Cleansing the (Un)clean: The Ongoing Saga of the Clean Hands Doctrine

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The arbitral tribunal in *Glencore Finance (Bermuda) Limited v. Bolivia* has recently hinted at its intent to address an old question: What is the doctrine of "*clean hands*" in investment arbitration?

On 31 January 2018, an arbitral tribunal composed of Professor Ricardo Ramírez Hernández, Professor John Gotanda and Professor Philippe Sands issued a Procedural Order No. 2 on the issue of bifurcation. While the order itself is uncontroversial, the tribunal notes that the standard and scope of clean hands will have to be examined thoroughly. Therefore, the tribunal will have an opportunity to clarify a problem that has frustrated former tribunals and led to divergent decisions.

Bolivia had objected to Glencore's claims, arguing that the privatization of the assets underlying the investment in question had been illegal under Bolivian law, the acquisition of mining and leasing assets were contrary to the Bolivian Constitution and the circumstances surrounding the privatization of the assets were contrary to transparency and good faith. Based on this, Bolivia claimed that under the "clean hands" principle, the foreign investor could not present claims tainted by illegality which the foreign investor was aware of when it received the assets in question. The Claimant maintained that the investment was made lawfully through a public tender process.

In its Order, which rejected bifurcation, the tribunal referenced *Churchill Mining* to agree that the clean hands doctrine had found "*expression*" internationally, but that its "*status and exact contours*" remain uncertain (para. 46). The tribunal acknowledged its doubts that a "*mere assertion of unlawful conduct*" would raise the objection above the required threshold (para. 47), but indicated that it would not only have to accept the clean hands principle, but also to lay out its contours. The tribunal also indicated that it would need to look at the merits to address this objection.

There remains significant disagreement about the status of the clean hands doctrine under international law.

Proponents argue that the doctrine exists as a general principle, pointing to international tribunals and a significant number of national legal decisions (e.g., P. Dumberry, "State of Confusion: The Doctrine of "Clean Hands" In Investment Arbitration after the Yukos Award", 17 Journal of World Investments and Trade (2016), pp. 229-259). Past tribunals have relied on similar good faith principles, international public policy and the duty to honor local laws (e.g., Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 244 ('*[N]o legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them.*'). According to Dumberry, the legality requirement is itself a manifestation of the

clean hands doctrine.

However, to become a general principle of law, a principle must have "*a certain level of recognition and consensus*" (Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014), para. 1359.). The ILC Articles on State Responsibility and Diplomatic Protection do not contain any reference to the doctrine of unclean hands. As the *Yukos* tribunal noted – which itself included a member who had previously dissented in an ICJ case based on a finding of unclean hands (para. 1361) – there is not a single majority decision by an international tribunal which has applied the clean hands doctrine to an investor-State dispute to conclude that it operated as a bar to claims as a principle of international law (para. 1362).

In *Fraport II*, for instance, the principle did not operate to exclude the investor's claim, since the relevant treaty contained a legality requirement clause (para. 328). In another case, *Al-Warraq v. Indonesia*, the tribunal's finding that claimant's conduct fell within the scope of the application of the clean hands doctrine and therefore could not benefit from the protection afforded by the OIC Agreement was made, but in *obiter dictum* (para. 647). Given the lack of relevant case law, it is difficult to determine the doctrine's status, let alone the standard to be applied.

A 2013 case provides a potential solution. The tribunal in *Niko Resources v. Bangladesh* ("Niko") addressed clean hands separately from contentions of bad faith and international public policy (para. 476). It also sidestepped determining the status of unclean hands as a general principle of law by focusing on its content. It found that, at the principle's core, some form of reciprocity was required, i.e., a nexus between the relief forming the objection and past actions which may be characterized as unclean hands (para. 483). In doing so, it relied on three elements referenced by Judge Hudson's opinion in *Guyana v. Suriname* (para. 481):

1. the breach must concern a continuing violation;
2. the remedy sought must be 'protection against the continuance of that violation in the future', not damages for past violations and
3. there must be a relationship of reciprocity between the obligations considered

In *Niko*, as the violation was not continuing, the remedy did not concern protection against a past violation and there was no relationship between the relief being sought and the acts in the past characterized as involving unclean hands, the respondents' objection based on acts of corruption were dismissed (paras. 483, 485).

The tribunal in *Glencore* might apply this narrow standard, which would avoid the contentious task of outlining the standard and scope of unclean hands as a general principle of law, while addressing genuine concerns of illegality. This would also allow the tribunal to avoid making a distinction between admissibility and jurisdiction, should Bolivia fail to corroborate its objection.

While some treaties expressly cover only those investments that are made in accordance with host State law, the question of whether there is a general principle of international law which requires "*clean hands*" is unsettled, at best. In the authors' opinion, the most that can be said is that rather than forcing the parties to guess at the appropriate standard to apply in cases where the clean hands doctrine is invoked, it is important for the arbitrators in Glencore to provide the parties guidance as early as possible, so that the parties can adapt themselves to those standards, strengthening due process while minimizing tilting at windmills.