CHAPTER 21

Evidence and the Principle of Good Faith in Investment Arbitration: Finding Meaning in Public International Law

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1 Introduction

Investment arbitration is a relatively young field of dispute resolution, and therefore, available precedent for taking decisions can be limited in comparison to more developed areas of international law. Often situations arise in which the language of either the treaties or the rules simply offer limited or no guidance. By reaching into broader principles of public international law, tribunals are able to supplement the limited guidance provided. In this respect, tribunals reach into public international law, in particular decisions by the International Court of Justice, to support decisions—using both the reasoning of earlier public international law tribunals as well as the larger principles of public international law. The use of the principle of good faith is a critical example of this interaction. As will be discussed below, good faith allows interaction with the ideal of a fair trial as well as procedural fairness. In the submission of evidence, the idea of a fair trial as well as the principle of good faith frequently act as guiding principles in decisions on evidence.

As a more defined field of law, public international law gives authority to the development of investment arbitration. This grounding, however, does not mean that investment arbitration mirrors public international law. Instead, tribunals often apply these principles and the reasoning of international tribunals but within the confines of the investment arbitration context—thus giving it a distinct interpretation and application. Cross-referencing with public international law serves usefully as a background to strengthen the field of investment arbitration.

The following chapter first identifies the background to the general idea of the fair trial and the principle of good faith as supported in public international law as well as the application by tribunals. Then the analysis turns to how the application of these general principles has been developed in the investment arbitration context.
II The Principles Guiding Evidentiary Submissions in Public International Law

A Good Faith in Public International Law

Good faith has been well-recognized as a general principle of international law.1 Supporting its place as a general principle, Kotzur has noted that ‘[g]ood faith belongs to the very few legal principles which do find resemblances in more or less all legal systems and legal cultures.’2 The basic meaning of good faith varies, however, in its application in international and national contexts.3 The principle arises throughout legal codes and decisions as a means of ensuring fairness. Yet, the principle cannot be simply defined. Notably, Bin Cheng indicated that good faith ‘eludes definition’.4 Such clear definition is arguably a

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2 Kotzur, in Max Planck Encyclopedia of Public International Law.

3 Peter Schlechtriem, Good Faith in German Law and in International Uniform Laws: ‘If the principle of good faith and fair dealing is indeed common to all legal systems based on the values of western civilization, then it should be easy to find a common core of concrete rules derived from this principle. [...] But I have looked in vain for a monograph [...] which would report and compare in detail the various manifestations of the principle and its applications and understanding in the legal systems of the Western world [...]’

4 Bin Cheng, General Principles of Law as Applied by Courts and Tribunals, 105. Cremades further contemplates the complexity of defining with specific state examples. After stating that good faith has been applied in the international arbitration context, he further notes