

Swiss Arbitration Association



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“Good faith” in investor-state arbitration

Elliott Geisinger (Co-Chair)
Andrea Bianchi
Emily Sipiorski
Mohamed S. Abdel Wahab
Natalie Reid

Swiss Arbitration Association



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Good Faith as an Instrument of Treaty Interpretation: Instructions for Use

Andrea Bianchi,
Geneva Graduate Institute

Is Good Faith Like Lohengrin?

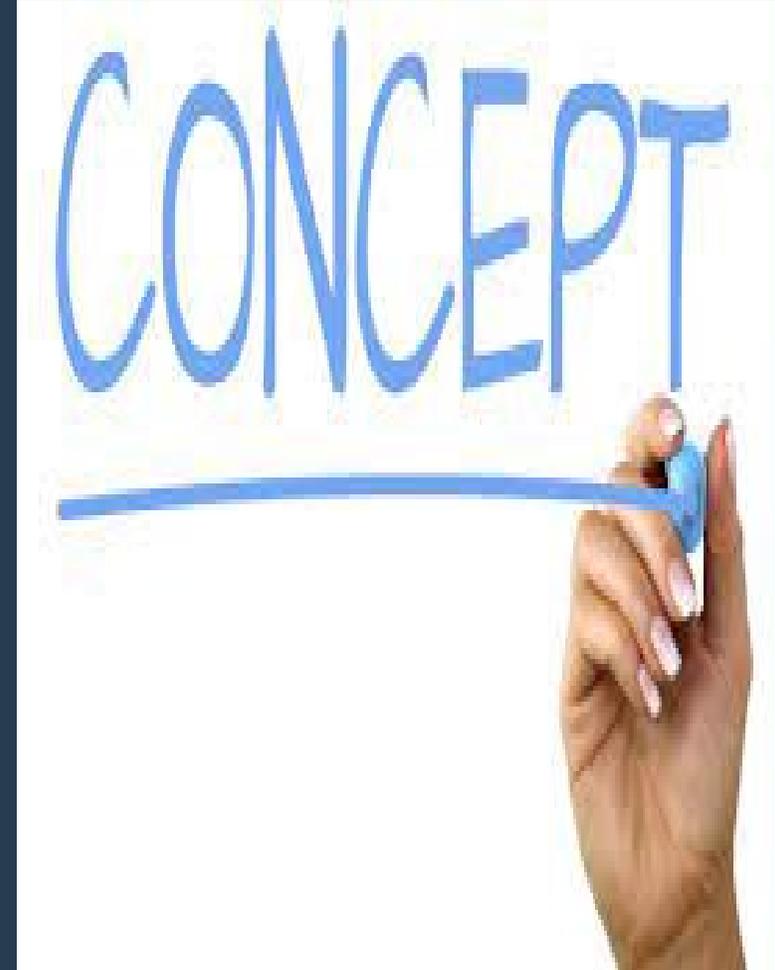
Elsa of Brabant and the Castle of the Holy Grail

Bin Cheng on good faith: 'it eludes a priori definition'



Good Faith as a Travelling Concept

In any discipline, concepts are ways of apprehending reality, the tools its members use to understand the world. They are intellectual constructs that allow for the drawing of boundaries, for classifying, orientating and creating meaning. We use concepts as categories to fit the realities surrounding us, to account for and justify them or, if need be, to contest them and advocate change. Despite their inherent vocation for bringing order by way of theoretical abstraction and systematization, concepts may be volatile.



Legal Validation: Translating Concepts into Principles



Despite the fixity and 'boundedness' that disciplines tend to attach to them, oftentimes the contours of concepts can be porous. Furthermore, concepts may travel across disciplines and adjust to different cultures and scientific paradigms. A journey almost inevitably changes the traveller and it should not come as a surprise that this is also the case with concepts. Once they are used in contexts different from that for which they were originally designed and meant to operate, concepts may take up different connotations and discharge different functions. A good example of such versatility is the concept of good faith.

Legal Validation: Translating Concepts into Principles

General Principles

General Principles of Law
Art.38 ICJ Statute

Interpretive principle Art. 31 VCLT

Meta-principles (Ago, Cassese)

Interstitial principles (Lowe)

Nuanced
Normativity



Zeroing in on the Target

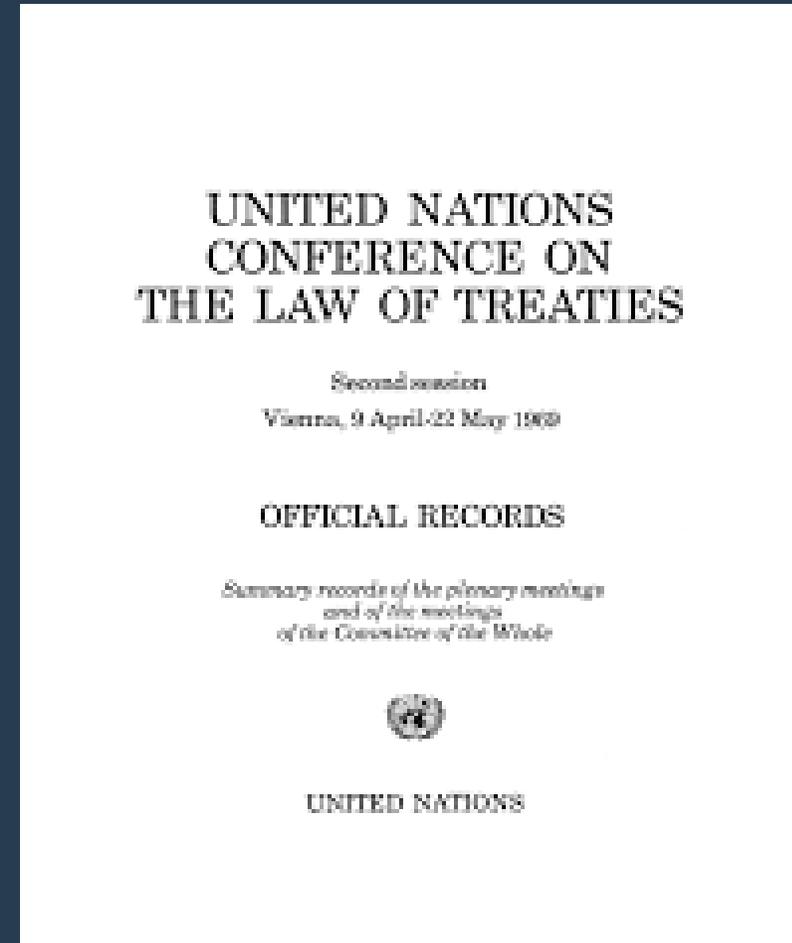
Article 31

General rule of interpretation

A treaty shall be interpreted **in good faith** in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Vivendi (2007): 'the first criteria of Art. 31 'good faith' requires no further explanation'

...



Heterogeneity of Case Law and Scholarly Opinion



Sipiorski (2019-2021): Moral standard/Achieve a Teleological Result/Emphasize the contractual nature of treaty obligations

Sipiorski (2019): Interpretive function: Legitimizing Function/Gap-filling Function/Connecting Function/Corrective Function

Kolb (2017): Two meanings: i) spirit of the treaty when black letter approach fails (accord O'Connell 1991); ii) search for a reasonable interpretation

De Brabandere/Van Damme (2015): limit to the exercise of discretion by arbitral tribunal

Bin Cheng (1953): parties presumed not to have acted unreasonably or in absurd or contradictory way



Good faith in treaty interpretation
vs
Good faith in treaty application

Heterogeneity of Case Law and Scholarly Opinion



2007: Sempra; Hussein N. Soufraki
2006: Inceysa
2005: Yukos (Annulment)
1988: Southern Pacific
1983: AMCO

2021: Kimberly-Clark; Çap & Sehil; FREIF Eurowind;
2020: Reiffeisen; Lee-Chin; Strabag; Pugachev; Addiko; Itisaluna;
SunReserve; Kappes and Kappes; Natland; Watkins;
2019: Stadtwerke; ICW Europe; Photovoltaik; Voltaik; WA Investments
Europe; Eskosol; Indian Metals; NextEra Energy; Juvel

2018: Vattenfall; Casinos Austria International; Dawood Rawat;
2017: Orascom;
2016: Urbaser; Postova (Annulment); Menzies; Venezuela US; Ickale Insaat

2015: PNG; Postova; 2014: Fraport; Alemanni, AES Solar; Hulley; Veteran Petroleum; Yukos (Ann.);
Churchill Mining; 2013: OPIC Carimum; Ambiente Ufficio. 2012: Achmea; European American
Investment Bank; Daimler; Khan Resources. 2011: El Paso; HICEE; Alps Finance and Trade: 2010
Saba Fakes; 2009: HRVATSKA; 2008: Enron.



The Babel Tower and its Discontents

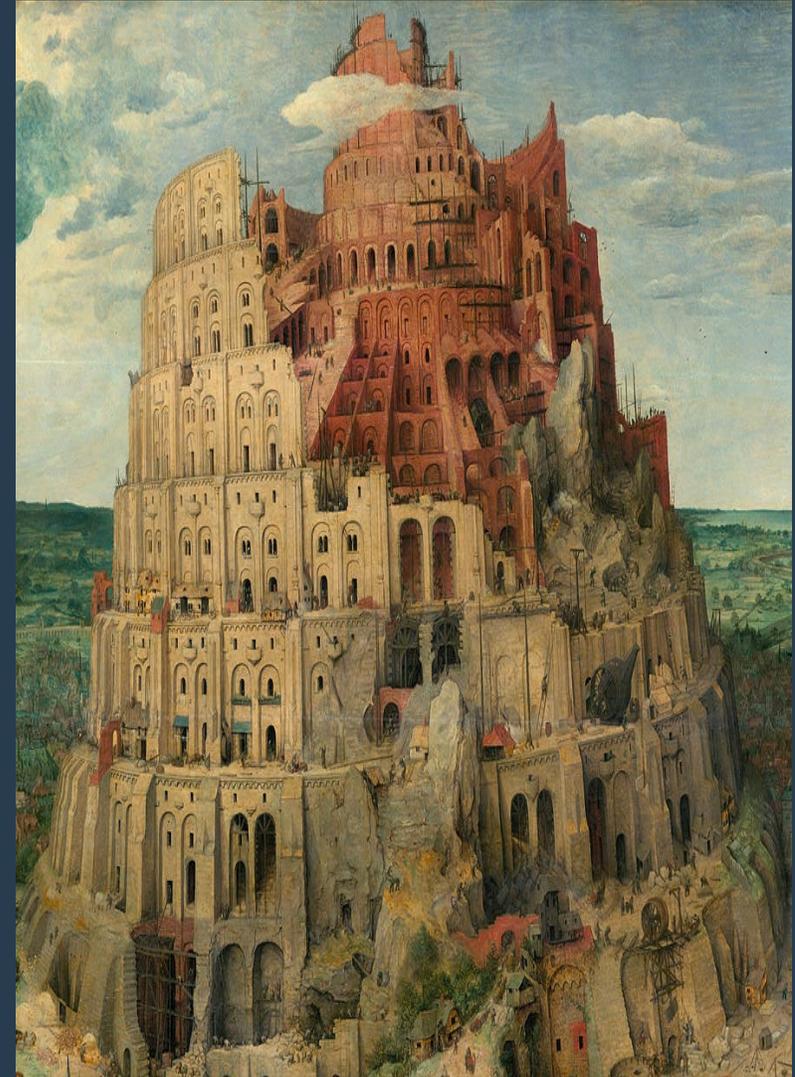


'It is difficult to find any international arbitration award not based on, or that does not at least mention, good faith. The omnipresence of good faith does not mean (rather quite the contrary) that it is clearly understood, that we know how to use it, or that we are able to predict how an arbitration tribunal may apply good faith in a particular case.'

Bernardo M. Cremades, 'Good Faith in International Arbitration' (2012) 27 Am U Int' L Rev 761

Crucial Question:

**What can one do with good faith
as an instrument of treaty
interpretation?**



The Guiding Beacon



*Sempra Energy International v Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007, 297: '[t]he principle of good faith is thus relied on as **the common guiding beacon** that will orient the understanding and interpretation of obligations'*

The Guiding Beacon



The Guiding Beacon

‘an interpretation in good faith is not simply interpretation bona fides, as opposed to the absence of mala fides, or a principle providing for the rejection of an interpretation that is abusive or that may result in the abuse of rights. It also means that the interpretation requires **elements of reasonableness** that go beyond the mere verbal or purely literal analysis.’

Postova banka, 2015, § 241



The Guiding Beacon

Where to go

Kappes and Kappes (2020) : ‘In accordance with Article 31 (1) of the VCLT, a good faith interpretation must take into account the consequences that the State Parties must ‘reasonably and legitimately be considered to have envisaged as flowing from their undertakings.’ § 84 (quoting from J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP, 2012 47-48))

Yukos (Hague Court of Appeal) (2020): ‘That the interpretation must be performed in good faith means that it must comply with the fundamental principle of reasonableness and must not lead to a meaning that is manifestly absurd or unreasonable.’ § 4.2.3.

AMCO (1983): ‘...any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately expected.’ § 14 (i)

Accord Euram (2012), §§ 166-168





Where Not to Go

Natland (Swiss Fed.Trib. 2020): Interpretation in good faith implies that the host State is precluded from offering interpretation that will result in the State's evasion of its international obligations, or such interpretations that will result in absurd outcomes (3.1.2.)

Vattenfall (2018): Good faith requires that the terms of a multilateral treaty 'have a single consistent meaning' for all the parties. The need for coherence in interpretation is embedded in the text of Art. 31 VCLT. § 156

Menzies (2016): Interpretation in good faith does not allow Art. II (MFN clause) of the GATS to provide a basis for consent to international arbitration. §§ 145-146

Hulley (2014): 'A good faith interpretation of the provision (Art. 21 (5)(b)(i) of the ECT) leads to the conclusion that a referral cannot be required if following the referral procedure would clearly be futile under the circumstances of a specific case.' § 1424. Accord **Veteran Petroleum** (2014), § 1424; **Yukos** (2014), § 1424.

Khan (2012): A good faith interpretation does not permit the Tribunal to choose a construction of Art. 17 that would allow host states to lure investors by ostensibly extending to them the protection of the ECT, to then deny them protections when the investor attempts to invoke them in international arbitration. § 429

HICEE (2011): Not to take into account 'highly pertinent circumstances...' would fly in the face of logic and good sense. It would not...be reconcilable with the requirement that a treaty is to be interpreted in "good faith", which the Vienna Convention consciously placed at the very head of the provisions dealing with interpretation.' (§ 136)



Ancillary Function

Good faith in treaty interpretation is almost invariably used in an accessory, secondary role. It's hardly ever a stand-alone source of obligation.

It is often subservient to other principles and/or values and rarely plays a prominent role or provide the rule of decision in international investment arbitration and int'l law.

'It is usually difficult to detect any evidence that an interpretation has been proffered in bad faith, still less that an interpretation in a judgment or arbitral tribunal has been reached in bad faith. Where good faith is specifically included in the justification for an interpretation, this is usually **to buttress some other line of reasoning** without providing any obviously additional criteria (Gardiner, *Treaty Interpretation*, 2nd ed., OUP 2017, 168.)



Ancillary Function

If it were to compete for the Academy Awards (Oscars), good faith would most likely be nominated in the 'best supporting actress' category.

No distinction between leading and supporting role in acting in the official rules. This is the only award the eligibility criteria for which are not specified.

Voting members make the determination at the time of balloting.

Depending on how central to the story being told each role is.



Ancillary Function

To confirm interpretation reached :

Hrvatska (2009): 'It is to be remembered that VCLT Article 31 mandates that treaties be interpreted "in good faith". That is the core principle about which all else revolves. The Tribunal is persuaded that a good faith interpretation of the 2001 Agreement compels the conclusions at which it has arrived. That result does no violence, either to the Agreement's language or in its result.' § 191

To buttress (and provide further justification) the other components of Article 31 VCLT, such as 'ordinary meaning' (**Alps Finance**, 2011, §§ 225-226); or 'object and purpose' (**Antaris**, 2018, §§ 220 ff.; **Al-Warraq**, 2012, § 82)...or all of the above: **PV Investors** (2014): '...a good faith interpretation of the ordinary meaning of Article 26 (ECT editor's note) suggests that no "special" or "dual" consent is required for the institution of arbitral proceedings in aggregate form beyond the express jurisdictional requirements contained in Art. 26. Neither does the context in which the offer of consent is placed nor the object and purpose of the Treaty suggest a different conclusion.' § 98...plus... embedding interpretive solution in the wider fabric of international law and ICJ jurisprudence, by analogizing statements made by the ECT Contracting Parties under Art. 26 (3)(b)(ii) to unilateral declarations of acceptance of the ICJ jurisdiction under Art. 36 of its Statute in order to apply the interpretive principles used by the ICJ (must be interpreted in a natural and reasonable way, having due regard to the intention of the parties (ICJ, *Fisheries Jurisdiction*, 1998), § 333.

To provide normative basis and justification to the *effet utile* principle: **Orascom** (2017); **Urbasor** (2016); **Postova banka** (2016); **Fraport** (2014).



Instructions for Use

Recap



'Instructions for Use' refers to the information provided by the manufacturer to inform the user of a device's intended purpose and proper use and of any precautions to be taken. Not to be taken literally...

Who should read it / might find it useful to read ?

No hard-and-fast rule – Almost never a stand-alone source of obligation

As an interpretive principle it is a beacon of light that shows the direction

By showing where to go, it implicitly warns against where not to go

Normative value contextual, but strategic use highly valuable

No matter the perspective (counsel, arbitrator) its invocation/application has great potential for persuasion, particularly when it complements and/or supports interpretations based on other rules or principles (ancillary function)

Instructions for Use

Recap



In terms of persuasive force, it is more effective when used in a systemic way rather than in an adversarial way. Terry Eagleton's quote paraphrased: ideology - or bad faith for that matters - is like halitosis; it's always the other who has it.

Not to be used too aggressively or in a confrontational way, for the connotation of moral stigma that the qualification of bad faith inevitably brings about may backfire. Good faith is there to temper, and possibly pre-emptively strike against an unfavourable/unfair/unjust interpretive solution, not to vilify or express contempt towards the party advancing it.

To be used parsimoniously to show that a given interpretation conforms with professionally and socially shared understandings of reasonableness and fairness (image commonly associated with good faith is a handshake). It allows to exclude the negativity of an interpretation based on bad faith or bias and leading to an an absurd or manifestly unjust result.

This communal orientation of the principle goes hand in hand with the practice of using it together with other interpretive principles to establish a sense of fairness and reasonableness of the adopted interpretive solution. This rationale can be embedded in different normative contexts (in the WTO it has been associated with expectations of the parties; in international law and investment arbitration it resonates better when used in connection with respecting the intention of the parties and the undertakings they made when they adopted the treaty).

Instructions for Use

Recap



If one learns how to tame the principle and its nuanced normativity, its potential for providing justification and legitimation of interpretive solutions is great. Its apparent ethereal features are in fact powerful instruments for persuasion.

In a way, good faith is part and parcel of our perennial quest for equitable and impartial solutions, the quest for the Holy Grail of justice and good governance, in fairness to all.

The art of using its argumentative benefits largely offsets the need for articulating a ‘theory’ or investigating in detail where it comes from....

After all the initial metaphor of Lohengrin might be appropriate. Let’s not just allow Lohengrin to go back to the Castle of the Holy Grail and keep good faith in our interpretive tool kit. Sooner or later it will come in handy.



Thank you



Andrea Bianchi

andrea.bianchi@graduateinstitute.ch

+ 41 22 908 58 01

Swiss Arbitration Association



4 February 2022

Good Faith Investments of the Future

Emily Sipiorski
Assistant Professor
Tilburg University

swissarbitration.org/asa

Discussion Plan

1. Investment and its definitions
2. Stages of relevance
3. Investment protection and its discontents
4. Good faith investments of the future

The Principle of Good Faith in Investment Law

Danger of overuse and misuse

Interpretative and substantive applications

Differences in understandings of the scope and application

Enables just decisions where justice cannot otherwise be achieved



“Investment”

ICSID Convention Article 25(1): “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, [...]”

Salini...Phoenix...and beyond

“Investment” as included in IIAs

Dutch Model Agreement (2019), Art 1(a)

“investment” means every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk. Forms that an investment may take include:

- (i) movable and immovable property as well as any other property rights in rem in respect of every kind of asset, such as mortgages, liens and pledges;*
- (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;*
- (iii) claims to money, to other assets or to any contractual performance having an economic value;*
- (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;*
- (v) rights granted under public law or under contract, including rights to prospect, explore, extract and exploit natural resources.*

“Investment” as included in IIAs

Nigeria-Morocco BIT (2016)

*“Investment” means an enterprise within the territory of one State **established, acquired, expanded or operated, in good faith**, by an investor of the other State in accordance with law of the Party in who territory the investment is made taken together with the asset of the enterprise which **contribute sustainable development** of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration. An enterprises will possess the following assets:*

- a) Shares, stocks, debentures and other instruments of the enterprise or another enterprise;*
- b) A debt security of another enterprise;*
- c) Loans to an enterprise;*
- d) Movable or immovable property and other property rights such as mortgages, liens or pledges;*
- e) Claims to money or to any performance under contract having a financial value;*
- f) Copyrights and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State;*
- g) Rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources; [...] (emphasis added)*

Sustainable Development and the Preamble

Desiring to strengthen their traditional ties of friendship and to extend and intensify economic relations between them by creating conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development;

Recognizing that fostering an open and transparent policy environment and protecting investments of investors of one Contracting Party in the territory of the other Contracting Party are conducive to the stimulation of mutually beneficial economic activity and intensification of economic cooperation;

Reaffirming their commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development;

[...]

(Dutch Model Agreement, 2019)

Relevant Stages

Securing the Investment

Making the Investment

Maintaining the Investment

De-investment



Thank you

Emily Sipiorski

e.m.sipiorski@tilburguniversity.edu

Swiss Arbitration Association



4 February 2022

Good Faith As a Positive Basis for the Claims in Investor – State Arbitration

Prof. Dr. Mohamed Abdel Wahab
Professor at Cairo University,
Founding Partner at Zulficar & Partners

swissarbitration.org/asa

Overview



- i. Prologue: Conceptions & Misconceptions
- ii. Can the principle of good faith be a basis for a claim or source of obligations?
- iii. Good faith & Fair and Equitable Treatment (FET)
- iv. Good faith & Legitimate Expectations
- v. Good faith & Full Protection and Security (FPS)
- vi. Good faith & Damages
- vii. Epilogue: Concluding Remarks

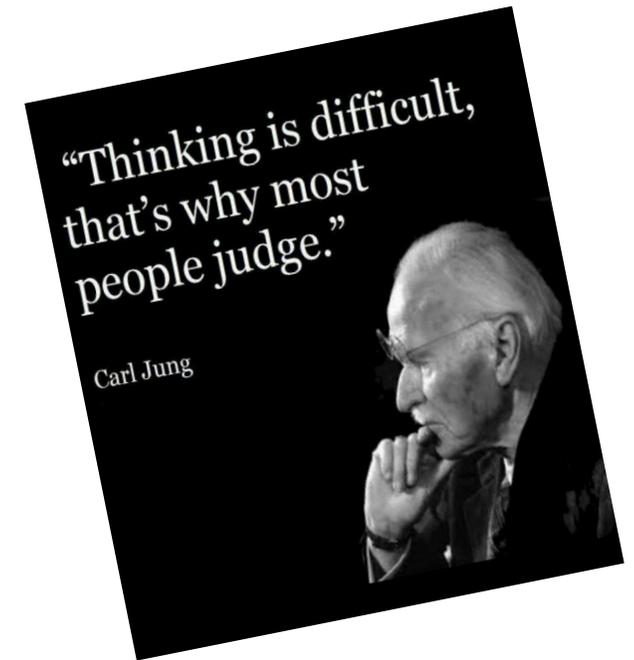
Prologue: The Good Faith Dilemma – Conceptions & Misconceptions

The Dilemma:

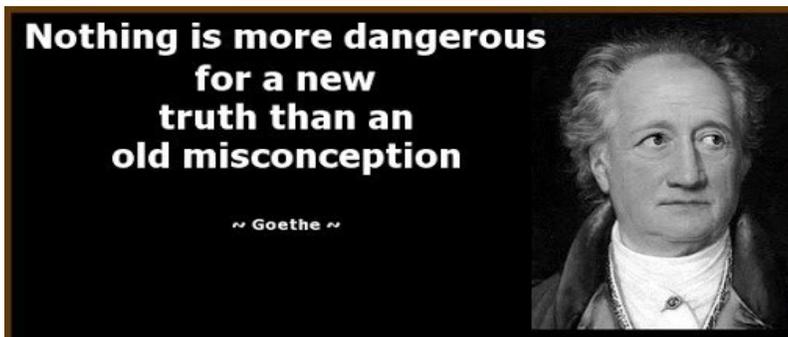
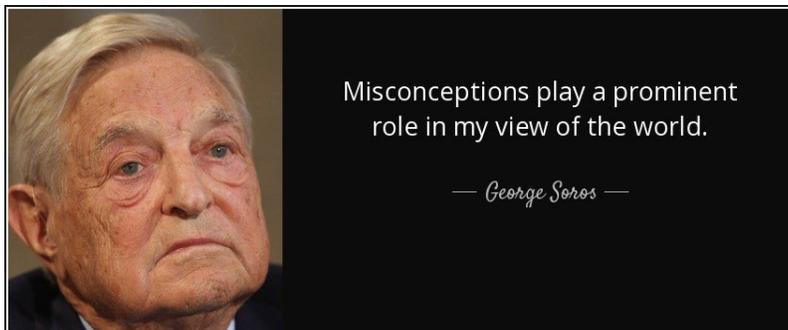
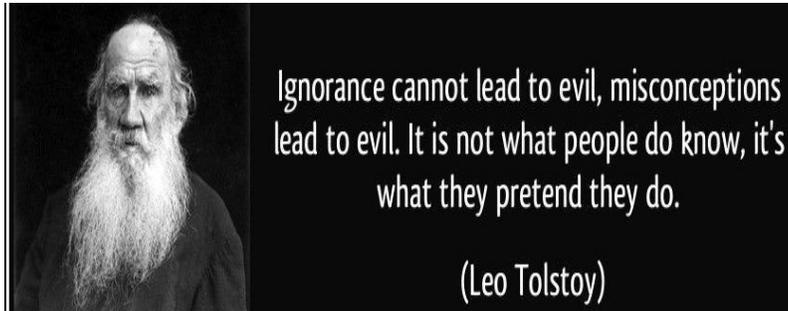
- ✓ No Established Universal Definition!
- ✓ A General Principle of Law?

**[Article 1.7 of the UNIDROIT Principles – ICJ Decisions
*‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith’ (The Nuclear Tests Case 1974 Judgment – ¶ 46)]***

- ✓ Varying Scope in Legal Systems?
- ✓ Frequent Use and Abuse?
 - ✓ Misconceptions?



Prologue: The Good Faith Dilemma – Conceptions & Misconceptions



- **Good Faith brings uncertainty?**
- **Invoking breaches of good faith demonstrate weakness of argument?**
- **Good Faith can be a defense, tool of interpretation, supportive argument, but not an outright positive basis for a claim or a source of obligations?**

Good Faith

Positive Basis for Claims

- **Legitimate Expectations**
- **Fair & Equitable Treatment**
 - **Non Discrimination?**
- **Full Protection & Security?**
 - **Expropriation?**

Good Faith

Positive Basis for Claims

**(I) Can the principle of good faith
be a source of positive obligations?**

Good Faith

Source of Obligations?

Treaty law recognises the principle of good faith and imposes an obligation to comply with it.

- Article **2(2) of the United Nations Charter** states that *“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter”*
- Article **26 of the Vienna Convention on the Law of Treaties (VCLT)** reads: *“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”*

Good Faith

Source of Obligations?

In the **Nuclear Tests Case (Australia v Argentina) [1974] ICJ Reports 253**, The International Court of Justice (ICJ) stated that: *“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.”*

However, in **Border and Transborder Armed Actions Case (Nicaragua v Honduras) [1988] ICJ Reports 69**, the ICJ retracted from this view by stating that *“good faith is not in itself a source of obligation where none would otherwise exist.”*

Good Faith Positive Basis for Claims

(II) Good faith & Fair and Equitable Treatment (FET)

Good Faith Breach of Fair & Equitable Treatment (FET)

In **S.D. Myers Inc. v. Canada (UNCITRAL (First Partial Award of 13 November 2000), pp. 15-27)**, the issue was whether Canada's export ban in violation of the principle of good faith under international law was discriminatory against SDMI and U.S PCB disposal companies in favour of Canadian PCB remediation business. Under **Article 1105 of NAFTA, Canada is obliged to treat foreign investors in accordance with international law, including fair and equitable treatment and to perform that treaty obligation in good faith. SDMI, the claimant, argued that the export ban was discriminatory and unfair and violated the principle of good faith under international law.** The Tribunal found that Canada did not act in good faith and its actions prejudiced SDMI's interests in favour of U.S companies operating in Canada. Thus, **Canada's breach of the principle of good faith triggered a breach of the FET standard.**

Good Faith Breach of Fair & Equitable Treatment (FET)

In *Tecnicas Medioambientales, TECMED SA v. Mexico, Tecmed* (ICSID Case No. ARB(AF)/00/2 (Award of 29 May 2003), ¶¶ 154 and 172), the claimant and a Spanish company, alleged to have lost investments in a waste landfill because Mexican authorities did not renew a licence necessary for the operation of that landfill. Under the Spain-Mexico BIT, an FET standard exists. **The Tribunal interpreted that treaty obligation in the light of the good faith principle and found that the contracting parties must meet the basic expectations taken into account by foreign investors before investing in the host state.** The Tribunal stated that foreign investors expect from the host State:

- To **act consistently, without ambiguity, and with total transparency;**
- **Not to deprive foreign investors of their investments without proper compensation;**
- **Not to revoke any pre-existing decisions or permits** relied upon by investors to launch their commercial and business activities.

Good Faith

Breach of Fair & Equitable Treatment (FET)

The Tribunal concluded that **Mexico did not act in good faith and its behaviour amounted to a violation of fair and equitable treatment**, Mexico assured Tecmed that it could operate the landfill until the relocation was conducted and that new land would be provided together with licenses to operate the new landfill, but the renewal of the license was denied. The Tribunal stated that:

“It cannot be ignored, in light of the good faith principle (Articles 18 and 26 of the Vienna Convention), that the conduct of the Respondent between the date of execution of the Agreement (in view of the Respondent's determination to ratify it subsequently) and the effective date thereof, is incompatible with the imperative rules deriving from Article 4(1) of the Agreement as to fair and equitable treatment”

Good Faith

Positive Basis for Claims

(III) The interplay between good faith and legitimate expectations

Good Faith Legitimate Expectations

In **International Thunderbird Gaming Corporation v. United Mexican States (Arbitral Award, 26 January 2006 ¶ 147)**, Thunderbird, a Canadian gaming company, wished to establish gaming and entertainment facilities in Mexico. Thunderbird fully disclosed its intended business activities to Mexico and sought an official opinion attesting to the legality of these business activities. Mexico approved the legality of the claimant's gaming operations and consequently Thunderbird *relied* on that official opinion and started its investments in Mexico. Following a change of government, Mexico *renege*d on its prior approval of the claimant's investments.

The issue was whether Mexico's official opinion created a *legitimate expectation to the effect that it brings the claimant's claim under Article 1105 NAFTA*. **The Tribunal relied upon the principle of good faith to determine that Mexico is under an obligation to meet the claimant's expectations.** The Tribunal concluded that:

*“Having considered recent investment case law and the **good faith principle of international customary law**, the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations [...], such that a **failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.**”*

Good Faith Positive Basis for Claims

**(IV) Good faith & Full Protection and
Security (FPS)**

Good Faith

Full Protection & Security (FPS)

In *Frontier v The Czech Republic (PCA Case No. 2008-09, Final Award, 12 November 2010, ¶ 273)*, the issue was whether the Czech Republic breached its obligations under **Canada-Czech Republic BIT** because the *Czech courts refused to recognise and enforce an international arbitration award on the grounds of public policy under the New York Convention*. The Tribunal found that the Czech Republic was *obligated to provide full protection and security to the investor*. *The Tribunal added that not every failure to obtain a remedy could be considered as a breach of the FPS standard, provided that the courts have acted in good faith and have reached decisions that are reasonably tenable*. The Tribunal held that:

“Even a decision that in the eyes of an outside observer, such as an international tribunal, is “wrong” would not automatically lead to state responsibility as long as the courts have acted in good faith and have reached decisions that are reasonably tenable.”

The Tribunal imposed an obligation on the host State to act in good faith to avoid breaching the FPS standard.

Good Faith Positive Basis for Claims

(V) Good Faith and Claims for Damages

Good Faith Damages

There is scarcity in cases establishing a direct correlation or causation between the breach of good faith and the award of damages exclusively on such basis.

In **Parkerings Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8, Award, 11 September 2007)**, because the host State refused to either perform or renegotiate the agreement in good faith, the Tribunal awarded the claimant *full compensation on the basis of the fair market value of BP*.

Good Faith Positive Basis for Claims

(VI) Concluding Remarks

Epilogue: **Concluding Remarks**



- It appears that whenever good faith is invoked as a basis for a positive claim, it is pleaded to evidence a breach of established standards and principles such as FET, non-discrimination, expropriation, FPS, legitimate expectations, etc. “***Good faith hunts in a pack***”.
- There is paucity in awards establishing a **correlation or causation between the awarded damages and an *exclusive* breach of good faith.**



Thank you

Prof. Dr. Mohamed Abdel Wahab
msw@zulficarpartners.com

Swiss Arbitration Association



4 February 2022

“Good faith” as a negative defense (jurisdiction and substance).

Natalie Reid
Partner at Debevoise & Plimpton, New York



Thank you

Natalie Reid

nlreid@debevoise.com