SEPARATE OPINION OF JUDGE IWASAWA

The Court rejects the clean hands doctrine as a defence on the merits in a situation where the respondent State argues that the applicant State has engaged in unlawful conduct — The Court does not address the applicability of the clean hands doctrine in investment arbitration.

A measure based on a prohibited ground listed in Article 1, paragraph 1, of CERD is inherently suspect — A State bears a very heavy burden of demonstrating that the measure pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved — The scrutiny must be most rigorous — The Court has laid down a framework for analysing indirect discrimination — The reference to "mere collateral and secondary effects" is unnecessary — In the present case, the Russian Federation does not deny the notion of indirect discrimination as such.

1. In the present Judgment, the Court has made important decisions on two points, in particular. First, it has rejected the clean hands doctrine as a defence on the merits. Second, it has laid down a framework for analysing indirect discrimination. The purpose of this opinion is to elaborate on these two points.

I. Clean hands doctrine

2. The Court has previously not accepted arguments based on the clean hands doctrine either as a ground for the inadmissibility of a claim or as a defence on the merits. Nor has the Court denied the applicability of the clean hands doctrine before it entirely.

3. For example, in its 2019 Judgment on preliminary objections in *Certain Iranian Assets*, the Court stated:

> "[w]ithout having to take a position on the 'clean hands' doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the 'clean hands' doctrine".

It then noted that "the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity" (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 44, para. 122). In *Jadhav*, the Court stated that "[it] does not consider that an objection based on the 'clean hands' doctrine may by itself render an application based on a valid title of jurisdiction inadmissible" (*Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, p. 435, para. 61). In its 2023 Judgment on the merits in *Certain Iranian Assets*, the Court observed that "[a]s a defence on the merits, [it] has always treated the invocation of 'unclean hands' with the utmost caution". It recalled that in its 2019 Judgment, it had not taken a position on the clean hands doctrine, "reserving its position on the legal status of the concept itself in international law". It then rejected the respondent's defence on the merits based on the doctrine, noting that, in any case, one of the conditions put forward by the respondent for the

doctrine to be applicable was not met (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, *Judgment of 30 March 2023*, paras. 81-83)[1].

4. Some arbitral tribunals have suggested that in order for the State of nationality to exercise diplomatic protection in respect of a national who has suffered an injury, that national must not have caused or amplified that injury through his or her unlawful or reprehensible conduct[2]. However, John Dugard, the Special Rapporteur on Diplomatic Protection of the International Law Commission (hereinafter the "ILC"), has pointed out that the cases involving diplomatic protection in which the clean hands doctrine has been raised are few. In his view, where an internationally wrongful act is committed by a State in response to the misconduct of an alien, the clean hands doctrine cannot bar a claim brought by the State of nationality on behalf of that individual, because as a consequence of the fiction that an injury to a national is an injury to the State itself, the claim becomes an international claim and the clean hands doctrine cannot be raised against the injured individual for its misconduct. For these reasons, he took the view that "the clean hands doctrine has no special place in claims involving diplomatic protection"[3]. At his recommendation, the ILC did not include clean hands as a condition for the exercise of diplomatic protection in the 2006 Draft Articles on Diplomatic Protection[4].

5. Some investment arbitral tribunals, however, have been receptive to the clean hands doctrine operating as a bar to a claim. For example, in *Littop* v. *Ukraine*, the tribunal stated that

> "this Tribunal . . . finds that the doctrine of clean hands, just like the concept of good faith, is now a principle of international law. In several cases tribunals have made clear that a party cannot come to investment arbitration with unclean hands . . . The doctrine has been recognised as a principle of general international law by arbitral tribunals and a number of academic authorities."[5]

The tribunal cited another award, in which the tribunal concerned had stated:

> "Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties . . . or, absent an express provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect."[6]

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[1] See also *Delimitation of the Maritime Boundary between Guyana and Suriname (Guyana* v. *Suriname)*, in which the arbitral tribunal dismissed the defendant's argument based on the clean hands doctrine, stating that "Guyana's conduct does not satisfy the requirements for the application of the doctrine of clean hands, to the extent that such a doctrine may exist in international law". Award of 17 September 2007, United Nations, *Reports of International Arbitral Awards*, Vol. XXX, p. 118, para. 421.

[2] See e.g. *Good Return* and the *Medea* cases, Ecuadorian-United States Claims Commission, 8 August 1865, in John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. III, 1898, p. 2739.

[3] Sixth report on diplomatic protection by Mr John Dugard, Special Rapporteur, *Yearbook of the International Law Commission (YILC)*, 2005, Vol. II, Part One, p. 4, paras. 8-10.

[4] Report of the International Law Commission on the work of its fifty-eighth session, *YILC*, 2006, Vol. II, Part Two, pp. 23-24.

[5] *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited* v. *Ukraine*, SCC Case No. V 2015/092, Final Award of 4 February 2021, paras. 438-439.

[6] *Franport AG Frankfurt Airport Services Worldwide* v. *Republic of the Philippines*, ICSID Case No. ARB/11/12, Award of 10 December 2014, para. 328. See also *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/02/24, Award of 27 August 2008, paras. 143, 146; *Hesham Talaat M. Al-Warraq* v. *Republic of Indonesia*, Final Award of 15 December 2014, para. 646; *Rusoro Mining Limited* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, para. 492.

6. In the present Judgment, the Court rejects the Respondent's defence on the merits based on the clean hands doctrine, stating "the Court considers that the 'clean hands' doctrine cannot be applied in an inter-State dispute where the Court's jurisdiction is established and the application is admissible" (Judgment, paragraph 38). The Court thus rejects the clean hands doctrine as a defence on the merits in a situation where the respondent State argues in proceedings before the Court that the applicant State has engaged in unlawful conduct. The Court does not address the applicability of the clean hands doctrine in investment arbitration.

II. Racial discrimination

7. In this section, I will offer my views on the tests for determining racial discrimination, in particular, indirect discrimination.

1. The level of scrutiny required

8. Article 26 of the International Covenant on Civil and Political Rights provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Other international human rights treaties of a general nature, such as the European Convention on Human Rights (Art. 14 of the Convention and Art. 1 of Protocol No. 12) and the American Convention on Human Rights (Art. 1), contain analogous non-discrimination provisions.

9. The international courts and monitoring bodies established under these international human rights treaties have used similar frameworks for interpreting these non-discrimination provisions and for determining whether a differentiation of treatment constitutes discrimination. A differentiation of treatment is generally considered to constitute discrimination, "unless the criteria for such a differentiation are reasonable and objective"; in other words, "unless [the differentiation] pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"[7].

10. Article 1, paragraph 1, of CERD defines "racial discrimination" as follows:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

The definition of racial discrimination in this provision comprises two elements. First, a measure must constitute a distinction, exclusion, restriction or preference based on one of the prohibited grounds, namely "race, colour, descent, or national or ethnic origin". Second, the measure must have

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[7] E.g. Human Rights Committee, General Comment No. 18 on non-discrimination, 9 November 1989, para. 13; European Court of Human Rights ("ECtHR"), *Biao* v. *Denmark*, Grand Chamber, judgment of 24 May 2016, No. 38590/10, para. 90; Inter-American Court of Human Rights ("IACtHR"), *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, advisory opinion of 19 January 1984, OC-4/84, para. 57.

the "purpose or effect" of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights. The Court makes a statement to the same effect (Judgment, paragraph 195).

11. In its General Recommendation XIV on Article 1, paragraph 1, of the Convention, the CERD Committee states that "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention"[8]. The Committee seems to be of the view that a differentiation of treatment based on race, colour, descent, or national or ethnic origin can be justified "if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate". This test does not appear to require rigorous scrutiny and is thus questionable.

12. Racial discrimination is one of the most invidious forms of discrimination. A measure based on a prohibited ground listed in Article 1, paragraph 1, of CERD ("race, colour, descent, or national or ethnic origin") is inherently suspect and must be subjected to the most rigorous scrutiny. The ECtHR has stated that "[w]here the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted *as strictly as possible*"[9]. The ECtHR has gone so far as to declare that "[n]o difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society"[10]. In my view, where a measure is based on "race, colour, descent, or national or ethnic origin", a State bears a very heavy burden of demonstrating that the measure pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The level of scrutiny must be most rigorous and the threshold must be especially high. In particular, a measure based on race, colour or ethnic origin is hardly justifiable in a democratic society, unless it qualifies as a temporary special measure taken for the sole purpose of securing the adequate advancement of certain racial or ethnic groups or individuals (Art. 1 (4) and Art. 2 (2) of CERD; also commonly referred to as "affirmative action").

2. Indirect discrimination

13. According to the definition of racial discrimination set out in Article 1, paragraph 1, of CERD, if a measure has the "purpose or effect" of discrimination based on one of the prohibited grounds, it constitutes racial discrimination. The object and purpose of CERD is to eliminate racial discrimination "in all its forms and manifestations" (preamble, paras. 4, 5 and 10; see also Arts. 2 (1) and 5). It is consistent with this object and purpose that CERD seeks to eliminate all forms of racial discrimination, including those that not only have the "purpose" but also the "effect" of racial discrimination.

14. Effects-based discrimination, often referred to as indirect discrimination, can be explained in relation to racial discrimination as follows. If a rule, measure or policy that appears on its face to be neutral has an unjustifiable disproportionate prejudicial impact on a group distinguished by race, colour, descent, or national or ethnic origin, it constitutes racial discrimination, even if it is not specifically aimed at that group. The analysis of disproportionate impact requires a comparison to be made between different groups. A disproportionate prejudicial impact on a group is unjustifiable, unless such an impact can be justified by a legitimate reason that does not implicate any of the

[8] CERD Committee, General Recommendation XIV on Article 1, paragraph 1, of the Convention, 17 March 1993, para. 2.

[9] ECtHR, *D. H. and Others* v. *Czech Republic*, Grand Chamber, judgment of 13 November 2007, No. 57325/00, para. 196 (emphasis added).

[10] *Biao* v. *Denmark*, *supra* fn. 7, para. 94.

prohibited grounds under Article 1, paragraph 1, of CERD. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether it amounts to racial discrimination.

15. International human rights courts and treaty bodies have adopted the notion of indirect discrimination. For example, the CERD Committee states in its General Recommendation XIV on Article 1, paragraph 1, of the Convention that, "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin"[11]. In *L. R.* v. *Slovakia*, it recalled that

> "the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially"[12].

16. Other human rights treaty bodies have explained the notion of indirect discrimination in analogous terms. The Human Rights Committee has recalled that

> "article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons"[13].

The Committee on Economic, Social and Cultural Rights has declared that "[b]oth direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant", defining indirect discrimination as "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination"[14]. The Committee on the Elimination of Discrimination against Women has also stated that "States parties shall ensure that there is neither direct nor indirect discrimination against women", adding:

> "Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can

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[11] CERD Committee, General Recommendation XIV, *supra* fn. 8, para. 2.

[12] CERD Committee, *L. R. et al.* v. *Slovakia*, 7 March 2005, Communication No. 31/2003, para. 10.4. See also CERD Committee, General Recommendation XXXII on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, August 2009, para. 7 ("Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect").

[13] Human Rights Committee, *Derksen* v. *Netherlands*, 1 April 2004, Communication No. 976/2001, para. 9.3. See also Human Rights Committee, *Simunek et al.* v. *Czech Republic*, 19 July 1995, Communication No. 516/1992, para. 11.7; *Diergaadt* v. *Namibia*, 25 July 2000, Communication No. 760/1997, para. 10.10; *Althammer et al.* v. *Austria*, 8 August 2003, Communication No. 998/2001, para. 10.2; *Genero* v. *Italy*, 13 March 2020, Communication No. 2979/2017, para. 7.3.

[14] Committee on Economic, Social and Cultural Rights, General Comment No. 20 on non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 18 May 2009, para. 10.

> exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men."[15]

17. International human rights courts have explained the notion of indirect discrimination in a similar manner. For example, the ECtHR has stated that "a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group"[16]. The IACtHR has also considered that

> "a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups"[17].

18. In the present case, even though the Court has refrained from using the term "indirect discrimination", it has embraced the notion and laid down a framework for analysing indirect discrimination under CERD in the following terms:

> "[R]acial discrimination may result from a measure which is neutral on its face, but whose effects show that it is 'based on' a prohibited ground. This is the case where convincing evidence demonstrates that a measure, despite being apparently neutral, produces a disparate adverse effect on the rights of a person or a group distinguished by race, colour, descent, or national or ethnic origin, unless such an effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1." (Judgment, paragraph 196.)

This framework is consistent with the notion of indirect discrimination adopted by other international human rights courts and treaty bodies.

19. After laying down the framework for indirect discrimination, the Court adds that "[m]ere collateral and secondary effects on persons who are distinguished by one of the prohibited grounds do not, in and of themselves, constitute racial discrimination within the meaning of the Convention" (Judgment, paragraph 196, referring to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108-109, para. 112). This addition is wholly unnecessary, because the framework adopted by the Court can fully explain why "collateral and secondary effects" do not constitute racial discrimination. "Collateral and secondary effects" do not constitute racial discrimination because "such an effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1". Indeed, the Court does not refer to the concept

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[15] Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, para. 16.

[16] ECtHR, *J. D. and A.* v. *United Kingdom*, First Section, judgment of 24 October 2019, Nos. 32949/17 and 34614/17, para. 85.

[17] IACtHR, *Nadege Dorzema et al.* v. *Dominican Republic*, judgment of 24 October 2012, para. 235.

of "collateral or secondary effects" when analysing the Russian citizenship régime in Crimea (see Judgment, paragraph 287).

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20. In the present case, the Russian Federation does not deny the notion of indirect discrimination as such. Indeed, during the oral proceedings, it stated that, "contrary to what is claimed by our opponents, Russia in no way denies that racial discrimination in effect can constitute a violation of the Convention"[18]. Rather, it challenges the "very broad notion" as put forward and defined by Ukraine[19]. It takes issue with the idea, set out in an expert report submitted and adopted by Ukraine, that "[i]ndirect discrimination recognises that *equal treatment* which has a disproportionate effect on a group defined by the enumerated grounds is itself discriminatory"[20]. The Respondent argues that this notion, "which eliminates differentiation of treatment", is not compatible with the definition of racial discrimination in CERD, which requires a "distinction, exclusion, restriction or preference", and it maintains that "equality of treatment cannot . . . constitute racial discrimination"[21].

21. Article 1, paragraph 1, of CERD defines racial discrimination as "any distinction, exclusion, restriction or preference" based on one of the prohibited grounds. Normally, it is differential treatment based on a prohibited ground that falls within this definition. However, a measure that appears on its face to be neutral and equal can have an unjustifiable disproportionate prejudicial impact on a protected group and can thus constitute racial discrimination. Indeed, the CERD Committee has acknowledged that "to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same"[22]. Therefore, in accordance with the notion of indirect discrimination, equal treatment can also constitute racial discrimination if it has an unjustifiable disproportionate prejudicial impact on a protected group under CERD.

(Signed) IWASAWA Yuji.

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[18] CR 2023/10, p. 57, para. 30 (Tchikaya).

[19] CR 2023/8, pp. 31, 39-40, 44, paras. 5, 44-46, 62 (Tchikaya).

[20] Sandra Fredman, Expert report, Memorial of Ukraine, Ann. 22, para. 53 (emphasis added).

[21] CR 2023/8, pp. 38-40, paras. 37-47. CR 2023/10, pp. 57-58, paras. 31-34 (Tchikaya).

[22] CERD Committee, General Recommendation XXXII on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, August 2009, para. 8.