

Investment Claims

1 Introducing Good Faith in International Investment Law

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1.01 Good faith plays a vital role in the maintenance of justice within the system of international investment law. Tribunals rely on the principle when treaties fail to provide definitions that anticipate specific scenarios, such as in assessments of ‘investment’ or ‘investor’. Tribunals also refer to good faith when agreements grant them discretion to take decisions, such as in evidence and costs. Parties often argue that they have acted in good faith as a way of supporting their actions. Although investors and states rarely overtly act in bad faith,¹ good faith often becomes a parameter in disputes.

1.02 This chapter first establishes the relevance of the principle of good faith in international investment law, and then explains the basic characteristics of good faith. The final part of the chapter introduces the methodology and organization of the book.

(p. 2) A. Good Faith and Its Use in International Investment Law

1.03 Good faith is a general principle of law.² The application of the principle in investment arbitration, however, lacks consistency.³

1. Modes of application

1.04 Tribunals often apply good faith based on language in the treaties and agreements.⁴ The most frequent application is in the fair and equitable treatment provision. This standard may imply conduct in good faith.⁵

(p. 3) **1.05** Tribunals have deferred to the principle of good faith without express reference to the agreements.⁶ Tribunals often require compliance with the laws of the host state through the principle of good faith.⁷

(p. 4) **1.06** However, in other instances, tribunals avoid referring to good faith and analyse the relevant actions based strictly on the express language of the treaty or agreement.⁸ A tribunal's decision to apply or disregard the principle of good faith rests on how it perceives the relationship between principles of public international law and investment treaty law,⁹ and application of the complex relationship to the facts of the dispute.¹⁰ Although 'international investment law is part of public international law',¹¹ there are differences in the approach to the relationship.¹² The application of good faith is reliant on arbitrators from diverse legal backgrounds with diverse conceptions of the principle.¹³ The parties' conceptions of the principle add another layer to the complexity.

2. Timing and the application of good faith

1.07 Good faith serves a role at every step of the international investment process. First, the state parties negotiate the treaty or agreement in good faith. Lack of good faith creates a potential later challenge to the validity of the treaty.¹⁴

(p. 5) **1.08** Business decisions are made regarding treaty protections. Decisions to take advantage of treaties made prior to a dispute arising are in good faith, while decisions made after a dispute has arisen may be in bad faith.¹⁵ The inextricable connection between good faith and legitimate expectations, largely through the standard of fair and equitable treatment, sustains the investment. While the investor remains in the state, both the state and the investor make periodic decisions about the investment. Legislative and regulatory changes may be implemented in disregard of good faith expectations. Once the dispute has arisen, the parties are obliged to attempt an amicable settlement in good faith before initiating a hearing.

1.09 Turning to the proceedings themselves, the parties may have good faith obligations regarding submission of evidence, conduct in preparation for the hearings and during the hearings, and the duty to not initiate a second proceeding in a different forum. The tribunal ultimately has the authority to take the good or bad faith behaviour of the parties into account when making its final assessment of costs. There is a subjective element to those decisions, and the arbitrators' own requirement to act within standards of good faith guides the process.

B. Investment Arbitration

1.10 Investment arbitration is young and its growing pains are apparent. It has only existed for little more than half a century as a forum for resolution of disputes between foreign investors and host states.¹⁶ As a system arising out of Treaties of Friendship, Commerce, and Navigation (FCN)¹⁷—which provided for state-to-state dispute settlement—the modern evolution of BITs allows investors to bring disputes against states.¹⁸

1.11 Regulation of the procedure of arbitral dispute resolution by ICSID, ICSID (Additional Facilities) (AF), the United Nations Committee on International Trade Law (UNCITRAL), (p. 6) the International Chamber of Commerce (ICC), the International Court of Arbitration, the Stockholm Chamber of Commerce (SCC), or another set of arbitration rules as provided in the treaty grounds the applicability of principles and the methods for application in the procedure. These procedural rules thus establish the structure of the system and the

treaties maintain the substance. The role of the principle of good faith supports both aspects.

1. The system of investment law

1.12 International investment law remains a live, evolving system impacted continually by new tribunal decisions, commentaries, and scholarly opinions. This provides a canvas for the development of principles and trends. The nearly 3,000 bilateral investment treaties (BITs) in force represent a complex web of bilateral relationships between states aimed at encouraging investment and peaceful settlement of disputes.¹⁹

1.13 The purposes of BITs are multilayered, arguably for both the legal protection of the investor and acquisition of foreign investment into the economy of the host state. BITs are designed to protect investors entering a state with legal recourse outside of the domestic courts of the jurisdiction in which they have invested.²⁰ A state may sign a BIT or International Investment Agreement (IIA) for the purpose of attracting foreign investment into its territory, or for the purpose of protecting its investors.²¹ To a certain degree, BITs are designed to prevent a foreign investor from being discriminated against in a foreign court, but they also ensure the stability and predictability of the law under which the relationship is regulated.²² Local laws, however, remain a relevant aspect of the relationship.

1.14 BITs have become symbols of shared economic interests and global economic integration—more specifically with the flow of foreign direct investment (FDI). With the first wave of BITs signed during the 1970s and a later wave corresponding with the fall of the Soviet Union and the expansion of free market economies, these treaties served—and continue to serve—an important diplomatic purpose. They create a means of cooperation between investors and states.

1.15 As the web of treaties expanded, so did the number of domestic legal systems with interests in the system and the respective associations with specific principles. It was not until several decades into the regime that investors began to bring investment disputes against (p. 7) host states. The early disputes involved investors from wealthy democracies bringing claims against economically developing host states. Those disputes set the foundation for the later application and relevance of general principles. To a certain extent,²³ a state no longer signs a BIT with any certainty of its role as either a host state or home state of the investments.²⁴

1.16 Although the bilateral nature of investment agreements means that each treaty has somewhat distinct language, that language is hardly unique. Its recognition as a unified system is becoming more widely accepted.²⁵ Overlap occurs between the treaties and agreements.²⁶ The development of a system is also evidenced by the widespread use of previous investment tribunal decisions in later disputes.²⁷ The use of general principles to support the system further enriches the creation of a system. Some authorities, however, suggest that the system lacks the integrity of a more developed legal regime and results in diverse language and one-off decisions that fail to establish uniformity.²⁸

2. Public and private international law

1.17 Complexity with respect to the application of principles of international law arises out of the nature of investment arbitration at the intersection between private international law (p. 8) and public international law.²⁹ The relationship between investment arbitration and public international law has varied over time. Arbitrators have different opinions about how it should be understood.³⁰

1.18 The investor-state dispute resolution feature creates a more complicated application of general principles than is the case in state-to-state dispute settlement. Private investors are not bound to public international law in the same way as host states. Nonetheless, they are equally responsible for behaving in good faith. In treaties operating within the international realm, certain expectations and actions are required despite the status of investors under international law. Direct references to international law are one means of creating these obligations for investors.³¹

1.19 The obligations for both the host state and the investor to conduct the relationship in good faith emanate from more than just the general principles in public international law; they also arise from principles in private international law and legal requirements in national jurisdictions arising more pointedly out of contract law. The latter more specifically applies to the investor whose obligations cannot arise out of public international law, for example under the foreign investment law of a state.

C. Positioning Good Faith in International Law and Investment Arbitration

1.20 Underlying this study is the general acceptance of general principles of law in the investment arbitration context.³² Kolb considers general principles to ‘allow the judge to blow some flexibility into the law to be applied and sometimes even to develop international law’.³³ Good faith requires this connection to have relevance in the context of investment decisions.

1.21 Each dispute arising under a bilateral treaty or multilateral agreement requires distinct consideration of the application of general principles. Some treaties allow for a more direct application of such principles, or make requirements that directly point to the principle. Thus, there are always exceptions to certain trends in applying general principles.

1.22 These general principles are often applied on the basis of ICSID Convention Article 42(1). The article provides that the tribunal may apply domestic law ‘and such rules of international law as may be applicable’. Schreuer notes in the Commentary to the ICSID Convention that even where parties have a ‘combined choice of the law of the host State and of international law [such choice] would produce a result similar to the residual rule (p. 9) of Article 42(1) second sentence’.³⁴ This provision was intended by the drafters to allow arbitrators to ‘set aside the applicable domestic law when it, or an action taken under it, violated international law’.³⁵

1.23 At the origins of the ICSID Convention, the drafters considered the relevance of Article 42 to allow for certain gaps in the treaties or conventions to be filled with general principles of international law:³⁶ ‘The prevailing view on the relationship of international law to the host State law under the second sentence of Article 42(1) is the doctrine of supplemental and corrective function of international vis-a-vis domestic law.’³⁷

1.24 This position was supported by the *Klöckner* ad hoc committee decision in 1986. In its consideration of Article 42(1) of the ICSID Convention, the ad hoc committee noted that the provision allowed ‘recourse to the “principles of international law” only *after* having inquired into and established the content of the law of the State party to the dispute ... and *after* having applied the relevant rules of the State’s law’.³⁸ International law, however, is not indiscriminately applied when it is unnecessary.³⁹

1.25 Similarly, Article 1131(1) of the North American Free Trade Agreement (NAFTA) provides that the tribunal ‘shall decide the issues in dispute in accordance with this

Agreement and applicable rules of international law'. Bilateral investment treaties may also give direct reference to international law, in particular 'customary international law'.⁴⁰

(p. 10) **1.26** The application of general principles allows for international law to dynamically develop,⁴¹ as well as 'increasing its unity by a web of interrelationship and of interdependencies'.⁴² It further allows for a level of 'progress and responsiveness of international law to modern challenges'.⁴³ It follows with the idea that '[i]nternational law is a process—it is a system of constant renewal, dynamism and development'.⁴⁴ Similarly, Henkin notes that

principles common to legal systems often reflect natural law principles that underlie international law ... if the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this ... source seems another example of the triumph of good sense and practical needs over the limitations of concepts and other abstractions.⁴⁵

1. Rule versus principle

1.27 Good faith operates within public international law as a principle.⁴⁶ Some scholars conclude that it is ambiguous or is 'serv[ing] a mediatory role' between rule and principle.⁴⁷ Good faith, however, being unable to function independently, cannot act as a rule.⁴⁸ It functions as a principle by serving the role of balancing the law⁴⁹ and attempting to achieve an optimal realization of it.⁵⁰

1.28 In the context of the International Court of Justice (ICJ) decisions where good faith has been applied, it is not considered an independent obligation.⁵¹ The ICJ has reaffirmed that it is 'not in itself a source of obligation where none would otherwise exist'.⁵² The ICJ decisions maintain that good faith applies as a principle.⁵³ In the *Nuclear Tests Cases*, the ICJ stated:

(p. 11)

One basic principle 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.⁵⁴

1.29 As a general principle, good faith does not necessitate a specific decision and allows for application of argumentation and reasoning where no other options may exist: 'Such a situation could either arise where it is impossible for a judge or arbitrator to find a solution in the positive law as to which of two contradictory norms should be applied or where simply no norm exists.'⁵⁵

1.30 Applied as a principle, good faith has an integral role in 'informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised'.⁵⁶ Good faith in this sense fits into the idea of meta-rules, applied as principles, which assist in the application of legal rules. These principles represent the most basic aspects of justice.⁵⁷

2. Relationship to related doctrines

1.31 Good faith is closely related to several other concepts.⁵⁸ Equity, *pacta sunt servanda*, and estoppel often arise in parallel with the application of good faith in judicial decisions and with regard to the particular intent of the term in treaties and conventions. These concepts have a significant place in the discussion of good faith.

1.32 Furthermore, abuse of rights, abuse of process, and clean hands often overlap with the applicability of good faith. These related doctrines, applied as customary international law or as elements of non-binding precedent, serve to inform the application of the principle of good faith. Doctrines related to good faith are often applied as defences to performance of the treaty obligations. In particular, abuse of rights has been applied by state parties to defend against the applicability of the treaty or standards of treatment.

1.33 These related doctrines form the general fabric to the principle of good faith and its applicability in international investment law. As such, these doctrines are part of the broader characterization of the principle of good faith. Nonetheless, the distinction in the specific words used by the parties or the tribunal is important for fully locating the relevance to future precedent and the emerging body of international investment law.

1.34 This book includes *bona fides* and the translation of good faith into other languages, for example *buena fe*, *bonne foi*, and *Treu und Glauben*. The language chosen can have an impact. In the Vienna Convention on the Law of Treaties (VCLT), the Latin *bona fides* was used by the drafters of the convention for the probable reason that the term would not have (p. 12) the same tendency to transform over time, as for example might be the case if using the English version ‘good faith’.

1.35 In its explicit reference, within the obligations, to cooperation during conciliation, the ICSID Convention uses ‘good faith’ instead of *bona fides*.⁵⁹ Tribunals also more consistently refer to applying the principle of ‘good faith’ in English. The French version and decisions refer to *bonne foi*.⁶⁰ Likewise, the Spanish version of the Convention and relevant decisions follow this logic.

D. The Various Forms of Good Faith

1.36 The principle of good faith is complex and full of varied definitions. Some scholars have divided it into procedural and substantive, others into subjective and objective; still others consider it applied and behavioural. One tribunal distinguished ‘material good faith’ from ‘procedural good faith’.⁶¹

1.37 There are two basic applications of good faith. First, there is a performance aspect to good faith—considering the behaviour of the parties, including the host state’s observance of the investors’ rights and the conduct of the investors. Second, there is interpretative good faith with reference to the arbitral decisions and the interpretation of the treaties and relevant conventions.⁶²

(p. 13) **1.38** Thus, for the purposes of this book, the principle of good faith is divided into these two applications: (1) good faith as a performance obligation and (2) good faith as an interpretative function.

1. Performance obligation

1.39 Good faith as a performance obligation reflects Article 26 of the Vienna Convention on the Law of Treaties (VCLT). Through the principle of *pacta sunt servanda*, Article 26 VCLT provides that treaty commitments must be observed. Kolb considers this a ‘necessary normative proposition’ and further indicates that ‘if the pledged word was not binding, an international legal order would be impossible’.⁶³ Parties must first accept the obligations and rights derived from the performance of the treaty.

1.40 This performance function, however, extends further into the course of the investment, proceedings, and evidentiary submissions. This extension respects the contractual origins of international investment law. It parallels ideas of good faith and fair dealing in domestic contract law. Similar to contractual partners, the investor and the host state have undertaken a form of contractual commitment. Good faith actions align closely with these expectations. The actions during the course of the investment must respect that

commitment. The behaviour during the proceedings is a further extension of that commitment.

2. Interpretative function

1.41 The interpretative function of good faith reflects Article 31(1) of the VCLT, providing for treaty interpretation in good faith in light of the object and purpose. The principle of good faith allows the treaty to be expressed and applied in light of a broader, contextual focus.

a) Gap-filling function

1.42 Good faith is most frequently applied to fill gaps in the language of treaties. This usage reflects the limitations of language in treaties and agreements. The object and purpose of the treaty may provide for certain protections or obligations, but it is only through the tribunal's interpretative application of good faith that those protections or obligations are realized. Good faith is thus applied to better establish the type and level of protection as intended.

1.43 Along these lines, ambiguities in definitions are often filled with good faith interpretation. 'Nationality' and 'investor' often require further rendering, dependent on the facts of the case. Parallel proceedings, typically regulated by *lis pendens*, may at times rely on good faith as a way of deciding grey areas. As such, parties and tribunals may apply the principle of good faith to fill the uncertainty where precision is lacking in the language—regardless of whether those ambiguities are intentional or unintentional.

b) Legitimizing/balancing function

1.44 Second, the principle of good faith is applied to legitimize decisions. Often tribunals rely on the principle to justify decisions on procedural issues such as evidence and costs. As the tribunals have wide discretion with regard to submission and consideration of evidence, the principle of good faith gives authority to a decision. Discretion alone would not hold the same persuasive authority. Similarly, no set rules dictate how a tribunal must allocate costs. (p. 14) In line with the general discretion provided, good faith allows a broader exploration of the circumstances of the case. This gives a level of 'justified' reasoning to those conclusions.

1.45 In parallel with legitimizing decisions, good faith rebalances a perceived imbalance. Although rare, there are instances where the principle is included in decisions in a manner that corrects. This corrective function in favour of host state values applies with regard to substantive protections.

c) Connecting function

1.46 Finally, more broadly, the principle of good faith connects international investment law to the more established framework of public international law. When a tribunal applies the principle, it accepts—implicitly or explicitly—the position of investor-state disputes within international law.

1.47 The application of the principle in this context sits at the intersection of international public and private law—derived from both treaties and contracts. Following the use of the principle helps better understand the evolution of the investor-state system, and more specifically the direction of the growth and changes. These changes move closer to either public international law or international commercial arbitration.

1.48 Ultimately, the power in using the principle of good faith rests in its ability to connect. It creates a connection between public and private law, between the domestic and the

international, and between developed and developing states. The principle allows for a deeper growth and development of international investment law.

3. Other elements of good faith

a) Good faith as a moral principle

1.49 There are also moral implications to the principle of good faith.⁶⁴ Zoller concludes that good faith is an ethical principle—an ethical principle that nonetheless has practical application in its association to principles such as *pacta sunt servanda* and *abus de droit*.⁶⁵ Cheng also considers the moral nature of the principle: ‘The enforcement of the principle of good faith may be considered as the enforcement of that degree of morality which is necessary for the functioning of the legal system.’⁶⁶

1.50 The question of why and how tribunals apply good faith naturally fits into questions of morality and law. Good faith acts as a natural moral barometer—a principle that cannot be applied independently but adds moral strength to the other express obligations.⁶⁷ The principle guarantees a certain confidence in treaty partners that thus allows the system to function.⁶⁸ Its origins in Roman religion further emphasize a necessary moral contemplation.

(p. 15) **1.51** Good faith, however, does not apply as a single-use application of ethical obligations: ‘It is not a simple ethical principle, when applied to law, even though it is *also* an ethical principle and was borrowed by law from the ethical realm.’⁶⁹ Instead, there is an acceptance that good faith applies as a means of ‘regulating’ certain behaviour and thus controls the absolute sovereignty of a state in its relations with other states, or, in this case, investors.

1.52 The principle serves an important role, acting as an unwritten, all-informing remedy to prevent unfair and unjust results. Judges and arbitrators, acting as the decision-makers, allow for an understanding of fairness, built on precedent and the body of law that creates the international legal order.

b) Law and language

1.53 The difficulty in objectively defining the principle of good faith stands as one of its greatest limitations, as well as its most important attribute. Language has limits.⁷⁰ The term ‘good faith’ lacks a determinacy that is often preferred in black-letter law. This allows fluidity in its application when it does appear in the law.

1.54 The principle of good faith also holds the important role of informing where language and laws are unable to regulate behaviour. Limitations on language in an agreement or treaty are multiplied by the use of commonly understood languages in international treaty making.⁷¹ Treaties are often written in boilerplate language that may disrespect or disregard the specific relationship between the two contracting parties. Beyond misunderstandings, the words of laws cannot account for every situation, and often the more attempts made to detail requirements for behaviour, the more cracks and misunderstandings that arise.

E. Organization and Scope of the Study

1. Methodology

a) Previous scholarship on good faith

1.55 In the past decades, several full-length studies have examined the principle of good faith. These analyses have considered good faith in the World Trade Organization (WTO),⁷² good faith in the *lex mercatoria*,⁷³ good faith in international economic law generally,⁷⁴ and (p. 16) good faith in international law.⁷⁵ Good faith in investment arbitration has been

considered from a number of perspectives,⁷⁶ but no comprehensive study has considered its general applicability in investment treaty jurisprudence.

1.56 Grounding the study in the theoretical work conducted on good faith in international law, most recently the comprehensive study by Robert Kolb and earlier the work by Elisabeth Zoller as well as the formative work of Bin Cheng, this book focuses on how the principle impacts, informs, and directs international investment law specifically.

1.57 This theoretical framework illustrates the background for the importance of good faith in this context as well as others. It is the theories developed on how good faith functions in the international sphere that allow for its further expression in international investment disputes. This usage also defines the relationship between public international law and international investment law.

1.58 The studies of good faith in other fields of public international law—the law of the World Trade Organization (WTO), for example—can often be seen as a mirror to its applicability in international investment decisions. That WTO law should not be read in ‘clinical isolation’ is a frequent refrain in Panel and Appellate Body Reports.⁷⁷ The application in international investment law is not as clear.

1.59 The studies on commercial law thereby show the reverse side of the looking glass. International commercial law draws extensively from the contractual obligations for fair dealing grounded in many domestic contract codes. These sensibilities regarding good faith and fair dealing have been transferred into international rules. Thus, this study draws heavily from these applications and this previous analysis on the functionality of good faith (p. 17) in international contracts. These applications parallel obligations of good faith arising out of public international law.

1.60 The application of good faith has many facets and complexities; setting its application as a gap filler against its more general role in informing the fair and equitable treatment protections demonstrates there is a pull on the principle. The requirements for good faith as an interpretative obligation, behavioural requirement, and basic contractual element combine in the hybrid field of investor-state dispute settlement.

1.61 The more specific studies already conducted on the application of good faith in international investment law are typically limited to one issue in international investment law. Bringing these studies together allows a more complete understanding of the principle. This study attempts to fill in the limitations of a singular study by offering a broader scope of examination—encompassing procedural, substantive, and theoretical considerations of good faith in investment decisions. The book builds on these previous, more specific studies by challenging the use of good faith in its multifarious roles.

1.62 The study is not exhaustive. This attempt to fill the gap in the scholarship will no doubt also create more questions and identify several areas where more careful consideration is necessary.

b) Method of analysis

1.63 The express use of the principle of good faith in relevant conventions, treaties, and rules provides the first step in the analysis of the use and application of the principle of good faith. Second, and most critically, the study uses the application of the principle in decisions as the main source of analysis.

1.64 The decisions of investment tribunals are composed of the arguments presented in the proceedings and submissions. The individual arguments of those involved informs the decisions. Parties make arguments that rely in part or in full on good faith. Subsequently, the tribunal summarizes those arguments in the decisions or addresses them in its own analysis of the arguments. The parties’ good faith arguments, the frequency of referral, and the amount of time spent on addressing the principle are buried in the decisions. Ultimately,

however, the amount of space the tribunal grants to the principle in the public decision is a certain indicator of its general usage in the entirety of the proceeding.

1.65 The opinions of individual arbitrators prove highly relevant in the examination of the principle as investment arbitration lacks the principle of *stare decisis*.⁷⁸ Although it can be difficult to distinguish the persuasive force of individual arbitrators from one decision to another, a pattern can be seen in the decisions of the arbitrators. These patterns reveal how the arbitrators perceive good faith specifically, and public international law generally, being appropriately used in the analysis of the issues in dispute.⁷⁹

(p. 18) 2. Chapter organization

1.66 By following the arbitral process temporally, the study provides a comprehensive overview of many of the ways in which tribunals apply good faith. This book uncovers tribunals' uses of the principle to achieve certain results and parties' uses to support their arguments. The book also addresses situations where good faith has not been applied or should not be applied.

1.67 Chapter 2 gives an overview of the definitions and construction of the principle of good faith in both the domestic and international contexts. Chapters 3 and 4 consider the role of good faith in the process of making the investment and maintaining the investment. Specifically, these chapters consider how some of the jurisdictional elements—namely 'nationality', 'investment', and 'investor'—are affected when tribunals consider the requirements through the prism of good faith.

1.68 Chapter 5 turns to the admissibility requirements, specifically the requirements to negotiate in good faith and exhaust local remedies. This chapter is unique in the fact that 'good faith' is more deliberately implied in the treaty and convention obligations. Thus, instead of being a general principle of international law that is merely added to another existing obligation, analysing the negotiation process and assessing whether it meets the good faith standard is obligatory.

1.69 The next chapters turn to the aspects of good faith during proceedings. Chapter 6 addresses the role of national institutions and potential interference in the process of investment arbitration. This chapter considers the situation of parallel proceedings, highlighting a range of behaviours that panels have considered lacking in good faith, including cases where tribunals disregarded any consideration of good faith. Chapter 7 considers the particular issue of submission of evidence. The chapter considers the tribunal's discretionary application of good faith to evidentiary requirements as a means of maintaining the right to a fair trial.

1.70 Chapters 8 and 9 address the substantive requirements in the treaties and their relationship with the principle of good faith. These ambiguous standards leave substantial interpretative space. As a result, tribunals apply the principle of good faith to inform the application of these standards. The chapters consider how good faith adds an element of morality in the judgment process that allows tribunals room to take decisions respecting the specific circumstances of the case as well as its impact on the system of international investment law as a whole.

1.71 The role of the principle of good faith—as well as related doctrines—in defences on the merits is considered in Chapter 10. This analysis takes note of the opening for state counterclaims and the defences to investment claims that are often derived from other areas of public international law.

1.72 Chapter 11 addresses the actors in the arbitral process. Soft law rules guiding arbitrator and counsel conflicts of interests closely relate to the ability of these arbitral actors to undertake their commitments to the parties in good faith. These issues of behaviour, conflicts, and transparency further extend to witnesses and third parties. The

chapter approaches the role of good faith in the relationships between the various actors, drawing from both soft law rules on behaviour and international normative standards.

(p. 19) **1.73** The final substantive chapter, Chapter 12, considers how good faith behaviour factors into cost allocation decisions. This chapter offers a broad picture of good faith in the investment arbitral process. Many aspects of party behaviour during the process are considered by tribunals in taking these final cost and valuation decisions.

1.74 Chapter 13 concludes with an overall assessment of the results of using good faith as a principle in international investment law.

Footnotes:

¹ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Council on Foreign Relations 1979) 47 (noting that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’).

² Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press 1994, reprinted) 103 (hereafter Cheng, *General Principles of Law*) (noting the relevance of good faith in, inter alia, treaty formation, treaty performance, and the exercise of rights); James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) 377 (hereafter Crawford, *Brownlie’s Principles of Public International Law*) (noting the application of good faith in treaty relations); Anthony D’Amato, ‘Good Faith’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 1992) 599–601 (stating that ‘[t]he principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them’); Markus Kotzur, ‘Good Faith (Bona Fides)’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) (stating that ‘[b]ona fides takes a most prominent place among the general principles as specified in Art. 38(1)(c) Statute of the International Court of Justice’); Vaughn Lowe, ‘Book Review: Good Faith in International Law by J.F. O’Connor’ (1992) 41(2) *International and Comparative Law Quarterly* 484, 484 (suggesting that ‘good faith is an awful subject for a narrowly focused monograph, if only because it is so hard to find anyone who doesn’t think that it is a jolly good thing’); Andrew Mitchell, ‘Good Faith in WTO Dispute Settlement’ (2006) 7 *Melbourne Journal of International Law* 339, 341 (tracing its origins in modern international law to the drafting of the Statute of the Permanent Court of International Justice); JF O’Connor, *Good Faith in International Law* (Dartmouth Publishing Company 1991) 2 (hereafter O’Connor, *Good Faith in International Law*) (describing good faith as ‘the foundation of all law’); M Virally, ‘Review Essay: Good Faith in Public International Law’ (1983) 77 *American Journal of International Law* 130, 130 (hereafter Virally, ‘Review Essay: Good Faith in Public International Law’) (‘It is commonly understood by international lawyers that a requirement of good faith in various contexts is a well-established principle of international law and even one of the most fundamental ones’); Elisabeth Zoller, *La Bonne Foi en Droit International Public* (A Pédone 1977) (hereafter Zoller, *La Bonne Foi en Droit International Public*).

³ See generally Bernardo Cremades, ‘Good Faith in International Arbitration’ (2012) 27(4) *American University International Law Review* 761, 761 (hereafter Cremades, ‘Good Faith in International Arbitration’) (contending that ‘[i]t is difficult to find any international arbitration award not based on, or that does not at least mention, good faith’); AFM Maniruzzaman, ‘The Concept of Good Faith in International Investment Law—The Arbitrator’s Dilemma’ (2012) 89 *Amicus Curiae: Journal of the Society for Advanced Legal Studies* 16, 18 (hereafter Maniruzzaman, ‘The Concept of Good Faith in International Investment Law—The Arbitrator’s Dilemma’); Martha Belete Hailu, ‘Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case:

Exercise of Legitimate Right or “Exhibit A” for Guerrilla Tactics?’, 6 UNCTAD Virtual Library <https://vi.unctad.org/resources-mainmenu-64/digital-library?task=dl_doc&doc_name=826_good_faith_> accessed 30 January 2018 (hereafter Hailu, ‘Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case’); Eric De Brabandere, ‘“Good Faith”, “Abuse of Process” and the Initiation of Investment Treaty Claims’ (2012) 3(3) *Journal of International Dispute Settlement* 609, 609 (hereafter De Brabandere, ‘“Good Faith”, “Abuse of Process” and the Initiation of Investment Treaty Claims’).

⁴ ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States) (opened for signature 18 March 1965, entered into force 14 October 1966) (as amended and effective 10 April 2006) Art 42(1) (hereafter ICSID Convention); *ADC Affiliate Ltd & ADC & ADMC Management Ltd v Republic of Hungary*, ICSID ARB/03/16, Award (2 October 2006) para 290 (hereafter *ADC v Hungary*).

⁵ Martins Paparinskis, ‘Good Faith and Fair and Equitable Treatment in International Investment Law’ in Andrew Mitchell, M Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 144–45; Roland Kläger, ‘Fair and Equitable Treatment’ in *International Investment Law* (Cambridge University Press 2013) 130 (‘the principle of good faith has met with wide recognition in the discussion regarding the concept of fair and equitable treatment ... In their analysis of a possible breach of fair and equitable treatment, arbitral tribunals frequently highlight good faith as a guiding principle in the relationship between the investor and the host state’); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 291 (hereafter Dolzer and Schreuer, *Principles of International Investment Law*); *Genin and Others v Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001) para 367 (stating that ‘Article II(3)(a) of the BIT requires the signatory governments to treat foreign investment in a “fair and equitable” way ... Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith’); *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 116 (‘To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith’); *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 153 (‘The Arbitral Tribunal finds that the commitment of fair and equitable treatment included in Article 4(1) of the Agreement is an expression and part of the *bona fide* principle recognized in international law, although bad faith from the State is not required for its violation’); *Waste Management v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 138 (noting that ‘[a] basic obligation of the State under Article 1105(1) [of the NAFTA] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means’); *Bayindir Insaat Turizm Ticaret VE Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) para 237 (referring to the interpretation of the fair and equitable treatment obligation as stated in *Tecmed*); *Saluka Investments BV (the Netherlands) v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 307 (‘A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment’); *Sempra Energy International v Argentine*

Republic, ICSID Case No ARB/02/16, Award (28 September 2007) paras 291–92, 297 (contrasting the positions of the parties by noting that the claimant ‘explains that while this particular standard [of fair and equitable treatment] originates in the obligation of good faith under international law, it has gradually acquired a specific meaning in the light of decisions and treaties, and requires, inter alia, a treatment compatible with the expectations of foreign investors, the observance of arrangements on which the investor has relied in making the investment, and the maintenance of a stable legal and business framework’ while noting that the respondent considers that ‘fair and equitable treatment is a standard indistinguishable from the customary international minimum standard’. Ultimately, the tribunal maintains with respect to the fair and equitable treatment standard that ‘[t]he principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes’); *Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL, Final Award (12 November 2010) para 301 (‘It follows from these authorities that action by the host state that is not in good faith is at variance with the fair and equitable treatment promise. However, not every violation of the standard of fair and equitable treatment requires bad faith’).

⁶ *Inceysa Vallisoletana, SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, English Translation of Award Rendered in Spanish (2 August 2006) paras 230–35; *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 106 (hereafter *Phoenix v Czech Republic*, Award) (‘States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith’).

⁷ Dolzer and Schreuer, *Principles of International Investment Law* (n 5) 291; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) para 135 (‘the Arbitral Tribunal considers that this situation [deliberate concealment amounting to fraud] does not involve the “strawman” provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT’); *Gustav F W Hamester v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) para 123 (hereafter *Hamester v Republic of Ghana*) (‘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 constitutes a misuse of the 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’).

⁸ Regarding strict textualism in the context of US constitutional decisions, see Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (West 2012).

⁹ Stephan Schill, ‘International Investment Law and General Principles of Law’, in Jürgen Bering et al, ‘General Public International Law and International Investment Law: A Research Sketch on Selected Issues’ (March 2011) 105 *Beiträge zum Transnationalen Wirtschaftsrecht* <<http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20105.pdf>> 13–14 (hereafter Schill, ‘International Investment Law and General Principles of Law’) (stating that general principles of law ‘played quite a significant role in determining the parties’ substantive obligations in the oil concession arbitrations in the pre-BIT era’, but also noting that ‘general principles of law arguably can also be used in order to elucidate standards of treatment, such as fair and equitable treatment, or the concept of indirect expropriation, or as a basis to develop solutions for procedural issues that investment tribunals face, for example developing and concretizing the appropriate

standards of review’); Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 58 *International and Comparative Law Quarterly* 361, 362.

10 Thomas W Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 724.

11 Jürgen Bering, Tillmann Rudolf Braun, Ralph Alexander Lorz, Stephan Schill, Christian J Tams, and Christian Tietje, ‘General Public International Law and International Investment Law: A Research Sketch on Selected Issues’ (March 2011) 105 *Beiträge zum Transnationalen Wirtschaftsrecht* <<http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20105.pdf>> accessed 30 January 2018 (hereafter Bering et al, ‘A Research Sketch’) 10.

12 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereafter VCLT). Regarding the typical reliance on the VCLT, see, inter alia, *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Decision on the Claimant’s Preliminary Objection to Argentina’s Application for Annulment (23 October 2009) para 23 (applying Arts 31 and 32 of the Vienna Convention of the Law of Treaties to assist in interpretation of Art 49(2) of the ICSID Convention); *Phoenix v Czech Republic*, Award (n 6) paras 75–76; *Mr Franck Charles Arif v The Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) para 165; *Cambodia Power Company v Kingdom of Cambodia/Electricité du Cambodge*, ICSID Case No ARB/09/18, Decision on Jurisdiction (22 March 2011) para 222; *Global Trading Resource Corp and Globex International, Inc v Ukraine*, ICSID Case No ARB/09/11, Award (1 December 2010) para 47; *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal*, ICSID Case No ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010) para 62. Similarly, tribunals have applied the ILC Articles on State Responsibility. In this regard, see, inter alia, *Chevron Corporation and Texaco Petroleum Corporation v the Republic of Ecuador*, PCA Case No 2009-23, Interim Award (1 December 2008) para 118 (hereafter *Chevron v Ecuador*, Interim Award); *Mr Franck Charles Arif v The Republic of Moldova*, noted, para 344; *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Award (3 March 2010) para 280.

13 Cremades, ‘Good Faith in International Arbitration’ (n 3) 767.

14 In the context of obligations to negotiate in public international law, see Kate Mitchell and Dapo Akande, ‘Espionage and Good Faith in Treaty Negotiations: East Timor v Australia’ (EJIL: Talk!, 20 January 2014) <www.ejiltalk.org/espionage-fraud-good-faith-in-treaty-negotiations-east-timor-v-australia-in-the-permanent-court-of-arbitration/> accessed 30 January 2018.

15 *Philip Morris Asia Limited v the Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para 588 (hereafter *Philip Morris v Australia*, Award on Jurisdiction and Admissibility) (‘the Tribunal cannot but conclude that the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection’).

16 The first bilateral investment treaty (BIT) was signed between the Federal Republic of Germany and Pakistan in 1959. See Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (25 November 1959).

17 Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015) 84; see generally Christian Tietje and Emily Sipiorski, 'The Evolution of Investment Protection Based on Public International Law Treaties: Lessons to be Learned' in Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012) 194 (hereafter Tietje and Sipiorski, 'The Evolution of Investment Protection').

18 The early BITs maintained a system of state-to-state arbitration. An investor seeking redress would need to convince his home government of the merits of the dispute. By the 1990s, the mechanisms for investor-state arbitration—without the involvement of the investor home state at the moment of the dispute—were well entrenched in the typical BIT language. Recent BITs, however, have in some cases returned to state-to-state arbitration. See for example, recent Australian BITs and FTAs. The reasoning for such shift may point to a desire for investor-State arbitration to re-enter the more transparent and somewhat more regulated arena of public international law—thus removing investor-state arbitration from the margins of private and public international law and returning it to its classical origins. See Tietje and Sipiorski, 'The Evolution of Investment Protection' (n 17) 196.

19 See United Nations Conference on Trade and Development, Investment Policy Hub <<http://investmentpolicyhub.unctad.org/IIA>> accessed 30 January 2018; see also Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51(2) *Virginia Journal of International Law* 397; Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law and Society Review* 805, 827–28; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Development Countries?' (2005) 33 *World Development* 1567.

20 See generally Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 9 (hereafter Van Harten, *Investment Treaty Arbitration and Public Law*).

21 Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a Bit ... and They Could Bite', The World Bank, Policy Research Working Paper Series, No 3121, June 2003 <http://www.google.de/url?q=http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3121&sa=U&ei=09HPVMr3CYrzUr_egOAP&ved=0CBQQFjAA&sig2=ogF:2> accessed 30 January 2018; Kevin P Gallagher and Melissa BL Birch, 'Do Investment Agreements Attract Investment? Evidence from Latin America' (2006) 7(6) *Journal of World Investment and Trade* 961, 969.

22 Julian Lew, Loukas Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 17.

23 Notably, the Netherlands has been the home State in ninety-six disputes and the responding state in none. Along a similar trend, the United States has been the respondent state in sixteen disputes, all currently pending, decided in the favour of the State, or settled. This compares to the 152 disputes in which the United States was the home state of the investor. See Investment Policy Hub, UNCTAD, available at <<http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>> accessed 30 January 2018.

24 See for example, *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6, Notice of Arbitration (31 May 2012) (dispute by a Swedish investor under the Energy Charter Treaty against the Federal Republic of Germany—a state typically seen as a home state of investors); *Philip Morris v Australia*, Award on Jurisdiction and Admissibility (n 15) (dispute brought against Australia under the Australia–Hong Kong China SAR BIT (1993)); *Ping An Life Insurance Company of*

China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium, ICSID Case No ARB/12/29, Award (30 April 2015).

²⁵ See generally Stephan Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?', British Institute of International and Comparative Law, May 2011, <www.biicl.org/files/5630_stephan_schill.pdf> at 1 ff accessed 30 January 2018 ('[O]ne can observe that the jurisprudence of investment treaty tribunals creates a significant amount of convergence rather than fragmentation and results in a system of international investment protection that can well be understood as a multilateral system, even though it is based largely on bilateral treaties and implemented by one-off arbitral tribunals').

²⁶ Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2014) 15 (hereafter Schill, *The Multilateralization of International Investment Law*) ('Unlike genuinely bilateral treaties, that is, treaties that are bilateral in form and substance, BITs do not stand isolated in governing the relation between the two contracting states only; they rather develop multiple overlaps and structural interconnections that, it is argued, create a uniform and treaty-overarching regime for international investments. BITs in their entirety, it is argued, function analogously to a truly multilateral system as they establish rather uniform general principles that order the relations between foreign investors and host states in a relatively uniform manner independently of the sources and targets of specific transborder investment flows. Instead of being prone to almost infinite fragmentation, international investment law is thus developing into a uniform governing structure for foreign investment with only limited room for insular deviation by individual States'); Van Harten, *Investment Treaty Arbitration and Public Law* (n 20) 9.

²⁷ *Saipem v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Provisional Measures (21 March 2007) para 67 (hereafter *Saipem v Bangladesh*, Decision on Jurisdiction and Provisional Measures) (noting that although 'not bound by previous decisions ... [the tribunal] is of the opinion that it must pay due consideration to earlier decisions of international tribunals'); but see also *AES Corporation v the Republic of Argentina*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) para 30 (hereafter *AES Corporation v the Republic of Argentina*, Decision on Jurisdiction) (noting the sovereignty of each tribunal to resolve similar issues differently).

²⁸ Charles N Brower, Charles H Brower II, and Jeremy K Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415.

²⁹ José E Alvarez, *The Public International Law Regime Governing International Investment* (The Hague Academy of International Law 2011). 406; Van Harten, *Investment Treaty Arbitration and Public Law* (n 20) 4

³⁰ *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012).

³¹ See for example, inter alia, North American Free Trade Agreement (NAFTA) (signed 17 December 1992, entered into force 1 January 1994) Art 1105(1) providing that '[e]ach Party shall accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security' [emphasis added].

³² See generally Bering et al, 'A Research Sketch' (n 11).

³³ Robert Kolb, *Good Faith in International Law* (electronic edition, Hart 2017) position 276 (hereafter Kolb, *Good Faith in International Law*).

- 34** Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) Art 42, para 97 (hereafter Schreuer, *ICSID Commentary*).
- 35** Antonio R Parra, 'Applicable Law in Investor-State Arbitration', paper presented at Second Annual Conference on International Arbitration and Mediation (Investor-State Arbitration Panel) held at Fordham University Law School on 18–19 June 2007 4, referencing ICSID, 2 Documents Concerning the Origin and Formulation of the Convention 570 (1968) (History of the Convention) 984–85 (hereafter Parra, 'Applicable Law in Investor-State Arbitration'); Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 *ICSID Review—Foreign International Law Journal* 375, 383–88 (hereafter Gaillard and Banifatemi, 'The Meaning of "and" in Article 42(1)').
- 36** Parra, 'Applicable Law in Investor-State Arbitration' (n 35). This position of using international law for the purpose of gap-filling has also been considered extensively by WTO Panels and the Appellate Body. In the context of the WTO, see for example, WTO, *Brazil—Measures Affecting Desiccated Coconut*, Appellate Body Report and Panel Report, WT/DS22/AB/R (adopted 20 March 1997) (non-retroactivity of treaties); WTO, *Japan—Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R (adopted 1 November 1996). See generally Christina Voigt, 'The Role of General Principles of International Law and Their Relationship to Treaty Law' (2008) 31 *Retfærd Årgang* 2/121, 3, 6, 16 (hereafter Voigt, 'The Role of General Principles of International Law and Their Relationship to Treaty Law').
- 37** Christoph Schreuer, 'The Relevance of International Law in International Commercial Arbitration: Investment Disputes' <http://www.univie.ac.at/intlaw/pdf/csunpubpaper_1.pdf> 12 accessed 30 January 2018.
- 38** *Klöckner Industrie-Anlagen GmbH, et al v United Republic of Cameroon*, ARB/81/2, Decision of the Ad Hoc Committee (21 October 1983) (1986) 1 *ICSID Review* 89, para 69.
- 39** *Autopista Concessionada de Venezuela CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (23 September 2003) para 336 (noting that 'there is no reason in this case, especially considering that it is a contract and a not a treaty arbitration, to go beyond the corrective and supplemental functions of international law').
- 40** See Gaillard and Banifatemi, 'The Meaning of "and" in Article 42(1)' (n 35) 377–78; Agreement between the Kingdom of Norway and ... for the Promotion and Protection of Investments (Norwegian Model BIT) (2015), Art 5; Canadian Model Agreement for the Promotion and Protection of Investments (2004), Art 5; US Model BIT (2004), Art 5.
- 41** Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1994, reprinted 2010) 4 (hereafter Higgins, *Problems and Process*).
- 42** Robert Kolb, 'Principles as Sources of International Law (with Special Reference to Good Faith)' (2006) 53(1) *Netherlands International Law Review* 1, 27.
- 43** Higgins, *Problems and Process* (n 41) 4.
- 44** Voigt, 'The Role of General Principles of International Law and Their Relationship to Treaty Law' (n 36) 3.
- 45** Louis Henkin, *International Law: Politics, Values and Functions: General Course in Public International Law* (Nijhoff 1989) 61–62.
- 46** Robert Alexy, 'Formal Principles: Some Replies to Critics' (2014) 12(3) *International Journal of Constitutional Law* 511, 511 (hereafter Alexy, 'Formal Principles: Some Replies to Critics').

- 47** Steven Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40, Bonn Research Paper on Public International Law No 2/2013, 3 (hereafter Reinhold, 'Good Faith in International Law').
- 48** Ronald Dworkin notes that a principle guides the decision-making process. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 25 (hereafter Dworkin, *Taking Rights Seriously*); see also Reinhold, 'Good Faith in International Law' (n 47) 3.
- 49** Alexy, 'Formal Principles: Some Replies to Critics' (n 46) 512; see also Sir Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', Band 2 von Recueil des cours (The Hague Academy of International Law 1957) 7 (clarifying that '[a] rule answers the question "what": a principle in effect answers the question "why"').
- 50** Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford University Press 2002)
- 51** In this regard, see S Litvinoff, 'Good Faith' (1987) 87 Tulane Law Review 1645, 1649 (noting that in the context of marriage laws in the Louisiana Civil Code '[i]t is clear that these rules contemplate legal relations that are not obligations in the technical sense. It is also clear that, in the context of these rules, good faith does not appear as a duty to be observed, but rather as a circumstance, a condition shown by a party as a sort of personal quality, or perhaps a state of mind').
- 52** *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Reports 69, para 94.
- 53** *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Reports 253, 268.
- 54** *ibid.*
- 55** Voigt, 'The Role of General Principles of International Law and Their Relationship to Treaty Law' (n 36) 10.
- 56** *ibid.*
- 57** Dworkin, *Taking Rights Seriously* (n 48) 22; see also HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 79 (hereafter Hart, *The Concept of Law*) (distinguishing between primary and secondary rules).
- 58** See generally Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart Publishing 2006) 21–30 (hereafter Panizzon, *Good Faith in the Jurisprudence of the WTO*).
- 59** International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (as amended and effective 10 April 2006), Rules of Procedure for Conciliation Proceedings.
- 60** See eg *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) c Burkina Faso* (Affaire CIRDI ARB/97/1), Sentence of Tribunal (19 January 2000), para 5.13.
- 61** *Abaclat v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (Tribunal: Pierre Tercier [President], Albert Jan van den Berg, Georges Abi-Saab [dissenting]) para 647.
- 62** An important distinction should be made between procedural aspects of good faith—for example, interpreting treaty language—and substantive application of good faith. Substantive good faith impacts the obligations of the parties and their rights. Both aspects of good faith will be covered in this study. See also De Brabandere, '“Good Faith”, “Abuse of Process” and the Initiation of Investment Treaty Claims' (n 3) 609 ('From a substantive perspective, “good faith” often is used to assess the conduct of the host State. From a

procedural perspective, “good faith” likewise plays a significant role in relation to the conduct of the arbitral proceedings, linked to the obligation to arbitrate fairly’); *Abaclat and Others v The Argentine Republic*, Decision on Jurisdiction and Admissibility, (n 61) para 648 (holding that ‘TFA’s role in the proceedings [did] not amount to an abuse of rights which would justify dismissing Claimants’ claim for lack of admissibility’). The *Abaclat* tribunal generally distinguished procedural good faith from ‘material good faith’, noting that material good faith had been approached by tribunals in two ways: ‘(i) It can be seen as an issue of consent and thus of jurisdiction, where the consent of the Host State cannot be considered to extend to investments done under circumstances breaching the principle of good faith; (ii) It can be seen as an issue relating to the merits, where the key question is whether the circumstances in which the relevant investment was made are meant to be protected by the relevant BIT.’ In contrast, the tribunal noted that the two approaches to procedural good faith by tribunals were as follows: ‘(i) It can be seen as an issue of consent and thus of jurisdiction, where one party considers procedural aspects to be key components of the consent of the Host State; or (ii) It can be seen as an issue of admissibility, where the key question is whether the way in which the investor initiated the proceedings, although in accordance with the applicable provisions, aim to obtain a protection, which he is—under the principle of good faith—not entitled to claim.’

⁶³ Kolb, *Good Faith in International Law* (n 33) position 223.

⁶⁴ Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge University Press 1989) 135-136: ‘Its normative content is to be distinguished from the role of good faith against the broader background of international relations ... Without denying ... that good faith, as a concept, is *also* one of public and of private morality, the view that it is *only* a moral or a metaphysical concept is one that cannot be entertained.’

⁶⁵ Zoller, *La Bonne Foi en Droit International Public* (n 2).

⁶⁶ Cheng, *General Principles of Law* (n 2) 118.

⁶⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, para 99.

⁶⁸ Bin Cheng notes with regard to treaty negotiation that ‘good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances’. Cheng, *General Principles of Law* (n 2) 107; Regarding the fulfilment of treaty obligations, see *Van Bokkelen Case* (1888), 2 *International Arbitration* 1807, 1849-50, quoting Kent’s Commentaries, as cited in Cheng, *General Principles of Law* 112: ‘Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals ... and to be kept with the most scrupulous good faith.’

⁶⁹ Virally, ‘Review Essay: Good Faith in Public International Law’ (n 2) 133.

⁷⁰ See Hart, *The Concept of Law* (n 57) 126; Brian Bix, *Law, Language and Legal Determinacy* (Clarendon 1993) 7; Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) 13.

⁷¹ See for example, Mathilde Cohen, ‘On the Linguistic of Multinational Courts: The French Capture’ (2016) *Design I-CON* 1, 16 (discussing the different styles of judicial opinions resulting from judges writing in different languages, specifically French).

⁷² Panizzon, *Good Faith in the Jurisprudence of the WTO* (n 58) 21-30.

⁷³ Lorena Carvajal-Arenas, *Good Faith in the Lex Mercatoria: An Analysis of Arbitral Practice and Major Western Legal Systems*, PhD thesis (University of Portsmouth 2011)

<[https://researchportal.port.ac.uk/portal/en/theses/good-faith-in-the-lex-mercatoria\(d1495c6c-b68e-4b6f-a4c1-a0d52d3fe306\).html](https://researchportal.port.ac.uk/portal/en/theses/good-faith-in-the-lex-mercatoria(d1495c6c-b68e-4b6f-a4c1-a0d52d3fe306).html)> accessed 30 January 2018.

⁷⁴ Andrew D Mitchell, M Sornarajah, and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015).

⁷⁵ O'Connor, *Good Faith in International Law* (n 2) 2; Zoller, *La Bonne Foi en Droit International Public* (n 2); Kolb, *Good Faith in International Law* (n 33).

⁷⁶ For example, Maniruzzaman, 'The Concept of Good Faith in International Investment Law—The Arbitrator's Dilemma' (n 3) 18 (describing good faith as 'a subject of perennial controversy since it was derived from the Roman legal equivalent "*bonas fides*" '); De Brabandere, ' "Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims' (n 3) 609; Hailu, 'Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case (n 3); VV Veeder, 'The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith' (2002) 18(4) *Arbitration International* 444

⁷⁷ WTO, *United States—Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB (20 May 1996) 16: 'The general rule of interpretation [based on Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law'; WTO, *United States—Continued Existence and Application of Zeroing Methodology*, Appellate Body Report, WT/DS350/AB/R (4 February 2009) 268: 'The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it ... a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.'

⁷⁸ *Saipem v Bangladesh*, Decision on Jurisdiction and Provisional Measures (n 27) para 67 (noting that although 'not bound by previous decisions ... [the tribunal] is of the opinion that it must pay due consideration to earlier decisions of international tribunals'); but see also *AES Corporation v the Republic of Argentina*, Decision on Jurisdiction (n 27) para 30 (noting the sovereignty of each tribunal to resolve similar issues differently).

⁷⁹ Compare, for example, the impact of Professor Brigitte Stern in *Phoenix v Czech Republic* (n 6) and in *Hamester v Republic of Ghana* (n 7).