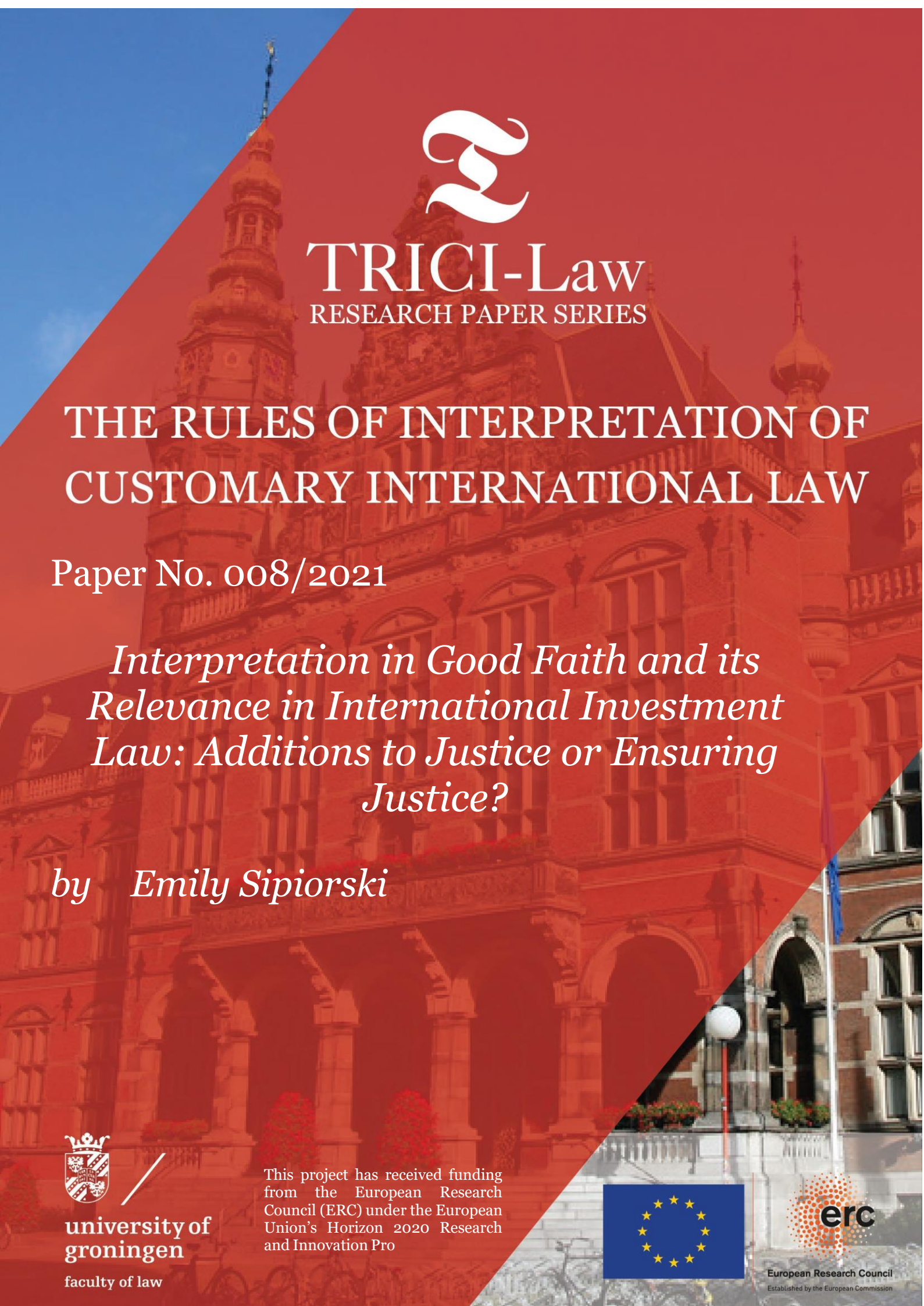

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Interpretation in Good Faith and its Relevance in International Investment Law: Additions to Justice or Ensuring Justice?

by Emily Sipiorski

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Interpretation in Good Faith and its Relevance in International Investment Law: Additions to justice or ensuring justice?

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Abstract: The principle of good faith drives forward the interpretation of provisions of international investment treaties. While the tribunal must interpret the treaty in good faith, the parties—as well as the tribunal—are also obliged to fulfil their treaty and contractual obligations in good faith. This creates a complex interplay of interpreting customary international law in the form of behavioural obligations. During this period of reconsideration of the system, these interpretative and behavioural aspects of the principle of good faith may provide an opening to a more cohesive system of investment protection. The following contribution approaches the tribunals' power to interpret the good faith behavioural obligations of parties and considers its future value.

Keywords: treaty interpretation; investment protection; principle of good faith; systemic integration

1. Introduction

The principle of good faith directs tribunals' interpretation of treaties.[1] Treaties are to be interpreted based on their ordinary meaning and in good faith.[2] This requirement for good faith interpretation exists in all aspects of public international law.[3] And as such, the obligation exists in international investment law.[4]

While codified in the Vienna Convention on the Law of Treaties, the rules of interpretation were unsettled in international law when the Convention was drafted.[5] The VCLT includes many provisions that act to reaffirm rules already existing in international law, in particular *pacta sunt servanda*.[6] In the case of treaty interpretation, the process can be viewed in the reverse: namely, the express language provided for in the VCLT for the direction of interpretation resulted in its widespread acceptance in state practice and *opinio juris*—and thus its development as customary international law.

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[1] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Articles 31-33; James Crawford, *Brownlie's Principles of Public International Law* (9th ed., 2019), p. 366 et seq.; see also Shai Dothan, "The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights", 42 *Fordham International Law Journal* (2019) pp. 765, 767; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) p. 309; Oliver Dorr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2012) pp. 524–25.

[2] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(1).

[3] Robert Kolb, *Good Faith in International Law* (2017); Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1994, reprinted) p. 103 (noting the relevance of good faith in, *inter alia*, treaty formation, treaty performance, and the exercise of rights).

[4] Tarcisio Gazzini, "General Principles of Law in the Field of Foreign Investment", 10(1) *The Journal of World Investment and Trade* (2009) pp.103, 109-110.

[5] E.W. Vierdag, "The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention", 76(4) *The American Journal of International Law* (1982) p. 799.

[6] Ibid, p. 788 (identifying 'codificatory' and compatible provisions of the VCLT with customary international law).

The process of interpreting in good faith in international investment law exposes the multi-layered complexity to the role of arbitrators in interpreting international agreements while international law grows around it. The value of good faith in the interpretation of treaty obligations occurs on several levels in international investment law—forming the system and the process of interpretation itself evolving within it.[7] Not only does the principle of good faith direct the very act of interpretation, but good faith requires honest and fair behaviour of the parties.[8] It is essential to the just reading of treaties and their obligations, but 'is not in itself a source of obligation where none would otherwise exist.'[9] In international investment law, certain standards of treatment are informed by the principle of good faith,[10] tribunals' decisions can be legitimized by the reference to good faith,[11] and the procedural behaviour of the parties typically must be performed in good faith.[12] The interpretation of these good faith behavioural obligations creates a richly layered structure of analysis in investment law as it sits at the cusp between public international law and private international law.[13] The treaty is formed in public

[7] Michael Waibel, "Demystifying the Art of Interpretation", 22 *European Journal of International Law* (2011) pp. 571, 572 ('The law of treaty interpretation, despite having been codified more than 40 years ago, has become one of the most dynamic in international law. It continues to evolve, driven in part by new dispute settlement bodies […]').

[8] See for example, *North Atlantic Fisheries Case (1910) 1 H.C.R.*, p. 143, p. 167 (holding that '[e]very State has to execute the obligation incurred by treaty bona fide); *Anglo-Norwegian Fisheries Case, Judgment, I.C.J. Reports 1951*, p. 116, p. 142 ('[t]he principle of good faith requires that every right be exercised honestly and loyally. Any fictious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.').

[9] *Border and Transborder Armed Actions (Nicaragua v Honduras), ICJ Reports 1988*, p. 68, p. 105, para. 94.

[10] 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* (2015) pp. 144–45; Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (2013) p. 130; *Genin and Others v Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, para. 367; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, para. 116; *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para. 153; *Waste Management v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, para. 138; *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; *Saluka Investments BV (the Netherlands) v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 307; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, paras. 291–92, 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, just as happens under civil codes'); *Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 301.

[11] With respect to decisions on evidence, see for example, *Renée Rose Levy and Gremcitel SA v Republic of Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, para. 194; *Methanex Corporation v the United States*, UNCITRAL (NAFTA), Final Award, 3 August 2005, para. 58 ('[T]he Tribunal decided that this documentation was procured by Methanex unlawfully; and that it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and, indeed, incumbent on all who participate in international arbitration, without which it cannot operate.'); *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Procedural Order No 3, 29 August 2008, para. 47 (requiring 'good faith and procedural fairness' in the submission of evidence). See also, Emily Sipiorski, 'Evidence and the Principle of Good Faith in Investment Arbitration: Finding Meaning in Public International Law', in Dario Moura Vicente (ed.), *Towards a Universal Justice?: Putting International Courts and Jurisdictions into Perspective* (2015).

[12] See for example, *Teinver SA, Transportes de Cercanias SA and Autobuses Urbanos del Sur SA v the Argentine Republic*, ICSID Case No ARB/09/1, Decision on Provisions Measures, 8 April 2016, para 239; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013, paras 263-264; *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8 (ECT), Decision on Preliminary Issues, 23 June 2008, para.78.

[13] Julie A. Maupin, "Public and Private in International Investment Law: An Integrated Systems Approach", 54(2) *Virginia Journal of International Law* (2014) p. 367; see also Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law", 17 *European Journal of International Law* (2006)p. 121; Stephan W. Schill, "Enhancing the Legitimacy of International Investment Law: Conceptual and

law, while the investment is made under private law. On one level, *pacta sunt servanda* binds the state parties, and the acceptance of this aspect of treaty relationships, as part of customary international law, has been broadly accepted and reinforced.[14] On the second level, contractual obligations in part and most directly bind the investors.[15]

The interaction among these elements of good faith interpretation have become increasingly important, and depending on the approach, may either over-stretch the justice intended by the international investment agreements or resolve the long-standing legitimacy crisis that fails to holistically consider the cross-overs and implications of other systems of international law on the interpretation of these agreements.[16] The tribunals' duty to interpret the good faith behaviour of parties creates a circle, but an important circle to follow in order for international investment law to evolve with the changing world order and reality. During the process of reform and reconsideration of the system of investment protection,[17] the implications of the requirement to interpret in good faith and its possibility for a broader scope of obligations derived from treaties have been largely underestimated. The interplay of these good faith interpretive and performance obligations during the re-characterization of international investment law prove particularly timely and add a layer of depth and sophistication to the treaties—and more specifically, their existence in the international legal sphere. This contribution considers these requirements, their interpretation by tribunals, and the possibilities created therein.

The following article first identifies the role and placement of the principle of good faith in international investment law and then considers the interpretation of commitments and behaviour, providing an overview of those expectations for the state parties and investors by highlighting several relevant and illustrative decisions. In short, the paper examines examples of states' procedural good faith, investors' behavioural good faith, and tribunals' procedural obligations to comment on the power inherent in interpretation fuelled by the principle of good faith. The final section provides an initial assessment of the power of the tribunals in their interpretation of these treaty commitments[18]—concentrating on the tribunals' own obligations

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Methodological Foundations of a New Public Law Approach", 52 *Virginia Journal of International Law* (2011) p. 57; Charles N. Brower, "W(h)ither International Commercial Arbitration?" 24 *Arbitration International* (2008), pp. 181, 190; Anne van Aaken, "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis", 12 *Journal of International Economic Law* (2009)-p. 507.

[14] James Crawford, *Brownlie's Principles of Public International Law* (9th ed., 2019) p. 434 ('One of the central canons of the customary international law of treaties is the rule *pacta sunt servanda*, that is, the notion that states must comply with their obligations in good faith. No case has yet arisen in which an international court or tribunal repudiated the rule or challenged its validity.').

[15] See infra section 4.

[16] Stefan Hindelang and Markus Krajewski, "Shifting Paradigms in International Investment Law – more balanced, less isolated, increasingly diversified", 27(2) *European Journal International Law* (2016) pp. 545, 551; Ulf Linderfalk, "Cross-fertilization in International Law", 84(3) *Nordic Journal of International Law* (2015) p. 428; Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System", 107 *American Journal of International Law* (2013), p. 45; Joost Pauwelyn, "Bridging Fragmentation and Unity: international law as a universe of inter-connected islands", 25(4) *Michigan Journal of International Law* (2004) pp. 903, 916; Martti Koskenniemi, "Fragmentation of international law: difficulties arising from diversification and expansion of international law", (2006) Report of the Study Group of the International Law Commission Fifty-eighth Session Geneva, 1 May–9 June and 3 July–11 August 2006; Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", 15(3) *Leiden Journal of International Law* (2002) p. 553.

[17] See *inter alia*, United Nations Commission on International Trade Law, Fifty-third session (6–17 July 2020) Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), A/CN.9/1004, available at <https://undocs.org/en/A/CN.9/1004> (accessed on 10 January 2020); Stephan W. Schill, "Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?", 19(1) *The Journal of World Investment and Trade* (2018) p. 1.

[18] See generally Anthea Roberts, "Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States", 104 *American Journal of International Law* (2010) p. 179; Stephan W. Schill, "System Building in Investment Treaty Arbitration and Lawmaking", in Armin von Bogdandy and Ingo Venzke (eds.), *International*

to perform their interpretive functions in good faith—from the perspective of the current controversy and proposing a resolution through a more responsive interpretation of the treaties based on the principle. The focus of this analysis is the integral role of the tribunal in forming the understanding of good faith behaviour and realization of good faith commitments—thus, the overwhelming authority of the tribunal and the residual impact of that power on the development of the system itself. The interpretive use of good faith can be either restricted or expanded as a mechanism for forming and moulding a more realistic version of international investment protection that respects the transforming values, global commitments, and realities for the future decades.

2. Identifying the Principle of Good Faith in International Investment Law

General principles of law are frequently relied upon and incorporated into the international investment regime.[19] Article 42 of the ICSID Convention most expressly provides for international law to be taken into account by the tribunals while interpreting parties' obligations under the treaties.[20] The drafters of the Convention considered the value of this article to fill potential gaps in language with general principles.[21] This draws on the idea that the system does not stand isolated from other systems of international law, and that there are benefits in drawing from sources beyond the treaty in the process of interpretation, particularly where that language requires additional consideration. McLachlan, Shore, and Weiniger consider it 'indispensable in reminding the treaty interpreter of the potential guidance in interpretation which may be

Judicial Lawmaking: on public authority and democratic legitimation in global governance (2012) pp. 131, 141 ('Investment treaty tribunals operate in an institutional framework that confers significant powers on them. These powers chiefly serve the tribunals' primary function of settling specific investor-State disputes effectively; they shield tribunals against State interferences with the arbitral process. They also, however, lay the foundation for investment treaty tribunals to act as law-makers in international investment law, in particular by concretizing and further developing uniform standards of treatment of foreign investors based on the principles of international investment law laid down in investment treaties.').

[19] Tarcisio Gazzini, "General Principles of Law in the Field of Foreign Investment", 10(1) *The Journal of World Investment and Trade* (2009) pp. 103, 109-110 ('General principles of law recognized by States within their own jurisdiction play an important role in the field of foreign investment not only with regard to the relationship between States, but also—if not especially—in respect of the relationship between the host State and the foreign investor. […] [I]nvestment tribunals have refrained from engaging in theoretical distinctions between rules and principles or between customary international law and general principle of law. Instead, they have opted for a more pragmatic approach.').

[20] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159, Article 42(1) (providing 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.). See also, Christoph Schreuer, Lorettta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary* (2d ed., 2009), Art. 42, paras. 178-182.

[21] 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", 18 ICSID Review—*Foreign International Law Journal* (2003), pp. 375, 383-388; ICSID, History of the ICSID Convention (1968), pp. 985-985 ('Mr. Broches referring to Article 42 on the law applicable in a dispute explained that it proceeded on the initial assumption that the parties would themselves agree upon the law to be applied. Where the parties by an oversight, or because they could not agree, or because they felt that the tribunal was best qualified to decide the matter, did not reach agreement on the law applicable, the supplementary rule in Article 42(1) would require the tribunal to look to two sources, viz. in the first place, to national law and specifically to the law of the country where the investment had taken place; and secondly, to international law if international law should be applicable.').

obtained beyond the four corners of the treaty.'[22] This has been further affirmed by Stephan Schill:

> '[I]n the context of foreign investment disputes, both under investment treaties and under investor-State contracts, arbitral tribunals frequently draw on general principles of law for a variety of purposes, in particular to fill gaps in the governing law and to aid in treaty interpretation. This method should also be explored further in order to concretize the principles of international investment law and arbitration, and to reform the resolution of investor-State disputes from within.'[23]

This interchange and reliance on general principles of law enables the interpretation of treaty commitments in a more broadly-framed perspective, panning out from the snapshot of the investment dispute and recognizing where the investment protection system exists in the larger landscape of global economics, international law, and development.

The principle of good faith is engrained in the basic conceptions of justice.[24] This is true from the perspective of public international law[25] as well as domestic legal systems[26]—even when it may be called by another name or conceptually constructed differently. The Vienna Convention on the Law of Treaties (VCLT) has codified the principle of good faith, in two respects: both behavioural[27] and interpretative.[28] Both of these applications are relevant in international investment law. It has been understood to add an element of justice to the proceedings, and frequently is relied on by tribunals to breathe meaning into provisions that contain ambiguous language.

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[22] Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2017) para. 1.63.

[23] Stephen W. Schill, "The Sixth Path: Reforming Investment Law from Within", in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015) pp. 621, 642.

[24] For a historical perspective, see William Proudfoot, "Specific Performance of Contracts in the Roman Law", 14 *Canadian Legal Times* (1894) pp. 257, 258 (referencing the goddess Fides in Roman mythology); Remus Valsan, "Fides, Bona Fides, and Bonus Vir: Relations of Trust and Confidence in Roman Antiquity", 5 *Journal of Law, Religion and State* (2017) pp. 48, 52; Marc de Wilde, "Fides Public in Ancient Rome and Its Reception by Grotius and Locke", 79 *Tijdschrift voor Rechtsgeschiedenis* (2011) pp. 455, 462. For a more modern reflection on the relevance of good faith in law, see for example, James Crawford, *Brownlie's Principles of Public International Law* (9th edn., 2019) p. 367 (noting the application of good faith in treaty relations); Anthony D'Amato, "Good Faith", in *Max Planck Encyclopedia of Public International Law* (1992) pp. 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* (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'); Andrew Mitchell, "Good Faith in WTO Dispute Settlement", 7 *Melbourne Journal of International Law* (2006) pp. 339, 341 (tracing its origins in modern international law to the drafting of the Statute of the Permanent Court of International Justice); J.F. O'Connor, *Good Faith in International Law* (1991) 2 (describing good faith as 'the foundation of all law'); M. Virally, "Review Essay: Good Faith in Public International Law",77 *American Journal of International Law* (1983),p. 130 ('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* (1977).

[25] J.F. O'Connor, *Good Faith in International Law* (1991).

[26] See infra note 58.

[27] Vienna Convention on the Law of Treaties, Article 26.

[28] Vienna Convention on the Law of Treaties, Article 31.

Through the codification of treaty interpretation in VCLT Articles 31-33,[29] the mechanisms for resolving difficult interpretive issues in investment law are clarified and the idea of interpretive good faith is introduced. The principle of good faith guides these articles and therefore customary international law generally on treaty interpretation. Article 31(1) of the VCLT provides that '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.' Interpretative good faith implies not only understanding the text justly but also approaching the act of interpretation in a fair manner. While this responsibility to interpret in good faith and within the ordinary meaning is often repeated, the responsibility it places on the interpreter is often ignored: the actor behind the rule is essential yet neglected. Ultimately it is the human decision-makers interpreting the principle of good faith and its application that gives life to the words of the provisions. These interpretative requirements are the responsibility of the arbitrators.

2.1. Defining Good Faith

While few would deny the value and necessity of including an element of good faith in the interpretation of international law,[30] there is a lack of definition and clear direction for its application.[31] Indeed, the expectations and understandings of 'good faith' vary dynamically among states and individuals.[32] This malleability in the conceptions of good faith and its role in the interpretive process may lead to potential variabilities, and as a result may interfere with an idealized and desired consistency of awards.[33] Good faith interpretation also necessarily implies an element of human judgment.[34] This safeguards the process of dispute resolution from unintended outcomes and also allows for an evolution of the words and requirements of treaties in line with the broadening and developing societal necessities.

Within the widely respected acceptance and use of the principle of good faith for the purposes of interpretation and assessing behavioural norms of parties, the substantial

[29] See Ulf Linderfalk, "Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation", 54 *Netherlands International Law Revi*ew (2007) pp. 133, 141.

[30] Vaughn Lowe, "Book Review: Good Faith in International Law by J.F. O'Connor", 41(2) *International and Comparative Law Quarterly* (1992) p. 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').

[31] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953, reprinted 1994) p. 105.

[32] See for example, Jori Munukka, "Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem", 48 *Scandinavian Studies in Law* (2005) pp. 229, 233; Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", 61 *The Modern Law Review* (1998) pp. 11, 12; Michael G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?", 9(4) *Canadian Business Law Journal* (1984) pp. 385, 413; Omer Tene, "Good Faith in Precontractual Negotiations: A Franco-German-American Perspective" (2006) Working Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943383>; Werner F. Ebke and Bettina M. Steinhauer, "The Doctrine of Good Faith in German Contract Law", in Jack Beatson and Daniel Friedman (eds.), *Good Faith and Fault in Contract Law* (1995) pp. 171–90; Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws* (1997) p. 5.

[33] Mark Feldman, "Responding to Incorrect ISDS Decision Making: Policy Options" (EJIL: Talk! 5 April 2019), available at <https://www.ejiltalk.org/responding-to-incorrect-isds-decision-making-policy-options/> ('Applicable law in ISDS cases also can be misapplied in different ways, including by interpretations that (i) are excessively broad or narrow, (ii) lack support in treaty text, (iii) are unworkable as a practical matter, or (iv) reflect insufficient diligence and attention to detail. Particularly in the context of investment treaties, of central importance for the precise application of law is adherence to Vienna Convention treaty interpretation principles. Diligent application of Vienna Convention principles can protect against excessively broad or narrow, unworkable, or unsupported interpretations of investment treaty provisions. Diligent application of the customary international law elements of State practice and *opinio juris* can play a similar role.).

[34] See generally, Armin Von Bogdandy and Ingo Venzke, *In Whose Name? A Public LawTheory of International Adjudication* (2014) pp. 210-13; Anne Peters, "Humanity as the A and Ω of Sovereignty", 20 *European Journal of International Law* (2009) pp. 513, 514.

complexities to its acceptance and use in international jurisprudence creates powerful layers in its use. The very challenge to define good faith proves to be both the source of its power and the heart of its controversy. Bin Cheng affirmed not only the importance of the principle but also asserted that it 'elude[s an] *a priori* definition.'[35] In fact, attempting to provide a clear definition would work contrary to the purpose of the principle and undermine its purpose.[36] The diversity of approaches, education, and senses of morality of jurists, scholars, lawyers, and academics would further inhibit the development of a precise, unequivocal definition.[37] In this context, Cremades notes that the selection of the arbitrators is 'one of the most delicate and fundamental tasks […] For those who set the parties' strategy when a case arises in which good faith may play a material role, the major question to ask is whether or not the legal culture and training of the potential arbitrators might condition their ultimate decision. Counsel must be aware of the various angles that can be given to good faith in legal argument as well as in the arbitrators' decision-making process.'[38]

While understanding that it empowers basic notions of honesty and fairness,[39] those ideas can be highly subjective and culturally defined.[40] Even when the legal system attempts to define the intricacies of good faith behaviour, it is ultimately the judges who decide on its application.[41] In this regard, different understandings of good faith behaviour in, for example, contractual performance obligations, can even exist also within the same jurisdiction.[42] Despite these inherent challenges, the principle is integrated both implicitly and explicitly into the fabric

[35] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953, reprinted 1994), p. 105; Bernardo Cremades, "Good Faith in International Arbitration", 27(4) *American University International Law Review* (2012) pp. 761, 766 ('[n]evertheless, it is not clear what the concept of good faith actually means. Some view this principle with religious connotations: in Rome, the goddess Fides was entrusted by Jupiter with justice in contracts. In medieval times, good faith was connected to Christian morality. The French doctrine of the 19th and 20th centuries introduced a key element of altruism or loyalty. German doctrine applies paragraph 242 BGB with Kantian references to the categorical imperative. In the Anglo-Saxon sphere, doctrine and jurisprudence demonstrate a radical rejection of good faith that they hold to be "abhorrent" with the adversarial spirit, which must govern in the world of contracts. Naturally, this rejection has been mitigated in the legal system of the United States, where there is no shortage of voices advocating good faith as the great recent discover in U.S. law. In other legal systems, good faith is questioned as are, in general, any standards which may lead to arbitrariness by judicial or arbitral decision-makers.').

[36] Filip Černý, "Short Flight of the Phoenix: A Few Thoughts on Good Faith, the Abuse of Rights and Legality in Investment Arbitration", *Czech Yearbook of International Law* (2012) pp. 183, 184.

[37] See generally, Onuma Yasuaki, *International Law in a Transcivilized World* (2017); Baudouin Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification", 1(1) *European Journal of Legal Studies* (2007) p. 20.

[38] Bernardo Cremades, "Good Faith in International Arbitration", 27(4) *American University International Law Review* (2012) pp. 761, 767.

[39] Martijn W. Hesselink, "Good Faith", in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, and Muriel Veldman (eds.), *Towards a European Civil Code* (2nd edn., 1998) pp. 285-310 (noting that [m]ost lawyers from a system where good faith plays an important role, will therefore agree that these differences in theoretical conception do not matter very much. Indeed, many authors are themselves not very consistent in their indication of the status of good faith. What really matters is the way in which good faith is applied by the courts: the character of good faith is best shown by the way in which it operates.).

[40] See generally Rüdiger Wolfrum, "Legal Pluralism from the Perspective of International Law", in M. Kötter, T.J. Röder, G.F. Schuppert, and R. Wolfrum (eds.), *Non-State Justice Institutions and the Law. Governance and Limited Statehood* (2015) pp. 216-233.

[41] See for example, Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", 61 *The Modern Law Review* (1998) pp. 11, 12.

[42] See for example, E. Allan Farnsworth, "Good Faith in Contract Performance", in Jack Beatson and Daniel Friedman (eds.), *Good Faith and Fault in Contract Law* (1995) pp. 153-170; Robert S. Summers, "The Conceptualisation of Good Faith in American Contract law: a general account", in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000) p. 369.

of justice and rule of law. It is a fundamental principle of law, extending beyond a mere rule,[43] and is unequivocally an element in the process of interpretation.

2.2. Morality

Beyond its fluidity in definition, the principle of good faith frequently embodies a sense of morality, resting in some part on 'moral standards' in its application.[44] The power of the tribunal in interpreting both treaty and customary international law is enabled by the principle of good faith. Directly built into the system, good faith acts as an inherently moral element of the law, including public international law where that morality may be more difficult to succinctly identify. This moral element ensures that the evolving mores are instilled in the system.[45] The evolving values in international law are able to affect and form international investment law as a result of the principle of good faith.

2.3. Ambiguity, Interpretation, and the Relevance of the Principle of Good Faith

Treaty interpretation rests on words.[46] Those words, the result of both replication and compromise embody a vagueness[47] that arguably permits fluidity and has resulted in an evolution in the process recognizing and identifying developing international law within the standards of protection specifically contained in the treaty language.[48] Many of the standards of protection in investment protection agreements contain substantial ambiguity in their wording.[49] Nonetheless, the words of the treaties create the obligations contained therein. Under the ICSID Convention Article 42(2), this obscurity opens further possibility for interpretation

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[43] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953, reprinted 1994), p. 24; see also Hugo Grotius, *The Rights of War and Peace*, (1901 ed.), Chapter 19, Section IX.

[44] Andrew Grubb and Michael Furmston, *The Law of Contract* (2nd ed., 2003) p. 73 ('Whilst everyone agrees that a doctrine of good faith represents some set of restrictions on the pursuit of self-interest, the objection is that it is not clear how far these restrictions go. In other words, good faith presupposes a set of moral standards against which contractors are to be judged, but it is not clear whose (or which) morality this is. Without a clear moral reference point, there is endless uncertainty about a number of critical questions.'); S. Litvinoff, "Good Faith", 87 *Tulane Law Review* (1987) pp. 1645, 1649 ('It has been said that, in a legal context, good faith has both a psychological and an ethical component. The former would consist of a belief that one is acting according to the law, and is designated as good faith-belief. The latter would consist in conducting oneself according to moral standards, and is designated as good faith-probity, or good faith-honesty, and is germane to ideas of loyalty and respect for the pledged word. From the vantage point of the psychological component it does not matter if the belief is erroneous, provided it is sincere.').

[45] With respect to corruption as a violation of international public policy, see for example, among others, *Niko Resources v Petrobangla, Bapex and Bangladesh*, ICSID Case No ARB/10/11 and ICSID Case No ARB/10/18, Decision on Jurisdiction (19 August 2013) para. 374.

[46] Michael Waibel, "Demystifying the Art of Interpretation", 22 *European Journal of International Law* (2011) pp. 571, 577.

[47] Ralf Poscher, "Ambiguity and Vagueness in Legal Interpretation", in Lawrence M Solan and Peter M Tiersam (eds.), *Oxford Handbook of Language and Law* (2012); Ingo Venzke, "Semantic Authority", in Jean d'Aspremont and Sahib Singh (eds.), *Fundamental Concepts of International Law* (2016); Andreas Kulick, "From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law", 59 *German Yearbook of International Law* (2016).

[48] See generally Jeremy Waldron, "Vagueness in Law and Language: Some Philosophical Perspectives", 82 *California Law Review* (1994) pp. 509, 510 ('Words do not determine meanings, people do. No amount of staring at the words of a rule, then staring at the world, then staring at the words again, will tell us when we have a proper application.'); Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (2019); Catharine Titi, "The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties", International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), (RTA Exchange, Geneva 2018) available at <www.rtaexchange.org/> p. 1.

[49] The fair and equitable treatment standard frequently relies on the principle of good faith in interpretation as a result of its lack of clear definition. For a critical perspective, see 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* (2015) pp. 144–45. The definition of investment is similarly vague, while recent treaties have attempted to provide additional clarity.

and control over the process of interpreting those words.[50] This type of indeterminacy can lead to 'value inputs by the interpreter'.[51] As identified by the International Law Commission Study Group on Fragmentation in International Law, '[c]ustomary international law and general principles of law are of particular relevance to the interpretation of a treaty under Article 31(3)(c) especially where: (a) The treaty rule is unclear or open-textured; (b) the terms used in the treaty have a recognized meaning in customary international law or under general principles of law; (c) The treaty is silent on the applicable law and it is necessary for the interpreter […].'[52]

The words and thus obligations contained in the treaties can be read from several perspectives. Some arbitrators choose to read those obligations as contractual commitments, others see them as arising out of international obligations. When viewed through the prism of good faith interpretation, both perspectives are right to some extent, but the approach significantly impacts both the implications of the treaty protection as well as the application of behavioural requirements. A treaty read as a contract will fail to navigate the needs for evolutive interpretation as international law further develops, even if it may respect the plain meaning of the words.

3. State Parties to the Treaty

3.1.Pacta sunt servanda

The discussion up to this point has approached the principle of good faith in its interpretive function. The role, however, of the principle of good faith extends to the behavioural commitments of the parties to the treaties. It is within this framework of behavioural obligations that interpretation of treaty commitments may extend and responsibilities may be further realized within the context of international law.

The obligation to uphold the commitments in the treaties is required of the state parties based on the principle of *pacta sunt servanda*,[53] as part of customary international law and codified in VCLT, Article 26. *Pacta sunt servanda*, however, and the approach taken in interpretation towards good faith behaviour in treaty obligations only binds sovereign states[54]— based on the current construction and understanding of our international legal framework. This leaves a substantial gap in the full force of requirements for good faith behaviour needed to ensure the just operation of the system and reasonable protection of investments.

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[50] ICSID Convention, Article 42(2) (providing 'The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.').

[51] Richard Falk, "On Treaty Interpretation and the New Haven Approach: Achievements and Prospects?", 8 *Virginia Journal of International Law* (1967-1968) pp. 323, 352; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) p. 286.

[52] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006), available at < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=2ahUKEwivjvnwgIbnAhUQkxQKHQvJDQMQFjAJegQIAhAB&url=https%3A%2F%2Flegal.un.org%2Filc%2Ftexts%2Finstruments%2Fword_files%2Fenglish%2Fdraft_articles%2F1_9_2006.doc&usg=AOvVaw2-ha2Hj2yIjwiU5Vhzkc3N>.

[53] James Crawford, *Brownlie's Principles of Public International Law* (9th ed., 2019) p. 434 ('One of the central canons of the customary international law of treaties is the rule *pacta sunt servanda*, that is, the notion that states must comply with their obligations in good faith. No case has yet arisen in which an international court or tribunal repudiated the rule or challenged its validity.').

[54] Samantha Besson, "Sovereignty, International Law and Democracy", 22(2) *The European Journal of International Law* (2011), pp. 373, 377 (noting that while '[s]overeign states are the primary subject of binding international law norms', international law is also challenged by its imposition on the sovereignty of states); Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?", 22(2*) The European Journal of International Law* (2011) pp. 315, 343 (emphasizing the value of states' behaviour in the international realm to uphold rule of law).

Performance of treaty obligations, namely *pacta sunt servanda*, has been conceptualized by the drafters of the VCLT to mean respecting the obligations of a treaty in good faith: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[55] These obligations are exclusively tied to sovereign states, and thus the behavioural aspects of *pacta sunt servanda* remain attached to the state.

In the interpretation of such commitments, some tribunals have reflected on the purpose of the treaties for the protection of the investors.[56] There is manoeuvrability within this scope of behaviour for investors, as beneficiaries of the treaties, to be similarly bound by human rights obligations and corporate social responsibility in their actions.[57] This, however, requires a teleological interpretation of rights and responsibilities.

3.2.Procedural Good Faith

This obligation to uphold *pacta sunt servanda* has been extended by tribunals to the procedural phase of the dispute. As one example, in *Quiborax v Bolivia*, an investor in the mining sector brought a claim against the state for revocation of mining rights.[58] The State initiated certain criminal proceedings in response to tax and customs irregularities. While the Tribunal considered that the potential illegal behaviour of the investors did not affect the Tribunal's jurisdiction and thus the right to seek protection under the relevant investment treaty,[59] the Tribunal similarly did not consider the initiation of the criminal proceedings to indicate that the State had breached its duty to arbitrate in good faith.[60] The Tribunal first acknowledged that there was an obligation for the parties to arbitrate in good faith.[61] Its basis for this obligation was established by reference to both previous investment decisions[62] as well as decisions by the International Court of Justice.[63] This obligation was grounded by the Tribunal in the principle of *pacta sunt servanda* through its application in the *Nuclear Tests case*: '[o]ne of the basic principle governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. […] the very rule of *pacta sunt servanda* in the law of treaties is based on good faith.'[64]

The Tribunal concluded that the sovereign right of a state to initiate criminal proceedings was protected and did not impede the process of good faith behaviour of the parties in the process of arbitrating: 'Under the circumstances, the Tribunal is not convinced that it should issue a declaration of breach of the duty to arbitrate in good faith. First, the Tribunal does not find that the Respondent breached its duty to arbitrate in good faith by initiating or failing to suspend the criminal proceedings. As the Tribunal has emphasized on several

[55] Vienna Convention on the Law of Treaties, Article 26.
[56] *Tradex Hellas SA v Albania*, 5 ICSID Reports 43 (1996) paras. 68-69.
[57] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award, paras. 1190 et seq.
[58] *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015.
[59] *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún*, ICSID Case No ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 298.
[60] *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, paras. 589 et seq.
[61] Ibid, para. 591.
[62] Ibid, referencing *Methanex Corporation v United States of America*, UNCITRAL Tribunal under NAFTA Chapter XXI, Final Award, 3 August 2005, Part II – Chapter I, para. 54; *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 78.
[63] Ibid, referencing *Gabcikovo-Nagymaros Project, Hungary v Slovakia*, I.C.J. Reports 7, Judgment of 25 September 1997, para. 149.
[64] *Nuclear Tests, New Zealand v France*, I.C.J. Reports 457, Judgment of 20 December 1974, para. 49.

occasions, Bolivia has the sovereign prerogative to prosecute crimes on its territory, and such prerogative is not barred by the BIT or ICSID Convention.'[65]

While such procedural integrity and the sovereign right of the state with respect to the principle of good faith has been examined differently by other tribunals,[66] there is a basis in the process of interpreting the treaty obligations that ensures the respect for sovereignty as engrained in the good faith interpretation. These sovereign rights of states, as protected even in spite of the express treaty commitments, opens an interpretive possibility when human, social, and environmental commitments of the host state have been compromised by investor behaviour. The state's own international law obligations are not undermined by protecting their own internal criminal law, in the same way that internally upholding these obligations could be respected by tribunals as they interpret the relevant requirements.

4. Investors

This section considers the relationship with domestic laws and the sovereign rights of states within the international investment law system from the perspective of the investors, and how such internal commitments are recognized through the lens of good faith behaviour.

Investors are not exempt from acting in good faith—although they are not subjects of international law and thus have no obligations under general principles of law or the VCLT. Rather their obligations to act within good faith in their commitments and the proceedings can be more closely linked with good faith as derived from domestic contractual commitments but also from the 'international principle of good faith'[67]. The nearly uniform recognition of this behavioural requirement in contract commitments[68] elevates it under Article 38(1)(c) of the ICJ Statute as a general principle of law. Once a dispute has been initiated by an investor, the investor's obligations turn more contractual in nature. This pulls the principle of good faith from domestic contract law. Most domestic legal systems require a good faith observance of the treaty obligations: the mirror of *pacta sunt servanda* for private parties. Reading the disputes as mere contracts, however, may subvert the object and purpose of the treaties as they emerge in public law.[69]

Compliance with laws of the host state has frequently been considered by tribunals as part of the behavioural responsibilities of investors. This incorporates the functionality of good faith behaviour in the international action even prior to the dispute itself—meaning prior to when the contractual aspects of the relationship would necessarily imply a good faith behaviour. In *Fraport v the Philippines*, the tribunal examined whether the investment had been made within the laws of the host state. More specifically, they examined whether the investor had

[65] *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Award, 16 September 2015, para. 594.
[66] *Kardassopoulos v Georgia; Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Award, 3 March 2010.

[67] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para. 113.
[68] See for example, amongst many others, Uniform Commercial Code Section 1-304 ('Every contract or duty with the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement'); Bürgerliches Gesetzbuch (German Civil Code) Section 242 ('Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.'); Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil (Spanish Civil Code) Article 7 ('Los derechos deberán ejercitarse conforme a las exigencias de la buena fe.').
[69] Regarding effectiveness of treaty interpretation, see Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 129, 132.

acted in good faith.[70] The *Phoenix* tribunal made similar judgments as to whether it had jurisdiction, based on the investor's interaction with the laws of the Czech Republic and whether the investment was *bona fide*.[71] The *Inceysa* tribunal considered the investor's behaviour in good faith, derived from both domestic law and international public policy, and related it to the state's consent to jurisdiction: 'Good faith is a supreme principle, which governs legal relations in all their aspects and content […] El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors.'[72] Some tribunals, however, have limited the interpretation of the investors' pre-dispute responsibility to fundamental breaches of law. For example in *LESI v Algeria*, the Tribunal limiting investor wrongdoing to violations to 'fundamental principles in force.'[73]

Beyond compliance with the laws of the host state in order to secure jurisdiction under the treaty, few requirements are made of investors and international efforts to force investors to a different level of responsibility have not progressed.[74] The inclusion of such obligations in contracts between states and investors is possible[75] but has not been extensively implemented. The consideration of counter-claims by the state, as approached in the *Perenco v Ecuador*[76] and *Burlington v Ecuador* disputes, is limited in its potential applicability where

[70] *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Award, 16 August 2007, para. 396 ('When the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue. Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of protected profitability. This would indicate the good faith of the investor.').

[71] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, paras. 113, 134 et seq (focusing on the international principle of good faith and the investor's compliance with this principle in the context of international investment law).

[72] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August2006, para. 230.

[73] *LESI SpA and Astaldi SpA v Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 83. See also, *Desert Line Projects LLC v Yemen*, ICSID Case No ARB/05/17, Award, 6 February 2008, para. 104; *Rumeli Telekom AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, para. 319.

[74] Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises–Zero Draft (16 July 2018); United Nations Human Rights Council, Resolution 26/9, UN Doc. A/HRC/Res/26/9 (14 July 2014); International Chamber of Commerce et al., Response of the International Business Community to the "Elements" for a Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (20 October 2017).

[75] See for example, *Balkan Energy v. Ghana*, PCA Case No. 2010–7, Award, 1 April 2014.

[76] *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Award, 27 September 2019, para. 1023; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Ecuador's Counterclaims, 7 December 2017, para. 60; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016, para. 1151 ('The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the Counterclaims well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimants' failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimants' claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome.').

specific circumstances are not in place.[77] Yet, it could be argued that interpretation of the provisions of the investment agreements, when conducted in good faith, and with recognition of international investment law's position in the international legal order and with further respect to Article 42 ICSID, such possibilities could be expanded. This requires that a cause of action exists on a domestic—or even international—level.

5. The Tribunal

This analysis of the good faith behavioural requirements and their relationship with state sovereignty rest on the tribunals in their process of interpretation. Interpretation in and of good faith has several facets. Foremost, it is the duty of the tribunal to interpret in good faith. However, part of that good faith interpretation is understanding the grey areas of behaviour. Namely, it is the tribunal's responsibility to determine the good faith behaviour of the parties involved.

While complicated by the sectioning of international investment law between the pre-dispute and post-dispute phases, arbitral tribunals are required to interpret the treaties and international investment agreements in good faith. The states' obligations under this assessment may vary from the investors, as discussed above. This further implies assessing whether the parties to the treaty have acted in good faith in performing their obligations. The tribunals determine how these obligations are extended to the investors—whether through the requirements to comply with the laws of the host state and their actions within general standards of good faith. The standards for such interpretation are determined on an on-off basis.

The different approaches to the process of interpreting in good faith can be identified. Namely there is a distinction that can be drawn between tribunals interpretation in good faith as a moral standard,[78] interpreting in good faith to achieve a teleological result,[79] or good faith interpretation that implies a contractual nature of treaty obligations.[80] These different approaches, while all supporting the essence of the process of good faith interpretation, characterize the difficulty in identifying a singular approach in the act of interpretation. Such singular approach would be contrary to the essence of good faith interpretation.

Moreover, the tribunal holds an essential role as an actor in the process of interpretation, and as such, must also behave and conduct its own act of interpretation in good faith. This is

[77] Tomoko Ishikawa, "Counterclaims and the Rule of Law In Investment Arbitration", Symposium on Investor Responsibility: The Next Frontier in International Investment Law, 113 *American Journal of International Law* Unbound (2019) pp. 33, 37; Esther-Jane Grenness, "Let's Have Soufflé Instead: Selective Reform of the Investor-State Dispute Settlement Regime", 6(1) *University of Baltimore Journal of International Law* (2018) pp. 138, 155; (indicating that 'States can strategically create a mechanism whereby investors can themselves be bound under the terms of IIAs into which their home States enter. This would be achieved through a two-pronged approach'); Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodriguez, *Arbitrating the Conduct of Investors* (2018) pp. 15-16; Kevin Crow and Lina Lorenzoni Escobar, "International Corporate Standards, Human Rights and the Urbaser Standard", 144 *Beitrage zum Transnationalen Wirtschaftsrecht* (2017).

[78] *Phoenix v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para. 100; *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) para. 181; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013).

[79] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award, paras. 1190-1200, especially para. 1200 ('The Tribunal further retains that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties […] The BIT has to be construed in harmony with other rules of international law of which it form part, including those relating to human rights.').

[80] *Mr Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) paras. 106 et seq.

most often assessed through challenges as a result of conflict of interest.[81] Extending good faith obligations for the tribunal beyond this clear application could undermine the trust in the system and its dispute resolution system that creates the very fabric of international investment protection.

6. Good Faith and the Future of International Investment Law

Interpretation by tribunals may well be at the heart of the current legitimacy crisis in international investment law. The provisions were written in an open—nearly constitution-type language—permitting the malleability of protections as they evolve. Yet, despite the development of certain international norms, transformations in the roles of private individuals and sovereign states, and the overwhelming acceptance of human rights norms, many investment tribunals continue to read investment law in an isolated sphere. The use of good faith interpretation as not only a moral indicator but also to achieve teleological interpretation of commitments indicates an opening. The principle of good faith breathes life into the interpretation of investment treaties, in much the same way that it guides interpretation of other treaties concluded in international law. Its relationship, however, is complicated by the fact that one party benefiting from that treaty is not a traditional actor in public international law and was not party to the treaty. How does this impact good faith interpretation of the private party's behaviour? Is it similarly drawn from customary international law, or is its source from a depth of privately-formed legal relationships?

The obligations to behave in good faith in international law have relevant and profound implications if read broadly. Diane Desierto has argued with respect to the incorporation of the Paris Agreement commitments—while lacking an enforcement mechanism—should remain part of the obligations of states to negotiate in good faith.[82] In the context of investment law, the negotiation of the treaties within the system of international law creates conductivity—among the systems that exist within it. While respect for ~~the~~ treaties themselves ~~are~~ is not debated, the interpretation of the responsibilities contained within those treaties is highly debatable through the lens of good faith. Should the principle of good faith be applied too broadly in this context, it may be argued that it undermines justice. Yet, the application of the principle, as it has already been applied by tribunals, implies that there is an expansion of rights and a continued respect for sovereignty contained within it. Interpretation of customary

[81] See for example, *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v Republic of Guinea*, ICSID Case No ARB/14/22, Decision on Proposal to Disqualify all Members of the Tribunal, 28 December 2016; *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, para. 12; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, paras. 9, 72; *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, paras. 96, 107; *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011, paras. 50-57.

[82] Diane Desierto, "COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?" (EJILTalk! 19 December 2019) (She argues that 'even within the hard and soft letter of the Paris Agreement, is interwoven an independent [customary] international legal obligation to negotiate in good faith that could be the substantive basis for incurring international or State responsibility. This obligation does NOT pertain to the specific realization of climate targets, but rather, refers to the good faith obligation of States to ensure that negotiations to implement the Paris Agreement remain meaningful.').

international law is not a stagnant exercise to a achieve an ultimate definition of resolution of an issue. It is a process, and the conclusions may evolve. The principle of good faith plays a central role in this process of interpreting the law not only correctly but also justly.