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The Obligation to Arbitrate Fairly and in Good Faith in Investment Treaty Arbitration

Andrew Newcombe (University of Victoria Faculty of Law) · Monday, April 19th, 2010

The principle of good faith arises in investment treaty arbitrations in various contexts. Tribunals, of course, regularly refer to Article 31(1) of the Vienna Convention for the rule that treaties shall be interpreted in good faith. Tribunals have noted that states must perform their treaty obligations in good faith. References to good faith occur in the interpretation of substantive obligations, notably fair and equitable treatment and the minimum standard of treatment in customary international law. Further, states sometimes seek to defend their actions on the basis that there was good faith in government conduct. This blog focuses on the obligation of good faith in the conduct of investment treaty arbitration proceedings. This procedural obligation should be distinguished from the separate issue of whether the investment in question and any claims arising from it are made in good faith.

Whenever there are allegations of misconduct by investors or states references to the principle of good faith are likely to follow. Not surprisingly, good faith has been relevant in cases involving issues of investor misconduct (*Plama v. Bulgaria*; *Phoenix Action, Ltd. v. Czech Republic*; *Fraport v. Philippines*; *Inceysa Vallisoletana S.L. v. El Salvador*). These cases have, however, involved questions of good faith in the making of the investment and the subsequent conduct of the investor, rather than whether the investor's claim was made and pursued in good faith (the exception is *Phoenix*—see below). In contrast, in a 2008 Decision on Preliminary Issues in *Libananco Holdings Co. Limited v. Turkey*, good faith was discussed in the context of the alleged interception and surveillance by Turkish police of legally privileged communications between the claimant, its counsel and witnesses. In addressing, the parties' submissions on the issue, the Tribunal (Mr. Michael Hwang S.C.; Mr. Henri C. Alvarez Q.C.; Sir Franklin Berman Q.C.) 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).
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> *Libananco Holdings Co. Limited v. Turkey*, Decision on Preliminary Issues, 23 June

> 2008, para. 79.

The Tribunal cites no authority for these principles, presumably because they are self-evident ground norms. The idea that there is a duty to arbitrate in good faith is well-established (see Born, *International Commercial Arbitration* at pp. 1008-1014) and, in the investment treaty context, has been recognized in other investment treaty awards (for example, see *Methanex Corporation v. United States of America, Final Award*, Part II – Chapter I, para. 54 at p. 56). The second principle flows as a necessary incident of a tribunal's jurisdiction and is implicit in arbitration rules that allow a tribunal to make decisions regarding the conduct of the arbitration proceedings.

If we accept that there is an obligation to arbitrate fairly and good faith, does that duty also apply to the making of a claim, or does it apply only to the procedural obligations that come with an agreement to arbitrate (i.e. co-operation and conduct in the proceedings)? Here I am thinking of *Phoenix v. Czech Republic* where the Tribunal referred to the principle that in order to have access to ICSID arbitration, investments must be made in good faith. The Tribunal referred to Phoenix's "initiation and pursuit of this arbitration" as "an abuse of the system of international ICSID investment arbitration" (para. 144). The Tribunal found an abuse of rights by the Claimant's "creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled" (para. 143). *Phoenix*, however, is unlike cases such as *Inceysa* or *Fraport*, where there was misconduct (fraud and illegality respectively) in the initial investment. In *Phoenix*, the Tribunal characterized the claimant's wrong as a "détournement de procédure", but the good faith issues in *Phoenix* are unlike those in *Libananco*, *Quiborax* or *Methanex*, where the issue was party conduct during the proceeding.

The obligation to arbitrate fairly and good faith identified in *Libananco* applies to party conduct during the proceedings. With respect to the investor's conduct in bringing a claim, good faith and other concepts, such as abuse of process, abuse of rights and *détournement de procedure*, may be relevant either as jurisdictional impediments (as suggested in *Phoenix*) or as issues of admissibility of claims (see my earlier post).

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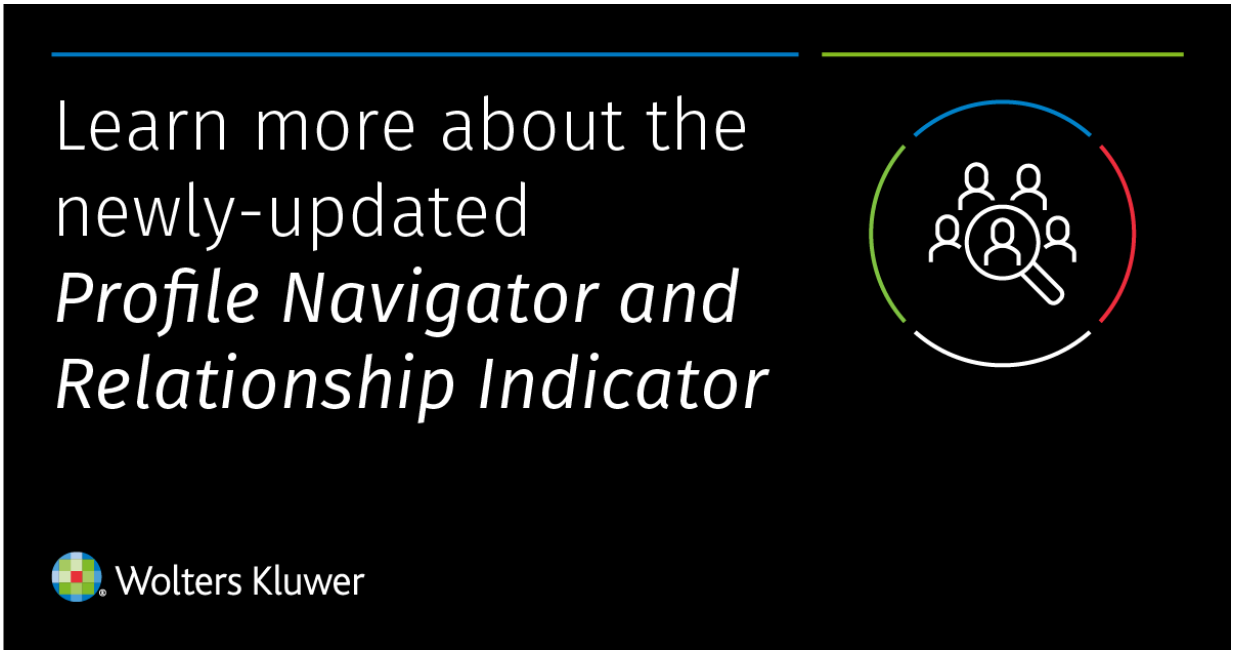

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