

2022 ASA Winter Conference

“Good Faith in International Arbitration – Myth, Reality, Label... or All of the Above?”

Geneva, 4 February 2022

N. Reid Outline of Remarks

Panel 3 (“Good faith” in investor-state arbitration); “Good faith” as a negative defense

I. Introduction & Scope of Remarks

- Broadly understood, “good faith” defenses in investor-state arbitration can arise in context of jurisdiction, admissibility, or merits arguments.
- Propose to focus on admissibility, on assumption (*please correct if wrong!*) that (i) role in interpreting treaty jurisdictional requirements would be covered by Prof. Dr. Andrea Bianchi; (ii) other principal jurisdiction issues (e.g., explicit / implicit requirement in making investment or over life of investment) would be covered by Prof. Dr. Emily Sipiorski. Would note briefly, largely by reference to prior remarks.
- Would touch briefly on merits, to extent there is independent content to “good faith” defense (beyond opposing arguments made in support of affirmative claim, which would be covered by Prof. Dr. Mohamed S. Abdel Wahab)

II. Good Faith as a Form of Illegality Defense

- Illegality defense in investor-State arbitration has evolved along two distinct axes: jurisdictional/temporal axis, and admissibility/claims axis.¹ Plan to focus on second axis (on assumption that first axis largely covered by Prof. Dr. Sipiorski’s remarks).
- Using examples of (i) unclean hands doctrine and (ii) invocations of transnational public policy: is “good faith” in this context a theory or a label in search of specific substantive content, a real rule of decision? (Cases highlighted will include *Yukos*.)

III. Good Faith as Abuse of Process / Abuse of Right Defense

- Plan to discuss two contexts in which abuse of process / abuse of right arguments often arise: (i) allegations of “treaty-shopping” or similar steps to gain access to treaty protections and forum, (ii) parallel / overlapping claims
- Cases highlighted to include corporate restructuring discussions (e.g., *Phoenix/Mobil*, *Philip Morris*, *Gramcitel*), claims in different fora or by different claimants (e.g., *Ampal*, *Orascom*)

¹ See *Bank Melli Iran & Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, 9 November 2021, paras. 351 *et seq.*