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Glencore v. Bolivia: Is the Uncertainty of the (Un)Clean Hands Doctrine Finally Settled?

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For several years, the uncertainty of the (un)clean hands principle has been subject to debate due to the diverse approaches taken by arbitral tribunals. However, in September 2023, the tribunal in *Glencore Finance (Bermuda) Ltd. v. The Plurinational State of Bolivia* (PCA Case No. 2016-39) may have indirectly settled the uncertainty. The case proposes a remarkably clever and quite important approach to the clean hands doctrine, which I discuss below.

Background

From 1985 to 1997, Bolivia amended its legal framework by enacting a variety of laws and regulations with the intent of (i) providing a new stabilization and privatization program for Bolivia's industry, (ii) stimulating foreign investment, (iii) privatizing public enterprises, (iv) increasing foreign participation, and (v) allowing foreign individuals and collective entities to obtain mining concessions.

Under this new regime, the Mining Corporation of Bolivia ("**Comibol**") was required to transfer by way of international public tender the mining concessions which were not subject to risk-sharing or leasing contracts. Thus, in 1999, Bolivia alongside the Comibol issued the public terms for the sale of (i) the Tin Smelter, (ii) the Antimony Smelter, and (iii) the rights to operate and exploit the Colquiri Mine (together the "**Assets**").

Before the privatization, the Assets were controlled by Comibol. From 1999 to 2000, Bolivia awarded the Assets in the following way:

1. On 24 December 1999:
 1. The Colquiri Mine Lease was awarded to Compañía Minera Colquiri S.A. ("**Colquiri**"), which was owned by a consortium between UK-based Commonwealth Development Corporation ("**CDC**") and Bolivian-based *Compañía Mineral del Sur* ("**Comsur**"); and
 2. The Tin Smelter was awarded to Allied Deals Estaño Vinto S.A. (a subsidiary of Allied Deals PLC that later changed its name to RBG Resources plc ("**RBG**"). Allied Deals Estaño S.A. changed its name to RBG Estaño Vinto SA and later to Complejo Metalúrgico Vinto SA.
2. On 11 January 2000, the Antimony Smelter was awarded to Colquiri.

Due to certain fraudulent practices of RBG, the High Court of Justice in London ordered its liquidation on 3 May 2002. For that reason, on 29 May 2002, RBG Estaño Vinto SA sold its shares to Comsur. The sale was authorized by Bolivia and Comibol.

In August 2002, Sánchez de Lozada assumed the Presidency. However, due to social confrontations in Bolivia, he resigned from office in October 2003.

By 2002, all the Assets were owned by Comsur. Comsur was formerly owned by Minera S.A. (a Panamanian company) through three Panamanian companies.

Between 30 January and 2 March 2005, Glencore International AG (“**Glencore International**”) purchased the Panamanian companies. Thus, Glencore International had 100% control over Comsur, which in turn held 51% of Colquiri. At the same time, Glencore International acquired from CDC the remaining 49% shares of Colquiri. Thus, by March 2, 2005, Glencore had acquired full indirect ownership of the Assets. On 7 March 2005, Glencore assigned the Assets to Glencore Finance.

Later Bolivia decided to revert all concession related to the Assets:

1. On 9 February 2007, the property of Complejo Metalúrgico Vinto and all of its assets (including the Tin Smelter) reverted to Bolivia due to the low price paid for the Tin Smelter.
2. On 1 May 2010, the Antimony Smelter reverted to Bolivia because it had been transferred in violation of various legal statutes and regulations.
3. On 20 June 2012, the Colquiri Mine reverted to Bolivia due to social issues related to the Colquiri Mine and that the new legal framework set out by the [Bolivian Constitution](#) allowed the state to control mining activities.

General Consideration of the (Un)clean Hands Doctrine

The doctrine of (un)clean hands has been commonly described as not allowing a party that has committed an intentionally wrongful act or acted improperly to claim legal protection against the other party (Ka?du?ski, M. *Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration*, Polish Review of International And European Law, 2015). Hence, one cannot bring an action before a court if the origin of the action is improper behavior (Ka?du?ski, 2015). However, the legal status of the doctrine remains undefined because there remains significant disagreement whether it should be considered as a general principle of international law (Kirtley, [Cleansing the \(Un\)clean: The Ongoing Saga of the Clean Hands Doctrine](#), Kluwer Arbitration Blog, 2018).

According to Amianto (Amianto, L. [The Role of “Unclean Hands” Defences in International Investment Law](#), McGill Journal of Dispute Resolution, 2019), and while there is no universally accepted criterion of what a general principle of law is, it is commonly understood as: “[t]hose rules on which there is international consensus to consider them as universal standards.” ([Inceysa v. El Salvador](#), ¶ 227). Therefore, this raises the question whether the principle has reached such international consensus.

Due to the broader concept of the doctrine, the legal status of the clean hands principle was fragmented in two distinct scenarios (i) *Ex delicto non oritur action* or claims tainted by illegality, and (ii) *Nemo auditor propriam turpitudinem allegans* or no one can be heard to invoke his own

turpitude.

Regarding the former, the principle in that form has already been embraced by the international community. However, in the second form, mainly due to the *Yukos v. Rusia* case, it has not been considered a principle of international law (¶1363).

The (Un)clean Hands Doctrine in *Glencore v. Bolivia*

Bolivia raised the unclean hands doctrine in objecting to the jurisdiction of the tribunal, alleging that the privatization process of the Assets was illegal and “[c]ontrary to basic requirements of transparency and good faith.” However, Glencore argued that its investments in Bolivia were legal and that the “[u]nclean hands doctrine did not exist as a general principle of international law.”

The tribunal analyzed whether it was precluded from adjudicating the dispute due to the illegality of the privatizations and the unclean hands principle. Thus, the tribunal examined:

1. The seriousness of the fraud [illegality].
2. The role of the disputing parties in relation to the fraud.
3. The nexus between the fraud and the claims.
4. The time when the fraud was committed.

Bolivia argued that the privatization process was illegal due to (i) the legal framework that allowed the concessions was wrongfully approved by the personal interests of President Sánchez de Lozada, and (ii) being contrary to the basic requirements of transparency and good faith, without regard to the protection of the public patrimony and disregarding the basic principle of administrative law.

Glencore argued that (i) Sánchez de Lozada was not in office at the time of the privatization, and (ii) the Assets were privatized by means of a general legal framework applicable to all industries.

The tribunal considered that all legal steps and formalities were observed in the bidding process. Furthermore, the tribunal noted that even if from a legal standpoint not all formalities were observed, the fact that the bidding process was never challenged before any court or tribunal until this arbitration undermined Bolivia’s position.

The tribunal further observed that Bolivia was not alleging that Glencore committed any wrongdoing when it acquired the Assets, but rather that it knew (or should have known) at the time it acquired the Assets that they were privatized through highly irregular and publicly contested processes which could have been discovered through *minimum due diligence*. However, the tribunal found that Bolivia did not produce any evidence indicating that Glencore should have been aware of these irregularities.

The tribunal further found that the process was conducted in accordance with applicable law, that no challenge of illegality was filed after the privatization, and the alleged wrongdoing was committed by Bolivian Government officials. Therefore, the tribunal concluded that the illegality did not meet the serious criteria.

From the decision adopted by the Arbitral Tribunal, it is apt to conclude that in this case the clean

hands principle was manifested in its *nemo auditur propriam turpitudinem allegans* form. Hence, the Arbitral Tribunal did not have the necessity to separately scrutinize the legality requirement and the clean hands doctrine, due to the unrecognition of the principle in the international community.

Final Remarks

Glencore v. Bolivia is an illustrative case study as to what the general approach to the unclean hands doctrine should look like. When analyzing the application of the unclean hands doctrine, tribunals should bear in mind the fragmentation of the principle and whether it is considered a general principle of international law. After proper identification of the form that the principle adopts in each case, tribunals shall point out the criteria or threshold that either the principle or the legality requirement has to meet.

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