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(Un)Clean Hands in International Investment Arbitration: Some Cleaning Required?

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Abstract

The aim of the paper is to examine the so-called doctrine of clean hands frequently utilized as a defence in Investor-State arbitration procedures under international investment agreements in cases, where the law of the host State has been violated. The paper thus provides a historical and comparative context of the doctrine at hand stemming from the common law tradition. Furthermore, it scrutinizes the status of the doctrine under contemporary international law by analysing the scholar views, as well as the jurisprudence of international bodies.

Keywords

Clean Hands Doctrine; General Principles of Law; Investment Arbitration; Comparative Law.

1 Introduction

Cases of corruption, fraud, or other violations of host State laws are no exceptions in international investment disputes. Regularly, the scenarios may be summarized by a situation where the investor faces the potential direct, or indirect expropriation by a State that pursues the misconduct committed by the investor. More often, than not, such cases involve high stakes. In this regard the so-called doctrine of clean hands may seem as an ideal defence for the host State, barring any further claims of the corrupt, or fraudulent investor. However, the status of the doctrine throughout the history of international law, as well as in the international investment arbitration has been at the very least controversial. Therefore, the present paper aims to clarify

the formal status of the doctrine under international law and its involvement in the investment disputes, as compared to the roots of the doctrine. Hence, the paper will be dealing with the historical and theoretical foundations of the doctrine in a comparative perspective, analysing both common-law, as well as civil-law jurisdictions. Then it will proceed to assess the practice of international bodies and its status as a general principle of law under Art. 38 para. 1 letter c) of the International Court of Justice ("ICJ") Statute and finally the paper will compare the findings established in arbitral awards *vis-à-vis* the domestic law practice.

2 Historical and Comparative Context

While the doctrine of clean hands has received a well-deserved attention in the recent years, it must be acknowledged right at the outset that it is not a novel concept of law. It is then vital to firstly examine its historical and comparative roots, in order to show the fundamental mechanism of the doctrine, for the right assessment of its status under international law. It is the historical basis of the doctrine that may have a significant impact for the assessment whether the clean hands doctrine falls within the scope of sources recognized in Art. 38 para. 1 of the ICJ Statute,[1] as the earlier scholarship surprisingly resembles the approaches taken by investment tribunals with regards to conduct of investors in violation of the host State's law.

2.1 Common-Law

Frequently, the roots of the doctrine are attributed by scholars to Anglo-American legal tradition,[2] more specifically to equity,[3] where the doctrine

1 Statute of the International Court of Justice of 18 April 1946. Discussed below in Chapter 3.

2 KALDUŃSKI, M. Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration. *Polish Review of International and European Law,* 2015, Vol. 4, no. 2, p. 70; KREINDLER, R. Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine. In: HOBER, K. et al. (eds.). *Between East and West: Essays in Honour of Ulf Franke*. Huntington, New York: Juris, 2010, p. 317.

3 A specific body of law, originating in antiquity, furthermore developed in English law as developed as *"an alternative jurisdiction to furnish relief to those who did not have an adequate remedy at common law."* TITI, C. *The Function of Equity in International Law*. Oxford: Oxford University Press, 2021, p. 25.

operates as a positive defence.[4] Additionally, the clean hands doctrine has been also included in the so-called "Twelve Maxims of Equity"[5] coined by *Snell*, a leading authority on equity.[6] But it was not until the eighteenth century, when the maxim materialized into a specific formula defined by an otherwise unknown barrister *Richard Francis*, in his work of *Maxims of Equity* first published in 1728[7] as follows: *"He that hath committed iniquity shall not have equity."*[8]

The development was advanced by the end of eighteenth century, when the doctrine in its present shape has been famously adopted by the English Court of Exchequer,[9] where Chief *Baron Eyre* stipulated in *Dering vs. Earl of Winchelsea* that *"a man must come into a Court of Equity with clean hands"*.[10]

Whereas the origins of the clean hands doctrine are intertwined with the development of English law and it is perceived as the British legacy,[11] the practical reach has not been strictly limited to the United Kingdom. As a matter of fact, one of the most prominent American legal scholars, *Zechariah Chafee*, has paralleled the born of the maxim with the United States

4 SEIFI, J. and K. JAVADI. The Consequences of the "Clean Hands" Concept in International Investment Arbitration. *Asian Yearbook of International Law*, 2013, Vol. 19, no. 1, p. 126.

5 The Twelve Maxims of Equity serve as a non-exhaustive list of guiding principles governing the equity and are as follows: 1. Equity will not suffer a wrong to be without remedy; 2. Equity follows the law; 3. Where there is equal equity, the law shall prevail; 4. Where the equities are equal, the first in time shall prevail; 5 He who seeks equity must do equitably; 6. He who comes into equity must come with clean hands; 7. Delay defeats equities; 8. Equality is equity; 9. Equity looks to the intent rather than to the form; Equity looks on that as done which ought to be done; 11. Equity imputes an intention to fulfil an obligation; 12. Equity acts 'in personam'. For further reference, see FALCÓN Y TELLA, M. J. *Equity and Law*. Leiden: Martinus Nijhoff Publishers, 2008, pp. 64–65.

6 Ibid.

7 CHAFEE Jr., Z. Coming into Equity with Clean Hands I. *Michigan Law Review*, 1949, Vol. 47, no. 7, p. 880.

8 It was the second maxim coined by Francis, based on nine excerpts from equity cases. The second maxim, quoted under FRANCIS, R. *Maxims of Equity. Collected from and Proved by Cases out of the Books of the best Authority in the High Court of Chancery*. Dublin: Henry Watts, 1791, pp. 5–8.

9 An English court vested with the powers to adjudicate the matters of equity, see also BAKER, J. *Introduction to English Legal History*. Oxford: Oxford University Press, 2019, pp. 54–57.

10 Judgment of the Court of Exchequer of 1787, *Dering vs. Earl of Winchelsea,* Case 1 Cox Eq. 320, 29 Eng. Rep. 1185 (1787), .

11 ANENSON, T. L. *Judging Equity – The Fusion of Unclean Hands in U.S. Law*. Cambridge: Cambridge University Press, 2018, p. 23.

("US") Constitution, as it is exactly as old as the founding law of the US federal system.[12] At the same time, it must be stressed that it is not the only parallel with the legal development in the US. It is quite the opposite, considering that the doctrine of clean hands has also played a vital role in the jurisprudence of the US Supreme Court (known as SCOTUS) as well as lower federal courts. Subsequently, it has been considered as well-settled[13] and by the half of the twentieth century considered as *"so ancient an origin that extended analysis of its scope and effect would seem unnecessary"*[14] and has been almost verbatim referenced in the jurisprudence.[15]

Example of the said scholarship is, for instance, *John Pomeroy*, who underscored that the maxim of clean hands, rather a universal rule guiding and regulating the action of equity courts, applies *"whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine"*.[16] By this approach the court will then refuse to take any further steps and will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy. Moreover, according to *Pomeroy*, the principles involved in clean hands express the basic conceptions of equity jurisprudence, as it is based upon conscience and good faith.[17]

As regards the material scope of the doctrine, *Pomeroy* concedes that the principle is rather broad, but at the same time observes the limits thereto. Hence, in order to invoke the consequences of the equitable relief at hand, the misconduct must be connected with the matter in litigation. Accordingly, the court will not go outside the subject-matter of the case.[18]

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12 CHAFEE JR, Z. Coming into Equity with Clean Hands I. *Michigan Law Review*, 1949, Vol. 47, no. 7, p. 880.

13 Judgment of the U.S. Supreme Court of 1831, *Cathcart vs. Robinson*, Case 30 U.S. 264 (1831), p. 276.

14 Judgment of the Circuit Court of Appeals, Sixth Circuit of 6 December 1932, *General Excavator Co. vs. Keystone Driller Co.*, Case 62F.2d 48 (6th Cir. 1932), p. 50.

15 *"He who comes into equity must come with clean hands."* Judgment of the U.S. Supreme Court of 23 April 1945, *Precision Instrument Manufacturing Co. vs. Automotive Maintenance Machinery Co.*, Case 324 U.S. 806 (1945), p. 814.

16 POMEROY, J. N. *A Treatise on Equity Jurisprudence, as administered in the United States of America adapted for all the States, and to the Union of Legal and Equitable Remedies under the Reformed* Procedure. San Francisco: Bancroft-Whitney Company, 1918, pp. 737–738.

17 Ibid., p. 739.

18 Ibid., p. 741.

Finally, *Pomeroy* proceeds with the illustrations where the doctrine may be applied, which are surprisingly close to questions arising out of investment disputes. The first example is connected with a contract and the question whether a party has either obtained or performed a contract inequitably, or unconscientiously (for example, by taking undue advantage of one's position). In such circumstances, a court will refuse the claimant a remedy.[19] Another example worth of discussion is a fraud. It has been clarified that in a situation where the claim emanates from, or is dependent upon a claimant's prior fraud, the court will likewise deny any relief.[20] Very similar and common event, when the clean hands may be invoked is the illegality, where it is well-settled that court will not aid, either by enforcing the contract or obligation while it is yet executory, nor set it aside, or will not enable the party to recover the title to property.[21]

2.2 Civil-Law

Albeit, the previous space has been devoted principally to Anglo-American legal system, it is certainly correct to assume that the doctrine is not strictly limited to common-law jurisdictions. But the opposite is the case, seeing that the overall roots of the doctrine have been traced to antiquity and the Roman Law.[22]

Scholars and jurisprudence[23] usually refer to several legal maxims as the sources forming the unclean hands doctrine.[24] *De Alba* specifically names:

- *ex turpi causa non oritur actio* (an action does not arise from a dishonorable cause),

19 Ibid., pp. 743–744.
20 Ibid., pp. 745–749.
21 Ibid., p. 750.
22 NEWMAN R. A. *Equity and Law: A Comparative Study*. New York: Oceana Publications, 1961, p. 31.
23 These will be further referenced in particular attention to arbitral awards below.
24 It is worth mentioning that even the US Department of State referred to the maxim of *ex dolo malo non oritur action* in relation to the Pelletier case and reaffirmed that it is the principle of public policy. Additionally, it submitted that this principle has been applied by *"innumerable rulings under the Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States"*. This elaboration has been labelled as *"the most notable exposition and application of the principle"*. United States, Papers Relating to the Foreign Relations of the United States, For the Year 1887, Transmitted to Congress, With a Message of the President, June 26, 1888. *Document No. 385*, *Mr. Bayard to Mr. Thompson* [online]. 8 March 1887, p. 607 [cit. 20. 5. 2021]. Available at: https://history.state.gov/historicaldocuments/frus1887/d385

- *nemo auditur propriam turpidunem allegans* (no one can be heard to invoke his own turpitude) and
- *nemo ex suo delicto meliorem suam conditionem est facit* (no one can perfect his condition by a crime).[25]

Kałduński additionally provides the principle *nullus commodum capere potest de sua iniuria propria* (a party may not derive an advantage from its own unlawful acts) as a further embodiment of the clean hands doctrine.[26]

Building upon these principles, the attention should be brought also to civil law jurisdictions, where the doctrine of unclean hands can be derived from the provisions of Civil Codes, such as § 242 of the German Civil Code *(Bürgerliches Gesetzbuch)*,[27] § 6 of the Czech Civil Code *(Občanský zákoník)*,[28] as well as in the Draft Common Framework of Reference under the heading of "Not allowing people to rely on their own unlawful, dishonest or unreasonable conduct".[29]

Apart from the potential situations, where the clean hands doctrine may be applicable, it is important to highlight the role of the doctrine, which will be important with respect to balancing the interests of parties. The scholars have often stressed the fact that it enforces certain ethical ideals and values such as good faith, but most importantly, the principal objective of the doctrine is to protect the court and its judicial integrity, as well as to promote justice.[30] Would it be otherwise, the courts could risk a potential doubt as to the overall fairness of the framework.

25 DE ALBA, M. Drawing the line: addressing allegations of unclean hands in investment arbitration. *Revista de Direito Internacional*, 2015, Vol. 12, no. 1, p. 323.

26 KALDUŃSKI, M. Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration. *Polish Review of International and European Law,* 2015, Vol. 4, no. 2, p. 70.

27 An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration. See also WESTERMANN, H. et al. *Erman Bürgerliches Gesetzbuch*. Köln: Otto Schmidt, 2014, pp. 782–837.

28 No person may benefit from their dishonest or illegal act. LAVICKÝ, P. § 6. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654)*. Praha: C. H. Beck, 2014, p. 72.

29 BAR, C. von et al. *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)*. London: Oxford University Press, 2010, p. 67.

30 LAWRENCE, W. J. Application of the Clean Hands Doctrine in Damage Actions. *Notre Dame Law Review*, 1982, Vol. 57, no. 4, pp. 674–675.

3 Doctrine of Cleans Hands and Its Status Under International Law

The next important question to address is the status and role of the clean hands doctrine under international law. More specifically, whether the doctrine can be considered as a source of international law falling within the scope of Art. 38 para. 1 of the ICJ Statute.[31]

Firstly, to the very best knowledge of the author, at the present time, no international treaty prescribes the doctrine of unclean hands as a norm of international law. Furthermore, the status of the doctrine as an international custom fulfilling the criteria of state practice and *opinio juris* has been rejected as well.[32]

3.1 General Principle of Law?

As will be shown, the most controversial consideration of the clean hands doctrine is established under Art. 38 para. 1 letter c) of the ICJ Statute as a general principle of law recognized by civilized nations.

Although no watertight definition of general principles of law exists, *Pellet* and *Müller* point out that there is little doubt that they are unwritten legal norms of a wide-ranging character, they must be recognized in the municipal laws of States, and transposable at the international level.[33] The *travaux préparatoires* of the Statute also point towards the conclusion that those principles envisaged by Art. 38 para. 1 letter c) of the ICJ Statute are accepted by all nations in *foro domestico*.[34] *Gutteridge* has emphasises that among those principles that have been already applied are the doctrine of unjust enrichment, estoppel, and general principles of equity.[35] As was

31 Art. 38 para. 1 of the ICJ Statute is generally considered as listing the formal sources of international law. See THIRLWAY, H. *The Sources of International Law*. Oxford: Oxford University Press, 2019, p. 8.

32 BALCZERAK, F. *Investor – State Arbitration and Human Rights*. Leiden/Boston: Brill – Nijhoff, p. 146.

33 PELLET, A. and D. MÜLLER. Article 38. In: ZIMMERMAN, A. et al. *The Statute of the International Court of Justice (3rd Edition): A Commentary*. Oxford: Oxford University Press, 2019, p. 923.

34 Ibid., p. 927.

35 GUTTERIDGE, H. C. The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice. *Transactions of the Grotius Society, Problems of Public and Private International Law*, 1952, Vol. 38, p. 125.

already pointed out, the doctrine of clean hands retains the main attributes of equity maxims, thus could be potentially considered as a general principle of law in the same line. What was in this line, almost prophetically, put forth by *Bassiouni* is that *"as the world's interdependence increases, there will doubtless be greater reliance on international law as a means to resolve a variety of issues which neither conventional nor customary international law is ready to meet"*.[36] He then proceeded to enumerate, in his view, four most pressing areas of law, where the employment of general principles of law will be influential, among them the human rights, the environment, international and transnational criminality and last, but not least the economic development.[37]

Undoubtedly, the importance of the general principles of law as foreseen by Art. 38 para. 1 letter c) of the ICJ Statute has been acknowledged in association with the field of foreign investment and especially within the relationships between host States and investors.[38]

Building upon the fact that the sources of general principles of law are emerging from common cultural and legal traditions[39] the methodology for identifying their exact scope and content should be based on comparative law, in particular by looking at two legal orders, common-law and civil-law.[40]

Despite the doctrine enjoys the recognition in *foro domestico*, as has been stressed above, a considerable part of the controversy associated with the clean hands doctrine is stemming from international jurisprudence, in particular, from the case-law of the "World Court" and its predecessor.

3.2 Jurisprudence of the PCIJ and the ICJ

The maxim has been referred to already by the judges of the Permanent Court of International Justice ("PCIJ"), in the *Meuse Water Case*.[41] Specifically,

36 BASSIOUNI, M. C. A Functional Approach to "General Principles of International Law." *Michigan Journal of International Law*, 1990, Vol. 11, no. 3, p. 769.

37 Ibid.

38 GAZZINI, T. General Principles of Law in the Field of Foreign Investment. *The Journal of World Investment & Trade*, 2009, Vol. 10, p. 109.

39 Ibid., p. 133.

40 ELLIS, J. General Principles and Comparative Law. *European Journal of International Law*, 2011, Vol. 22, no. 4, p. 957.

41 This elaboration has been labelled as *"the most notable exposition and application of the principle"*, compare SCHWEBEL, S. Clean Hands, Principle, § 2. *Max Planck Encyclopedia of Public International Law* [online]. March 2013 [cit. 20. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18?rskey=11WN80&result=1&prd=MPIL

judge *Manley Hudson* listed several maxims of equity and concluded that *"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"*.[42] This argument was supported by the fact that the utilisation of equity under international law is not strictly limited by deciding case *ex aequo et bono*.[43]

In addition to that, judge *Anzilotti* argued that *"principle inadimplenti non este adimplendum is so just, so equitable, so universally recognized, that it must be applied in international relations also"* and concluded that it does indeed fall within the scope of general principles of law.[44] Interestingly though, his views remained consistent, as in the earlier case concerning the *Legal Status of Eastern Greenland* he concluded his observations by stating that the claim of Norwegian government should be rejected, as *"the unlawful act cannot serve as the basis of an action at law"*.[45]

Apart from several blinks of light in the jurisprudence of the PCIJ, the jurisprudence gained momentum in subsequent judgments of the ICJ and has been relied on by the States in several contentious cases and advisory opinions. For instance, in *Nauru vs. Australia,* the ICJ dealt with an argument referring to principles of good faith with a consequence of declining to hear the case.[46] Furthermore, in *Oil Platforms*, the US suggested to dismiss the claim at the merits stage and to refuse the relief sought by Iran, based on its allegedly unlawful conduct.[47] Even more specifically, in the *Wall Advisory Opinion*, Israel referred to the doctrine of clean hands, which in its own words provided *"a compelling reasons that should lead the Court to refuse the General Assembly request"*.[48] Finally, the doctrine has been invoked also

42 Individual Opinion by Mr. Hudson of 28 June 1937, Case *The Diversion of Water from the Meuse (Netherlands vs. Belgium)*, PCIJ (Ser. A/B) No. 70, p. 77.

43 Ibid., p. 76; Compare also LAUTERPACHT, H. *Private Law Sources and Analogies of International Law*. London, New York: Green and Co. Ltd., 1927, p. 63.

44 Dissenting Opinion of M. Anzilotti of 28 June 1937, Case *The Diversion of Water from the Meuse (Netherlands vs. Belgium)*, PCIJ (Ser. A/B) No. 70, p. 50.

45 Dissenting Opinion of M. Anzilotti of 5 April 1933, Case *Legal Status of Eastern Greenland (Denmark vs. Norway)*, PCIJ (Ser. A/B) No. 53, p. 95.

46 Judgment of the ICJ of 26 June 1992, Case *Phosphate Lands in Nauru (Nauru vs. Australia)*, § 37.

47 Judgment of the ICJ of 6 November 2003, Case *Oil Platforms (Islamic Republic of Iran vs. United States of America)*, § 27-30.

48 Advisory Opinion of 9 July 2004, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, § 63-64.

in the currently pending cases,[49] but the ICJ has refrained from taking a conclusive position.[50]

Notwithstanding these facts, the individual judges of the ICJ provided in their dissenting opinion a guidance on the applicability of the doctrine at hand. Such views ranged from tacit employment of the clean hands doctrine,[51] *in abstracto* consideration,[52] or a full-fledged usage in the argumentation.[53]

Probably the clearest and most referenced elaboration up to date has been made by judges *Schwebel* and *Weeramantry*. The former has submitted in the *Nicaragua* case that Nicaragua should have been deprived of the *locus standi* due to its own illegal conduct, as it *"has not come to Court with clean hands"*.[54] *Schwebel* grounded his arguments in the already mentioned jurisprudence of the PCIJ,[55] principles stemming from common-law and civil law system based on Roman law[56] and scholar views.[57] By the same token, judge *Weeramantry* argued in *Legality of Use of Force* that the "clean hands" principle has been well recognized in all legal systems.[58]

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49 See, for example, Preliminary Objections Judgment of 2 February 2017, Case *Maritime Delimitation in the Indian Ocean (Somalia vs. Kenya)*, ICJ, § 139–140; Preliminary Objections Judgment of 13 February 2019, Case *Certain Iranian Assets (Islamic Republic of Iran vs. United States of America)*, ICJ, § 116-125.

50 *"Without having to take a position on the "clean hands" doctrine, the Court considers that …"* Preliminary Objections Judgment of 13 February 2019, Case *Certain Iranian Assets (Islamic Republic of Iran vs. United States of America)*, ICJ, § 122.

51 *"The Applicant itself committed many actions which caused enormous damage to the Islamic Republic of Iran, the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation."* Dissenting Opinion of Judge Morozov of 24 May 1980, Case *United States Diplomatic and Consular Staff in Tehran (United States of America vs. Iran)*, ICJ, § 5.

52 Separate Opinion of Judge Shahabuddeen of 14 June 1993, ICJ, Case *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark vs. Norway)*, p. 195.

53 Dissenting Opinion of Judge ad hoc Van den Wyngaert of 14 February 2002, Case *Arrest Warrant of 11.4.2000 (Democratic Republic of the Congo vs. Belgium)*, ICJ, § 35.

54 Dissenting Opinion of Judge Schwebel, Case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, ICJ, § 268.

55 Ibid., § 269.

56 Ibid.

57 Ibid., § 273, referencing Sir Gerald Fitzmaurice and Oscar Schachter.

58 Dissenting opinion of Vice-President Weeramantry of 2 June 1999, Case *Legality of Use of Force (Serbia and Montenegro vs. Belgium)*, ICJ, P. 184.

3.3 Contributions of the ILC

No less important contribution to the controversy linked to the doctrine of clean hands and its status under international law has been elaborated by the International Law Commission ("ILC"). More specifically, in connection with two prominent topics – State responsibility and diplomatic protection.

With respect to the codification process resulting in the adoption of Draft Articles on State Responsibility for Internationally Wrongful Acts[59] the doctrine has been heavily criticised by several prominent members of the ILC. Firstly, *James Crawford* was of the view that the maxim such as the "clean hands" was new and vague,[60] hence he did not see the reason to include the doctrine in the draft articles, as its existence was rather disputed.[61] In this regard, the Special Rapporteur has taken the view of Rousseau that the doctrine was not a part of customary international law.[62] Another proponent of the restrictive view was *Gerhard Hafner*, who believed in the same line that the doctrine was not a part of general international law at all.[63] At the same time, these views were opposed by *Alain Pellet* who considered the doctrine as a principle of positive international law.[64]

The second time the doctrine has been considered by the ILC, was in connection with the question of diplomatic protection. The doctrine has posed some challenges to the members of the ILC,[65] primarily due to its

59 The so-called ARSIWA was on the agenda of the ILC since 1949, finally endorsed under Special *Rapporteur James Crawford* who has recently passed away.

60 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Documents of the fifty-first session*. Vol. II, Part 1A/CN.4/SER.A/1999/Add.1 (Part 1), 23 July 1999, § 335, p. 83.

61 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Summary records of the meetings of the fifty-first session*. Vol. I, A/CN.4/SER.A/1999, 23 July 1999, § 39, p. 142.

62 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Documents of the fifty-first session*. Vol. II, Part 1A/CN.4/SER.A/1999/Add.1 (Part 1), 23 July 1999, § 336, p. 83.

63 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Summary records of the meetings of the fifty-first session*. Vol. I, A/CN.4/SER.A/1999, 23 July 1999, § 55, p. 167.

64 Ibid., § 66, p. 168.

65 Sir *Ian Brownlie* expressed concerns that the clean hands doctrine was not part of positive international law. INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Summary records of the meetings of the fifty-seventh session*. Vol. I, A/CN.4/SER.A/2005, 5 August 2005, § 8, p. 108.

distant link to a diplomatic protection.[66] Nevertheless, what must be stressed is the fact that the ILC recognized the importance of the clean hands doctrine in international law,[67] and in particular, the Special Rapporteur *John Dugard* submitted that *"it was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands"*.[68]

3.4 Other Bodies

It is necessary to underline the fact that the ICJ and the ILC were not the only bodies, where the doctrine of clean hands has been brought into light. The principle has been also triggered in *amicus curiae* briefs,[69] the Prosecutor,[70] before the International Criminal Court. In the same line, the doctrine has been relied on by several judges of the European Court of Human Rights ("ECtHR").[71]

Finally, a similar legal concept has been also utilized by the Court of Justice of the European Union ("CJEU") in *Courage* case, where the CJEU ruled that *"under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past,*[72] *a litigant should not profit from his own unlawful conduct, where this is proven"*.[73] Exactly that case has been deemed

66 INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission. Report of the Commission to the General Assembly on the work of its fifty-seventh session.* Vol. II, Part 2, A/CN.4/SER.A/2005/Add.l (Part 2), 5 August 2005, § 226–236, pp. 50–52.

67 Ibid., § 226, p. 50.

68 Ibid., § 236, p. 52.

69 Submissions Pursuant to Rule 103 (The Israel Forever Foundation) of 16 March 2020, ICC, Pre-Trial Chamber I, Case No. ICC-01/18, Situation in the Palestinian Authority, § 71, 75, 77, 79.

70 Prosecution's response to Mathieu Ngudjolo Chui's request for compensation of 18 September 2015, *Prosecutor vs. Mathieu Ngudjolo Chui*, ICC, Trial Chamber II, Case No. ICC-01/04-02/12, § 5.

71 Separate Opinion of Judge Morenilla of 13 July 1995, *Van der Tang vs. Spain*, ECtHR, Case No. 19382/92, § 6; Separate Opinion of Judge Bonello of 18 January 2001, *Chapman vs. The United Kingdom*, ECtHR, Case No. 27238/95, § 5; Partly Dissenting Opinion of Judge Pellonpää, joined by Judge Zupančič, of 22 March 2001, *K.-H. W. vs. Germany*, ECtHR, Case No. 37201/97, p. 47.

72 The CJEU referred to § 10 of the Judgment of the CJEU of 7 February 1973, *Commission vs. Italy*, Case C-39/72.

73 § 31 of the Judgment of the CJEU of 20 September 2001, *Courage Ltd vs. Bernard Crehan and Bernard Crehan vs. Courage Ltd and Others*, Case C-453/99.

to include the doctrine of clean hands as a general principle,[74] or at least as a "chameleonic principle".[75]

After consideration of the diverse opinions raised either by the multiple international bodies, one may reach the conclusion that none of the aforementioned sources provide an unequivocal inference that the doctrine should be considered as a general principle of law under Art. 38 para. 1 letter c) of the ICJ Statute. What may be satisfactorily concluded is that in light of the above, the question whether the doctrine should be considered as a general principle of law is still unsettled.[76] Neither the ICJ, nor the ILC has expressly recognized the doctrine of clean hands. The same applies for other international judicial organs, with a minor exception of the CJEU, however the judgment has been issued in the context of competition law. At the same time, it must be stressed that none of the international bodies have expressly refused its application, even though they were provided with multiple opportunities to do likewise.[77]

4 Investment Arbitration as a Possible Forum of Application?

The confusion pertaining to the character of clean hands doctrine becomes even more clear in connection with the international investment arbitration, as it is not a foreign concept in this field. It is no surprise, since the doctrine represents an effective strategic defence for the States,

74 GROUSSOT, X. and H. H. LIDGARD. Are There General Principles of Community Law Affecting Private Law? In: BERNITZ, U., J. NERGELIUS and C. CARDNER (eds.). *General Principles of EC Law in a Process of Development: Reports from a conference in Stockholm, 23-24 March 2007, organised by the Swedish Network for European Legal Studies*. Alphen aan den Rijn: Kluwer Law International, 2008, p. 162.

75 HESSELINK, M. W. The General Principles of Civil Law: Their Nature, Roles and Legitimacy. In: LECZYKIEWICZ D. and S. WEATHERILL (eds.). *The Involvement of EU Law in Private Law Relationships*. Oxford/Portland: Hart Publishing, 2013, pp. 161–162.

76 SCHWEBEL, S. Clean Hands, Principle. *Max Planck Encyclopedia of Public International Law* [online]. March 2013, § 3 [cit. 20. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18?rskey=11WN80&result=1&prd=MPIL; DUMBERRY, P. The Clean Hands Doctrine as a General Principle of International Law. *Journal of World Investment & Trade*, 2020, Vol. 21, no. 4, p. 492.

77 MOLOO, R. A Comment on the Clean Hands Doctrine in International Law. *Inter Alia: University of Durham Student Law Journal*, 2010, Vol. 7, no. 1/2, p. 43.

early in the proceedings, either connected to the issue of jurisdiction or the admissibility before the tribunal. In this regard, the doctrine has been subject to substantial criticism as to its overall fairness and balance of rights and obligations.[78]

The application of the doctrine by arbitral tribunals has been explained by the scholars as two-fold.[79] Firstly, it may be represented in the bilateral investment treaties ("BITs") in form of the *"in accordance with host State law"* provision and secondly, as a general principle of law.[80]

As was suggested by some authors, the first argument pointing towards the recognition of clean hands doctrine is the investment legality requirement embodied in many BITs.[81] The concrete obligation is usually framed in a way that the investment must be made in accordance with law of the host state.[82] It may be observed that the treaties often include broad definitions of investments, ranging from tangible assets to contractual obligations. The wording and structural placement of the legality requirement

78 HABAZIN, M. Investor Corruption as a Defence Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration. *Cardozo Journal of Conflict Resolution*, 2017, Vol. 18, no. 3, p. 810.

79 ZWOLANKIEWICZ, A. The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes? *ITA in Review*, 2021, Vol. 3, no. 1, p. 9; see also DE ALBA, M. Drawing the line: addressing allegations of unclean hands in investment arbitration. *Revista de Direito Internacional*, 2015, Vol. 12, no. 1, p. 324.

80 Several scholars have considered the doctrine as a general principle of law in connection with investment disputes, see, for instance, KREINDLER, R. Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine. In: HOBER, K. et al. (eds.). *Between East and West: Essays in Honour of Ulf Franke*. Huntington, New York: Juris, 2010, p. 317; See also DUMBERRY, P. The Clean Hands Doctrine as a General Principle of Law. *Journal of World Investment & Trade*, 2020, Vol. 21, no. 4, pp. 489–527.

81 DUMBERRY, P. and G. DUMAS-AUBIN. The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law. *Transnational Dispute Management*, 2013, Vol. 10, no. 1, p. 4; MOLOO, R. A Comment on the Clean Hands Doctrine in International Law. *Inter Alia: University of Durham Student Law Journal,* 2010, Vol. 7, no. 1/2, p. 7.

82 It typically involves a similar wording: *"the investment is made and maintained in accordance with the laws and regulations of the Host State"*, Art. 1 para. 2 Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, 22.09.2016; *"The term 'investment' means any kind of asset held or invested either directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws"*, Art. 1 letter d) Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, 27. 7. 2010.

in each BIT may differ,[83] nevertheless, by the requirement of legality, the definition of investment is inextricably linked to the scope of BITs. Consequently, the protection afforded by the BIT is then applicable only to those investments that comply with the domestic law of the host State. In cases, where the States opt to defend the claims by relying on the legality of the investments, the tribunals assess the issue in a two-fold way. Firstly, the majority of tribunals address the legality as the question of jurisdiction.[84] Quite a frequent argument coming under the category of jurisdiction is the State's consent to arbitrate, which is an essential precondition for the proceedings.[85]

Despite the fact that many BITs have already incorporated the legality clause and its presence has become more of a standard than the exception, it is important to also examine a situation, when a treaty does not specifically refer to equivalent prerequisites.

The investment tribunals have against this background formed a view that if a treaty does not expressly mention the legality criterion, it may still be implicitly found to be present. A noteworthy example is the case of *Phoenix Action Ltd. vs. the Czech Republic*, where the tribunal held that the *"States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws* […] *and it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT".*[86] The ICSID[87] Tribunal supported its conclusion by referencing the *Plama vs. Bulgaria* case,

83 It has been ruled that whether the investment falls within the scope of the BIT must be examined not only by relying on the definition of investment *per se*, but also in the context of other provisions of such treaty. Award of the ICSID of 2 August 2006, *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, Case No. ARB/03/26, § 197; See also MOUAWAD, C. and J. BEESS UND CHROSTIN. The illegality objection in investor-state arbitration. *Arbitration International,* 2021, Vol. 37, no. 1, pp. 4–6.

84 Award of the ICSID of 2 August 2006, *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, Case No. ARB/03/26, § 264.

85 Decision on Jurisdiction of the ICSID of 24 February 2014, *Churchill Mining PLC and Planet Mining Pty Ltd vs. Republic of Indonesia*, Case No. ARB/12/14 and 12/40, § 291.

86 Award of the ICSID of 15 April 2009, *Phoenix Action, Ltd. vs. The Czech Republic*, Case No. ARB/06/5, § 101.

87 International Centre for Settlement of Investment Disputes.

which reached a similar conclusion in association with the Energy Charter Treaty that did not contain a legality requirement.[88]

Under that guidance, it seems that the doctrine of clean hands would be able to operate in a variety of scenarios. As was indicated with respect to the comparative analysis and historical roots of the doctrine, it is well suited to address the issues of fraud and corresponding violations of law. Apart from proposals to address violations of human rights,[89] it may be shown on cases related to fraudulent conduct of investor.

The tribunal in the already mentioned case of *Plama* reasoned its finding in light of the introductory note, stating that fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues[90] and more importantly, granting the protection to an investment obtained by deceitful conduct would be contrary not only to the principle *nemo auditur propriam turpitudinem allegans*, but also to international public policy,[91] principle of good faith[92] and *ex turpi causa* defence.[93]

A careful observer would immediately notice that those maxims are forming a demonstration of unclean hands doctrine. The corresponding principles also served as a basis for another landmark decision, *Inceysa vs. El Salvador*, where the tribunal firstly observed that the investment made by Inceysa in the territory of El Salvador via misrepresentation, violated the principle of good faith.[94] Secondly, it must be stressed that the tribunal expressly based its award upon general principles of law,[95] among which the principle *nemo auditur propriam turpitudinem allegans* was found to be violated.[96] However the tribunal also considered a spectrum of other principles that were

88 Ibid, § 101; Award of the ICSID of 27 August 2008, *Energy Charter Treaty (Plama Consortium Ltd. vs. Bulgaria)*, Case No. ARB/03/24, § 138–139.

89 DUMBERRY, P. and G. DUMAS-AUBIN. The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law. *Transnational Dispute Management*, 2013, Vol. 10, no. 1, p. 8-10.

90 Award of the ICSID of 27 August 2008, *Energy Charter Treaty (Plama Consortium Ltd. vs. Bulgaria)*, Case No. ARB/03/24, § 139.

91 Ibid., § 143.

92 Ibid., § 144.

93 Ibid., § 146.

94 Award of the ICSID of 2 August 2006, *Inceysa Vallisoletana, S.L. vs. Republic of El Salvador*, Case No. ARB/03/26, § 234.

95 Ibid., § 229.

96 Ibid., § 240.

applicable to that case,[97] and determined that *"the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, nobody can benefit from his own fraud"*.[98]

Likewise, the application may be observed in the scenarios of corruption, for example, in the *Word Duty Free* case, where the tribunal relied on the principle *ex turpi causa non oritur actio*[99] and sharply summarized that *"bribery is contrary to international public policy of most, if not all, States"*.[100] It has furthermore touched upon the question of public policy and ruled that *"the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world"*.[101] Such claim then once again resembles the objectives of the clean hands doctrine discussed above.

Moreover, the doctrine has been expressly mentioned by the tribunal in *Fraport*, a case, where the tribunal established that the *"clean hands doctrine, or doctrines to the same effect"* were rules of international law[102] in connection with deliberate violations of legal provisions of the host State.[103]

Unfortunately, the present state of international arbitral law is not that clear, as several other awards point to the other direction. In *Guyana vs. Suriname*, the Permanent Court of Arbitration ("PCA") has ruled that the use of the doctrine has been considered as sparse and its application inconsistent.[104] Secondly, the arbitral tribunal in *Niko Resources* case, similarly

97 Ibid., § 240, Among them were a) *"Ex dolo malo non oritur action"* (an action does not arise from fraud); b) *"Malitiis nos est indulgendum"* (there must be no indulgence for malicious conduct); c) *"Dolos suus neminem relevat"* (no one is exonerated from his own fraud); d) *"In universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur"* (in general, the rule must be that fraud shall be always punished); e) *"Unusquique doli sui poenam sufferat"* (each person must bear the penalty for his fraud); f) *"Nemini dolos suusprodesse debet"* (nobody must profit from his own fraud).

98 Ibid., § 242.

99 Award of the ICSID of 4 October 2006, *World Duty Free Company Ltd. vs. The Republic of Kenya*, Case No. ARB/00/7, § 179.

100 Ibid., § 157.

101 Ibid., § 181.

102 Award of the ICSID of 10 December 2014, *Fraport Frankfurt Airport Services Worldwide vs. Philippines*, Case No. ARB/11/12, § 328.

103 DE ALBA, M. Drawing the line: addressing allegations of unclean hands in investment arbitration. *Revista de Direito Internacional*, 2015, Vol. 12, no. 1, p. 329.

104 Award of the PCA of 17 September 2007, Case *Guyana vs. Suriname*, § 418.

as *World Duty Free* concerning the crime of corruption, held that *"the question whether the principle of clean hands forms part of international law remains controversial and its precise content is ill defined"*.[105] Finally, in *Yukos*, the tribunal outright rejected the hypothesis that doctrine of clean hands constitutes a general principle of law.[106] Notwithstanding the fact that the arbitral award has been subject to intense academic scrutiny, the author submits to the view expressed by *Dumberry* that that the reasoning has been to some extent confusing, at least with regards to the terminology employed.[107]

5 Concluding Remarks

Despite the fact that the clean hands doctrine has been wading through the waters of international law for more than a century and has been re-emerging from time to time, the fact remains the same. The jurisprudence related to its applications seems miles away from the cleanness indicated by the name of the doctrine. The author of the paper takes the view that the doctrine of clean hands fulfils all the necessary criteria for it to constitute a general principle of law under Art. 38 para. 1 letter c) of the ICJ Statute. It has been shown by the comparative analysis that its utilisation is not strictly limited to common-law jurisdictions, but operates as well in the civil-law system. While the arbitral awards discussed in the present paper (with some exceptions) do not explicitly refer to the doctrine, the applied maxims correspond to those usually attributed to clean hands doctrine. Last but not least, the objectives and applicable scenarios in the investment arbitration cover those schemes theoretically developed within the framework of clean hands doctrine. Albeit, the evident lack of consensus among scholars, arbiters and judges may persist, the issues connected with the scope of the present paper only highlights the importance of comparative law and the possible challenges it may face in the upcoming years.

105 Decision on Jurisdiction of the ICSID of 19 August 2013, *Niko Resources (Bangladesh) Ltd vs. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited, Bangladesh Oil Gas and Mineral Corporation*, Case No. ARB/10/11 and Case No. ARB/10/18, § 477.

106 Final Award of the PCA of 18 July 2014, *Hulley Enterprises (Cyprus) Limited vs. Russian Federation*, Case No. AA 226, § 1363.

107 DUMBERRY, P. The Clean Hands Doctrine as a General Principle of International Law. *Journal of World Investment & Trade*, 2020, Vol. 21, no. 4, p. 501.

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