GOOD FAITH: AN ICSID CONVENTION REQUIREMENT?

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The International Convention for the Settlement of Investment Disputes (ICSID) or the 'Washington Convention of 1965' was implemented by the World Bank to facilitate global investment. It provides for the settlement of investment disputes by establishing an autonomous system of conciliation and arbitration between foreign private investors and host states administered by ICSID.

I INTRODUCTION

This paper investigates whether good faith plays a role in the resolution of investment disputes between states and investors. The issue is complicated as, in effect, three contracts are at play. To start with, there is the contract between the investor and the state. This is supported by a Free Trade Agreement (FTA) or a Bi-lateral Investment Treaty (BIT)[1], which in most cases provides the impetus and the basic rules of the investment, being the second contract. Importantly, FTAs or BITs can also contain a method of dispute resolution. Third, in general, any disputes between a state and an investor are submitted to ICSID for a resolution. Wälde importantly noted:

> The arbitration relates directly to the 'investment' and the 'investor' which are covered by the treaty. Serious misconduct by the State towards the Claimant during the arbitration should therefore be covered by the pertinent obligation of the treaty, primarily the duty of 'fair and equitable treatment' and the obligation to provide 'constant security and protection' the 'due diligence' obligation imported into treaties form customary international law.[2]

Arguably the issue of 'fair and equitable treatment' and the general thrust of the Wälde's argument lead to the conclusion that good faith has to play a role in dispute resolution processes. This paper will investigate the role of good faith in relation to the dispute resolution process, that is, when the parties rely on ICSID to resolve the investment dispute. The question therefore is; do the procedural rules mandate that the investment dispute must be resolved with good faith in mind? This is a pertinent question as 'it is difficult to find any international arbitration award not based on, or that does not at least mention, good faith. The omnipresence of good faith does not mean (rather quite the contrary) that it is clearly understood.'[3] At the same time, caution must be exercised as an application of good faith does carry risks. 'Given the uncertainties about what precisely is meant by a standard of only 'good faith' review, arbitrators who opt for it without explicit textual

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[1] As was the case in *Empresas Lucchetti SA v Republic of Peru (Award)* (ICSID arbitral tribunal, Case No ARB/03/4, 7 February 2005). 'Award of the Tribunal, February 7, 2005' (2004) 19(2) *ICSID Review – Foreign Investment Law Journal* 359. The arbitration could not proceed as the investment took place before the Peru – Chile BIT was in force.
[2] TW Wälde, ''Equality of Arms' in Investment Arbitration: Procedural Challenges' in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements* (Oxford University Press, 2010) 161, 188.
[3] Bernado Cremades, 'Good Faith in International Arbitration' (2012) *American University International Law Review* 761, 761.

warrant are in uncharted waters and might be accused, as by a subsequent ICSID annulment body of exceeding their legal mandate.'[4]

As a result, the application of good faith requires 'the need for a greater conviction at first and the need for a more exact reasoning by the arbitrator in his decision-making process afterwards.'[5] This paper therefore will demonstrate that good faith is an integral part of any arbitral mechanisms, including ICSID, and must be taken into consideration when not only interpreting the convention itself but also the behaviour of parties.

II THE ROLE OF GOOD FAITH

In international arbitration, the notion of good faith has been accepted but the problem is that 'it is not clear what the concept of good faith actually means.'[6] The issue is that good faith is not universally accepted and also there is no definition of what it actually means. The questions are whether principles applicable to contracts in domestic law are conflated with principles applicable to treaties. In other words, are principles applicable to contracts in domestic law also to be applied in international law? The answer is definitively 'yes', as a legal principle, which can be found in all legal families, must have a meaning that is common to all. This argument is reinforced by the fact that good faith has now found its way into customary law, hence it is internationalised.

The problem is that not all international instruments recognise good faith as a principle. The ICSID rules, as an example, do not define good faith and only note in article 34 and Rule 23 that, 'the parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions.'[7] Arguably, good faith cannot be considered to be a principle considering it only affects the relationship between the parties and the commission, but not what other conventions or model laws prescribe.

Several international instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) have introduced good faith as a principle which regulates not only the behaviour of the parties, but also assists courts to interpret legislation and conventions.

Good faith has also been introduced in domestic law. In the US as an example, it is expressly noted in the Unified Commercial Code (UCC) in article 1-304. In essence it states that 'every contract or duty within the Unified Commercial Code imposes an obligation of good faith in its performance and enforcement.' In Australia a contractual duty of good faith is implied. Although some courts have accepted the idea of good faith, its place in Australian law remains unclear[8] as the High Court has not yet ruled on this issue. In England the principle of good faith has not fallen on fertile ground. However, the court in *Yam Seng Pty Ltd v International Trade Ltd*[9] had to address the issue as a breach of an implied duty of good faith was pleaded. Leggat noted first that 'refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide.'[10] The glimmer of hope was quickly extinguished as he stated:

[4] 'The Argentine Crisis and Foreign Investors' (2009) *Yearbook of International Investment Law and Policy* 379, 426.
[5] Cremades, above n 3, 786.
[6] Ibid 765.
[7] 'ICSID Convention, Regulations and Rules', *International Centre for Settlement of Investment Disputes* (Web Page, 10 April 2006) <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>.
[8] Australian Government, Attorney-General's Department, *United States contract law: Lessons for Australia?* Infolet 11.
[9] *Yam Seng Pty Ltd v International Trade Ltd* [2013] EWHC 111.
[10] Ibid 124.

> I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.[11]

The court resolved the issue by treating the breach of an implied term as a term in fact and not law, hence avoiding creating a precedent.

In sum, it is obvious that good faith comes in various forms and arguably disguises and has been described as the elusive Scarlet Pimpernel.[12] What can be said is that good faith takes on substance from domestic laws which include conventions and treaties.

What can be said in relation to ICSID is that good faith might be implied in the underlying contract between the state and the investor as expressed in the underlying governing law.

The real issue and hence the problem is that there is no uniform explanation of good faith, let alone definition. As Anderson argues good faith 'is simply too tainted by regional diversity to be of any constructive use on a global transnational playing field.'[13] That might be true but equally true is the fact that good faith is a part of the legal culture and therefore simply cannot be ignored. After all it has been in use for more than 2000 years. Anecdotally, it has often been noted as being the IKEA argument in legal disputes. That said it is argued that good faith cannot be defined but that there is no need to define good faith as it takes on meaning when applied to facts. Hence an explanation or application of good faith is defined by its function, namely to enforce the expected performance of both parties.[14] It is not coincidental that Cremades, an experienced arbitrator notes:

> It is therefore of enormous interest to focus our attention on good faith in international arbitration. At the onset of a proceeding, one of the most delicate and fundamental tasks is the selection of the panel's arbitrators and, especially, of its chairman. 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.[15]

However, one noteworthy attempt has been made to define good faith which is the seminal work undertaken by Professors Summers[16] and Burton[17] which warrants close attention. Summers is of importance as his theory was the basis in explaining the application of good faith in article 205 in the second *Restatement*

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[11] Ibid 131.

[12] 'They seek him here they seek him there . . . everywhere. Is he in heaven, is he in hell, that . . . elusive Pimpernel?' from Baroness Orczy, *The Scarlet Pimpernel* (London, New York, S. French, revised ed, 1988). See B Zeller, 'Good Faith - The Scarlet Pimpernel of the CISG', *Institute of International Commercial Law* (Web Page, 29 January 2016) <http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html>.

[13] C Andersen, 'Good faith? Good Grief? Festschrift for Bruno Zeller' (2014) 17 *International Trade and Business Law Review* 310, 311.

[14] B Zeller and C Andersen, 'Good Faith – The Gordian Knot of International Commerce' (2016) 28(1) *Pace International Law Review* 1.

[15] Cremades, above n 3, 766.

[16] See Robert Summers, 'The General Duty of Good Faith – its Recognition and Conceptualisation' (1982) 67(4) *Cornell Law Review* 810; Robert Summers, ' 'Good Faith' in General Contract Law and the Sales Provision of the Uniform Commercial Code' (1968) 54 *Virginia Law Review* 195.

[17] See Steven Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 *Harvard Law Review* 369; Steven Burton, 'Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Law Code' (1981) 67 *Iowa Law Review* 1; Steven Burton, 'More on Good Faith Performance of a Contract: A reply to Professor Summers' (1984) 69 *Iowa Law Review* 497.

of Contract which appeared in 1979 (and was finally published in 1981).[18] Summers, in brief, developed the excluder principle. Sepe summarised Summers' arguments which are:

> … in favour of an open-ended conceptualisation of good faith in order to guarantee the substantive justice of contractual relations. Good faith imposes on parties' separate moral standards of conduct, which may override the explicit terms of the contract if these do not satisfy requirements of decency, fairness, or reasonableness.[19]

Burton, on the other hand, did not agree with Summers and developed the 'forgone opportunity approach' which can be summarised as follows:

> Courts generally do not use the good faith performance doctrine to override the agreement of the parties. Rather, the good faith performance doctrine is used to effectuate the intentions of the parties, to protect their reasonable expectations though interpretation and implication.[20]

This paper seeks to answer the question whether good faith plays an important role within the ICSID regime. Hence, in the first part, the principle of good faith as it is developed in the Vienna Convention on the Law of Treaties (VCLT) will be considered briefly as it will inform and assist in the interpretation of treaties. As ICSID is a treaty the VCLT is potentially applicable.

In the second part, the good faith requirements as contained in ICSID will be analysed with the purpose to answer the question of whether good faith not only regulates the relationship of the contractual parties but also extends to the interpretation of ICSID.

In the third part, ICSID decisions will be analysed in order to evaluate the influence of good faith.

The fourth part will investigate whether precedent in the case of the use of good faith is an important element in the armoury of arbitrators and part five will conclude the arguments. Part five will summarise the arguments.

[18] See for a closer examination B Zeller and C Andersen, 'Good Faith – The Gordian Knot of International Commerce' (2016) 28(1) *Pace International Law Review* 1, 1–28.

[19] Simone M Sepe, 'Good Faith and Contract Interpretation: A Law and Economics Perspective' (Discussion Paper No 10–28, University of Arizona, 2010) 14.

[20] Burton, above n 17, 499.

III GOOD FAITH AND THE VCLT

For an interpretation of the role of good faith it is necessary to turn to the influence of the VCLT Articles 31–33[21] which are devoted to the implementation of good faith, and may be taken to reflect the position under customary international law.[22]

Article 31 of the VCLT goes further to extend the influence of good faith. In other words, pursuant to the purpose of the VCLT, any treaty must, as core values take note of, in this case, Articles 31–33, but only if the text requires interpreting, otherwise the VCLT does not interfere at all. 'These principles of interpretation neither require nor condone the imputation into a treaty of words that are not there nor the importation into a treaty of concepts that were not intended.' [23]

Article 31(2) of the VCLT provides the essential elements of interpretation of the convention which was confirmed in the *United States Gasoline* case[24] where it was stated the VCLT attained the status of a rule of

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[21] Article 31: General Rule of Interpretation

1. 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.
2. The context for the purpose of the interpretation of a Treaty shall comprise, in addition to the text, including its preamble and annexes:
   - (a) any agreement relating to the Treaty which was made between all the parties in connection with the conclusion of the Treaty;
   - (b) any instrument which was made by one or more parties in connection with the conclusion of the Treaty and accepted by the other parties as an instrument related to the Treaty.
3. There shall be taken into account, together with the context:
   - (a) any subsequent agreement between the parties regarding the interpretation of the Treaty or the application of its provision;
   - (b) any subsequent practice in the application of the Treaty which establishes the argument of the parties regarding its interpretation;
   - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the Treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33: Interpretation of Treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

[22] Christoph Schreuer, 'Consent to Arbitration' ILA Paper Schreuer (Web Page, 27 February 2007) <https://www.univie.ac.at/intlaw/con_arbitr_89.pdf>.

[23] Appellate Body Decision, *India-Patent Protection for Pharmaceutical Protection and Agricultural Chemical Products*, WTO Doc WT/DS50/AB/R (5 September 1997) [45].

[24] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*Complaint by Venezuela*), WTO Doc WT/DS2/AB/R, (*Complaint by Brazil*); WTO Doc WT/DS4/AB/R (29 April 1996).

customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law.'[25]

Further, Article 31(3) (c) of the VCLT states:

> … treaties should be interpreted in the light of 'any relevant rules of international law applicable in the relations between the parties'.[26] Domestic courts might employ among other arguments, the international law doctrines of '*abuse of rights,*' '*denial of justice*', '*unfair and inequitable treatment*' or '*good faith*' as a basis of interpreting the recognition and enforcement obligations established by ICSID.[27]

Similarly, Article 31(2), Article 32 of the VCLT has been acknowledged as having attained the status of a customary rule of interpretation of public international law.[28] Whilst this interpretation is applicable to ICSID[29], it is also applicable to the European Court of Justice (ECJ) and the North American Free Trade Agreement (NAFTA). The nature of international investment disputes requires parties to draw on such canons of interpretation to equip them to resolve their disputes. Moreover, the principle of good faith is expressly provided for in Articles 26, 46 and 69 of the VCLT.[30]

Essentially, the process of interpretation of the VCLT within treaties including ICSID arises from the particular disputes encountered in ICSID jurisdiction. Considering that one party to a dispute is a Nation-State, a clear set of rules is essential to ensure equality of decision-making.[31]

However, the Treaty makes it perfectly clear that good faith is only to be used in conjunction with the interpretation of the text and does not extend to the behaviour of the parties. Therefore, it is arguable that an application of the VCLT in relation to ICSID should only be applied if the text of ICSID requires interpretation but not in relation to the behaviour of the parties. Wälde also noted that ICSID tribunal in this case must interpret the treaty by extrapolating the logical consequences of this reference to good faith.[32] However, it is not only the behaviour of the parties which is to be considered. A third party, namely the arbitrators, or in the case of ICSID, the commission is also to be considered.

IV (A) ICSID AND THE GOOD FAITH REQUIREMENT

At the outset it must be noted that article 42(1) of the Washington Convention states '[i]n 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.'[33]

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[25] Appellate Body Report, *United States – Standards for the Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/9 (20 May 1996) [17].

[26] *Maritime Delimitation v Territorial Questions Case (Qatar v Bahrain)* [1995] ICJ Rep 6, 18. The contents of Article 31 now reflect customary international law.

[27] E Baldwin, M Kantor and M Nolan, 'Limit to Enforcement of ICSID Award' (2006) 23 *Journal of International Arbitration* 20.

[28] Panel Report, *Mexico-Telecommunications*, WTO Doc WT/DS192/R (31 May 2001) [7.15]; US-Cotton Yarn (Panel) [7.17]; Panel Report, *US-Sardines*, WTO Doc WT/DS231/R (29 May 2002) [7.12]; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (4 October 1996); Panel Report, *US – Anti Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WTO Doc WT/DS282/R (20 June 2005).

[29] *Salini Construttori Spa v Jordan* (Jurisdiction) (ICSID arbitral tribunal, Case No ARB/02/13, 9 November 2004) [75].

[30] VCLT article 26. 'Every treaty enforced is binding upon the parties and must be performed by them in *good faith.*'

[31] *Azurix Cororation v Argentine Republic* (Award) (ICSID arbitral tribunal, Case No ARB/01/12, 14 July 2006).

[32] Wälde, above n 2, 161.

[33] 'Washington Convention', *International Centre for Settlement of Investment Disputes* (Web Page, 10 April 2006) <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>.

As such, the arbitrator in any ICSID dispute is linked to the rules or principles of international law.[34] The ICSID convention sets out rules to resolve disputes, but interestingly enough good faith only is mentioned in the conciliation part as 'cooperating in good faith with the commission.'[35] Nothing in the convention suggests that the parties ought to exhibit good faith amongst themselves. Also, unlike many conventions, ICSID did not embed an interpretative article within it scope.

Hence, arguably it is left to the VCLT), specifically Articles 31–33 to fill the gap. However, the VCLT does not directly apply, as Article 4 notes:

> NON-RETROACTIVITY OF THE PRESENT CONVENTION Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.[36]

ICSID came into force in 1966, whereas the VCLT only in 1980. However, in the meantime, the question of good faith as expressed in the VCLT and other treaties has now been viewed as an implied force of law as it has become international customary law. This has been confirmed by the WTO.[37]

It is argued that as the WTO, which resolves disputes between nations, has adopted good faith as an international customary law and good faith is used by courts to assist their decision-making and regulates the behaviour of the parties, ICSID as resolving disputes between a state and an investor would, by definition, also be subject to customary international laws.

IV (B) VCLT AND ITS INFLUENCE IN THE INTERPRETATION OF ICSID

It is recognised that specifically in investment disputes, unequal bargaining power between the parties exist, thus the need for compatible interpretation of agreements becomes imperative. This is particular to the case of ICSID which provides awards based on the interpretation of domestic laws.

ICSID does rely on the VCLT, but has extended the influence of good faith to the interaction between parties and the Commission as seen in Article 34 of ICSID which states 'the parties shall co-operate in good faith with the Commission in order to enable the Commission to carry out its function and shall give their utmost serious consideration to its recommendations.'

The case of *SOABI v Senegal* is instructive where the Tribunal stated:

> The interpretation must take into account the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings. It is this principle of interpretation, rather than one of a priori strict, or, for that matter, broad and liberal construction that the Tribunal has chosen to apply.[38]

The broad approach to interpretation taken by the Tribunal in *SOABI v Senegal*, demonstrates an expansion of the application of good faith to other Articles within ICSID. This expansion also relates to the process of arbitration where it is believed that there is a good faith obligation on the part of the arbitrator and

[34] Cremades, above n 3, 785.
[35] ICSID Convention rules 23 and 34.
[36] VCLT No. 18232 came into force in 1980.
[37] *Certain Norwegian Loans (France v Norway) (Jurisdiction and Admissibility)* [1957] ICJ Rep 9. 'Unquestionably, the obligation to act in accordance with good faith, being a general principal of law, is also part of International law.'
[38] *SOABI v Senegal (Award)* (1988) 2 ICSID Rep 190.

the parties to arrive fully prepared for the arbitration, enabling the arbitration to be conducted in a timely manner and being proactive in order to settle their dispute.

This was highlighted by Hill and DeLacenseri in their statement 'the arbitration process with lengthy 'legalisms', procedural niceties, and endless arrays of data that result in hearings with no focus. The parties are advised to resist the urge to advance every conceivable argument and sub-issue.'[39]

Further, it must be appreciated that with an adversarial approach, the more technical and legalistic arbitration becomes, the more detrimental it is to the efficiency of an arbitration process. Against this background the tribunal in *Inceysa Vallisoletana SL v Republic of El Salvador* noted: '[g]ood faith is a supreme principle, which governs legal relations in all of their aspects and content.'[40]

The foregoing supports the argument that the principle of good faith in the VCLT has an effect on the interpretation of ICSID but it is not the only factor in deciding and applying good faith.

V (A) ICSID AND GOOD FAITH AS A REGULATOR

The question is whether good faith is a regulator of the relationship between the parties and an extension of the interpretation of ICSID. As noted above, the drafters of ICSID convention had not embedded an article acting as a regulator of the relationship between parties. What is clear and not disputed is that all conventions are subject to an implied obligation to use good faith when interpreting the text of the convention. Simply put, there is no clear express mandate or duty for the parties to act in good faith. However this does not suggest that good faith is not applied in one form or another. The tribunal in *Libananco Holdings Co. Limited v Turkey* did not cite any authority arguably because norms of good faith are self-evident. The tribunal stated:

> Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).[41]

The conclusion which can be drawn is that by implication it can be inferred that obligations at least similar to good faith are embedded within the conventions.

ICSID Article 8 extends this duty to the parties' relationship with the arbitrator which provides that arbitrators must be persons of high moral character and possess recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.[42] The most favourable context assumes that there are parties or counsel for the parties willing to co-operate in good faith and who do not impede the pace of proceedings.[43]

ICSID Article 14 goes further than Article 8 with the addition of competence in the field of law being of particular importance in the case of persons on the panel of arbitrators. It provides that 'the Chairman, in

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[39] M F Hill and E Delacenseri, 'Interact Criteria in Fact Finding and Arbitration: Evidentiary and Substantive Consideration' (1991) 74 *Marquette Law Review* 399, 444.

[40] *Inceysa Vallisoletana SL v Republic of El Salvador* (ICSID arbitral tribunal, Case No ARB/03/26, 2 August 2006) [230]; *(Award)* (2008) 28 ICSID Rep 311.

[41] *Libananco Holdings Co Limited v Turkey (Decision on Preliminary Issues)* (ICSID arbitral tribunal, Case No ARB/06/8, 23 June 2008) [79].

[42] [1991] *Australian Treaty Series* 23.

[43] EM Obadia, 'How Proactive Arbitrators Really are in Conducting Arbitral Proceedings: An ICSID Perspective' (1999) 16(2) *International Centre for Settlement of Investment Disputes News* 2.

designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.'

Another example of the extension of what might be termed good faith to the interpretation of ICSID is evident in Article 44, where arbitrators are required to conduct the arbitration according to ICSID rules and if questions are not covered by the rules, then the Tribunal shall decide upon the question. Arguably, therefore, article 44 of ICSID requires that the members of the Tribunal also act in good faith.

ICSID Article 50 provides that the Centre must also act in good faith if an award is to be reviewed or the parties seek an annulment. In the case of seeking an annulment pursuant to Article 52, the ad hoc committee constituted by the Secretary General of ICSID must ensure that this review Tribunal acts in good faith when examining the constitution of the original Tribunal and whether it has exceeded its powers, is guilty of corruption, has departed from the rules of procedure, or failed to state the reasons for its decision.

Article 54(1)[44] concerning Stay of Enforcement of the Award, further expands the influence of good faith as it is interpreted in the light of international law principles. If there is a lack of good faith by a foreign investor in the underlying transaction and this is proven, this may result in difficulty in enforcement of an ICSID Award in national courts.[45]

The above cases demonstrate the influence of good faith to the extent that it encompasses the regulation of the relationship of the parties and the interpretation of ICSID.

V (B) ICSID DECISIONS AND THE INFLUENCE OF GOOD FAITH

The far-reaching influence of good faith can be evidenced in numerous ICSID cases such as the *Salini-Jordan* case where ICSID Tribunal held that the wording of the Italy-Jordan Bilateral Investment Treaty (BIT's) only referred to maintaining a 'legal framework' favourable to investments rather than any guarantee or obligations to nationals, 'each contracting party shall create and maintain in its territory a legal framework appropriate to guarantee the investors the continuity of legal treaties, including the compliance in good faith, of all undertakings assumed with regard to each specific investor.'[46]

Furthermore, national courts use other concepts, such as Fair and Equitable Treatment (F&ET), which incorporates the principle of good faith as established in ICSID and other conventions. The effect of good faith in the regulation of the relationship between the parties was elaborated in *Genin v Estonia*,[47] a case involving the privatisation of an Estonian bank where the Tribunal found F&ET to include 'acts showing a wilful neglect of duty, an extremely insufficient action falling far short of international standards, subjective bad faith, or a wilful disregard of due process.'

Another example of good faith regulating the relationship between the parties is found in the case of *Tecmed v Mexico,*[48] where the Tribunal identified a breach of expectation by the investor with respect to F&ET rules. Here the Tribunal considered the F&ET provisions incorporated the principle of good faith conduct, adding that it '*required host countries to act in a manner that is consistent, totally transparent and free of ambiguity'*.

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[44] (1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

[45] Baldwin, Kantor and Nolan, above n 27.

[46] *Italy-Jordan Bilateral Investment Treaty*, opened for signature 21 July 1996 (entered into force 17 January 2000).

[47] *Genin v Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 June 2001).

[48] *Técnicas Medioambientales Tecmed, SA v The United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003.

The expansion of the interpretation of good faith rests to a degree with the definition of F&ET. The manner in which F&ET relates to the principle of good faith was defined by Judge Schwebel as 'a broad and widely accepted standard encompassing such fundamental standards as '*good faith*' '*due process' 'non-discrimination' and 'proportionality'*.'[49]

This is supported by the case of *TECMED S.A. v The United Mexican States* where the Tribunal interpreted the 'F&ET' standard as resulting from the good faith principle. The Tribunal made a clear connection between the principle of good faith and a State's obligation to provide foreign nationals with a transparent regulatory environment.

The Tribunal assessed the claim on the international law principle of '*good faith*: and the ordinary meaning' of Article 31(1) VCLT. It held that Mexico's behaviour amounted to a violation of the duty to accord F&ET[50] and found that the obligation of F&ET is an expression and part of the *bona fide* principle recognised in international law.[51]

Similarly, in *CMS Gas Transmission v Argentine Republic* the Tribunal found that Argentina had breached the F&ET standard of the US–Argentina BIT. The Tribunal held 'there can be no doubt, therefore, that a stable legal and business environment is an essential element of F&ET.'[52]

Provision of a stable legal and business environment as a principle of F&ET which is underpinned by the principle of good faith was taken a step further in the case *Metalclad Corporation* where the Tribunal held that:

> … the Respondent failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly.[53]

These ICSID cases demonstrate that good faith is considered as a fundamental principle underlying an obligation. The references to F&ET in the above cases is inclusive of the principle of good faith, thereby substantiating its wide sphere of influence.

However, different views are expressed in relation to F&ET specifically in conjunction with claims based on a FTA. An example in ICSID case of *Spence International Investments et al v The Republic of Costa Rica*[54] the US in their submission based their arguments on chapter 10 of the Dominican Republic–Central America–United States FTA (CAFTA-DR).

CAFTA-DR in Article 10.5.1 requires that each party 'accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.'[55]

Article 10.5.2 specifies:

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[49] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Award)* ICSID Arbitral Tribunal, Case No ARB/01/7, 21 March 2007) [109].

[50] *Tecmed* Award Paragraph 154 interpreting Article 4(1) which states 'each contracting party will guarantee in its territory F&ET according to international law for the investments made by the investors of the other contracting party.

[51] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (Working Paper, No 2004/3, Organisation for Economic Co-operation and Development, September 2004) <www.oecd.org/dataoecd/22/53/33776498.pdf> 49.

[52] *CMS Gas Transmission Company v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005) [274].

[53] *Metalclad Corporation v The United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/01, 30 August 2000).

[54] *Spence International Investments LLC and Berkowitz et al v The Republic of Costa Rica (Jurisdiction)* (UNICITRAL Ad Hoc Tribunal, Case No UNCT/13/2, 25 October 2016).

[55] Ibid [11].

> For greater certainty paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

The submission relied on *S.D. Myers Inc v Government of Canada*[56] by noting that this standard establishes 'a floor below which treatment of foreign investors must not fall.'

Surprisingly the submission noted that 'neither the concept of good faith nor legitimate expectations are component elements of fair and equitable treatment under customary international law that gives rise to an independent host obligation.'[57] The submission went on to argue that while good faith is a basic principle governing the creation and performance of legal obligations it is not in itself a source of obligation where none would otherwise exist.[58]

This is quite correct as good faith is a trigger or legal principle which determines a breach of an obligation. There can be no distinction between good faith and F&ET as they are both part of customary international law. Good faith is specifically noted in the VCLT and besides good faith comes in many disguises as noted by Keily such as 'unconscionability, fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness' and 'honesty in fact'.'[59]

Arguably one case where good faith has come in disguise was noted in *Methanex v United States* where the tribunal noted:

> … [i]n the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness.[60]

This leads back to both Burton[61] and Summers[62] as noted above. Both stating in their seminal work that good faith cannot be defined.

Of real significance and importantly the intention is focused on upholding the intention of the parties which is not only gleaned from the contractual instrument but also through implication and hence interpretation. Burton's interpretation was that if terms are clear, courts must uphold the contractual agreement. He restricts the application of good faith to terms which have not clearly established the performance duties of parties.[63] The result is that a certain degree of discretion in performance is expected or even needed. [64] Burton in essence describes good faith as a functional tool to ascertain whether parties with discretion to perform, exercise this duty within the contemplations the parties had at the formation of the contract. Summers in reply argued that Burton tried to tender a general definition when he stated that 'good faith performance occurs when a party's discretion is exercised for any purpose within the reasonable

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[56] *SD Myers, Inc. v Government of Canada (Partial Award)* (NAFTA/UNCITRAL, 13 November 2000) 259.
[57] Ibid [17].
[58] Ibid [19].
[59] Troy Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 1 *Vindobona Journal od International Commercial Law and Arbitration,*15–40.
[60] *Methanex Corporation v United States of America (Jurisdiction)* (NAFTA/UNCITRAL, 3 August 2005 <http://www.state.gov/documents/organization/51052.pdf.>.
[61] Steven Burton 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94(2) *Harvard Law Review* 369; (1981) 67 *Iowa Law Review* 1 and (1984) 69 *Iowa Law Review* 497.
[62] See, eg, Robert Summers, ' 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 *Virginia Law Review*, 195.
[63] Bruno Zeller, 'The Elusive Term of Good Faith in Contract Law: Is There an Acceptable Transnational Definition?' (Speech delivered at The Hochelaga Lectures, University of Hong Kong, 7 October 2014) 40.
[64] Ibid 501.

contemplation of the parties at the time of formation to capture opportunities that were preserved upon entering the contract, interpreted objectively.'[65]

Hence good faith is more than a tool to interpret any treaty. It extends into the behaviour of the parties. It is argued that good faith, as a state of mind, need not have a particular outcome but rather, that good faith as a state of mind signals, amongst other things essentially, what attitude and commitment parties exhibit to one another. [66]

Arguably it is not correct to state that 'neither the concept of good faith nor legitimate expectations are component elements of fair and equitable treatment'[67] and then argue that customary international law must be established to determine the breach of the minimal standard.[68] After all, international customary law has been developed by the VCTL, which includes good faith.

It is unnecessary to always have an abstract definition in order for a concept to be applicable. It is possible to apply good faith if the material facts are known or can be identified. Essentially, good faith is linked to known facts and need not be independently defined or constrained to a rigid rule: 'it acquires substance from the particular events that take place and to which it is applied.'[69] It is argued that Burton specifically alluded to this fact in his theory of good faith. It also has to be conceded that good faith is not a principle in all jurisdictions. Especially, English common law is resolutely opposed to any introduction of good faith as a principle. In *Walford v Miles* the court noted:

> The concept of a duty of care on negotiation in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiation….a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.[70]

The staunch position taken by the English common law is reflected differently in the US, which is the only common law country that has enacted good faith in its statutory regime. Section 1–203 of the Uniform Commercial Code states 'every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement'.

The application and definition of good faith in public international law mirrors the one in contract law as it also requires parties to a transaction to deal honestly and fairly with each other.[71] D'Amato argues that good faith is rooted in natural law which has the effect that it puts constraints upon a nation to take into account the reasonable expectations and needs of other nations in the international community. Hence a treaty should be implemented to include the exchange of reciprocal obligations and would 'exclude the exploitation of an advantage deriving from a literal but mutually unintended reading of a treaty or other international agreements.'[72] In essence, the seminal work of Burton – as noted above – is replicated not only in contract law but also public international law where fair and equitable treatment has been understood to prohibit acts by states which amount to bad faith.[73] Furthermore, the principle of good faith might affect the claimant's right in local enforcement proceedings. Conversely 'if a lack of good faith by a foreign investor is proven those principles might buttress an argument that a Contracting State need not enforce an ICSID award in its

[65] Steven Burton, 'Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Law Code' (1981) 67 *Iowa Law Review* 373.
[66] Bruno Zeller, *Good Faith – The Scarlet Pimpernel of the CISG,* (May 2000) CISG Database <www.cisg.law.pace.edu>.
[67] *Spence International Investments LLC and Berkowitz et al v The Republic of Costa Rica (Jurisdiction)* (UNICITRAL Ad Hoc Tribunal, Case No UNCT/13/2, 25 October 2016) [17].
[68] Ibid [23].
[69] *Aiton v Transfield* [1999] NSWSC 996 (1 October 1999).
[70] *Walford v Miles* [1992] 2 WLR 174, 181.
[71] Anthony D'Amato, 'Good Faith' (1992) 1 *Encyclopaedia of Public International Law* 599.
[72] Ibid 600.
[73] Baldwin, Kantor and Nolan, above n 27, 19.

national court.'[74] Most importantly Burton noted that 'good faith performance occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation to capture opportunities that were preserved upon entering the contract, interpreted objectively.'[75]

Specially, in ICSID arbitrations, Burton's view should be taken into consideration as it is anecdotally reported that States do tend to draw a proceeding out as long as they can. Arguably, therefore, if a party to the agreement attempts to draw matters unnecessarily out, it is in effect acting in bad faith. This is so as they do not use the discretion to exercise the capture of opportunities which were at the forefront of the reason to enter into an investment agreement in the first place. In other words, Burton's theory would, especially in ICSID arbitration, be a very useful tool for arbitrators to develop a theory or application of good faith.

This leads to an important question namely how has good faith influenced the reliance of arbitrators on previous cases or in other words does precedent play an important role in ICSID decisions.

VI THE USE OF PRECEDENT

As seen above good faith comes in many disguises and has been introduced in legal cultures differently or not at all as in England. The problem therefore is how good faith can be a precedential principle when there is no accepted definition.

Guillaume notes that since 1922 the *stare decisis* rule has been excluded in international law.[76] The Permanent Court of Justice noted in 1926 that 'the object of [Article 59 of the Statute] is (...) to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes'[77]

However, the other side of the coin is that certainty in decision-making is important as business and their legal counsel need a minimum of foreseeability when engaging in dispute resolution. Despite the fact that ICSID tribunals are not bound by the rule of *stare decisis,* precedent does have a role to play – the question is – when and in what circumstances. Argentina is a case at hand where the use of precedent arguably would have assisted the tribunal to decide the issues of debt collection in a uniform manner. History shows that the unilateral, coercive and aggressive methods employed by the authorities were the tools used to manage, default and restructure their debt obligations[78] which contributed to diverse decisions on arguably the same facts.

However, the theoretical construct of what good faith actually means has only produced one common and acceptable outcome namely that a definition of good faith is not possible. Both Burton and Summers come to this conclusion. Summers' argument of the excluder principle, namely that the meaning of good faith must be derived from an opposite, that is bad faith,[79] is arguably only opening Pandora's Box; that is, the question has been reflected to a meaning of what is *bad faith*. In essence nothing has been gained as the definition of bad faith is as elusive as defining good faith.

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[74] Ibid 20.

[75] Burton, above n 65, 373.

[76] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *Journal of International Dispute Settlement* 5.

[77] Case concerning certain German interests in Polish Upper Silesia (The Merits) (Collection of Judgments) PCIJ Rep Series A No 7, 19 (25 May 1926); see also Case Concerning the Factory at Chorzow (Claim for Indemnity) (Jurisdiction) PCIJ Rep Series A No 9, 20 (26 July 1927). This was confirmed by the PCJ in Continental Shelf (Libyan Arab Jamahiriya/Malta) (Application to Intervene, Judgment) [1984] ICJ Rep 3, 26, s 42.

[78] Arturo Porzecanski, 'The Origins of Argentina's Litigation and Arbitration Saga' (Working Paper No 2015-6, American University, May 13 2015) 9. On page 10 it was also noted that good faith negotiations though exhibiting best practices were absent in the way Argentina managed their ICSID cases.

[79] Robert Summers, ''Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 *Virginia Law Review* 201.

The use of precedent poses two problems:

- as in domestic law, we must consider the methods followed by each of the judicial and arbitration bodies in the use of its own precedents; and
- further, due to the proliferation of autonomous jurisdictions, it is also necessary to investigate the extent to which each court or tribunal makes use of the precedent that other courts or tribunals create.

A similar problem arises for arbitration institutions.[80]

In relation to good faith in domestic laws, it is the legal certainty which is in question as good faith is interpreted differently or not at all. As far as international law is concerned the coherence is in question as international law has to be anchored in a domestic system and hence a circular argument is the result.

The question of this paper of course is what true role precedent plays within ICSID framework. To that end Article 53 of the Washington Convention gives the answer to the question namely 'the award shall be binding on the parties' and that the *stare decisis* rule is no more applied in ICSID than it is in other international jurisdictional instances.'[81]

Guillaume comments that 'the arbitration tribunals are nonetheless inclined to rely on precedent in order to evaluate their pertinence. They do this even today with rather excessive zeal.'[82] The problem is a persistent one as in many cases the facts are that States in question might have or have treated the investor in less than a 'fair and equitable manner' even in the absence of bad faith. The question again is; how is it determined that there was an absence of bad faith? If that is so, then Summers would have argued that good faith must be present which of course is not the case. Bad faith and a lack of fair and equitable standards are two negative standards and it really does not matter which one is applied by a State as both give rise to a claim under the contract or the BIT, whichever is applicable. Admittedly though the remedy might be different but at least there is consensus that remedies rely only on facts and hence are not capable of forming a precedent.

However, if Articles 31 and 32 of the VCLT are taken as a guide to a decision where good faith is an issue a difficulty might arise. The question of good faith as proclaimed by the VCLT has taken on the mantle of a customary law and hence has a bearing on decisions reached by international arbitrations, such as ICSID.

> These are conventional norms (or more frequently customary norms created by the practice and by the *opinio juris* of States), elevated to peremptory norms by way of the conditions fixed by the Vienna Convention … and it has been arbitrators and judges who have been called to promote this concept and to define its contents.[83]

There is no doubt that precedent contributes toward certainty and predictability and for this reason it arguably is a necessity. However 'the cult of the precedent is thus just as dangerous as the rejection of precedent. Distinctions impose themselves and it is often wise to accept only a jurisprudence constant.'[84] ICSID Tribunals have advanced the good faith argument but not in a uniform way. It relates to different sources:

i. a rule of interpretation of treaties
ii. an obligation part of customary international law

[80] Guillaume, above n 76, 7.
[81] Ibid 17, quoting *El Paso Energy International vs Argentine Republic* (Decision on competence) (2006) ICSID case No ARB/03/15 27 April 2006 s 39.
[82] Ibid 16.
[83] Ibid 22.
[84] Ibid 23.

iii. the requirements of legitimate expectations and transparency flowing from fair and equitable treatment without any obvious legal source other than the good faith principle in international [law]

iv. or the absence of good faith being one of the elements of the obligation[85]

Given this diversity of applications or arguably definitions of good faith it is difficult to argue that good faith is a principle of international law let alone to attach any precedential value to it. However, at the same time, its existence and usefulness cannot be ignored either.

This paper has argued that good faith is not a 'jurisprudence constant' and hence Burton's theory that good faith merely preserves the reasonable contemplation of parties at the time of formation of the contract appears to be the most useful explanation or working tool of good faith. It is without doubt that to transplant domestic understanding of good faith into international instruments merely disguises a homeward trend[86] and must be avoided. The conclusion is that good faith is not a very good candidate when the discussion turns to whether precedent is a useful tool in ICSID arbitrations.

VII CONCLUSION

Although the principles of good faith sound simple, it still lacks global consensus in relation to its definition. Notwithstanding, its elusive definition, good faith as part of the VCLT wields considerable influence which extends to the interpretation of ICSID and any awards made under its jurisdiction.

Beyond domestic laws, international conventions are viewed as extending the debate on good faith. Civil law has already accepted the international harmonisation of good faith through the VCLT, ICSID, BITs, the UNIDROIT *Principles on the Unification of Private Law*, Contracts and European Contract Laws. Until the common law is able to accept the principles of good faith within the context of a harmonisation process, it will remain reliant upon the substitutes that have been developed.

With the variety of legislation within the legal systems of the world, it is necessary to have some form of harmonising in order to produce a system whereby interpretation by domestic courts are aligned and the benefits flow from the reduction of legalistic argument.

In the context of globalisation, there is increasing pressure on nations to accept uniformity and harmonisation of domestic laws with international laws. Ultimately, for a country to thrive commercially on a global scale, it must align its domestic laws to reflect international laws and conventions.

This can be achieved with the common law systems enacting legislation which aligns with the expansive civil law approach to the principle of good faith. However as the debate has advanced as to the utility of precedent in ICSID arbitrations caution must be exercised when good faith is called upon to resolve a dispute. Good faith comes in many disguises and hence an arbitrator must be aware or should be conscious of why good faith is applied. This paper argued that Burton's theory must be the foundation stone upon which good faith can be applied. In other words, good faith is the rule of law to remedy the breach of contract which was due when a party with discretion to perform did not exercise this duty within the contemplations the parties had at the formation of the contract.

[85] Wolters Kluwer, Kluwer Arbitration Blog <http://kluwerarbitrationblog.com>.

[86] Andersen, above n 12, 311.