

2022 ASA Winter Conference “Good Faith in International Arbitration – Myth, Reality, Label... or All of the Above?”

Emily Sipiorski, Draft Outline “Good Faith Investments of the Future”

- I. **Introduction**
 - a. Importance of the principle of good faith for interpreting “investment”
 - b. Good faith as a principle of public international law and domestic contract law (intersecting the public-private divide of investment protection)
 - c. Allows for just application/interpretation of treaty law where it cannot otherwise be achieved
 - d. Question to be explored: how will good faith be relevant in investments in the future?
 - i. Growing acceptance of the idea of the Anthropocene and its impacts on ideas of development
 - ii. Increasing global commitments regarding environment and human rights (SDGs, due diligence, etc.)
- II. **Investment and the perils of defining**
 - a. Intentionally left undefined in the ICSID Convention Art 25
 - b. Examples of definition in IIAs: 1) vague and broad, 2) explicit reference to g/f
 - c. Advantages to vagueness?
 - d. *Salini to Phoenix* and beyond
 - e. A turn to good faith for both interpretation (VCLT Art 31) and substance
- III. **Stages of relevance**
 - a. Securing Investment
 - i. Temporal aspects for jurisdiction
 - ii. Substantive aspects: admin processes, environmental impact assessments, corruption in the bidding process
 - b. Making the investment
 - c. Maintaining the investment
 - d. De-investment (see e.g., Draft regulations on mineral resources in the Area, Part VI)
- IV. **Investment protection and its discontents**
 - a. More recent agreements include “Sustainable Development” in the Preambles
 - b. EU due diligence in the supply chain legislation
- V. **What does a good faith investment look like in the future?**
 - a. Energy investments limited to those in line with SDGs?
 - b. Will certain types of investments be entirely excluded?
 - c. Can there be a greater responsibility imposed on investors in the post-investment phase?