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FINDING CLARITY AMIDST CONFUSION

Cleaning up the Clean Hands Doctrine in International Investment Law

The international investment regime has come a long way since its inception. However, it has also come under increasing fire for, amongst others, conflicting investor–State tribunal decisions and the corresponding lack of legal certainty. These, in turn, adversely affect the attractiveness of the international investment regime. A prime example would be investor–State tribunals' inconsistent treatment of the clean hands doctrine, which has generated a great deal of confusion. This article hopes to provide clarity on the applicability, scope, and effect of the doctrine under international investment law through a thorough examination of the existing jurisprudence.

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I. Introduction

1 Singapore is no stranger to investor–State arbitration. Recognised as a "modern and cost-efficient arbitration centre" with a "highly regarded" judiciary and a "supportive attitude towards arbitration",[2] Singapore has increasingly been chosen as the seat of arbitration for numerous investor–State arbitration disputes.[3] In the past half a decade alone, Singapore's apex court has adjudicated two separate disputes relating to investor–State

1 This article was heavily developed from a directed research paper that was written under the supervision of Mr Mahdev Mohan and Assoc Prof Chen Siyuan during the author's final undergraduate year at Singapore Management University. The author thanks both Mr Mohan and Prof Chen for their insights, guidance, and time. The author would also like to convey his appreciation to Low Yan Lin and Low Jia Na (who, for avoidance of doubt, are unrelated) for their comments on an earlier draft of this article. The author also wishes to thank his anonymous referee for his/her helpful comments. Any errors and omissions, however, remain the author's alone.

2 *Philip Morris Asia Ltd v The Commonwealth of Australia* UNCITRAL, PCA Case No 2012-12, Procedural Order No 3: Regarding the Place of Arbitration (26 October 2012) at paras 18 and 21.

3 See White & Case LLP and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*.

arbitration.[4] With more than 3,000 international investment agreements and almost 1,000 registered investment dispute settlement cases to date,[5] the modern international investment regime looks poised to continue the remarkable growth it has enjoyed since the establishment of the International Centre for Settlement of Investment Disputes ("ICSID") in 1966. The Singapore courts are likely to continue encountering cases involving international investment law elements in future, and will thus also have to grapple with the uncertainties that continue to plague investor–State disputes. Given the absence of a doctrine of binding precedent or *stare decisis* in investor–State arbitration,[6] conflicting decisions on international investment law are not uncommon.[7] From a pragmatic perspective, this lack of certainty not only adversely affects the attractiveness of the international investment regime,[8] but also poses a problem to any court or tribunal seeking to resolve disputes involving international investment law.

2 This article hopes to shed light on one legal principle in particular which has faced inconsistent treatment at the hands of, amongst others, investor–State tribunals – the clean hands doctrine. In recent times, there has been an upward trend of states embroiled in investor–State disputes attempting to rely on the clean hands doctrine as a shield against investors' claims.[9] This is unsurprising, given that it has become increasingly

4 See *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 and *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263.

5 United Nations Conference on Trade and Development, "Investment Policy Hub" website https://investmentpolicy.unctad.org/ (accessed 14 December 2019).

6 Christoph Schreuer & Matthew Weiniger, "A Doctrine of Precedent?" in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds) (Oxford University Press, 2008) at p 1189; United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.142 (18 September 2017) at para 37.

7 See Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73(4) Fordham L Rev 1521; Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?" (2018) 17(1) *Chinese Journal of International Law* 137.

8 Louis Wells, "Backlash to Investment Arbitration: Three Causes" in *The Backlash against Investment Arbitration: Perceptions and Reality* (Michael Waibel *et al* eds) (Wolters Kluwer, 2010) at p 341; United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.142 (18 September 2017) at para 31.

9 See *Yukos Universal Ltd (Isle of Man) v The Russian Federation* UNCITRAL, PCA Case No AA 227; *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Co Ltd* ICSID Case No ARB/10/11 and 10/18; *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24; *Hesham Talaat*

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expensive to be embroiled in investor–State disputes.[10] States not only have to grapple with potential damages to be paid should the arbitral tribunal rule in the investors' favour; there are also other costs such as legal costs, arbitrators' fees, administration fees of arbitration centres, and the costs incurred for bringing in expert witnesses.[11] To illustrate, in *Plama Consortium Ltd v Republic of Bulgaria*[12] ("*Plama*"), the legal costs alone amounted to US$17.8m;[13] in *Yukos Universal Ltd (Isle of Man) v The Russian Federation*[14] ("*Yukos*"), the claimants sought damages amounting to a whopping US$114.174bn.[15] The high costs of being involved in investor–State arbitration have even contributed to what commentators have called a "backlash" against the international investment regime over the past decade.[16] The clean hands doctrine is thus part of the arsenal of strategies that states have employed in a bid to reduce the high costs of investor–State arbitration inflicted on their taxpayers.[17]

3 However, it remains unclear if the clean hands doctrine even exists as a rule of public international law to begin with. Moreover, even if the doctrine is a rule of public international law (which this article submits that it is), the exact form and contents of the doctrine remain unclear. This article thus seeks to clarify the existence, scope, and effects of the doctrine. Part II[18] establishes that the clean hands doctrine is a rule of public international law. Specifically, this article establishes

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M Al-Warraq v Republic of Indonesia UNCITRAL; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB/11/12; *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40; *Glencore Finance (Bermuda) Ltd v Plurinational State of Bolivia* UNCITRAL, PCA Case No 2016-39.

10 United Nations Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (2010) at pp 16–17; United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.142 (18 September 2017) at paras 23–25.

11 United Nations Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (2010) at pp 16–17.

12 ICSID Case No ARB/03/24.

13 United Nations Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (2010) at p 17.

14 UNCITRAL, PCA Case No AA 227.

15 *Yukos Universal Ltd (Isle of Man) v The Russian Federation* UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) at para 4.

16 Nigel Blackaby & Caroline Richard, "*Amicus Curiae*: A Panacea for Legitimacy in Investment Arbitration?" in *The Backlash against Investment Arbitration: Perceptions and Reality* (Michael Waibel *et al* eds) (Wolters Kluwer, 2010) at p 255; Susan Franck, "Rationalising Costs in Investment Treaty Arbitration" (2011) 88(4) Wash U L Rev 769 at 772.

17 Christoph Scheurer, "The Future of International Investment Law" in *International Investment Law* (Marc Bungenberg *et al* eds) (Nomos, 2015) at pp 1908–1911.

18 See paras 4–24 below.

that the clean hands doctrine is a general principle of law and is thus applicable to investor–State disputes where public international law is an applicable law. Part III[19] proposes a framework for applying the clean hands doctrine in investor–State disputes. Part IV[20] takes a closer look at the recent decision of *Churchill Mining plc v Republic of Indonesia*[21] ("*Churchill Mining*"), applying this article's proposed framework to the facts of *Churchill Mining*. Finally, this article provides a few closing remarks in Part V.[22]

II. Clean hands doctrine as a general principle of law

4 Lawyers from both common law and civil law jurisdictions will no doubt be familiar with equivalents of the clean hands doctrine under their respective municipal laws.[23] The gist of the clean hands doctrine is simple – where a claimant is guilty of certain misconduct, the doctrine precludes the claimant from obtaining relief against the respondent. Any description of the doctrine is best kept generic at this juncture, given that there is presently no universally accepted definition of the clean hands doctrine in public international law.[24] In the context of investor–State arbitration, the doctrine, if successfully invoked by the State, would preclude a claimant investor who is guilty of misconduct from obtaining relief against the respondent state. Naturally, one would have various questions as to the precise content of the doctrine (for example, what type(s) of misconduct would allow a state to invoke the doctrine? Must the claimant and respondent owe each other obligations of a reciprocal nature for the doctrine to operate?); these questions will be addressed below.[25] The more pertinent issue is that the status of the clean hands doctrine as a rule of public international law remains murky. It is uncontroversial that investor–State tribunals are able to apply rules of public international law (assuming public international law is an applicable law to the dispute).[26]

19 See paras 25–63 below.
20 See paras 64–71 below.
21 ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016).
22 See paras 72–74 below.
23 This precise fact militates in favour of the clean hands doctrine's existence as a rule of public international law, as will be elaborated on below.
24 *Delimitation of the Maritime Boundary (Guyana v Suriname)* (Award) (2007) 30 RIAA 1 at 135.
25 See paras 25–63 below.
26 Florian Grisel, "The Sources of Foreign Investment Law" in *The Foundations of International Investment Law: Bringing Theory into Practice* (Zachary Douglas, Joost Pauwelyn & Jorge Viñuales eds) (Oxford University Press, 2014) at p 215. See, *eg*, *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* ICSID Case No Arb/99/6, Award (12 April 2002) at para 167, where the tribunal referred to and applied the duty to mitigate damages as rule of public international law.

But is the clean hands doctrine even a rule of public international law in the first place?

5 Under Art 38(1) of the Statute of the International Court of Justice[27] ("ICJ Statute"), there are three primary sources of public international law – treaties, international custom, and general principles of law. There are presently no treaties or international conventions that expressly establish the clean hands doctrine as a rule of public international law, and the doctrine has been emphatically rejected as a rule of customary international law.[28] Thus, the only gateway for the doctrine to be applied would be if the doctrine were a general principle of law within the meaning of Art 38(1)(c) of the ICJ Statute. This article takes the view that the doctrine is, indeed, a general principle of law.

6 It is generally accepted that a legal principle should be recognised as a general principle of law if it is found in the domestic legal orders of the world's major legal systems.[29] *A priori* any conclusion that a legal principle is a general principle of law is best arrived at only after an examination of the laws of domestic legal orders. That being said, it is recognised that judicial decisions and the writings of publicists, while not primary sources of public international law, are regarded as evidence of the law under Art 38(1)(d) of the ICJ Statute;[30] they have even been called "the most useful sources for ascertaining the existence and application of a given legal principle".[31] Accordingly, in order to establish that the clean hands doctrine is a general principle of law, this part will examine both (a) the existing jurisprudence of the International Court of Justice ("ICJ"); and (b) the laws of domestic legal orders. Given that the focus of this article is the clean hands doctrine in international investment law, this part will also analyse (c) the existing investor–State jurisprudence and its treatment of the clean hands doctrine. Where appropriate, existing academic literature will also be referred to and discussed.

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27 33 UNTS 993 (26 June 1945; entry into force 24 October 1945).

28 *Second Report on State Responsibility, by Mr James Crawford, Special Rapporteur* UN Doc A/CN.4/498 Add 1–4 (1999) at para 336; *Sixth Report on Diplomatic Protection, by Mr John Dugard, Special Rapporteur* UN Doc A/CN.4/546 (11 August 2004) at para 6.

29 Cherif Bassiouni, "A Functional Approach to "General Principles of International Law" (1990) 11(3) Mich J Int'l L 788 at 809; Stefan Kadelbach & Thomas Kleinlein, "International Law – A Constitution for Mankind? An Attempt at a Re-appraisal With an Analysis of Constitutional Principles" (2007) 50 *German Yearbook of International Law* 303 at 340; Jaye Ellis, "General Principles and Comparative Law" (2011) 22(4) *European Journal of International Law* 949 at 953–956.

30 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th Ed, 2019) at p 35.

31 Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11(3) Mich J Int'l L 788 at 769.

A. Existing International Court of Justice jurisprudence

7 The most recent pronouncement of the ICJ on the clean hands doctrine comes in the form of its judgment regarding preliminary objections in *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*,[32] where the ICJ expressly declined to take a position on the doctrine.[33] While this means that the ICJ has not formally rejected the doctrine as a general principle of law,[34] the ICJ has also evidently chosen to refrain from endorsing the doctrine despite having the opportunity to do so.[35] In short, the existing ICJ jurisprudence is regrettably unhelpful in assessing whether the doctrine constitutes a general principle of law.

8 Before turning to the laws of domestic legal orders, however, it bears mentioning that proponents of the clean hands doctrine typically rely on the same select decisions of (mostly individual judges of) the Permanent Court of International Justice ("PCIJ") and the ICJ to buttress the view that the doctrine is a general principle of law. Such decisions include:

(a) the dissenting opinion of Judge Anzilotti in *Legal Status of Eastern Greenland*;[36]

(b) the decision of the PCIJ in *The Diversion of Water from the Meuse (Netherlands v Belgium)*[37] ("*Diversion of Water from the Meuse*"), which some have argued was effectively an adoption of the clean hands doctrine;[38]

(c) the separate opinion of Judge Hudson in *Diversion of Water from the Meuse*, where he stated that he "who seeks equity must do equity";[39]

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32 Preliminary Objections, Judgment (2019) ICJ Rep 7.

33 *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Preliminary Objections, Judgment) (2019) ICJ Rep 7 at [122].

34 Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (JurisNet, 2010) at p 318; Rahim Moloo, "A Comment on the Clean Hands Doctrine in International Law" (2011) 8(1) TDM at 5.

35 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th Ed, 2019) at p 675.

36 (1933) PCIJ Rep Series A/B No 53 at [308] (Dissenting opinion of Judge Anzilotti).

37 *The Diversion of Water from the Meuse (Netherlands v Belgium)* (1937) PCIJ Rep Series A/B No 70.

38 Clarence Jenks, *The Prospects of International Adjudication* (Stevens and Sons, 1964) at p 326; Stephen Schwebel, *Justice in International Law* (Cambridge University Press, 2011) at p 297.

39 (1937) PCIJ Rep Series A/B No 70 at [323] (Individual Opinion of Judge Hudson).

(d) the dissenting opinion of Judge Anzilotti in *Diversion of Water from the Meuse*;[40]

(e) the dissenting opinion of Judge Morozov in *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*;[41]

(f) the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*;[42]

(g) the dissenting opinion of Judge Weeramantry in *Legality of Use of Force (Yugoslavia v Belgium)*;[43] and

(h) the dissenting opinion of Judge *ad hoc* Van den Wyngaert in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*.[44]

The aforementioned decisions (at least, as cited and relied on by proponents of the clean hands doctrine) may very well have contributed to the false impression that there are a number of variations of the doctrine under public international law.[45] However, in truth, none of the aforementioned decisions can truly be relied on to support the view that the doctrine is a general principle of law.

9 First, with specific regard to the decision of the PCIJ in *Diversion of Water from the Meuse*,[46] a closer examination of the judgment reveals that the PCIJ made no express declaration of the clean hands doctrine being a rule of public international law. To rely on said decision as evidence of the doctrine as a rule of public international law is thus tenuous at best.

10 Secondly, the remaining aforementioned decisions are either dissenting opinions or separate opinions by individual judges. As the

40 *The Diversion of Water from the Meuse (Netherlands v Belgium)* (1937) PCIJ Rep Series A/B No 70 at [211] (Dissenting Opinion of Judge Anzilotti).
41 Judgment (1980) ICJ Rep 3 at 51–52 (Dissenting Opinion of Judge Morozov).
42 Merits, Judgment (1986) ICJ Rep 14 at 336–337 and 392–393 (Dissenting Opinion of Judge Schwebel).
43 Provisional Measures, Order of 2 June 1999 (1999) ICJ Rep 124 at 184–185 (Dissenting Opinion of Vice-President Weeramantry).
44 Judgment (2002) ICJ Rep 3 at 159–161 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert).
45 See, *eg*, Ori Pomson, "The Clean Hands Doctrine in the *Yukos* Awards: A Response to Patrick Dumberry" (2017) 18 JWIT 715, which discusses three different variations of the doctrine that can be gleaned from the existing International Court of Justice jurisprudence.
46 Referenced at para 8(b) above.

nomenclature implies, dissenting opinions and separate opinions strictly represent the personal views of the individual judge, rather than the views of the ICJ and/or the PCIJ.[47] It is uncontroversial that little weight (if any) should be ascribed to dissenting opinions and separate opinions in terms of precedential value.[48] With specific regard to the dissenting opinion of Judge Schwebel,[49] its precedential value is in even greater doubt, given that Judge Schwebel appears to have changed his mind in more recent times as to the status of the clean hands doctrine as a general principle of law.[50]

11 On that note, most of the decisions referenced above[51] are decades old. Rules of public international law are very much subject to change – treaties may be terminated or created, international custom may evolve based on changing state practice, and general principles of law may likewise evolve as municipal laws change. A refreshed analysis as to the doctrine's status as a rule of public international law is thus desirable, and hence the *raison d'être* for this article. It bears repeating that the only three primary sources of rules of law are clearly set out in Arts 38(1)(a) to 38(1)(c) of the ICJ Statute – decisions of the ICJ are simply subsidiary means for determining the existence of rules of public international law under Art 38(1)(d) of the ICJ Statute. Thus, barring a clear pronouncement by the ICJ that the clean hands doctrine is a general principle of law, simply relying on the aforementioned decisions *sensu stricto* would not suffice.

B. Laws of domestic legal orders

12 Before embarking on our analysis of the laws of domestic legal orders, the methodology of this exercise warrants deeper discussion. First, it should be clarified that the search is for *broad* conceptions of the clean hands doctrine under municipal laws. This is in contrast to

47 *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase, Judgment) (1966) ICJ Rep 6 at 330 (Dissenting Opinion of Judge Jessup); Hemi Mistr, "'The Different Sets of Ideas at the Back of Our Heads': Dissent and Authority at the International Court of Justice" (2019) 32(2) *Leiden Journal of International Law* 293 at 296.

48 See Marcin Kałduński, "Some Reflections on Arbitration in the *Yukos v The Russian Federation* Case" (2014) 18 *Comparative Law Review* 141 at 157.

49 Referenced at para 8(f) above.

50 Judge Schwebel sat on the tribunal in *Yukos Universal Ltd (Isle of Man) v The Russian Federation* UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014), which unanimously held that the clean hands doctrine is not a general principle of law.

51 See para 8 above.

searching for *narrow* iterations of the doctrine under municipal laws. To borrow the illustration of the late Bassiouni:[52]

> For example, a broad principle may be whether a right to life exists in the world's major legal systems. A narrow principle may be whether the taking of the life of one person by another without legal justification constitutes a crime or, even more specifically, what crime it constitutes.

It would be illogical to search for the doctrine's narrow equivalent within domestic legal orders, since municipal laws would hardly contain oddly specific rules that, for instance, disallow foreign investors from claiming against the state in investor–State where the investor has violated the laws of the host state. Instead, it is more apt to search generally for broad legal rules that preclude a claimant from obtaining relief against the respondent in a dispute resolution medium where that claimant is guilty of some form of misconduct.

13 Secondly and on a related note, it need not be the case that the exact same legal rule exists across domestic legal orders; all that is required is that the "certain principle underlying a legal rule in question is broadly recognised".[53] A prime example would be the doctrine of good faith, which the ICJ has recognised as a general principle of law.[54] While good faith exists in a myriad of forms in municipal systems,[55] this has not prevented the importation of the doctrine into public international law as a general principle of law. In that light, it should be irrelevant that the clean hands doctrine manifests in differing forms in municipal systems, so long as the crux of the doctrine is broadly recognised. This is an important point, especially since it has been, with respect, incorrectly argued elsewhere that the clean hands doctrine cannot be a general principle of law given the varied conceptions of the doctrine present in municipal systems.[56] In a similar vein, it has also been, with respect, incorrectly argued that only one specific conception of the doctrine present in municipal systems constitutes a general principle of law,[57] whilst other conceptions have not yet gained the status of general principles of law.

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52 Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11(3) Mich J Int'l L 788 at 812.

53 Stephan Schill, "International Investment Law and Comparative Public Law – An Introduction" in *International Investment Law and Comparative Public Law* (Stephan Schill ed) (Oxford University Press, 2010) at p 30.

54 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Report Rep 253 at 268.

55 Steven Reinhold, "Good Faith in International Law" (2013) 2(1) *University College London Journal of Law and Jurisprudence* 40 at 46.

56 Ori Pomson, "The Clean Hands Doctrine in the *Yukos* Awards: A Response to Patrick Dumberry" (2017) 18 JWIT 712 at 726–734.

57 Lodovico Amianto, "The Role of 'Unclean Hands' Defences in International Investment Law" (2019) 6(1) *McGill Journal of Dispute Resolution* 1 at 36.

14 Finally, universal acceptance of the broad legal principle in question is not required.[58] It suffices that this broad legal principle is found in a significant number of representative states.[59] In modern practice, this would entail the acceptance or existence of the legal principle in representative legal orders of both common and civil law backgrounds,[60] which will now be examine.

(1) Common law systems

15 The clean hands doctrine has been labelled as a "common law doctrine",[61] no doubt due to its prevalence across common law systems. In common law systems, one of the most prominent forms of the clean hands doctrine would be the illegality doctrine under municipal laws, also known as *ex turpi causa non oritur action* (from a dishonourable cause an action does not arise).[62] The clean hands doctrine is also commonly expressed as a bar to claims in equity through the maxims "[h]e who comes into equity must come with clean hands" and "he who seeks equity must do equity".[63] While the illegality doctrine and the equitable maxims are conceptually distinct, they overlap significantly at their cores – "both rules are triggered by wrongdoing by one who seeks the law's assistance

58 Cherif Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11(3) Mich J Int'l L 788 at 779.

59 Stefan Kadelbach & Thomas Kleinlein, "International Law – A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles" (2007) 50 *German Yearbook of International Law* 303 at 340; Jaye Ellis, "General Principles and Comparative Law" (2011) 22(4) *European Journal of International Law* 949 at 953–956.

60 Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill, 2008) at pp 50–57; Jaye Ellis, "General Principles and Comparative Law" (2011) 22(4) *European Journal of International Law* 949 at 957.

61 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.

62 Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (JurisNet, 2010) at p 319; Kevin Lim, "Uploading Corrupt Investors' Claims against Complicit or Compliant Host States" in *Yearbook on International Investment Law and Policy 2011–2012* (Karl Sauvant ed) (Oxford University Press, 2012) at p 607; Aloysius Llamzon & Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in *Legitimacy: Myths, Realities, Challenges* (Albert van den Berg gen ed) (Wolters Kluwer, 2015) at pp 507–508; Kathrin Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (Cambridge University Press, 2017) at p 295.

63 Aloysius Llamzon & Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in *Legitimacy: Myths, Realities, Challenges* (Albert van den Berg gen ed) (Wolters Kluwer, 2015) at pp 507–508.

and … both rules require that the wrongdoing be sufficiently related to the proceedings".[64] In that sense, both the illegality doctrine and the equitable maxims are evidence of the existence of the clean hands doctrine in the municipal laws of common law systems.

16 Major common law systems that recognise the doctrine under their respective municipal laws include Australia,[65] Canada (save for Quebec, which remains the only civil law province in Canada),[66] Ireland,[67] Seychelles (in so far as the English common law governs procedural law),[68] the UK,[69] the US (save for Louisiana, the only civil law jurisdiction in the US),[70] and New Zealand.[71] Closer to home, the clean hands doctrine is also recognised under Singapore municipal law, where any plaintiff seeking equitable relief must come before the court with clean hands lest he be denied relief.[72] Suffice to say that in so far as common law systems are concerned, the clean hands doctrine certainly finds acceptance in a representative number of domestic legal orders.

(2) Civil law systems

17 While civil law jurisdictions do not adopt equity as a body of law, "a kindred idea can be found in the recognition of wrongdoing for an abuse of right".[73] This is unsurprising, given that the doctrine's origins lie in Roman law principles,[74] which greatly influenced the development of modern civil law systems. In civil law systems, the doctrine finds expression in the form of the maxim *nemo auditur propriam turpitudinem*

64 James Goudkamp, "The Law of Illegality: Identifying the Issues" in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018) at p 57.

65 See *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV* (1977) 138 CLR 534.

66 See *City of Toronto v Polai* [1970] 1 OR 483; *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534.

67 See *Quinn v Irish Bank Resolution Corp Ltd* [2015] IESC 29 at [6.1].

68 *Searles v Pothin* [2017] SCCA 14 at [35].

69 See *Patel v Mirza* [2017] AC 467. The full impact of this case on the remaining Anglo-American legal systems remains to be seen.

70 See *Talbot v Jansen* (1795) 3 US 133. See also T Leigh Anenson, *Judging Equity: The Fusion of Unclean Hands in US Law* (Cambridge University Press, 2019) at pp 24–26.

71 See *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2014] 3 NZLR 177.

72 See *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [84].

73 T Leigh Anenson, *Judging Equity: The Fusion of Unclean Hands in U.S. Law* (Cambridge University Press, 2019) at p 23.

74 Aloysius Llamzon, "Case Comment: *Yukos Universal Limited (Isle of Man) v The Russian Federation*" (2015) 30(2) *ICSID Review* 315 at 316. See *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 240; T Leigh Anenson, *Judging Equity: The Fusion of Unclean Hands in US Law* (Cambridge University Press, 2019) at p 23.

allegans (no one can be heard to invoke his own turpitude),[75] alongside analogous concepts as codified in the respective civil codes.

18 For instance, in Louisiana, it has been expressly declared that Art 2033 of the Louisiana Civil Code[76] represents the "clean hands doctrine" or the "doctrine of unclean hands" in so far that a litigant is prevented "from maintaining an action if he must rely even partially, on his own illicit or immoral act to establish a cause of action".[77] Similar provisions can be found in the civil codes of major civil law jurisdictions such as Austria,[78] the Czech Republic,[79] France,[80] Germany,[81] Italy,[82] Quebec,[83] Slovakia[84] and Switzerland,[85] just to name a few. In any case, it should be noted that a number of scholars have also concluded that the clean hands doctrine, as a broad principle, is recognised across not only common law systems but civil law systems as well.[86]

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75 Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (JurisNet, 2010) at p 319; Kevin Lim, "Uploading Corrupt Investors' Claims against Complicit or Compliant Host States" in *Yearbook on International Investment Law and Policy 2011–2012* (Karl Sauvant ed) (Oxford University Press, 2012) at p 607; *Yakovlev v Secretary-General* (2014) UNDT/2014/040 (14 April 2014) at [28].

76 Title IV, ch 11.

77 *Jan L Domingues Guilbeau v A Ray Domingues* 149 So 3d 825 at [829]–[830] (Louisiana Court of Appeal, 3rd Cir, 2014).

78 Austrian Civil Code (1811) § 1174(1) (albeit only in relation to the provisions on service contracts, as opposed to contracts involving goods).

79 Czech Civil Code (2012) § 6(2).

80 French Civil Code (1804) Art 1302-3. See Birke Häcker, "The Impact of Illegality and Immorality on Contract and Restitution from a Civilian Angle" in *Illegality after Patel v Mirza* (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018) at p 358.

81 German Civil Code (1896) § 817.

82 Italian Civil Code (1942) Art 2035, which albeit addresses immorality rather than illegality, has been recognised by majority of scholars as encompassing *nemo auditur propriam turpitudinem allegans* and *in pari causa turpitudinis cessat repetitio*. See Francesco Paolo Patti, "The Denial of Restitution under Italian Law: A Perspective on *Patel v Mirza*" (2018) 26(2) *European Review of Private Law* 255 at 255.

83 The prevailing view is that the doctrine of *nemo auditur propriam turpitudinem allegans* in relation to the restitution of benefits has been impliedly repealed since the advent of Art 1699 of the *Commission de la construction du Québec*. However, the doctrine appears to be alive and well in cases that do not involve the restitution of benefits. See *Bertout c Saffran*, 2019 QCCS 4367, where the doctrine was applied to render Saffran's counter claim inadmissible.

84 Slovak Civil Code (1964) § 40(a).

85 Swiss Code of Obligations (1911) Art 66.

86 Richard Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hobér, Annette Magnusson & Marie Öhrström eds) (JurisNet, 2010) at p 317; Patrick Dumberry & Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITS" in *Yearbook on International*

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19 The inexorable conclusion of the foregoing analysis is that the clean hands doctrine should be recognised as a general principle of law. Nonetheless, for completeness of analysis, this article shall also discuss the treatment of the clean hands doctrine at the hands of international investment tribunals.

C. Existing investor–State jurisprudence

20 The clean hands doctrine has been "approached differently by international [investment] tribunals";[87] some investor–State tribunals have declined to recognise and/or apply the doctrine as a general principle of law, while others have done the contrary. Such a dichotomy, however, is misleading. The crux of analysis should not be on whether a tribunal recognised the doctrine as a general principle of law. Rather, the focus should be on the methodology and reasoning that the tribunal adopted in reaching its conclusion *vis-à-vis* the doctrine as a general principle of law. Unfortunately, in the words of Schill:[88]

> … tribunals often do not explain the methodology they apply in extracting general principles, and often proclaim the existence of a general principle rather than providing structured comparative law analysis …

As will be seen, the lack of structured comparative law analysis by investor–State tribunals has rendered much of the existing investor–State jurisprudence unhelpful for present purposes.

21 Virtually all instances of investor–State tribunals rejecting the clean hands doctrine as a general principle of law can be attributed to, with respect, an incomplete or flawed analysis.[89] A prime example would

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Investment Law and Policy 2011–2012 (Karl Sauvant ed) (Oxford University Press, 2012) at p 591; Kevin Lim, "Uploading Corrupt Investors' Claims against Complicit or Compliant Host States" in *Yearbook on International Investment Law and Policy 2011–2012* (Karl Sauvant ed) (Oxford University Press, 2012) at p 607; Andrea Bjorklund & Lukas Vanhonnaeker, "Yukos: The Clean Hands Doctrine Revisited" (2015) 9(2) *Diritti Umani e Diritto Internazionale* 365 at 370; Aloysius Llamzon, "Case Comment: *Yukos Universal Limited (Isle of Man) v The Russian Federation*" (2015) 30(2) *ICSID Review* 315 at 316; Aloysius Llamzon & Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in *Legitimacy: Myths, Realities, Challenges* (Albert van den Berg gen ed) (Wolters Kluwer, 2015) at p 511.

87 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.

88 Stephan Schill, "International Investment Law and Comparative Public Law – An Introduction" in *International Investment Law and Comparative Public Law* (Stephan Schill ed) (Oxford University Press, 2010) at p 28.

89 In all fairness to the aforementioned investor–State tribunals, much of the analysis on the clean hands doctrine would have been guided by the authorities and arguments

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be the decision of the *Yukos* tribunal, whose emphatic rejection of the clean hands doctrine as a general principle of law has been the subject of much academic discussion.[90] In rejecting the clean hands doctrine as a general principle of law,[91] the *Yukos* tribunal made no reference to the laws of domestic legal orders;[92] it simply reached its conclusion "on the basis of the cases cited by the parties".[93] If those cases had themselves analysed whether the clean hands doctrine is found in the domestic legal orders of a significant number of representative states,[94] this would not have been an issue. However, that was not the case. Ironically, the *Yukos* tribunal itself cited an earlier tribunal decision which had expressly stated that general principles of law are "rules of law on which the legal systems of the states are based".[95] The failure of the *Yukos* tribunal to conduct an analysis of the laws of domestic legal orders renders its conclusion extremely unconvincing.[96]

22 A similar example can be found in the decision of the *South American Silver Ltd v Bolivia*[97] tribunal, which held that Bolivia had failed to show that "that the clean hands doctrine is part of international public policy or constitutes a principle of international law".[98] A close analysis of Bolivia's arguments relating to the doctrine reveals that Bolivia relied heavily on previous investor–State tribunal decisions, none of which had comprehensively analysed the laws of domestic legal orders with the view of proving that the doctrine is a general principle of law.[99] Had tribunals such as the *Yukos* and *South American Silver Ltd v Bolivia* tribunals

made (or rather, not made) by the counsels of the respective parties involved in the proceedings.

90 See, *eg*, Aloysius Llamzon, "Case Comment: *Yukos Universal Limited (Isle of Man) v The Russian Federation*" (2015) 30(2) *ICSID Review* 315; Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229; Ori Pomson, "The Clean Hands Doctrine in the *Yukos* Awards: A Response to Patrick Dumberry" (2017) 18 JWIT 712.

91 *Yukos Universal Ltd (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) at para 1363.

92 *Yukos Universal Ltd (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) at paras 1360–1363.

93 *Yukos Universal Ltd (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) at paras 1358–1359.

94 Campbell McLachlan, "Investment Treaties and General International Law" (2008) 57(2) ICLQ 361 at 391–392.

95 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 227.

96 Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229 at 248.

97 UNCITRAL, PCA Case No 2013-15.

98 *South American Silver Ltd v Bolivia*, UNCITRAL, PCA Case No 2013-15, Award (22 November 2018) at para 453.

99 See *South American Silver Ltd v Bolivia*, UNCITRAL, PCA Case No 2013-15, Award (22 November 2018) at paras 348–360.

conducted a comparative analysis (or had the tribunals been provided with such analysis by counsel) similar to the analysis conducted above,[100] the tribunals would likely have concluded that the clean hands doctrine is a general principle of law.

23 On the other hand, there have also been investor–State tribunals appearing to have recognised and applied the clean hands doctrine. However, on closer scrutiny, one would find that the decisions of such investor–State tribunals do not truly support the argument that the doctrine is a general principle of law: the *Churchill Mining* tribunal simply stated that the doctrine has "found expression at the international level", but provided no further elaboration;[101] the *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Co Ltd*[102] ("*Niko*") tribunal expressly recognised the clean hands doctrine as a general principle of law,[103] but failed to provide a convincing explanation as to why the doctrine constitutes a general principle of law; the *Hesham Talaat M Al-Warraq v Republic of Indonesia*[104] ("*Al-Warraq*") tribunal apparently applied the doctrine, but it did so without properly analysing the doctrine's status as a general principle of law.[105] Notably, several investor–State tribunals have expressly referred to and applied the maxim *nemo auditur propriam turpitudinem allegans* as a rule of public international law in reaching their respective decisions.[106] As earlier mentioned,[107] the maxim is an analogous concept to the clean hands doctrine. By referring to and applying the maxim, the tribunals were effectively applying the clean hands doctrine, albeit under a different label.[108] However, these decisions are similarly problematic as that they did not justify the maxim's (or the clean hands doctrine's) apparent status as a rule of public international law or general principle of law.

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100 See paras 12–19 above.

101 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.

102 ICSID Case No ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013).

103 *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Co Ltd* ICSID Case No ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013) at paras 476–485; Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229 at 255.

104 UNCITRAL, Final Award (15 December 2014).

105 *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) at para 646.

106 See *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006); *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24, Award (27 August 2008); *Rumeli Telekom AS v Republic of Kazakhstan* ICSID Case No ARB/05/16, Award (29 July 2008) at paras 310–323.

107 See para 17 above.

108 Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229 at 252–253.

24 Consequently, much like the existing ICJ jurisprudence, the existing investor–State jurisprudence is generally unhelpful in determining whether the clean hands doctrine is a general principle of law. What is pertinent, however, is that the conclusion arrived at following the comparative analysis above[109] (in other words, that the doctrine is a general principle of law) remains unchallenged by the existing case authorities. Accordingly, it can be said with certainty that the clean hands doctrine is, indeed, a general principle of law.

III. Proposed framework

25 While this article has established that the clean hands doctrine is a general principle of law, the precise content of the doctrine remains "ill defined".[110] This part seeks to provide a framework as to how the doctrine should apply in international investment law. While much of the existing investor–State jurisprudence proved unhelpful in establishing the doctrine as a general principle of law above,[111] the jurisprudence remains useful in informing us as to the content of the doctrine. This is especially so in relation to decisions of investor–State tribunals that have already applied (whether expressly or implicitly) the doctrine in reaching their decisions.[112] With that, this part shall address the following questions regarding the content of the doctrine:

(a) What is the doctrine's relation with "in accordance with the law" clauses in bilateral investment treaties ("BITs")?

(b) What types of investor misconduct would allow a state to invoke the doctrine?

(c) Can investor misconduct after the initial investment is made allow a state to invoke the doctrine?

(d) What is the precise legal effect of a successful invocation of the doctrine?

(e) At which stage of arbitral proceedings should the doctrine feature?

109 See paras 12–19 above.

110 *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Co Ltd* ICSID Case No ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013) at para 477.

111 See paras 4–24 above.

112 As earlier argued at para 24 above, a number of investor–State tribunals have effectively applied the clean hands doctrine, albeit without expressly referring to it as "the clean hands doctrine".

A. "In accordance with the law" clauses

26 By way of background, certain BITs incorporate provisions that expressly require investments to be made in accordance with the laws of the host state in order for the investments to be granted substantive protection under the relevant BIT. One example would be Art I(1)(a) of the Australia–Indonesia BIT:[113]

> … '[I]nvestment' means every kind of asset owned or controlled and invested by investors of one Party and admitted by the other Party in its territory in conformity with the laws, regulations and investment policies of the latter applicable from time to time …

Similar clauses can also be found in the investment chapters of modern free trade agreements. An example would be sub-para 2 of Art 83 of the Japan–India Comprehensive Economic Partnership Agreement[114] ("CEPA"):

> An investor of a Party whose investments are not made in compliance with the laws and regulations of the other Party which are consistent with this Agreement shall not be entitled to submit an investment dispute to conciliations or arbitrations referred to in paragraph 4 of Article 96.

Whether under Art I(1)(a) of the Australia–Indonesia BIT, or sub-para 2 of Art 83 of the Japan–India CEPA, making an investment in non-compliance with the laws of the host state leads to the same outcome – the investment is effectively denied substantive protection under the relevant treaty. However, the legal mechanisms by which each treaty achieves that outcome differ slightly. Under the Australia–Indonesia BIT, an investment made in non-compliance with the laws of the host state is simply not classified as an "Investment" to begin with, and thus cannot receive protection under the BIT. However, under the Japan–India CEPA, an investment made in non-compliance with the laws of the host state is still classified as an "investment". Instead, such an investment fails the negative condition precedent to investor–State arbitration and the investor is thus barred access to investor–State arbitration.

27 Several scholars have argued that "in accordance with the law" clauses such as those discussed above are manifestations of the clean hands doctrine.[115] Kałduński has even argued that the doctrine "does not

113 17 November 1992; entry into force 29 July 1993.

114 16 February 2011; entry into force 1 August 2011.

115 Rahim Moloo, "A Comment on the Clean Hands Doctrine in International Law" (2011) 8(1) TDM at p 7; 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 at 4.

have an autonomous character and that it is enshrined in the obligation to make investments in accordance with law".[116] With respect, these arguments fail to recognise the conceptual distinction between an "in accordance with the law" clause and the clean hands doctrine.[117] The basis of the doctrine's applicability is its status as a general principle of law. As explained by the *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*[118] tribunal, general principles of law exist and operate in spite of treaty provisions:[119]

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention … *These are general principles that exist independently of specific language to this effect in the Treaty.* [emphasis added]

Moreover, since general principles of law such as the clean hands doctrine operate independently of BIT provisions, it follows that the doctrine applies even in the absence of an "in accordance with the law" clause.[120]

28 On the other hand, an "in accordance with the law" clause has legal force only due to the consent of the parties to the relevant BIT. This was rightly noted by the *Inceysa Vallisoletana SL v Republic of El Salvador*[121] ("*Inceysa*") tribunal in its discussion of Inceysa's breach of the "in accordance with the law" clause contained in the El Salvador–Spain BIT:[122]

> In conclusion, the Tribunal considers that, because Inceysa's investment was made in a manner that was clearly illegal, *it is not included within the scope*

116 Marcin Kałduński, "Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration" (2015) 4(2) *Polish Review of International and European Law* 69 at 96.

117 Aloysius Llamzon, "Chapter 2: On Corruption's Peremptory Treatment in International Arbitration" in *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Domitille Baizeau & Richard Kreindler eds) (Wolters Kluwer, 2015) at p 41; Lodovico Amianto, "The Role of 'Unclean Hands' Defences in International Investment Law" (2019) 6(1) *McGill Journal of Dispute Resolution* 1 at 8.

118 ICSID Case No ARB/07/24, Award (18 June 2010).

119 *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No ARB/07/24, Award (18 June 2010) at para 124.

120 Carolyn Lamm, Hansel Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in *Liber Amicorum Bernardo Cremades* (Miguel Fernandez-Ballesteros & David Arias eds) (Wolters Kluwer, 2010) at p 726; Rahim Moloo, "The Compliance with the Law Requirement in International Law" (2010) 34 Fordham Int'l LJ 1475 at 1483–1484.

121 ICSID Case No ARB/03/26, Award (2 August 2006).

122 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 257.

> *of consent expressed by Spain and the Republic of El Salvador in the BIT* and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. [emphasis added]

29 Not only do the clean hands doctrine and "in accordance with the law" clauses have different legal bases, but they also serve two disparate purposes. The doctrine has a "moral impetus" of holding investors accountable for their own wrongdoing.[123] Conversely, "in accordance with the law" clauses, as with all treaty provisions, simply represent the negotiated position between the parties to the BIT. It is thus unconvincing to argue that "in accordance with the law" clauses are manifestations of the clean hands doctrine. Crucially, the conceptual distinction between the clean hands doctrine and "in accordance with the law" clauses should also guide the author's analysis of the existing investor–State jurisprudence; decisions of investor–State tribunals based on an "in accordance with the law" clause must be viewed with caution and may not be directly relevant to the analysis of the clean hands doctrine.

30 In light of the foregoing analysis, a corollary question may arise – what then is the practical effect or relevance of an "in accordance with the law" clause, given the concurrent existence of the clean hands doctrine? If such a clause exists in the relevant BIT and an investment is not made in accordance with the laws of the host state, the tribunal does not have jurisdiction *ratione materiae* to hear the dispute.[124] Conversely, as shall be argued below,[125] an invocation of the clean hands doctrine should affect a claim's admissibility, rather than the tribunal's jurisdiction. Given that the doctrine operates independent of an "in accordance with the law" clause, the existence of such a clause in the relevant BIT effectively gives states an additional tool in its legal arsenal to defeat an investor's claim. In fact, a broadly worded "in accordance with the law" clause could potentially capture even minor investor misconduct that would otherwise fall outside the ambit of the clean hands doctrine. Thus, as a matter of strategy, all states should seek to include such a clause in their BITs with other states so as to safeguard their own interests.

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123 Aloysius Llamzon, "Case Comment: *Yukos Universal Limited (Isle of Man) v The Russian Federation*" (2015) 30(2) *ICSID Review* 315 at 316.

124 Rahim Moloo & Alex Khachaturian, "The Compliance with the Law Requirement in International Investment Law" (2011) 34(6) Fordham Int'l LJ 1473 at 1482 and 1488; Aloysius Llamzon & Anthony Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in *Legitimacy: Myths, Realities, Challenges* (Albert van den Berg gen ed) (Wolters Kluwer, 2015) at p 498.

125 See paras 55–61 below.

B. Types of investor misconduct

31 Turning to the second question – what types of investor misconduct would allow a state to invoke the clean hands doctrine? Preliminarily, the *Niko* tribunal has stated that the doctrine may only be invoked where there is some form of reciprocity in the obligations owed by the investor and the host state to each other.[126] While it is not entirely clear what this entails, it has been suggested that this means the doctrine only applies where both parties have allegedly breached mirroring obligations owed to each other in a single instrument.[127] In so far as this is the implication of the *Niko* tribunal's statement, it is categorically rejected. First, the original conception of the doctrine never imposed such a requirement;[128] the idea of reciprocity between obligations as a requirement likely stems from an incorrect[129] reliance on the decision of the PCIJ, the dissenting opinion of Judge Anzilotti, and/or the separate opinion of Judge Hudson in *Diversion of Water from the Meuse*.[130] Secondly, such a requirement is simply not transposable to the investor–State context. Investors do not owe states any obligation under BITs as a BIT is between two states, and not between an investor and a state. Even if an investor did owe the host state certain obligations under an instrument they were both party to, the investor's obligations are likely to be of a different nature from the state's obligations. For instance, while a host state is typically obligated to provide an investor fair and equitable treatment, it would be illogical for the investor to owe a similar obligation to the host state.

32 A more sensible reading of the *Niko* tribunal's statement would be that states should only be able to invoke the doctrine in so far as the alleged investor misconduct is "related or connected to the underlying

126 See, *eg*, *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Co Ltd* ICSID Case No ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013) at paras 480–483.

127 Peter Tzeng, "The Peaceful Non-Settlement of Disputes: Article 4 of *CMATS* in *Timor-Leste v Australia*" (2017) 18(2) *Melbourne Journal of International Law* 349 at 368.

128 Peter Tzeng, "The Peaceful Non-Settlement of Disputes: Article 4 of *CMATS* in *Timor-Leste v Australia*" (2017) 18(2) *Melbourne Journal of International Law* 349 at 368.

129 As discussed at paras 7–11 above.

130 Peter Tzeng, "The Peaceful Non-Settlement of Disputes: Article 4 of *CMATS* in *Timor-Leste v Australia*" (2017) 18(2) *Melbourne Journal of International Law* 349 at 368. See, *eg*, Ori Pomson, "The Clean Hands Doctrine in the *Yukos* Awards: A Response to Patrick Dumberry" (2017) 18 JWIT 712 at 716, where *The Diversion of Water from the Meuse (Netherlands v Belgium)* (1937) PCIJ Rep Series A/B No 70, Judge Anzilotti's dissenting opinion and Judge Hudson's separate opinion in relation to the same are (incorrectly) cited as proof of the existence of the clean hands doctrine as well as the requirement of reciprocal obligations.

investment for which the claimant started arbitration proceedings".[131] Undoubtedly, it would be illogical for states to be able to invoke the doctrine on the basis of investor misconduct that has no nexus to the relevant investment. However, the question still remains as to what precise types of investor misconduct "related or connected to the underlying investment" would allow the doctrine to be invoked. Several investor–State tribunals have declared that under public international law (and regardless of whether the relevant BIT contains an "in accordance of the law" clause), an investment will not be protected where it has been created as a result of a violation of the host state's laws, fraud, or corruption.[132] This article takes the view that the rule of public international law the tribunals were referring to is, in substance, the clean hands doctrine. In that light, and reviewing the existing jurisprudence, this article proposes that a state should be able to invoke the doctrine if the investment was procured as a result of a (a) violation of the state's laws; (b) the investor's fraud; or (c) corruption.

(1) Violation of host state's laws

33 A state should be able to invoke the clean hands doctrine against an investor who violated the host state's laws during the initial making of the investment. After all, it cannot be the purpose of the international investment regime to "protect investments made in violation of the laws of the host State".[133] This was most explicitly recognised by the *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (II)*[134] ("*Fraport (II)*") tribunal:[135]

> Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the

131 *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Co Ltd* ICSID Case No ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013) at paras 481–483; Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229 at 245.

132 See, *eg*, *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No ARB/07/24, Award (18 June 2010) at paras 123–124; *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania* ICSID Case No ARB/11/24, Award (30 March 2015) at para 378; Marcin Kałduński, "Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration" (2015) 4(2) *Polish Review of International and European Law* 69 at 95–96.

133 *Phoenix Action, Ltd v The Czech Republic* ICSID Case No ARB/06/5, Award (15 April 2009) at para 100.

134 ICSID Case No ARB/11/12, Award (10 December 2014)

135 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB/11/12, Award (10 December 2014) at para 328.

> treaty, based on rules of international law, *such as the 'clean hands' doctrine* or doctrines to the same effect. [emphasis added]

It has been argued elsewhere that the crux of analysis should be on *deliberateness* of the investor's violation of the host state's laws when making the investment.[136] However, the weight of the authorities does not support this conclusion; an approach of proportionality in relation to the investor's violation should be adopted instead.

34 In *Fraport (II)*, the claimant was a German airport operator who had purchased shares in Philippine International Air Terminals Co, Inc, a Filipino company that had recently won a concession to build and operate an airport terminal in the Philippines. In making its investment, the claimant had violated the Philippine's anti-dummy law, which prohibited foreign citizens from controlling, managing, or operating public utility companies. The Philippine Supreme Court subsequently declared the concession to be null and void, leading to the claimant initiating arbitration against the Philippines for, among other things, expropriation of its investment. The tribunal ultimately held that it had no jurisdiction *ratione materiae* to hear the claims as Fraport AG Frankfurt Services Worldwide's ("Fraport's") violation of the anti-dummy law was also a violation of the Germany–Philippines BIT[137] "in accordance with the law" clause.[138] Notably, in reaching its decision, the tribunal made no finding on the deliberateness of Fraport's violation of the anti-dummy law.[139]

35 If anything, the authorities lean in favour of an approach of proportionality with regard to an investor's breach of the host state's laws. In *Metalpar SA v The Argentine Republic*[140] ("*Metalpar*"), the investor failed to register the company documents on time in accordance with Argentinian law.[141] Crucially, the tribunal held that it would disproportionate to punish Metalpar SA by denying it access to ICSID arbitration, given the relatively minor nature of the omission to register the

136 Mariano de Alba, "Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration" (2015) 12(1) *Brazilian Journal of International Law* 321 at 329.

137 18 April 1997; entry into force 1 February 2000.

138 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB/11/12, Award (10 December 2014) at paras 467–468.

139 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB/11/12, Award (10 December 2014) at paras 422–468.

140 ICSID Case No ARB/03/5.

141 *Metalpar SA v The Argentine Republic* ICSID Case No ARB/03/5, Decision on Jurisdiction (27 April 2006) at para 84.

documents on time.[142] Similarly, in *Tokios Tokelės v Ukraine*[143] ("*Tokios Tokelės*"), Ukraine alleged that Tokios Tokelės had improperly registered its subsidiary under Ukrainian law and there were administrative defects in the documents related to the making of the investment.[144] Nonetheless, the tribunal held that "to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty".[145]

36 The approach of proportionality adopted by the tribunals in *Tokios Tokelės* and *Metalpar* is preferred over an analysis based solely on the deliberateness of the violation of a host state's laws. Under a proportionality approach, a holistic assessment of the alleged misconduct may be undertaken. Such an assessment would naturally include whether the violation was a deliberate one, but deliberateness would only be one factor in the analysis, as opposed to being the main factor. This would ensure that negligent and/or accidental violations of the host state's laws would not disproportionately lead to an investor's claim being defeated by the clean hands doctrine. To borrow the words of the *Rumeli Telekom AS v Republic of Kazakhstan*[146] tribunal, there must have been a "breach of fundamental legal principles of the host country" in order for the violation to allow a state to invoke the clean hands doctrine.[147]

37 It has also been argued elsewhere that the host state should be estopped from invoking the doctrine where the conduct of the state leads the investor to believe that his misconduct was lawful, even when it was not.[148] This article can find no fault in such a proposal. Allowing an investor to invoke the doctrine of estoppel would serve to ensure fairness to the investor. As aptly stated by the *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (I)*[149] ("*Fraport (I)*") tribunal:[150]

142 *Metalpar SA v The Argentine Republic* ICSID Case No ARB/03/5, Decision on Jurisdiction (27 April 2006) at para 84.

143 ICSID Case No ARB/02/18.

144 *Tokios Tokelės v Ukraine* ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) at para 83.

145 *Tokios Tokelės v Ukraine* ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) at para 86.

146 *Rumeli Telekom AS v Republic of Kazakhstan* ICSID Case No ARB/05/16, Award (29 July 2008).

147 *Rumeli Telekom AS v Republic of Kazakhstan* ICSID Case No ARB/05/16, Award (29 July 2008) at para 168.

148 Mariano de Alba, "Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration" (2015) 12(1) *Brazilian Journal of International Law* 321 at 331–333, relying on *Ioannis Kardassopoulos v The Republic of Georgia* ICSID Case No ARB/05/18.

149 ICSID Case No ARB/03/25.

150 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* ICSID Case No ARB/03/25, Award (16 August 2007) at para 346.

> Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defence when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.

(2) Fraud

38 A state should also be able to invoke the clean hands doctrine against an investor who procures an investment through fraud. After all, a state would never have approved of the investment had it known the true state of affairs that were being fraudulently concealed or misrepresented by the investor.[151] This is further supported by the decisions of investor–State tribunals that have held that under the principle of *nemo auditur propriam turpitudinem allegans*, an investor who had committed such fraud at the time of making the investment cannot claim protection under the relevant BIT.

39 In *Inceysa*, the tribunal found that Inceysa Vallisoletana SL ("Inceysa") had obtained an exclusive concession contract from El Salvador's Ministry of Environment and Natural Resources through fraudulent misrepresentation.[152] The tribunal also held that Inceysa's fraudulent conduct violated the principle of *nemo auditur propriam turpitudinem allegans*,[153] which, as earlier mentioned,[154] is an expression of the clean hands doctrine. Inceysa's fraudulent conduct in turn deprived the tribunal of jurisdiction.[155] Interestingly, in its award, the *Inceysa* tribunal expressly referred to the principle of *nemo auditur propriam turpitudinem allegans* as a general principle of law under Art 38(1)(c) of the ICJ Statute.[156] *Inceysa* is thus a clear endorsement that an investor's fraud can lead to the invocation of the clean hands doctrine under international investment law.

40 A similar endorsement can be found in *Plama*, where the tribunal also found that the investment had been obtained through the

151 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at paras 102–128.
152 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 236.
153 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 240.
154 See para 17 above.
155 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 247.
156 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at paras 225–229.

investor's fraud.[157] The *Plama* tribunal likewise held that the investor's fraudulent conduct was contrary to the principle of *nemo auditur propriam turpitudinem allegans*,[158] which in turn rendered Plama's claim inadmissible.[159] At this juncture, one might have noticed a small but legally significant discrepancy between *Inceysa* and *Plama* – in *Inceysa*, the fraud resulted in the tribunal being deprived of jurisdiction; in *Plama*, the tribunal was not deprived of jurisdiction; instead, Plama's claim was rendered inadmissible. This discrepancy will be addressed below.[160] For present purposes, however, the clear commonality between *Inceysa* and *Plama* is that a state should be able to invoke the clean hands doctrine against an investor who procures an investment through fraud.

(3) Corruption

41 Finally, a state should also be able to invoke the clean hands doctrine against an investor who procures an investment through corruption. This seems intuitive, given that corruption is universally frowned upon,[161] and that one of the objects of the clean hands doctrine in international investment law would be to express condemnation of an investor's wrongdoings.[162]

42 It has been argued elsewhere that *World Duty Free Co Ltd v The Republic of Kenya*[163] ("*World Duty Free*") and *Metal-Tech Ltd v Republic of Uzbekistan*[164] ("*Metal-Tech*") support the proposition that a respondent state is allowed to invoke the clean hands doctrine *even if* a representative

157 *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24, Award (27 August 2008) at para 133.

158 *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24, Award (27 August 2008) at para 143.

159 *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24, Award (27 August 2008) at para 146.

160 See paras 55–61 below.

161 *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, Award (4 October 2013) at para 290; Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Wolters Kluwer, 2004) at pp 231–309; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2014) at pp 307–309.

162 Carolyn Lamm, Hansel Pham & Rahim Moloo, "Fraud and Corruption in International Arbitration" in *Liber Amicorum Bernardo Cremades* (Miguel Fernandez-Ballesteros & David Arias eds) (Wolters Kluwer, 2010) at pp 720–728; Ori Herstein, "A Normative Theory of the Clean Hands Defence" (2011) 17(3) *Legal Theory* 171 at 171–172; Aloysius Llamzon, "Case Comment: *Yukos Universal Limited (Isle of Man) v The Russian Federation*" (2015) 30(2) *ICSID Review* 315 at 316.

163 ICSID Case No ARB/00/7, Award (4 October 2006).

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

or official of the state were complicit in the investor's corruption.[165] The underlying argument here is one of policy – in order to better fight corruption, absent any coercion or undue influence, "investors should prefer to withdraw from a prospective investment than incur in corruption in order to move forward with their intended business".[166] With respect, such an argument is misguided.

43 First, neither decision is of direct relevance to the clean hands doctrine. In *World Duty Free*, World Duty Free Co Ltd ("World Duty Free") initiated arbitration against Kenya under Art 9 of the House of Perfume Contract (as opposed to a BIT). Crucially, the applicable laws of the contract were Kenyan and English Law, which the tribunal deemed to be materially similar to each other for the purposes of the arbitration.[167] The tribunal found that World Duty Free had paid US$2m to Kenya's President in order to procure the investment contract.[168] In light of the bribery, the tribunal held that World Duty Free had violated, *inter alia*, the doctrine of *ex turpi causa non oritur actio* under Kenyan and English Law.[169] The tribunal thus held that it had no jurisdiction to hear World Duty Free's claims.[170] While *World Duty Free* is technically an ICSID decision, it relates to a contract and municipal laws, rather than a BIT and public international law. It is thus unintuitive to directly extrapolate the *World Duty Free* tribunal's analysis of the doctrine of *ex turpi causa non oritur actio* under Kenyan and English law to the clean hands doctrine in international investment law. While the clean hands doctrine is a general principle of law based on its prevalence in the laws of domestic legal orders (including Kenya and the UK), it does not follow that the content of the clean hands doctrine as a general principle of law will mimic that of its domestic law counterparts.

44 As for *Metal-Tech*, this dispute was based on the Israel–Uzbekistan BIT,[171] as opposed to a contract between the parties.

165 Mariano de Alba, "Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration" (2015) 12(1) *Brazilian Journal of International Law* 321 at 327–328.

166 Mariano de Alba, "Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration" (2015) 12(1) *Brazilian Journal of International Law* 321 at 328.

167 *World Duty Free Co Ltd v The Republic of Kenya* ICSID Case No ARB/00/7, Award (4 October 2006) at paras 158–159.

168 *World Duty Free Co Ltd v The Republic of Kenya* ICSID Case No ARB/00/7, Award (4 October 2006) at para 135.

169 *World Duty Free Co Ltd v The Republic of Kenya* ICSID Case No ARB/00/7, Award (4 October 2006) at para 179.

170 *World Duty Free Co Ltd v The Republic of Kenya* ICSID Case No ARB/00/7, Award (4 October 2006) at para 179.

171 4 July 1994; entry into force 18 February 1997.

However, *Metal-Tech* was decided on the basis of Metal-Tech Ltd's ("Metal-Tech's") breach of the "in accordance with the law" clause in the Israel–Uzbekistan BIT. The *Metal-Tech* tribunal found that Metal-Tech had made substantial payments to one Uzbek government official and the brother of the erstwhile Prime Minister of Uzbekistan for the facilitation of the establishment of Metal-Tech's investment in Uzbekistan.[172] These payments amounted to violations of Uzbek laws on bribery, which in turn were violations of Art 1(1) of the Israel–Uzbekistan BIT (that is, the "in accordance with the law" clause).[173] The *Metal-Tech* tribunal thus found that it lacked jurisdiction over the BIT claims in question.[174] As earlier argued,[175] the clean hands doctrine and the "in accordance with the law" clauses operate on different legal planes. *Metal-Tech* is thus, strictly speaking, irrelevant to the present discussion.

45 Secondly, to allow the clean hands doctrine to operate against the investor where the state and/or its representatives are also engaged in the corruption in question may have a severe chilling effect on investments, especially in certain states where corruption is viewed as "part and parcel of doing business".[176] This would run contrary to the *raison d'être* of the international investment regime – to promote investment and protect investors.[177] While seeking the elimination or reduction of corruption is doubtlessly a desirable and noble endeavour, the inconvenient truth is that such a goal is not something that the international investment regime was designed to accomplish. It is understandably difficult to demand that the international investment regime place the elimination of corruption, as opposed to promoting investment, as its foremost goal, especially since corruption does not constitute a *jus cogens* violation.[178]

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172 *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, Award (4 October 2013) at paras 325 and 351.

173 *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, Award (4 October 2013) at paras 326 and 352.

174 *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, Award (4 October 2013) at para 374.

175 See paras 27–29 above.

176 Jason Summerfield, "The Corruption Defence in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions" (2009) 6(1) TDM at 15; Kevin Lim, "Uploading Corrupt Investors' Claims against Complicit or Compliant Host States" in *Yearbook on International Investment Law and Policy 2011–2012* (Karl Sauvant ed) (Oxford University Press, 2012) at p 621.

177 United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.142 (18 December 2017) at paras 5–6.

178 Valentina Vadi, "*Jus Cogens* in International Investment Law and Arbitration" in *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (Maarten den Heijer & Harmen van der Wilt eds) (Springer, 2015) at p 377.

46 Thirdly, to allow a state that is arguably complicit in the investor's corruption to rely on the clean hands doctrine to escape liability only serves to further promote corruption.[179] It is recognised that there are difficulties attributing the corruption of the host state's officials to the host state directly.[180] But the fact remains that states are well placed to enact laws to deal with corrupt officials if they so choose, and in order to effectively combat corruption, both the supply and demand aspects must be targeted.[181] International investment law should not place the onerous burden of combatting corruption solely on investors.

47 Finally, to allow the doctrine to operate in such a manner would be unjust and unprincipled. In both *World Duty Free* and *Metal-Tech*, the investor was effectively deprived of any remedy despite the fact that a representative of the state was also involved in the impugned transaction. Both decisions have accordingly been criticised for essentially allowing the host states to rely on the misconduct of their own state officials to escape liability.[182] As observed by the *Metal-Tech* tribunal, the purpose of claims being barred as a result of corruption is "to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act".[183] It stands to reason that the clean hands doctrine should assist neither the host state nor the investor where both parties are involved (directly or indirectly) in the corruption in question.

48 Accordingly, states should certainly be able to invoke the clean hands doctrine against an investor who procures an investment through corruption. However, the proviso is that states cannot invoke the doctrine where it and/or its own officials were also complicit in the corruption.

49 That being said, an interesting situation arises where the host state has domestic laws targeting corruption. Even where the state and/or its officials are complicit in the corruption and the state cannot invoke the clean hands doctrine against the investor on the basis of corruption, the investor's claim may very well be defeated by the presence of an

179 Doak Bishop, "Towards a More Flexible Approach to the International Consequences of Corruption" (2010) 25(1) *ICSID Review* 63 at 66.

180 See Isuru Devendra, "State Responsibility for Corruption in International Investment Arbitration" (2019) 10(2) *Journal of International Dispute Settlement* 248.

181 Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at p 67.

182 Aloysius Llamzon, "The Control of Corruption through International Investment Arbitration: Potential and Limitations" (2008) 102 *Proceedings of the Annual Meeting (American Society of International Law)* 208 at 210–211.

183 *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No ARB/10/3, Award (4 October 2013) at para 389.

"in accordance with the law" clause in the relevant BIT (as was the case in *Metal-Tech*). In such a case, the tribunal would nonetheless be deprived of jurisdiction *ratione materiae* over the matter. Moreover, the state may also attempt to invoke the clean hands doctrine on the grounds of a violation of the host state's laws, rather than corruption *per se*. Whether the state succeeds would of course depend on the specific facts of the case in light of the proportionality approach discussed above,[184] but investors should in any case be alive to the possibility of the state having multiple bites at the cherry, so to speak.

C. Temporality of investor misconduct

50 Summarising the foregoing analysis, the clean hands doctrine may generally be invoked by the respondent state where there has been fraudulent conduct, corruption, or a breach of the state's laws on the part of the investor. But must such misconduct have occurred *during* the making of the investment, or does misconduct occurring *after* the making of the investment also allow the doctrine to be invoked? On closer analysis, it appears that the former position should be preferred.

51 It would certainly be more host state-friendly for the doctrine to apply in situations involving investor misconduct that occurs during and after the investment was made. After all, broadening the ambit of the doctrine would increase a state's chances of defeating an investor's claim. Yet, it is doubtful if the existing jurisprudence supports such a position; investor–State tribunals seem to prefer that only misconduct occurring during the making of the investment be examined.[185] This was made clear in the *Mamidoil Jetoil Greek Petroleum Products v Albania*[186] tribunal's discussion on an investor's violation of the host state's laws:[187]

> In the Tribunal's view, an investment can be found illegal for procedural reasons when the investor does not respect the norms regulating *the process of investment*. The investment may be legal in substance but still tainted by illegality when the investor violates procedural norms and regulations for *setting up its investment*. [emphasis added]

52 On the contrary, to date, only *Al-Warraq* appears to support the view that the clean hands doctrine may apply to investor misconduct that

184 See paras 33–37 above.

185 See, *eg*, *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No ARB/07/24, Award (18 June 2010) at para 123.

186 *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania* ICSID Case No ARB/11/24, Award (30 March 2015).

187 *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania* ICSID Case No ARB/11/24, Award (30 March 2015) at para 378.

occurs after the investment was made. *Al-Warraq* concerned a dispute between a Saudi investor and the Indonesian government. The claimant initiated arbitration under the Agreement on the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference[188] ("OIC Agreement"), alleging that Indonesia had failed to provide full protection and security to his investment, failed to provide fair and equitable treatment, and had expropriated his investment. However, the claimant had been convicted for theft, corruption, and money laundering in relation to the investment during the *operation* of the investment,[189] which the tribunal held to be a breach of Art 9 of the OIC Agreement.[190] Article 9 states that:

> The investor shall be bound by the laws and regulations in force in the host State and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

53 In essence, Art 9 "imposes a positive obligation on investors to respect the law of the Host State".[191] In light of the claimant's breach of Art 9, the *Al-Warraq* tribunal held that the clean hands doctrine rendered the investor's claim inadmissible.[192] Taken at face value, the decision of the *Al-Warraq* tribunal suggests that the clean hands doctrine applies even when the investor's misconduct occurs *after* the initial making of the investment. However, it should be emphasised that the *Al-Warraq* tribunal's application of the clean hands doctrine was premised on the investor's breach of Art 9 of the OIC Agreement. Commentators have noted that *Al-Warraq* is distinguishable on the basis of the existence of the positive obligation encased in Art 9.[193] Accordingly, the decision in *Al-Warraq* should not be interpreted as supporting the proposition that the clean hands doctrine applies even where the investor's misconduct was committed *after* the investment was made.

188 5 June 1981; 23 September 1986.

189 *Hesham Talaat M Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award (15 December 2014) at para 159.

190 *Hesham Talaat M Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award (15 December 2014) at para 647.

191 *Hesham Talaat M Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award (15 December 2014) at para 663.

192 *Hesham Talaat M Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award (15 December 2014) at para 646.

193 Andrew Newcombe & Jean-Michel Marcoux, "Case Comment: *Hesham Talaat M Al-Warraq v Republic of Indonesia*" (2015) 30(3) *ICSID Review* 525 at 530; Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229 at 258.

54 In any event, the reasoning of the *Yukos* tribunal regarding an investor's misconduct after the investment was made remains pertinent:[194]

> There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State *in the course of its investment*. If the investor acts illegally, *the host state can request it to correct its behaviour and impose upon it sanctions available under domestic law*, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. *It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.* [emphasis added]

Indeed, any investor misconduct (for example, fraud, corruption) committed *after* the investment has been made can and should be addressed by the host state's domestic laws. It may be argued that allowing the clean hands doctrine to operate in respect of investor misconduct after the investment was made would serve as a deterrent to existing and future investors from ever engaging in such misconduct. However, it would be too onerous on an investor to be punished twice for a particular misconduct – once by the host state's domestic laws, and another time via the clean hands doctrine completely barring the investor's claim in an investor–State dispute. Thus, the clean hands doctrine should *not* apply in situations where the investor misconduct occurred after the initial investment was made.

D. Legal effect of invoking the doctrine

55 Delving deeper into the more mechanical aspects of the doctrine's operation, we now turn to the fourth question – what is the precise legal effect of a successful invocation of the doctrine? As noted by the *Churchill Mining* tribunal, the legal consequences of a successful invocation of doctrine seem to "depend to a large extent on the circumstances of each case".[195] This article takes the view that (a) the doctrine operates by rendering the investor's claim inadmissible, rather than depriving the tribunal of jurisdiction over the matter; and (b) the doctrine has no direct impact on the award of damages *per se*.

194 *Yukos Universal Ltd (Isle of Man) v The Russian Federation* UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) at para 1355.

195 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 494.

(1) Admissibility versus *jurisdiction*

56 Does the clean hands doctrine operate by rendering the investor's claim inadmissible, or does the doctrine simply deprive the tribunal of jurisdiction over the matter? Practically speaking, one might call it a distinction without difference – in both situations, the clean hands doctrine operates to defeat the investor's claim; states embroiled in investor–State disputes would surely welcome the doctrine's operation either way. However, admissibility and jurisdiction are two distinct concepts under public international law; an objection on the admissibility of a claim presumes that the tribunal already has jurisdiction.[196] Judge Crawford has concisely described the distinction between the two as follows:[197]

> Objections to jurisdiction relate to conditions affecting the parties' consent to have the tribunal decide the case at all. If successful, jurisdictional objections stop all proceedings in the case, since they deprive the tribunal of the authority to give rulings as to the admissibility or substance of the claim. An objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time.

It thus remains necessary to determine whether a host state's successful invocation of the clean hands doctrine affects the admissibility of an investor's claim or the tribunal's jurisdiction.

57 This article proposes that successful invocation of the doctrine should render an investor's claim inadmissible, rather than affect the tribunal's jurisdiction. First, the traditional view is that the clean hands doctrine under public international law affects a claim's admissibility.[198] For instance, in the context of state responsibility, Judge Crawford noted (in his capacity as a Special Rapporteur) that "the doctrine appears to operate as a ground of inadmissibility rather than as a circumstance precluding wrongfulness or responsibility".[199] There is no reason to depart

196 *Copper Mesa Mining Corp v Republic of Ecuador* UNCITRAL, PCA Case No 2012-2, Award (15 March 2016) at para 5.62.

197 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th Ed, 2019) at p 667.

198 *Yearbook of the International Law Commission 1999: Report of the Commission to the General Assembly on the Work of Its Fifty-first Session* vol II (Part Two) UN Doc A/CN.4/SER.A/1999/Add. 1 (Part 2) (2003) at para 411; Charles Kotuby Jr & Luke Sobota, *General Principles of Law and International Due Process* (Oxford University Press, 2017) at p 133.

199 *Second Report on State Responsibility, by Mr James Crawford, Special Rapporteur* UN Doc A/CN.4/498 Add. 1–4 (1999) at para 333.

from the longstanding view of the doctrine being applied in relation to admissibility.

58 Secondly, the existing jurisprudence supports the conclusion that the doctrine should strike at admissibility of an investor's claim rather than the jurisdiction of the tribunal. The *Plama*, *Al-Warraq*, and *Churchill Mining* tribunals all held that the clean hands doctrine affects the admissibility of a claim. While it may seem that some investor–State tribunals have applied the clean hands doctrine so as to deprive the tribunal of jurisdiction rather than rendering the claims inadmissible, these cases can be easily rationalised on one simple basis – the decisions were premised on the investor's violation of an "in accordance with the law" BIT clause rather than the operation of the clean hands doctrine *per se*. A prime example would be the *Inceysa* tribunal's decision. As earlier mentioned,[200] the *Inceysa* tribunal held that Inceysa's fraudulent conduct deprived the tribunal of jurisdiction to hear the claim, rather than render the claim inadmissible. However, the *Inceysa* tribunal had conflated its analysis of the clean hands doctrine (referred to as the principle of *nemo auditur propriam turpitudinem allegans* by the tribunal) with Inceysa's violation of the "in accordance with the law" BIT clause.[201] As earlier argued,[202] an investment that is made in violation of an "in accordance with the law" BIT clause naturally affects the jurisdiction *ratione materiae* of the tribunal, rather than the admissibility of the claim. However, a violation of such a clause is legally distinct from an invocation of the clean hands doctrine, even if both stem from the same investor misconduct. Had the *Inceysa* tribunal correctly treated the clean hands doctrine as separate from issue of the investors' breach of an "in accordance with the law" BIT clause, it would have arrived at the following conclusions: first, the investor's violation of the "in accordance of the law" BIT clause deprived the tribunal of jurisdiction *ratione materiae*; and secondly, even if jurisdiction were established, the investor misconduct rendered the claims inadmissible under the clean hands doctrine.

(2) Damages

59 For completeness, a specific portion of the *Al-Warraq* tribunal's decision should be addressed. In particular, the *Al-Warraq* tribunal stated that the clean hands doctrine not only "render[ed] the Claimant's claim inadmissible",[203] but the doctrine "in any event … preclude[d]

200 See para 40 above.

201 *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26, Award (2 August 2006) at para 206.

202 See para 30 above.

203 *Hesham Talaat M Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award (15 December 2014) at para 646.

the awarding of [moral] damages" in favour of the Claimant.[204] The *Al-Warraq* could very well have meant that since the clean hands doctrine had already rendered the claim inadmissible, any award of damages was consequently precluded. However, in so far as the *Al-Warraq* tribunal was suggesting that the doctrine can preclude an award of damages even if the claim were admissible, this article strongly disagrees with such a suggestion.

60 Not only did the *Al-Warraq* tribunal fail to provide substantiation for such a suggestion; to date, no other investor–State tribunal has supported such a suggestion. Crucially, adopting such an approach would grant states invoking the doctrine two bites at the cherry. First, the doctrine may render the investor's claim inadmissible. Secondly, if the doctrine, for whatever reason, fails to do so, the doctrine may then preclude an award of damages in favour of the investor. This would skew the balance too heavily in favour of states. As earlier mentioned,[205] the purpose of the international investment regime is to promote investment and protect investors. While the "moral impetus" of the clean hands doctrine is to hold investors accountable for their own wrongdoing,[206] it suffices that the doctrine is capable of rendering an investor's claim invalid.

61 Further, investor–State tribunals already have the discretion to reduce the *quantum* of damages awarded to an investor in light of any investor misconduct.[207] For instance, in *Yukos*, in light of the misconduct of the investors and Yukos Universal Limited (which the investors controlled), the tribunal reduced the award of damages by 25% based on the principle of contributory fault.[208] It is unnecessary for the clean hands doctrine to function as an additional means for investor–State tribunals to affect the damages payable to an investor. The clean hands doctrine, if successfully invoked, should thus simply render the investor's claim inadmissible.

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204 *Hesham Talaat M Al-Warraq v Republic of Indonesia* UNCITRAL, Final Award (15 December 2014) at para 654.

205 See para 45 above.

206 Aloysius Llamzon, "Case Comment: *Yukos Universal Limited (Isle of Man) v The Russian Federation*" (2015) 30(2) *ICSID Review* 315 at 316.

207 Mariano de Alba, "Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration" (2015) 12(1) *Brazilian Journal of International Law* 321 at 329; Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the *Yukos* Award" (2016) 17 JWIT 229 at 243.

208 *Yukos Universal Ltd (Isle of Man) v The Russian Federation* UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) at para 1637.

E. Stage of arbitral proceedings at which the doctrine features

62 Thus far, this article has discussed at length the precise content of the clean hands doctrine, elucidating the situations in which it may be invoked to deny relief to an investor guilty of misconduct. However, one final question remains – at which stage of arbitral proceedings should the clean hands doctrine be addressed and analysed by the tribunal? The bifurcation of proceedings (that is, holding separate hearings for matters relating to jurisdiction and the merits) has become increasingly common in investor–State arbitration.[209] There also exists a clear trend of investor–State tribunals addressing the clean hands doctrine at the merits stage of proceedings;[210] only the decision of the *Niko* tribunal stands out for dealing with the doctrine at the jurisdiction stage. Such a trend is interesting, given that questions of admissibility are usually dealt with before any examination of the merits of the claim.[211] In any case, this article proposes that the doctrine should be addressed in the merits stage of proceedings.

63 At the jurisdiction stage of proceedings, the claimant need only present a *prima facie* case;[212] the tribunal may thus not be apprised of all the relevant facts necessary to make a decision on the application of the clean hands doctrine. Addressing the clean hands doctrine at the merits stage instead of the jurisdiction stage allows for the relevant facts to be properly ventilated, which would better enable the tribunal to make an informed decision on the issue. For instance, in *Oil Platforms (Islamic Republic of Iran v United States of America)*,[213] the ICJ deferred addressing the clean hands argument to the merits stage because an examination of the actions of both Iran and the US during the relevant period was required to make a decision on the clean hands argument.[214] The *Glencore*

209 Christopher Dugan *et al*, *Investor–State Arbitration* (Oxford University Press, 2008) at p 147; United Nations Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (2010) at p 58.

210 See, *eg*, *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40; *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No ARB/03/24.

211 *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) (2003) ICJ Rep 161 at 177.

212 Audley Sheppard, "The *Prima-Facie* Jurisdictional Threshold" in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds) (Oxford University Press, 2008) at pp 941–954; Christoph Schreuer *et al*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) at p 540.

213 Judgment (2003) ICJ Rep 161.

214 *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) (2003) ICJ Rep 161 at 177–178.

Finance (Bermuda) Ltd v Plurinational State of Bolivia[215] tribunal has also recently noted that it would be difficult to address the clean hands doctrine "without touching on the merits" of the dispute.[216] Given that the successful invocation of the clean hands doctrine by the state would result in a rather grave outcome for the investor (that is, being denied relief), it is all the more important that the doctrine is properly assessed by tribunals at the merits stage rather than the jurisdiction stage. As aptly stated by Bernado M Cremades, president of the *Fraport (I)* tribunal:[217]

> If the legality of the Claimant's conduct is a jurisdictional issue, and the legality of the Respondent's conduct a merits issue, then the Respondent Host State is placed in a powerful position.
>
> …
>
> Such an approach does not respect the fundamental principles of procedure.

IV. Closer look at *Churchill Mining v Indonesia*

64 At the time of writing, the latest investor–State tribunal decisions applying the clean hands doctrine are *Churchill Mining* and *Spentex Netherlands, BV v Republic of Uzbekistan*[218] ("*Spentex*"). However, the *Spentex* tribunal's award remains confidential and unpublished to date. This part shall thus summarise and examine the relevant portions of the *Churchill Mining* tribunal's decision before applying this article's proposed framework to the facts of the case.

A. Summary of relevant facts and findings

65 The claimants in *Churchill Mining* were a British company and an Australian company. In 2005, the claimants partnered with a group of Indonesian companies (collectively "Ridlatama") to explore the East Kutai Coal Project ("EKCP") in Indonesia. The claimants first acquired shares in a company registered in Indonesia. Subsequently, Ridlatama

215 *Glencore Finance (Bermuda) Ltd v Plurinational State of Bolivia* UNCITRAL, PCA Case No 2016-39, Procedural Order No 2: Decision on Bifurcation (31 January 2018).

216 *Glencore Finance (Bermuda) Ltd v Plurinational State of Bolivia* UNCITRAL, PCA Case No 2016-39, Procedural Order No 2: Decision on Bifurcation (31 January 2018) at para 47.

217 *Fraport AG Frankfurt Airport Services Worldwide v Philippines* ICSID Case No ARB/03/25, Dissenting Opinion of Mr Bernardo M Cremades (19 July 2007) at para 37.1.

218 ICSID Case No ARB/13/26, Award (27 December 2016). See Kathrin Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (Cambridge University Press, 2017) at p 296.

obtained mining licences for the EKCP. In 2010, Indonesia revoked Ridlatama's licences for the EKCP on the basis of violations of forestry regulations. In 2012, the claimants commenced investment arbitration against Indonesia, seeking compensation for the alleged expropriation of their investment. In response, Indonesia argued that Ridlatama had forged the licences, which rendered the claims inadmissible.

66 While the tribunal found that the licences were indeed forged by Ridlatama and not the claimants,[219] it noted that the claimants were aware of the risks of investing in the coal mining industry in Indonesia.[220] Thus, the claimants were expected to exercise a "heightened degree of diligence",[221] which the claimants failed to exercise by failing to investigate the reliability of Ridlatama and its directors before choosing to partner with them.[222] Further, the claimants did not conduct due diligence to verify the authenticity of the licences once "indications of forgery" came to light.[223] In light of the claimants' failure to exercise due diligence, the tribunal held that Ridlatama's fraudulent scheme to forge the licences rendered the claim inadmissible.[224] Churchill Mining plc ("Churchill Mining") subsequently commenced annulment proceedings against the tribunal's award, but to no avail.[225]

B. Tribunal's discussion on clean hands doctrine

67 With regard to the clean hands doctrine, the *Churchill Mining* tribunal noted that the doctrine has "found expression at the international level".[226] Yet, the tribunal shied away from expressly pronouncing on the doctrine's status under international investment law. Moreover, while the tribunal acknowledged that the doctrine's "status and exact contours are subject to debate and have been approached differently by international

219 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 476.
220 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 517.
221 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 519.
222 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 518.
223 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 524.
224 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at paras 528–529.
225 See *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Decision on Annulment (18 March 2019).
226 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.

tribunals",[227] it failed to clarify the doctrine in any meaningful manner. In short, the decision of the *Churchill Mining* tribunal is, as earlier argued,[228] of little value in determining whether the clean hands doctrine qualifies as a general principle of law and whether it applies in international investment law.

68 If anything, the tribunal's analysis only caused greater confusion as to the doctrine's scope. The tribunal first noted that the clean hands doctrine applies in relation to an investor's "illegal conduct".[229] However, puzzlingly, the tribunal then referred to the doctrine applying in relation to "fraudulent conduct".[230] To further confuse matters, the tribunal also characterised corruption as a "particularly serious" case of fraudulent conduct.[231] The tribunal's statements are perplexing because corruption, illegal conduct and fraudulent conduct are all conceptually distinct.

69 Finally, nowhere in the award did the *Churchill Mining* tribunal state that it was actually *applying* the clean hands doctrine. This was in spite of the fact that the tribunal had expressly referenced the doctrine by name and cited several investor–State tribunal decisions that have applied (whether expressly or implicitly) the doctrine,[232] including many decisions that have been discussed in this article. In fact, the tribunal seemed to deliberately avoid expressing concrete views on the doctrine's application. The tribunal's lack of detailed explanation on the scope and effect of the doctrine may perhaps have contributed to Churchill Mining's decision to challenge the award in the subsequent annulment proceedings.

C. Applying the proposed framework

70 Applying this article's proposed framework to the facts of the case would likely lead to the same conclusion as the *Churchill Mining* tribunal; the claimants' claims should be rendered inadmissible. This article has established that the clean hands doctrine would render an investor's claim inadmissible where there was fraudulent conduct on the

227 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.
228 See paras 23–24 above.
229 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.
230 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 494.
231 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 493.
232 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at paras 495–498.

part of the investor when procuring the investment. In *Churchill Mining*, the forgeries and fraudulent scheme in question were precisely for obtaining the mining licences for the EKCP.[233] However, it was Ridlatama that was responsible for the forgeries, not the claimants.[234] Hence, only one question remains – can the clean hands doctrine apply in relation to a third party's misconduct?

71 According to the *David Minnotte v Republic of Poland*[235] tribunal (which the *Churchill Mining* tribunal cited), where an investor deliberately closes his eyes to or unreasonable fails to perceive evidence of a third party's serious misconduct or crime, the investor's claim may be defeated.[236] While the *Minnotte* tribunal did not reference the clean hands doctrine in its award, its aforementioned statement remains relevant with regard to the clean hands doctrine. As earlier mentioned,[237] one of the objects of the clean hands doctrine in international investment law is to express condemnation of an investor's wrongdoings. An investor deliberately closing his eyes to a fraudulent scheme against the interests of the host state is certainly a wrongdoing worth condemning. It follows that the clean hands doctrine should apply in such a situation to render the investor's claim inadmissible. Given that the claimants did not conduct due diligence to verify the authenticity of the licenses once indications of Ridlatama's forgeries came to light,[238] the clean hands doctrine should apply to render the claims inadmissible.

V. Conclusion

72 The muddied status of the clean hands doctrine is but one example of legal certainty being found wanting in international investment law. While not intended to be a comprehensive treatise on the clean hands doctrine, this article has sought to provide clarity and structure in light of the confusion caused by the existing jurisprudence on the doctrine. To recapitulate:

(a) the clean hands doctrine is a general principle of law under Art 38(1)(c) of the ICJ Statute;

233 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 510.

234 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 476.

235 ICSID Case No ARB (AF)/10/1, Award (16 May 2014).

236 *David Minnotte v Republic of Poland* ICSID Case No ARB (AF)/10/1, Award (16 May 2014) at para 163.

237 See para 41 above.

238 *Churchill Mining plc v Republic of Indonesia* ICSID Case No ARB/12/14 and 12/40, Award (6 November 2016) at para 524.

(b) a state may invoke the doctrine if the investment was procured as a result of a violation of the state's laws (save for the operation of estoppel), the investor's fraud, or corruption (save where the state and/or its own officials were also complicit in the corruption);

(c) the doctrine has no application in relation to investor misconduct that occurs after the initial making of the investment;

(d) where proceedings are bifurcated, the doctrine should be addressed in the merits stage and not the jurisdictional stage; and

(e) if successfully invoked by a state, the doctrine would render the investor's claim inadmissible before the tribunal.

73 Nonetheless, until major reform is made to the existing international investment regime, confusion is likely to subsist in spite of the framework provided by this article. The fact remains that certain arbitrators favour a more liberal application of the clean hands doctrine in international investment law, while others prefer a more restrictive approach or a complete non-application of the doctrine. States and investors embroiled in an investor–State dispute potentially involving an application of the doctrine would naturally select arbitrators who would favour their respective causes. The evident lack of diversity amongst arbitrators and adjudicators involved in investor–State dispute settlement will only perpetuate doctrinal disagreements occurring in the form of inconsistent decisions.[239]

74 It bears mentioning that the aforementioned issues that plague the international investment regime have been the subject of much discussion by Working Group III of the United Nations Commission on International Trade Law, which has been deliberating possible reforms to the existing investor–State dispute settlement regime since November 2017.[240] In particular, serious consideration has been given to the establishment of a multilateral advisory centre to provide legal advice on international investment law before a dispute arises, a permanent international investment court for hearing investor–State disputes, and a potential appeal or review mechanism for international investment

239 See United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.166 (30 July 2019) at para 5.

240 See United Nations Commission on International Trade Law, Working Group III, *Annotated Provisional Agenda* UN Doc A/CN.9/WG.III/WP.141 (15 September 2017) at paras 5–15.

disputes.[241] Reforms have also been mooted in relation to the appointment of arbitrators and adjudicators, so as to promote diversity amongst decision makers and enhance both transparency and consistency in investor–State dispute settlement.[242] If implemented, such reforms would certainly restore certainty and confidence in the international investment regime. In fact, such reforms would greatly complement this article's proposed framework by ensuring that the framework is applied consistently and coherently across varying investor–State disputes involving the clean hands doctrine. As at the time of writing, Working Group III is scheduled to hold its 39th session in Vienna, beginning 5 October 2020.[243] Until then, and until such reform is actualised, litigants and adjudicating bodies alike must continue to grapple with the systemic uncertainties that are part and parcel of the existing international investment regime.

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241 See United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.166 (30 July 2019) at paras 12–23.

242 See United Nations Commission on International Trade Law, Working Group III, *Possible Reform of Investor–State Dispute Settlement (ISDS) Note by the Secretariat* UN Doc A/CN.9/WG.III/WP.166 (30 July 2019) at paras 24–26.

243 The 39th session was initially to be held in New York from 30 March 2020 to 3 April 2020. However, the session was postponed due to the COVID-19 situation.