Moi (President of the Republic of Kenya at the time the investment was made) clarifying that this was "part of the consideration paid [...] to obtain the contract."[169]

As a result, the tribunal, maintaining that corruption violated transnational public policy,[170] dismissed the claim.[171]

Despite appearing to be a strong condemnation of blameworthy practices, *WDF v Kenya* has often ben criticized both in its application of substantive law and for the negative financial repercussions on the host state population.[172] These critiques are thereafter briefly outlined.

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165 Stephan Wilske & Willa Obel, "The "Corruption Objection" to Jurisdiction in Investment Arbitration: Does it Really Protect the Poor?" in Krista Nadakavukaren Schefer ed, *Poverty and the International Economic Legal System* (Cambridge: Cambridge University Press, 2013) 177 at 178.

166 Andreas Kulick & Carsten Wendler, "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption" (2010) 37:1 LIEI 61 at 63—6; See also Wilske & Obel, *supra* note 169 at 179—82.

167 *Fraport I, supra* note 38 at paras 36—41.

168 *WDF v Kenya, supra* note 113.

169 *Ibid*.

170 *Ibid* at para 157.

171 *Ibid* at para 159.

172 Andrew Brady Spalding, "Deconstructing Duty Free: Investor-State Arbitration As Private Anti-Bribery Enforcement" (2015) 49:2 UC Davis L Rev 443 at 473.; Bruce W Klaw, "State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities" (2015) 33:1 Berkeley J Intl L 62 at 96; Wilske & Obel, supra note 169 at 179—82; Aloysius P Llamazon, *Corruption in International Investment Arbitration* (Oxford: Oxford University Press, 2014) at 10.29.

i. Lack of accountability for both responsible parties under international law

The question of law, which the tribunal seems to answer unconvincingly, is why the government of Kenya should be exempted from any liability, particularly given that the President of Kenya had himself solicited the bribe. The reasoning of the tribunal is that because the act of corruption was a "covert bribe" and considering that the President was acting in violation of Kenyan law, "there is no warrant at English or Kenyan law for attributing knowledge to the State."[173] On the one hand, it is true that both Kenyan and English law[174] do not warrant holding the State liable, but the same is true for not holding the State liable, since "the law appears neutral on this point."[175] Besides, it would have been appropriate for the tribunal to resort to international law, which was applicable law in this case,[176] to break the impasse.[177] Article 7 of the *Articles on Responsibility of States for Internationally Wrongful Acts* ("ILC Articles"),[178] expressly acknowledges in its official commentary that the acceptance of a bribe from an official of the State to perform an act would be attributable to that State, regardless of its ultra vires nature.[179] If we are to follow these premises, the Respondent's argument that the bribe was a concealed payment should have failed, and Kenya should have been at least partially held liable for it.

Although this critique is well-founded, we have already established that the mere potential responsibility of one party is not the only consideration that the tribunal has to bear in mind. Admittedly, declining jurisdiction in cases involving corruption also aims to protect the integrity of the system rather than the opposing party. This weakens, and sometimes nullifies, the importance of one party's liability. However, if the protection of the integrity of the tribunal generates, in turn, systemic and disproportionate injustice, the validity of this approach is severely called into question. This is because

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173 *WDF v Kenya*, *supra* note 113 at para 185.

174 The applicable law chosen by the Parties in their Agreement of 27 April 1989, as required by Article 42(1) of the ICSID Convention, is embodied in Article 9(2)(c) of the Agreement, which provides that "any arbitral tribunal constituted pursuant to this Agreement shall apply English law" and Article 10(A) provides that "This Agreement shall be governed by and construed in accordance with the law of Kenya."

175 Spalding, *supra* note 176 at 481.

176 Andrea K Bjorklund, "Mandatory Rules of Law and Investment Arbitration" (2007) 18:2 Am Rev Intl Arb at 175—76 [Bjorklund, "Mandatory Rules"].; Spalding, *supra* note 176 at 485.

177 Spalding, *supra* note 176 at 481; Klaw, *supra* note 176 at 92.

178International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53rd Sess UN Doc A/56/10 (2001) at 45. Article 7 reads "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

179 *Ibid* at 46; "[o]ne form of ultra vires conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction".

it ultimately results in the system becoming even more delegitimized. This is exactly what is happening in the context of corruption.

ii. Systemic, negative implications at the expense of the host state population

Indeed, the most substantial critique pertains to the negative financial effects on the host state population, which in turn arises from an excessive rebuke of the investor. In the short term, citizens of the host state who are actively benefitting from the investment, which could be a considerable segment of the population, unjustly suffer from the lack of protection accorded to the investor.[180] For example, the WDF investment included US$ 27 million for extensive renovations of Mombasa and Nairobi airports, US$ 2 million annually to advertise Kenya overseas as a tourist and business destination, and employment of a workforce of over 300 once completed.[181] All these economic benefits were, in large part, lost.

As numerous authors have rightfully pointed out, these negative implications are not limited to the specific investment, but they extend to possible future beneficial investments.[182] What often happens in highly corrupted environments is that the investor simply does not have the possibility to secure its investment legally. Therefore, the investor, driven by the fear of not being protected by the favorable terms of the BIT, ultimately avoids investing.[183] This phenomenon is particularly hideous because it deters investments in countries which, in turn, would benefit most from foreign direct investment. Finally, this system would hardly be able to heal spontaneously, it being easy to foresee how a State might be motivated to avail itself of corruption as a means of shielding itself from possible future investment claims.[184]

b. Transposition of these critiques to the context of human rights violations

i. Lack of accountability for both responsible parties under international law

As a matter of law, the same critique applies in the context of human

180 Wilske & Obel, supra note 169 at 188.
181 *WDF v Kenya, supra* note 113 at paras 67, 130.
182 Wilske & Obel, supra note 169 at 184; Spalding, *supra* note 176 at 452; Klaw, *supra* note 176 at 91; Llamzon & Sinclair, *supra* note 42 at 460—63.
183 Wilske & Obel, supra note 169 at 184.
184 *Ibid*; Diogo Pereira, "Can You Enforce an Agreement Involving Bribery? From World Duty Free v Kenya to Vantage Deep Water Co. v. Petrobras Am., Inc." (7 July 2019) online (blog): *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2019/07/07/can-you-enforce-an-agreement-involving-bribery-from-world-duty-free-v-kenya-to-vantage-deep-water-co-v-petrobras-am-inc/>

rights. As clarified by Special Representative J. Ruggie in the state business nexus embodied in the UN Guiding Principles, "States individually are the primary duty-bearers under international human rights law."[185] The same holds true pursuant to Articles 2(1) of both fundamental covenants[186] and of other numerous conventions which directly impose international obligations on States to prevent the occurrence of human rights violations.[187] Case law is also consistent.[188] Therefore, as a matter of law, it is only appropriate that the State, at least partially, is found responsible for its wrongdoing, stemming from the failure to take appropriate steps to prevent human rights abuses.

On the other hand, the real difference in cases involving corruption is that it is virtually impossible to foresee the same negative systemic repercussions in the context of human rights. Therefore, it is submitted that maintaining a zero-tolerance approach in the context of human rights would actually benefit the integrity of the system. For this reason, I consider it justifiable to disregard States' responsibility, at least in cases involving serious violations of human rights, in the aim of protecting the ISDS system.

ii. Lack of systemic negative implications, at the expense of the host state population

While it is possible to picture a real example involving corruption where the investment provides a real benefit for the population (such as in *WDF v Kenya*), in cases involving human rights, this scenario is not conceivable. Indeed, the beneficial economic effects flowing from the investment are always necessarily linked to, and thus trumped by, the disproportionate human cost suffered by part of the population. In other

185 United Nations Office of the High Commissioner for Human Rights (UNOHCHR), "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" UN Doc HR/Pub/11/04 (2011) at 7.

186 *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 UNTS 3 at art 2.1 (entered into force 3 January 1976) [*ICESCR*]; *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171 at art 2.1 (entered into force 23 March 1976) [*ICCPR*].

187 Duncan French (Chair) and Tim Stephens (Rapporteur), "ILA Study Group on Due Diligence in International Law" (7 March 2014) International Law Association Study Group First Report at 14—5; See, for example, *ICESCR, supra* not 182 at art 2 and *Convention on the Elimination of All Forms of Discrimination Against Women,* 13 December 1979, 1249 UNTS 13 at art 5 (entered into force 3 September 1981) [*CEDAW*]; *Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment Optional Protocol,* 10 December 1984, 1465 UNTS 85 at art 15 (entered into force 26 June 1987) [*UNCAT*]; and *International Convention for the Protection of All Persons from Enforced Disappearance,* 2715 UNTS at art 3 [*ICPPED*].

188 For instance, in the *Diplomatic and Consular Staff* case, the tribunal concluded that Iran failed to protect Consulates in Tabriz and Shiraz, and in doing so breached the *Vienna Convention on Consular Relations*. United States Diplomatic and Consular Staff in Tehran, "United States of America v Iran: The Court Delivers Judgment" (24 May 1980) International Court of Justice Unofficial Communiqué No 80/5 at 3—4.

words, what is really different from cases involving corruption is that it is simply not possible to separate the harmfulness of the illegal act and the benefits stemming from the investment.

This also relates to the long-term effect critique. While in cases involving corruption the deterrent effect may also impact positive investments, in cases of human rights violations, the sole investors disincentivized will be the ones aiming to profit by disregarding human rights violations. Thus, unlike with cases involving corruption, the dissuasion of future investments of that kind would always be advantageous for the population.

Therefore, while it is true that States, as a matter of international law, should be found responsible for corruption, it is also true that the importance of this responsibility can be set aside for the right reason, namely to preserve the integrity of the ISDS system. With human rights violations, it is unlikely that this approach would generate distortions in the system that are capable of undermining the system itself. It seems reasonable to conclude that the decision to apply the clean hands doctrine in cases involving serious violations of human rights should thus be embraced and used as an important tool to protect the ISDS system.

VI. CONCLUSION

As demonstrated, the idea of the clean hands doctrine, rooted in both civil and common law traditions, is becoming an increasingly more interesting phenomenon in investment law and international law in general.

Following the recent decisions of the *Al-Warraq* and *Copper Mesa* cases, it seems apt to conclude that the clean hands doctrine is a separate and autonomous legal concept. This free-standing obligation has already been embraced by the international community in its form *non ex turpi causa non oritur actio,* and consequently as forming part of international law pursuant to Article 38(1)(c) of the *ICJ Statute*. Therefore, when the Claimant's cause of action is directly based from the beginning upon the claimant's own illegal conduct, the claim will be considered inadmissible.

On the other hand, in cases where the subject matter of the case only relates to illegalities, the doctrine in its manifestation *nemo auditur propriam turpitudinem allegans* will not apply because, for now, it has not been considered a principle of international law.

However, at least in the context of serious violations of human rights, the notion of truly international, or transnational, public policy will be able to make up for the lack of recognition of the clean hands in its broader formulation. Indeed, in cases involving human rights violations, even if merely related to subject matter of the case, the tribunal should dismiss the case on the ground of admissibility because doing otherwise would violate public policy and, in a parallel manner, deteriorate the legitimacy of the system as well.

Adopting this approach is even more important in recent times when the legitimacy of an essential mechanism, such as the ISDS, is called into question. Moreover, it is submitted that consistently dismissing the claims of investors who have engaged in human rights violations will not entail the same negative systemic implications which have plagued the world of corruption. Therefore, the application of the clean hands doctrine should be embraced with less skepticism, especially in that context of serious violations of law.

To conclude, it is the present author's firm belief that the recognition of a basic principle of justice such as the clean hands doctrine can highly benefit the whole ISDS system, and for this reason it should be applied firmly and consistently also in its form *nemo auditur propriam turpitudinem allegans*.