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The Convergence of the Doctrine of "Unclean Hands" and the "In Accordance with the Law" Requirement in International Investment Law

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Introduction

The subject of this article is the *Defense of Illegality of Investment* ("**DII**"). Within the field of international investment arbitration, the DII precludes an arbitral tribunal from considering the merits of a case brought by an investor whose investment was made illegally. [1] Specifically, this article will discuss the two incarnations of the DII: the *Doctrine of Unclean Hands* ("**DUH**") and the "In accordance with the law" requirement ("**IAWL requirement**"). The thesis of this article is that these two notions have converged in such a way that it may no longer bear differentiating between them. It should be noted that this article is not taking a normative position regarding the desirability of this convergence. Rather, this article seeks to demonstrate that this convergence is occurring and to explain why it is occurring.

In its first section, this article offers a brief overview of the origin, nature and scope of both the DUH and the IAWL requirement. This section serves two purposes. First, this section will demonstrate that, on top of sharing the same function, the two notions have essentially the same scope and thus, in any given circumstances, should produce the same outcome. Second, investigating the origin and nature of the two notions serves to explain why, despite serving the same purpose, they have been considered distinct. The IAWL requirement has generally been understood to find application only where an International Investment Treaty ("**IIT**") contains a provision which explicitly requires that investments be made "in accordance with the laws of the Host State"

[1] Paolo Busco, *The defence of illegality in international investment arbitration : a hybrid model to address criminal conduct by the investor, at the crossroads between the culpability standard of criminal law and the separability doctrine of international commercial arbitration* (PhD Thesis, Scuola Superiore Sant'Anna di studi universitari e di perfezionamento & Université Paris 1 Panthéon-Sorbonne, 2018) [unpublished] at para 41.

("**IAWL provision**"). This differs from the DUH which, as a general legal principle, would apply regardless of whether the applicable IIT provides for the principle's application. The DUH's status as a principle of international law is, however, heavily disputed.[2]

This leads us to the second section of this article which will show that current trends within arbitral jurisprudence are, in effect, erasing this difference and thus bringing about the convergence of these two notions. Specifically, the article will present two trends. First, it will show that the DUH is gradually – albeit mostly tacitly – gaining acceptance within arbitral case law, thus making IAWL provisions superfluous. Second, it will show that recent arbitral jurisprudence is increasingly favourable to the recognition of an implicit IAWL requirement within all IITs, even those that contain no IAWL provision, thus transforming this requirement into a general principle of law akin to the DUH.

These two trends may be better conceptualized as two sides of the same coin. Indeed, implying an IAWL requirement within an IIT that contains no IAWL provision may well be construed as a surreptitious application of the DUH. Likewise, tacitly applying the DUH may well be construed as implying an IAWL requirement into the applicable IIT. After all, it is the very thesis of this article that distinguishing between these two doctrines is becoming increasingly unnecessary. Hence, many of the decisions cited hereinafter could be interpreted as contributing to either one of the two aforementioned trends. Nevertheless, the distinction between the two trends remains a useful conceptual tool that will help demonstrate how seemingly different decisions are contributing to the same convergence. Thus, together, the two first sections of this article will demonstrate that the two notions:

(a) Serve the same purpose, namely giving effect to the DII;

(b) Share the same scope and thus produce the same outcome; and

[2] Patrick Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the *Yukos* Award" (2016) 17:2 J of World Investment and Trade 229 at 242.

(c) Are equally accessible under all IITs.

This symmetry is the core of this article's argument. The two notions are growing increasingly indistinguishable. Finally, the third section of this article discusses how the IAWL requirement and the DUH may differ on the basis that the former relates to jurisdiction and the latter to admissibility. The potential impact of this difference with regards to the convergence of the two notions remains, however, an open question.

I. Overview of the Origin, Nature, and Scope of the Two Notions

1.1 - The "In Accordance with the Law" Requirement

1.1.1 - *Origin and Nature*

As a manifestation of the DII, an IAWL requirement deprives an investor who committed illegal acts from the substantive protections they would have otherwise been afforded under an IIT – thereby barring arbitral tribunals from considering the merits of their case.[3] An IAWL requirement was traditionally understood only to exist when the text of an IIT explicitly indicated that the substantive protections it afforded to investors were reserved to those who acted in accordance with the law of the Host State, that is an IAWL provision.[4]

Commentators have found that the first instance in which such a requirement was discussed in a publicly available arbitral decision appears to be the case of *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*.[5] This case concerned the Italy-Morocco bilateral investment treaty ("**BIT**"), which contained the following provision:

> "[T]he term 'investment' designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on

[3] *Ibid* at 242.
[4] Busco, *supra* note 1 at para 608.
[5] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (2003), 42 ILM 609 (International Centre for Settlement of Investment Disputes) (Arbitrators: Robert Briner, Bernardo Cremades, Prof. Ibrahim Fadlallah) [*Salini*]. See Busco, *supra* note 1 at para 602.

> the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party."[6]

In interpreting the IAWL definition *obiter dicta*, the *Salini* tribunal attributed a significant function to the provision:

> "[The provision] seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."[7]

This laid out the basic mechanism of an IAWL requirement and endowed the phrase "in accordance with the law" with significant meaning. Referring to *Salini*, multiple other international investment arbitral tribunals subsequently yielded decisions in which jurisdiction was declined on the basis of an IAWL provision.[8] The IAWL requirement thus became a recognizable tool to limit jurisdiction that is now frequently invoked by respondent Host States[9] and a prolific subject for academic commentary.

Amongst the many IAWL provisions that have been recognized by arbitral tribunals, one may distinguish between two types of IAWL provisions.[10]The first type encompasses IAWL provisions that expressly reserve an IIT's substantive protections to those whose investments were made in conformity with the laws of the Host State. The second type of IAWL provisions operates through an IIT's internal definition of the term "investment", embedding into it a requirement of legality. In other words, for the purposes of the IIT, the term "investment" is to be understood as only referring to ventures which abide by the Host State's laws.[11] Thus, a claimant whose venture is illegal will not be regarded as an investor under

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[6] *Ibid* at para 45.
[7] *Ibid* at para 46.
[8] Busco, *supra* note 1 at para 604.
[9] Thomas Obersteiner, "'In Accordance with Domestic Law' Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors" (2014) 31:2 J Int Arb 265 at 265–66.
[10] Busco, *supra* note 1 at paras 550ff.
[11] This legality requirement supplements the component of the objective definitions of "investment". On that subject, see *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia* (2012), ICSID, Decision on Jurisdiction at para 198 (International Centre for Settlement Investments Disputes) (Arbitrators: Prof. Gabrielle Kaufmann-Kohler, Hon Marc Lalonde, Prof. Brigitte Stern) [*Quiborax*], as well as the sources cited therein.

the IIT and will therefore be ineligible to the protection the IIT affords to investors. An example of such a provision can be found in the Ukraine-Lithuania BIT which defined the term "investment" as "every kind of asset invested by an investor by an of the Contracting Party in the territory of the contracting party [in accordance with its laws and regulations]"[12] and the term "investor" as any natural person or company in the territory of [Ukraine or Lithuania] "in accordance with its applicable laws and regulations".[13]

1.1.2 - *Scope*

As IAWL requirements were traditionally the product of a treaty provision, the scope of a requirement could in theory vary from one IIT to the another so as to be tailored to the will of the parties. In spite of that, IAWL provisions tend to be remarkably vague.[14] Perhaps because of this, tribunals and commentators have, since *Salini*, repeatedly discussed what should be the scope given to IAWL provisions, as a generic concept.[15] The scope of IAWL requirements has generally been discussed under four facets:

a) Gravity of the act – how grave must the illegal act be to constitute a breach of the IAWL requirement?

b) Subject-matter of the act – must the illegal act be specifically connected to the Host State's investment regime to constitute a breach of the IAWL requirement?

c) Timing of the act – must the illegal act necessarily be committed during the *making* of the investment (as opposed to during its *performance*) to constitute a breach of the IAWL requirement?

d) Nature of the broken law – must the illegal act necessarily be the infringement of a specific municipal rule or legislation (as opposed

[12] *Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments*, Lithuania and Ukraine, 8 February 1994, UNTS v. 2711 I-47992 art. 1(1).
[13] *Ibid* at paras 1(2)(a)–(b).
[14] Busco, *supra* note 1 at paras 757–58.
[15] *Ibid* at paras 606ff, which criticizes this approach.

to the infringement of a general principle of municipal or international law) to constitute a breach of the IAWL requirement?

Each facet will be analyzed separately in the following pages.

1.1.3 - *Gravity of the illegal act*

There is a jurisprudential and academic consensus that the *De Minimis* exception should apply to the IAWL requirement. In other words, a minor or trivial violation should not deprive an investor from an IIT's substantial protections.[16] This will be hereinafter referred to as the "non-trivial standard." Some tribunals, however, have suggested that the bar should be higher. In the case of *LESI SpA and ASTALDI SpA v Algeria,* the tribunal found that the IAWL provision contained in the Italy-Algeria BIT would only deprive investors of the treaty's protection if the illegality constituted a breach of the "principes fondamentaux en vigueur."[17] This constitutes a markedly higher standard than simply requiring that the violation be non-trivial. This aspect of the *LESI* decision was approved of and incorporated in two additional instances – the cases of *Desert Line Projects LLC v Yemen* and *Rumeli Telekom AS v Kazakhstan*. Borrowing the language used in the *LESI* decision, both arbitral tribunals indicated that only a violation of fundamental legal principles would justify depriving an investor from a treaty's protections.[18]

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[16] Rahim Moloo & Alex Khachaturian, "The Compliance with the Law Requirement in International Investment Law" (2011) 34:6 Fordham Intl L J 1473 at 1495; Agata Zwolankiewicz, "The Principle of Clean Hands in International Investment Arbitration: What is the Extent of Investment Protection in Investor-State Disputes?" (2021) 3:1 ITA in Rev 4 at 23; Busco, *supra* note 1 at para 853. The most influential decision on that subject was probably *Tokios Tokelės v Ukraine* (2004) ICSID, Decision on Jurisdiction at para 86 (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof. Prosper Weil, Prof. Piero Bernardini, Daniel M. Price) [*Tokios*].

[17] *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire* (2006), ICSID, Decision at para 83 (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof. Pierre Tercier, Prof. Bernard Hanotiau, Prof. Emmanuel Gaillard) [*L.E.S.I*].

[18] *Rumeli Telekom A.S. and Telsim Mobile Telekomikayson Hizmelteri A.S. v Republic of Kazakhstah* (2008) ICSID, Award at para 318 (International Centre for Settlement of Investment Disputes) (Arbitrators: Steward Boyd, Marc Lalonde, Bernard Hanotiua) [*Rumeli*]; *Desert Line Projects LLC v Yemen* (2008) ICSID, Award at para 104 (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof. Pierre Terrier, Ahmed S. El-Kosheri, Jan Paulsson) [*Desert Line*].

This "fundamental principle" standard has been the subject of criticism.[19] Indeed, it has been remarked that no other arbitral decision, outside of this trio of cases, has approved or made use of the "fundamental principle" standard. Moreover, the tribunals in these three cases were not actually tasked with considering the application of an IAWL requirement. As such, this standard was exclusively endorsed *obiter dicta*. [20] Furthermore, this standard was explicitly rejected in *Quiborax*. In response to the claimant's argument in favour of the "fundamental principle" standard, the tribunal explained that such a perspective would go "beyond the terms of the BIT, in an attempt to further the investor's protection without due regard for the State's interests."[21]

It is unclear why the tribunals in *LESI*, *Desert Line,* and *Rumeli* chose to endorse this elevated standard. Their laconic reasoning offers little help in that regard. The *LESI* case, which spurred the whole saga, is especially puzzling. In this case, the applicable IIT contained an IAWL provision which explicitly referred to the "laws and regulations in effect." [22] Not only did the IAWL provision make no reference to fundamental principles, but moreover, its reference to mere "regulations" suggests that a much lower standard should have been applied. Thus, in the author's view, the *LESI*, *Desert Line* and *Rumeli* cases should not displace the existing jurisprudential and academic consensus which are in favour of the non-trivial standard.

It is also relevant to mention the approach adopted by the tribunals in *Quiborax* and *Metal-Tech Ltd v The Republic of Uzbekistan*.[23] Reusing *verbatim* the language of the *Quiborax* decision, the *Metal-tech* tribunal indicated that "the legality requirement covers (i) non-trivial violations of the host State's legal order, (ii) violations of the host State's foreign

[19] Jarrod Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration" (19 November 2014), online*:* <https://www.iisd.org/itn/en/2014/11/19/in-accordance-with-which-host-state-laws-restoring-the-defence-of-investor-illegality-in-investment-arbitration/>.
[20] *Ibid*.
[21] *Quiborax*, *supra* note 11 at para 263.
[22] *L.E.S.I., supra* note 17 at para 83.
[23] *Metal-Tech Ltd v The Republic of Uzbekistan* (2013), ICSID, Award (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof. Gabrielle Kaufmann-Kohler, John M. Townsend, Claus von Wobeser) [*Metal-Tech*].

investment regime, and (iii) fraud – for instance, to secure the investment or to secure profits."[24] A textual reading of this passage would suggest that it is not a list of cumulative requirements, but rather a list of three categories of illegal acts that can all independently trigger the effects of an IAWL requirement. As such, it would seem that any "violations of the host State's foreign investment regime", regardless of its gravity, would be sufficient to strip an investor from an IIT's protection. However, it would be incorrect to interpret this passage in such a strict textual manner.

Indeed, the *Quiborax* tribunal also said the following: "The Respondent opposes an expansive construction [of the IAWL requirement] encompassing any breach of its legal order irrespective of its seriousness or timing. […] This approach would create deleterious incentives, as host States would be able to strip investors of treaty protection by finding any minor breach at any time."[25] This passage clearly demonstrates that the tribunal did not believe that investors should be deprived of their protections on the basis of "trivial" illegalities. We should therefore reject the aforementioned textual reading and apply the "non-trivial" standard in all cases.

1.1.4 - *Timing of the illegal act*

Tribunals have consistently found that the IAWL requirement only applies at the stage of making the investment, and not during its performance. Many tribunals have pointed to language in the applicable IAWL provision – e.g., the use of verbs such as "made"[26] or "accepted"[27] or "acquired"[28] – to conclude that only illegal acts that occurred during the initial making of the investment could amount to a breach of the IAWL

[24] *Ibid* at para 165.
[25] *Quiborax*, *supra* note 11 at para 263.
[26] *Ibid* at para 266; *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos de Sur S.A v The Argentine Republic* (2012), ICSID, Decision on Jurisdiction at para 319 (International Centre for Settlement of Investment Disputes) (Arbitrators: Judge Thomas Buergenthal, Henri C. Alvarez, Dr. Kamal Hossain); *Gustav F W Hamester Gmbh & Co Kg v Republic of Ghana* (2010), ICSID, Award at para 89 (International Centre for Settlement of Investment Disputes) [*Hamester*].
[27] *Fraport Ag Frankrut Airport Services Worldwide v Republic of the Philipines (I)* (2007), ICSID, Award at para 300 (International Centre for Settlement of Investment Disputes) (Prof. L. Yves Fortier, Dr. Bernardo M. Cremades, Prof. W. Michael Reisman) [*Fraport I*].
[28] *Teinver*, *supra* note 26 at 318.

requirement.[29] However, support for this position may also be found outside of treaty-specific language. Indeed, the wider rationale for this position was clearly explained by the tribunal in the case of *Yukos Universal Limited (Isle of Man) v The Russian Federation*:[30]

> "There is no compelling reason to deny altogether the right to invoke the [applicable treaty] 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 …. However, if the investor believes these sanctions to be unjustified …, [they] must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the [applicable treaty] 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."[31]

1.1.5 - *Subject-matter of the illegal act*

It is unclear whether it is only the breaching of laws which specifically govern investment that may constitute a breach of an IAWL requirement. In the case of *Saba Fakes v Republic of Turkey*, the tribunal argued that "the legality requirement contained [in the applicable IIT] concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State" and that "it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment

[29] Aloysius Llamzon & Anthony Charles Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct" in Albert Jan Van den Berg with the collaboration of International Council for Commercial Arbitration, ed, *Legitimacy: Myths, Realities, Challenges* (Miami, Florida: Kluwer Law International, 2015) 451 at 501.
[30] *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2014), PCA, Award at para 1355 (Permanent Court of Arbitration) (Arbitrators: Hon. L. Yves Fortier, Dr. Charles Poncet, Judge Stephen M. Schwebel) [*Yukos*].
[31] *Ibid*.

regulation." [32] The tribunal therefore deemed that the alleged non-compliance with domestic competition law and telecommunications regulatory law was irrelevant with regards to the IAWL requirement.

This is seemingly the only instance where the relevance of the subject-matter of the breached law was discussed, and it is subject to criticism. For instance, Professor Jarrod Hepburn remarked that: "It is hard to see why an investor should not be required to comply with competition and telecoms laws if these laws affect the entry of new players to a state's telecommunications market. In any case, almost by definition, any law that an investment might potentially breach is surely a law 'related to the very nature of investment regulation' — if the law in question does not regulate investment, it seems unlikely that an investment could breach it."[33] This article generally agrees with this criticism. However, it would be extreme to suggest that there should be no required link between the investment and the illegality. Without limiting the application of the IAWL requirement to breaches of "laws governing the admission of investments", an investor should not be deprived of an IIT's protection for illegal acts that have no relation to the investment – e.g., acts committed by an investor acting as a private individual, outside of his capacity of investor.

In *Metal-Tech* and *Quiborax*, "violations of the host State's foreign investment regime" were named as one of three categories of illegal acts that would trigger the application of the IAWL requirement.[34] This suggests that the scope of the requirement is not limited to such violations. However, as previously discussed, a textual interpretation of this excerpt produces contradictory and undesirable results. It is therefore of limited assistance with regards to questions of scope. In sum, this article argues that the limited body of literature on the subject prohibits any definitive

[32] *Saba Fakes v Republic of Turkey* (2010), ICSID, Award at para 119 (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof. Hans van Houtte, Dr. Laurent Lévy, Prof. Emmanuel Gaillard) [*Saba Fakes*] [emphasis added].
[33] *Hepburn*, *supra* note 19.
[34] *Metal-Tech*, *supra* note 23 at para 165; *Quiborax*, *supra* note 11 at para 266.

conclusions about the significance of the subject matter of the breached law.

1.1.6 - *Nature of the broken law*

Jurisprudence suggests that breaches of general principles of international or municipal law – in addition to breaches of specific laws and regulations – may trigger the IAWL requirement. The two first cases that must be considered are *Inceysa Vallisoletana S.L. v Republic of El Salvador*[35] and *Plama Consortium Ltd v Republic of Bulgaria*.[36] Both decisions explicitly state that breaching international legal principles would result in a denial of jurisdiction under the applicable IAWL requirement.

It is important to note, however, that both tribunals relied heavily on the text of the applicable IIT in denying jurisdiction. Specifically, the *Inceysa* tribunal explained that "the reference made in the [applicable treaty] to the generally recognized rules and principles of International Law obliges this Tribunal … to determine whether, according to said principles and rules, Inceysa's investment can be considered legally made."[37] Similarly, the *Plama* tribunal found that "the investment … violates not only Bulgarian law … but also 'applicable rules and principles of international law', in conformity with Article 26(6) of the [applicable treaty] which states that '[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'" [38] Nevertheless, other cases seemed to endorse this view without relying on the specific text of the applicable IIT. In *Quiborax*, for example, the tribunal found that an investment which violated the general principle of "good faith" would "not be a protected investment, i.e. deserve protection

[35] *Inceysa Vallisoletana S.L. v Republic of El Salvador* (2006), ICSID, Award (International Centre for Settlement of Investment Disputes) (Arbitrators: Rodrigo Oreamuno Blanco, Burton A. Landy, Claus von Wobeser) [Translation by ICSID] [*Inceysa*].
[36] *Plama Consortium Ltd v Republic of Bulgaria* (2008), ICSID, Award (International Centre of Investment of Settlement Disputes) (Arbitrators: Carl F. Salans, Prof. Albert Jan van den Berg, V.V. Veeder) [*Plama*].
[37] *Inceysa*, *supra* note 35 at para 224.
[38] *Plama*, *supra* note 36 at para 140.

in the sense that access to treaty arbitration and/or substantive treaty guarantees may not be granted."[39]

Furthermore, Professor Hepburn has suggested a reinterpretation of the cases of *LESI*, *Desert Line,* and *Rumeli* which also confirm the perspective around good faith requirements of investments. As previously discussed, these decisions proposed that investors would only be deprived of an IIT's protection if they committed an illegal act of such gravity that it could be deemed a violation of the fundamental legal principles in force. This standard was previously deemed erroneous. However, as suggested by Professor Hepburn, it may be more precise to say that this approach was "under-inclusive."[40] In other words, this trio of cases may have been right to suggest that an IAWL requirement prescribes compliance with the applicable fundamental legal principles; their error merely lied in how they excluded other lesser illegalities from the IAWL requirement's scope. In light of the foregoing, it appears likely that breaches of general principles of international or municipal law may constitute a breach of the IAWL requirement. This is not, however, certain, as authorities on the subject are generally scarce.

1.2 - The Doctrine of Unclean Hands

1.2.1 - *Origin and nature*

Within the field of international investment arbitration, the expression "Doctrine of Unclean Hands" ("DUH") refers to a general legal principle that constitutes an incarnation of the DII. As such, an arbitral tribunal may be barred, by virtue of the DUH, from considering the merits of a case brought by an investor that committed illegalities. By virtue of it being a general principle of law, the DUH could, in theory, be invoked even where an IIT contains neither a reference to the doctrine, nor an IAWL requirement. However, it remains contested whether the

[39] *Quiborax*, *supra* note 11 at para 226.
[40] *Hepburn*, *supra* note 19.

DUH has the status of a binding principle of international investment law.[41]

It should be noted that the DUH is not a concept that is exclusive to the field of international investment arbitration. Indeed, the expression "Doctrine of Unclean Hands" refers to a much wider legal notion that far exceeds the field of international investment arbitration,[42] namely the idea that the law should not offer relief to parties which have conducted themselves in a reprehensible manner. This principle has a long and complex history with civilian and common law roots.[43] As such, it has often been suggested that the DUH relates to both good faith and equity.[44] This mixed history explains the sheer volume of phrases that have been considered an incarnation of the DUH. These include:

- He who comes into equity must come with clean hands.
- He who has done iniquity shall not have equity.
- He who desires relief in equity must himself be free from fault.
- *In pari delicto or par delictum* ("of equal fault").
- *Ex dolo malo non oritur action* ("no right of action can have its origin in fraud").
- *Ex turpi causa non oritur action* ("an action does not arise from a dishonorable cause").
- *Nemo auditur propriam turpitudinem allegans* or *nemo auditur propriam suam turpitudinem allegan* ("no one should be heard to invoke his own turpitude").

[41] Dumberry, *supra* note 2 at 242.
[42] See generally Stephen M Schwebel, "Clean Hands" in *Max Planck Encyclopaedia of Public International Law* (2013).
[43] Caroline Le Moullec, "The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims" (2018) 84:1 Intl J Arbitration, Mediation and Dispute Management 13 at 15–16; Dumberry, *supra* note 2 at 230; Zwolankiewicz, *supra* note 16 at 7; Lodovico Amianto, "The Role of 'Unclean Hands' Defences in International Investment Law" (2019) 6:1 McGill J Dispute Resolution 1 at 6.
[44] Dumberry, *supra* note 2 at 230.

- *Nemo ex suo delicto meliorem suam conditionem est facit* ("no one can perfect his condition by a crime").
- *Nullus commodum capere potest de sua iniuria propria or nemo potest commodum capere de sua iniuria propria* ("no one should profit from the harm they caused").

The DUH, as it exists within the field of international investment arbitration, is thus a subset of this much wider notion. It is to be noted that the DUH's general idea can give rise to other specific principles than the one discussed in this article. According to Professor Ori Pomson, there are five principles which can be said to be narrower variants of the general idea of the DUH:[45]

I. Reciprocal Obligations – a claimant will be barred from complaining about the respondent's alleged illegality if the claimant has committed a similar illegality within their reciprocal relationship.

II. Reliance on illegality – a claimant which committed an illegal act will be barred from complaining about the respondent's alleged illegality if the latter's illegality was the direct result of the former's illegality;

III. Provocation – a claimant which committed an illegal act will be barred from complaining about the respondent's alleged illegal act if the latter's alleged illegality was undertaken as a response or counter to the former's illegality;

IV. Claims tainted in illegality – a claimant will be barred from complaining about the respondent's alleged illegality if the right invoked by the claimant was obtained through an unlawful act; and

[45] Ori Pomson, "The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry" (2017) 18:4 J of World Investment and Trade 712 at 716ff.

V. Unlawful Conduct Relating to the Subject-Matter of the Case – a claimant which committed an illegal act related to the subject-matter of a case will be barred from complaining about the respondent's illegal act.

The DUH, as it has been defined for the purposes of this text, falls within the fourth category of "claims tainted in illegality". Indeed, this article only concerns itself with cases where arbitral tribunals may be barred from considering the merits of claims where an investor's basis for action – i.e., the substantive protections of the IIT – was tainted by the illegal means through which it was obtained – i.e., an illegally made investment. That is not to say that the other variants put forward by Professor Pomson cannot find application in the field of investment arbitration; they most certainly can. They simply do not relate to the DII and the DUH since those concepts have been defined for the purposes of this article. Thus, cases like *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh*,[46] which considered only the first variant, will not be addressed herein.

Furthermore, it should be noted that multiple variants of the general DUH may find application within the same factual matrix. In fact, in the context of international investment arbitration, it is likely that many cases will simultaneously give rise to the application of the fourth and fifth variants, as the investment whose legality is disputed will often be both the subject-matter of dispute and the basis of the claimant's alleged right. Thus, in summary, the DUH, as an incarnation of the DII within the field of international arbitration, is a narrow subset of a much wider, homonymous notion.

1.2.2 - *Scope*

The four facets used to analyze the scope of the IAWL requirement will also guide the assessment of the DUH's scope. As this section will

[46] *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh* (2013) ICSID, Decision on Jurisdiction at para 481 (International Centre for Settlement of Investment Disputes) (Arbitrators: Michael E. Schneider, Campbell McLachlan, Jan Paulsson) [*Niko*].

show, the scope of the DUH appears to be very similar to that of the IAWL requirement.

1.2.3 - *Gravity of the illegal act*

Little has been written on the gravity of the illegal act and its impact on the DUH's scope. However, academic literature suggests that the non-trivial standard – which was previously found to apply to the IAWL requirement – should also apply to the DUH.[47] This seemed to be confirmed in the case of *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania* where the tribunal explained that, despite the "general assumption that States do not consent to the arbitration of disputes relating to illegal investments," jurisdiction should not be refused based on a "trivial" or "minor contravention of the law."[48]

1.2.4 - *Timing of the illegal act*

It is unclear whether the DUH may be invoked only with regards to illegal acts committed during the making of investment. Several academic commentators suggest that the DUH should also apply in cases where the illegality was committed after the making of the investment[49] – i.e., during its performance. This was also seemingly the position of the tribunals in the cases of *Copper Mesa Mining Corporation v The Republic of Ecuador*[50] and *Hesham Talaat M. Al-Warraq v Republic of Indonesia.*[51] In both cases, the tribunals considered illegalities which had happened long after the making of the investment.

Yet, in most decisions where support of the DUH was implicitly or explicitly expressed, the tribunals defined the principle using the past-

[47] Moloo & Khachaturian, *supra* note 16 at 1496.
[48] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania* (2015), ICSID, Award at paras 480–83 (International Centre for Settlement of Investment Disputes) (Arbitrators: Dr. Rolf Knieper, Dr. Yas Banifatemi, Steven A. Hammond) [*Mamidoil*].
[49] Zwolankiewicz, *supra* note 16 at 18.
[50] *Copper Mesa Mining Corporation v The Republic of Ecuador* (2016), PCA, Award (Permanent Court of Arbitration) (Arbitrators: Dr. Bernardo Cremades, Judge Bruno Simma, V.V. Veeder) [*Copper*].
[51] *Hesham Talaat M. Al-Warraq v Republic of Indonesia* (2011) UNCITRAL, Final Award (United Nations Commission On International Trade Law) (Arbitrators: Bernardo M. Cremades, Michael Hwan, Fall S. Nariman) [*Al-Warraq*].

tense verb "made."[52] This is the same word on which, as previously discussed, other tribunals have relied to conclude that only illegal acts that had occurred during the initial making of the investment could amount to a breach of an IAWL requirement. Furthermore, the DUH as it was defined for the purposes of this text relates to how the right to arbitration was obtained – i.e., the making of the investment. This article therefore suggests that illegalities which occurred during the execution of the act may be better addressed through other variants of the DUH. Nevertheless, this article recognizes that this aspect of the DUH's scope remains nebulous.

1.2.5 - *Subject-matter of the illegal act*

It appears that the DUH, like the IAWL requirement, applies even if the subject of the broken law is not specifically the regulation of investment. This was implicitly confirmed in the case of *Al-Warraq* where the broken laws had nothing to do with the making of investments.[53]

1.2.6 - *Nature of breached law*

Application of the DUH is not limited to cases where specific laws or regulations were broken. In considering how an illegal act may taint an investor's claim even in the absence of an IAWL requirement, the *Hamester* tribunal stated the following:

> "[A]n 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; … if its creation itself constitutes a misuse of the system of international investment

[52] *David Minnotte And Robert Lewis v Republic of Poland* (2014) ICSID, Award at para 131 (International Centre for Settlement of Investment Disputes) (Arbitrators: Vaughan Lowe, Maurice Mendelson, Eduardo Silva Romero) [*David Minnotte*]; *Mamidoil*, *supra* note 48 at para 359; *Teinver S.A., Transportes de Cercanías S.A and Autobuses Urbanos de Sur S.A v The Argentine Republic* (2012), ICSID, Decision on Jurisdiction at para 317 (International Centre for Settlement of Investment Disputes) (Arbitrators: Judge Thomas Buergenthal, Henri C. Alvarez, Dr. Kamal Hossain).

[53] *Al-Warraq*, *supra* note 51.

> protection under the ICSID Convention[; or] … if it is made in violation of the host State's law."[54]

Academic commentators have expressed support for this position.[55] For Llamzon and Sinclair, the misconduct does not have to be specifically punishable under the host State's laws for it to taint the investors cause of action. The authors argue that the DUH may be invoked to deny relief in three general circumstances: "where transactions are (i) fraudulent; (ii) illegal; or (iii) unconscionable."[56] The notion of unconscionability was not defined by the authors, but the very existence of such a broad category, distinct from formal illegality, suggests a vast and flexible scope. Likewise, Professor Busco stated that the DUH could be used against claimants who "engaged in illegal or morally reprehensible conduct."[57]

II. How recent jurisprudence is bringing about the convergence of these two notions

2.1 - Situating the differences which traditionally kept the notions distinct

As two incarnations of the DII, the DUH and the IAWL requirement have the same function. Furthermore, as summarized in the following table, this article's analysis suggests that DUH and the IAWL requirement share the same scope for the most part.

	IAWL requirement	DUH
Gravity of the illegal act	Non-trivial breaches.	Non-trivial breaches.
Timing of the illegal act	Only during the making of the investment.	Unclear, but this article argues that the investment DUH should only apply during the making of the investment.

[54] *Hamester*, *supra* note 26 at para 123.
[55] Moloo & Khachaturian, *supra* note 16 at 1487; LeMoullec, *supra* note 43 at 17.
[56] Llamzon & Sinclair, *supra* note 29 at 509 [emphasis added].
[57] Busco, *supra* note 1 at para 658 [emphasis added].

Subject-matter of the illegal act	Unclear, but this article argues that the scope of a generic IAWL requirement should not be limited to breaches of laws which specifically govern investment.	Not limited to breaches of laws which specifically govern investment.
Nature of the broken law	Both laws and general principles.	Both laws and general principles.

As noted above, the DUH may have a slightly larger scope on two fronts – i.e., timing and subject-matter of the illegal act – but that remains uncertain and is superfluous to this article's thesis. Indeed, if the DUH is to be recognized as a binding principle of international law, it would simply subsume the potentially narrower IAWL requirement. The scope and function of the two notions being essentially the same, this paper will now address the two main points that may be invoked to differentiate the notions:

1. The fact that an IAWL requirement, unlike the DUH, could only apply in cases where the relevant IIT contained an explicit IAWL; and

2. The fact that the DUH, unlike an IAWL requirement, has been said to be inapplicable because it lacked sufficient recognition.

As this article will discuss, both views are no longer accurate, and, as a result, may no longer bear differentiating between the DUH and the IAWL requirement.

2.2 - Trend #1: Findings of an IAWL Requirement Absent of any Explicit IAWL Provision

It is common for an IIT to contain an explicit IAWL provision.[58] However, the necessity for such explicit wording has come under dispute.

[58] Moloo and Khachaturian, *supra* note 16 at 1476.

Some tribunals argue that the requirement can be implied, even where there is no explicit provision, if evidence suggests that this would be consistent with the will of the parties. Others have gone even further, arguing that an implicit IAWL requirement exists within all IITs.

2.2.1 - *Plama, Inceysa & Yukos*

In analyzing its jurisdiction, the *Inceysa* tribunal first found that communications exchanged between the parties during the *travaux préparatoires* ("preparatory work") clearly indicated a common intent to limit the protection afforded by the relevant IIT to legally made investments. Thereby, the tribunal concluded that there existed an implicit IAWL provision within the Spanish-Salvadorian IIT, even if the treaty contained no explicit clause to such effect.[59] Similarly, the tribunal in *Plama* found support for an implicit IAWL requirement in the following line of the applicable IIT's introductory note: "The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues." [60] As a result, the tribunal held that the IIT's substantive protections could not apply to investments that are "made contrary to law."[61]

Likewise, the tribunal in *Yukos* held that tribunals must interpret treaties in good faith and take into account their object and purpose to ascertain whether there was an express requirement for the investor to abide by the laws of the host country.[62] Accordingly, the *Yukos* tribunal concluded that, even in the absence of an explicit IAWL requirement, "an investment that is made in breach of the laws of the host State" should "(a) not qualify as an investment, thus depriving the tribunal of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty."[63]

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[59] *Inceysa*, *supra* note 35 at paras 190–207.
[60] *Plama*, *supra* note 36 at para 139.
[61] *Ibid* at para 139.
[62] *Yukos*, *supra* note 30 at para 1346.
[63] *Ibid* at para 1349.

2.2.2 - *Phoenix*[64] *& SAUR*[65]

These two cases go beyond the three previous ones, arguing that an IAWL requirement should be implied within all IITs. In *Phoenix*, the tribunal plainly stated that "this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant IIT. […] The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law."[66] Interestingly, the *Phoenix* tribunal cited the *Plama* decision in support of this finding but, unlike the latter, the *Phoenix* decision in no way relied on contextual clues to imply the IAWL requirement.

The *SAUR* tribunal was even more explicit in endorsing the notion that an IAWL requirement could be implied in any IIT: "Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent. La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI."[67] It should be noted that the wording of this passage suggests that an IAWL requirement, when implied, would only act as a barrier to jurisdiction in cases of "grave" illegalities. That being said, it is not clear that "grave" actually constitutes a markedly different standard than the previously discussed non-trivial standard.

In summary, these influential cases constitute strong evidence that an IAWL requirement exists, at least implicitly, in all IITs. This article would suggest that the IAWL requirement is thus essentially becoming a

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[64] *Phoenix Action Ltd v The Czech Republic* (2009), ICSID, Award (International Centre for Settlement of Investment Disputes) (Arbitrators: Brigitte Stern, Andreas Bucher, Juan Fernández-Armesto) [*Phoenix*].
[65] *SAUR International S.A. v République Argentine* (2012), ICSID, Decision on Jurisdiction and Liability (French) (International Centre for Settlement of Investment Disputes) (Arbitrators: Juan Fernández-Armesto, Bernard Hanotiau, Christian Tomuschat) [*SAUR*].
[66] *Phoenix*, *supra* note 64 at paras 101–02.
[67] *SAUR*, *supra* note 65 at para 308 [emphasis added]. Translation by the author: "The fact that the IIT between France and Argentina mentions or does not mention the requirement for the investor to act in accordance with domestic legislation is not a relevant factor. The condition of not committing a serious violation of the legal order is an implicit condition inherent to any IIT".

free-standing general principle of international investment law and, as such, no longer bears being differentiated from the DUH.

2.3 - Trend #2: Recognition of the Doctrine of Unclean Hands

2.3.1 - *Preliminary considerations*

As previously stated, the status of the DUH in international law has been disputed. The mainstream position has generally been that the DUH was not a recognized principle of international investment law.[68] This was directly challenged by Professor Dumberry who argued that the DUH had tacitly been applied multiple times in the context of international arbitration.[69] This article would like to lend its support to Professor Dumberry's argument. The current section will seek to expand on Professor Dumberry's analysis of certain cases and adduce additional jurisprudence in support of his claim.

Before proceeding with this jurisprudential analysis, it bears defining what will be deemed a tacit utilization of the DUH. As previously established, the DUH, as an incarnation of the DII, bars arbitral tribunals from considering the merits of claims which rely on an investment that was illegally made. Hence, any instance in which an arbitral tribunal suggests that there exists a general principle to such effect will be deemed an implicit acknowledgment that the DUH is in fact a binding principle of international investment law.[70]

The next section will analyze thirteen ICSID decisions, the oldest of which dates back only to 2003. The decision to prioritize a demonstration of scale rather than an in-depth analysis of a few compelling cases, stems from the recognition that the establishment of a general principle of international law hinges on the extent of its support. Indeed, those against the recognition of the DUH argue that "[t]he rarity of the application of the *Doctrine of Clean Hands* does not authorize the interpreter to raise it

[68] Busco, *supra* note 1 at paras 712–13.
[69] Dumberry, *supra* note 2 at 230.
[70] Taking inspiration from Dumberry's method. See *ibid* at 231.

to the level of customary law rule."[71] Hence, this article will seek to demonstrate that reliance on the DUH, in international investment law, is by no means rare. As a final preliminary remark, it is relevant to note that in many of the cases analyzed below, the applicable IIT does contain an IAWL requirement. Tribunals therefore often used the DUH as a supplemental tool in justifying their application of the DII. This further emphasizes the redundancy of the two notions.

2.3.2 - *Recognition of the DUH in case law*

Al-Warraq, Fraport II & Mamidoil

In *Al-Warraq*, the applicable IIT did contain an IAWL provision. However, the tribunal also explicitly relied on the fact that "the doctrine of 'clean hands' renders the Claimant's claim inadmissible."[72] Similarly, in *Fraport II*, the tribunal found that the applicable IIT contained an IAWL provision, but then remarked obiter dicta that the same would have been true "absent an express [IAWL] provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine."[73] This was later strongly reiterated:

> [E]ven absent the sort of explicit legality requirement that exists here, it would be still be [*sic*] appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.[74]

The *Mamidoil* tribunal offered a very similar reasoning:

> "As stated in the preliminary remarks, the Tribunal shares the widely-held opinion that investments are protected by international

[71] Busco, *supra* note 1 at para 721.
[72] *Al-Warraq*, *supra* note 51 at para 646.
[73] *Fraport Ag Frankrut Airport Services Worldwide v Republic of the Philipines (II)* (2014), ICSID, Award at para 328 (International Centre for Settlement of Investment Disputes) (Arbitrators: Stanimir Alexandrov, Albert Jan Van de Berg, Piero Bernardini) [*Fraport II*].
[74] *Ibid* at para 332.

> law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions.
>
> This principle is reiterated in Article 2 of the Greek-Albanian IIT, and likewise applies to the substance of the protection when the relevant international instrument […] does not specifically refer to a requirement of legality."[75]

Churchill Mining[76] *& Minnotte*

In *Churchill Mining*, the tribunal recognized that the DUH is subject to controversy:

> "Particularly serious cases of fraudulent conduct, such as corruption, have been held to be contrary to international or transnational public policy. The common law doctrine of unclean hands barring claims based on illegal conduct has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals."[77]

However, the tribunal then stated that "[a] review of international cases shows that fraudulent conduct can affect the jurisdiction of the tribunal, or the admissibility of (all or some) claims"[78] and that "claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public

[75] *Mamidoil*, *supra* note 48 at paras 359-360 [emphasis added].
[76] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (2016), ICSID, Award (International Centre for Settlement of Investment Disputes) (Arbitrators: Prof. Gabrielle Kaufmann-Kohler, Michael Hwang, Albert Jan van den Berg) [*Churchill Mining*].
[77] *Ibid* at para 493.
[78] *Ibid* at para 494.

policy."[79] In other words, the tribunal recognized a general principle that would – as a matter of public policy – preclude fraudulent investors from benefiting from the protection of an IIT. This is essentially the DUH as this article has defined it, albeit within a narrower scope.

Similarly, the *Minnotte* tribunal, faced with an IIT containing no IAWL provision, endorsed a limited version of the DUH which would apply only to fraudulent conduct:

> "The [IIT] in this case does not define an 'investment' in terms that explicitly require the investment to be made in accordance with the host State's law. Nonetheless, it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from [IIT] protection; and this is a principle that is independent of the effect of any express requirement in an [IIT] that the investment be made in accordance with the host State's law."[80]

It should, however, be noted that the *Minnotte* decision included a mention of the maxim of *ex turpi causa non oritur action* which was accompanied by the following comment: "assuming, arguendo, that principle to have the status of a rule of international law".[81]

Hamester, Yaung Chi Oo[82] & Teinver

In all these cases, the presiding tribunal relied both on an IAWL provision and on general principles that are equatable to the DUH. These tribunals addressed the dual source of the DII suggesting that the function of IAWL provisions was to add specificity to this general obligation.In *Hamester*, the tribunal said the following:

> "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

[79] *Ibid* at para 508.
[80] *Minnotte*, *supra* note 52 at para 131 [emphasis added].
[81] *Ibid* at para 139.
[82] *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (2003), ICSID, Award (International Centre for Settlement of Investment Disputes) (Arbitrators: Sompong Sucharitkul, James R. Crawford, Francis Delon) [*Yaung Chi Oo*].

> constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law (as elaborated, e.g. by the tribunal in Phoenix).
>
> These are general principles that exist independently of specific language to this effect in the Treaty.
>
> In addition, however, it is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection. […] The precise effect of any such express condition will obviously depend upon the wording used."[83]

This idea was echoed in *Yaung Chi Oo*, where the applicable IAWL provision specifically required registration and written approval for the investment to be covered by the IIT. The tribunal described this as going "beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State,"[84] thus implicitly recognizing the existence of such a general rule. The same idea can also be found in *Teinver* where the tribunal noted that "it is widely acknowledged in investment law that the protections of the ICSID dispute settlement mechanism should not extend to investments made illegally,"[85] but then relied on the wording of the IAWL provision in determining that the legality requirement only applied at the moment of the initial investment.[86]

The trio of cases illustrate how, even if it no longer bears differentiating between the DUH's requirement and the IAWL requirement, the inclusion of IAWL provisions within IITs may still be useful for parties that may seek to add specificity to the general requirement. Indeed, it should be noted that it is not this article's thesis that IAWL provisions should disappear, rather this article argues that the

[83] *Hamester*, *supra* note 26 at paras 123–25 [emphasis added].
[84] *Yaung Chi Oo*, *supra* note 82 at para 58.
[85] *Teinver*, *supra note* 52 at para 317.
[86] *Ibid* at paras 318ff.

principle that such provisions have been said to embody should not be differentiated from the DUH.

Rumeli

In *Rumeli*, the tribunal found no act that could have violated international public policy or the principle of *nemo auditor propriam turpitudinem allegans*. However, the fact that the tribunal considered whether this principle – which is an embodiment of the DUH – had been violated suggests, in of itself, that the principle is applicable in the sphere of international investment arbitration.[87]

Plama & Inceysa

In the case of *Plama*, the tribunal offered two seemingly independent justifications in support of its decision to deny the claimants the substantive protections afforded by the applicable IIT. First, as previously mentioned, the tribunal, relying on case-specific facts, found that the applicable IIT should be interpreted as containing an implicit IAWL provision. However, the tribunal added that granting the IIT's protections to the claimants would also be contrary to "*nemo auditur propriam turpitudinem allegans*", "the basic notion of international public policy – that a contract obtained by wrongful means […] should not be enforced by a tribunal" as well as "the principle of good faith."[88] This line of justification is markedly distinct from those previously discussed as it arises not from the particularities of the case, but rather from general principles of international law which would apply to all IITs. The tribunal's decision to include this second line of justification, and especially its reliance on *nemo auditur propriam turpitudinem allegans*, constitutes a decisive, albeit tacit, utilization of the DUH.

Hence, the *Plama* case can be said to contribute to both the trends described in this essay: it simultaneously affirms that IAWL provisions may be implicit, and it implicitly recognizes the existence of DUH. The same can be said about the *Inceysa* case in which the tribunal also relied

[87] *Rumeli*, *supra* note 18 at para 323.
[88] *Plama*, *supra* note 36 at paras 143–45.

on both an implied IAWL provision and general principles of international law – including *nemo auditur propiam turpitudinem allegans* – in finding that it did not have jurisdiction to hear the investor's claim. That being said, to properly understand how this case constitutes a tacit recognition of the DUH requires a somewhat circuitous explanation because of the puzzling the way in which the tribunal made use of the aforementioned Latin maxim.

Having established the existence of an implicit IAWL provision within the Spanish-Salvadorian BIT[89], the tribunal set out to evaluate whether the investor had breached this provision.[90] In doing so, the *Inceysa* tribunal considered whether the investor had observed the principle of *nemo auditur propiam turpitudinem allegans*.[91] With respect for the arbitral tribunal, this article would suggest that utilizing this principle in ascertaining legality is, at best, paradoxical. Indeed, the latin maxim is simply a statement of the principle which underpins the DUH and IAWL provisions, i.e. that tribunals should refuse to hear claims which rely the claimant's illegality. Thus, the maxim *requires* the investor's legality but is of no use at the stage of *ascertaining* the investor's legality.

In of itself, the fact that *nemo auditur propiam turpitudinem allegans* was improperly utilized may seem to weaken the suggestion that *Inceysa* effectively recognized the DUH. However, a closer look at the justification offered by the tribunal for making use of this principle may salvage this argument.

The tribunal found support for its decision to invoke principles of international law within Article 38 of the *Statute of the International Court of Justice* (to which the IIT referred) – which requires that an arbitral tribunal apply "international custom, as evidence of a general practice accepted as law" and "the general principles of law recognized by civilized nations."[92] From this, it can be inferred that the *Inceysa*

[89] *Inceysa*, *supra* note 35 at para 203.
[90] *Ibid* at paras 208ff.
[91] *Ibid* at paras 240ff.
[92] *Ibid* at para 225 [emphasis added].

tribunal considered *nemo auditur propiam turpitudinem allegans* (and by extension the DUH that it embodies) to be a recognized principle of international law – even if it subsequently applied said principle at the wrong stage of its reasoning.

Phoenix & SAUR

As previously discussed, the *SAUR* and *Phoenix* tribunals argued that an IAWL requirement could be implied within any IIT, regardless of its content. Such an argument in favour of a general application of the DII can be safely equated as tacit endorsements of the DUH. This was seemingly the reading of the tribunal in *Hamester* which relied on *Phoenix* in arriving at the previously described conclusion.[93]

III. Questions of jurisdictions or admissibility?

Considering that jurisprudential trends are suggesting that (i) it is possible to imply an IAWL in any IIT even where no IAWL provisions exists and (ii) the DUH is gaining widespread acceptance in international investment law, this article argues that the two notions are effectively merging into one single unified incarnation of the DII. That being said, it may be relevant to evaluate the desirability of this convergence based on potentially differing classifications of the IAWL requirement and the DUH as matters of jurisdiction and admissibility. While this section stops short of providing a conclusive answer with regards to the impact of this classification, it will explain this difference in classification.

It bears noting at the outset that the very distinction between the notions of admissibility and jurisdiction has been the subject of a sizeable trove of academic literature which has not always been consistent. Nevertheless, on aggregate, there is consensus regarding the differences that separate these notions on a conceptual level. Professor Reinisch summarized the difference as follows:

[93] *Hamester*, *supra* note 26 at para 123.

> "[W]hereas jurisdiction is about the scope of the tribunal's authority, based on the State's consent to arbitrate, admissibility is about the particular claim raised by the claimant."[94]

Professor Jan Paulsson offered a compatible, yet slightly different basis for distinction:

> "To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> - If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
> - If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final."[95]

These general formulations may, however, not always provide sufficient precision to properly determine whether a specific objection is related to admissibility or jurisdiction. Therefore, it is sometimes useful to look at the five categories within which a jurisdictional objection may fall:[96]

1. *Ratione voluntatis* – was a valid consent given to arbitrate such a matter?
2. *Ratione materiae* – is there a covered investment as per the IIT*?*
3. *Ratione personae* – is the claimant a covered investor as per the IIT?

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[94] August Reinisch, "Jurisdiction and Admissibility in International Investment Law" (2017) 16:1 L & Practice of Intl Courts & Tribunals 21 at 23.
[95] Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Aksen and Robert Georg Briner, eds, *Global reflections on international law, commerce and dispute resolution: liber amicorum in honour of Robert Briner* (Paris: ICC Publishing, 2005) 601 at 617.
[96] Juan Pablo Hugues Arthur, "The Legal Value of Prior Steps to Arbitration in International Law of Foreign Investment: Two (Different?) Approaches, One Outcome" (2015) 15:1 Anuario Mexicano de Derecho Internacional 449 at 456.

4. *Ratione temporis* – was the consent in force when the tribunal was constituted?

5. *Ratione loci* – does the consent cover the territory where the investment was made?

If an objection does not fall within any of these categories, it likely relates to admissibility. This is suggested in *Erhas Dis Ticaret Ltd. Sti, et al. v. Republic of Turkmenistan*, as admissibility was defined as "the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a claim."[97] This was further echoed by Professor Reinish: "[W]hile jurisdiction is about the scope of the State's consent to arbitrate, admissibility is about whether the claim, as presented, can or should be resolved by an international tribunal, which otherwise has found jurisdiction."[98] In other words, it may be only residually that an objection should be classified as relating to admissibility. The distinction between jurisdiction and admissibility appears particularly difficult to establish in the field of international investment arbitration. This may be due, at least in part, to the English text of the ICSID convention, which uses the terms "jurisdiction"[99] and "competence",[100] but never "admissibility."

Perhaps due to this omission, as well as the lack of consensus regarding the status of the DUH, there is a great deal of inconsistency, both within academic literature and jurisprudence, as to whether the DUH relates to jurisdiction or admissibility.[101] All things considered, this article argues that objections based on the DUH should relate to the admissibility of the claim. In support of this, this article first observes that the DUH cannot be said to fall within any of the five aforementioned categories of jurisdictional objections given that the DUH, as a principle of general law, applies independently of the parties' consent or the scope of the IIT's

[97] *Erhas Dis Ticaret Ltd. Sti, et al. v Republic of Turkmenistan* (2015), PCA, Separate Declaration of Stanimir A. Alexandrov at para. 5 (Permanent Court of Arbitration) (Arbitrators: Alexis Mourre, Zachary Douglas).
[98] Reinish, *supra* note 94 at 23 [emphasis added].
[99] ICSID, "ICSID Arbitration Rules" (2022) at Rule 41, online: <icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf>.
[100] *Ibid*. The term "competence" is generally understood to also mean "jurisdiction". The French version of the convention confirms this, using only the term "compétence" in lieu of both "competence" and "jurisdiction".
[101] Busco, *supra* note 1 at paras 685ff.

coverage. Furthermore, this classification is also coherent with Jan Paulsson's basis for distinction. Indeed, the public policy underpinnings of DUH suggest that it would be undesirable for any tribunal to afford protections of an IIT to an illegally made investment.

Luckily, the classification of the IAWL requirement is not subject to similar confusion. Arbitral tribunals have consistently regarded the IAWL requirement as a matter of jurisdiction without exception.[102] Specifically, a jurisdictional objection which emanates from an IAWL requirement will either be *ratione materiae* – if the requirement is integrated within the definition of the term investment – or *ratione voluntatis* – if the consent to submit to arbitration was explicitly reserved for cases where the investment was made legally. Hence, it seems that the IAWL requirement and the DUH should be classified differently; the former as a matter of jurisdiction, and the latter as a matter of admissibility. It therefore bears asking whether and, if so, how this divergence affects the potential convergence of the two notions. In order to evaluate this, we should initially consider whether to classify the unified principle resulting from the convergence as jurisdictional or pertaining to admissibility. While it is true that either choice is viable, it is crucial to recognize the considerable repercussions of this decision.

Answering this question requires pondering upon the precise form that would take a unified incarnation of the DII. Two potential forms may be conceived. The first form would be one of a simple presumption. In this form, the unified DII would dictate that tribunals presume that states party to an IIT did not wish to afford the treaty's substantive protections to investors that breached their laws. This presumption could however be refuted if the text of the IIT or external evidence suggests that the parties had agreed to different terms that cannot be conciliated with the presumption. As this first form relates to the scope of the States' consent

[102] *Quiborax*, *supra* note 11; *Saba Fakes*, *supra* note 32 at paras 51ff; *Mamidoil*, *supra* note 48 at paras 261ff; *SAUR*, *supra* note 65; *Yaung Chi Oo*, *supra* note 82 at paras 26ff; *Tokios*, *supra* note 16; *Phoenix*, *supra* note 64 at paras 74ff; *Metal-Tech*, *supra* note 23 at paras 121ff.

to submit to arbitration, it would likely be considered a question of jurisdiction (*ratione voluntaris*).

The second form would be that of a principle of public policy. In this form, the unified DII would simply require that tribunals reject any claim brought by an illegal investor without considering its merits. In this form, the DII's application would relate to the quality of the claim which would be tainted by the investor's legality. Therefore, under this form, objections would relate to admissibility. Irrespective of the possible structure of a unified DII, the inquiries remain: is it possible that convergence is unfavourable, given the preference for two distinct manifestations of the DII, one concerning jurisdiction and the other concerning admissibility? This article raises an unresolved question that necessitates a comprehensive analysis of the distinction between jurisdiction and admissibility in the realm of investment arbitration.

Conclusion

This article sought to demonstrate that differentiating between the IAWL requirement and the DUH as separate incarnations of the DII has become superfluous. In support of this, this article first demonstrated that the two notions have the same function and essentially the same scope. More importantly, this article demonstrated the existence of two trends within in arbitral jurisprudence, namely that:

1. IAWL requirements can seemingly be implied within any IITs, even where there is no specific language to that effect; and

2. The DUH is gaining recognition in international investment law.

As a result of these trends, both the IAWL requirement and the DUH could be described as a recognized principle of international investment law which can find application under any IIT. Thus, in summary, this article has demonstrated that the two notions not only have the same function and scope but also that they apply in all the same circumstances. As such, it seems to be no longer necessary or helpful to distinguish between the two notions. It remains, however, to be seen if the diverging

classification of the IAWL requirement and DUH as jurisdictional and admissibility issues respectively may prove problematic to this convergence. Similarly, it is uncertain whether the notion resulting from a potential convergence should be classified as relating to jurisdiction or admissibility.