# Anatolie Stati, Gabriel Stati, Ascom Group, S.A. and Terra Raf Trans Traiding ("Stati Parties")

***v.***

# Republic of Kazakhstan ("Kazakhstan")

## Legal Opinion by Christoph Schreuer

## Introduction

1. Counsel for Kazakhstan has asked me for a legal opinion on the question of the effect of false or fraudulent evidence on the Award in *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, SCC Case No. V 116/2010 of 19 December 2013 ("**Award**").

2. For the purpose of preparing this legal opinion counsel for Kazakhstan has provided me with the following documents:

Arbitration Award dated 19 December 2013
Fourth Witness Statement of Patricia Nacimiento dated 27 August 2015
Swedish Court of Appeal judgment dated 9 December 2016
Fifth Witness Statement of Patricia Nacimiento dated 13 January 2017
Expert Report of Dr Patrick Schöldström
Judgement of Knowles J. dated 6 June 2017
Declaration of P. Carrington dated 1 April 2019
Affidavit of M. Kirtland dated 9 May 2019
Declaration of A. Foerster dated 10 May 2019
KPMG Letter to HSF dated 21 August 2019
KPMG Correspondence received from MoJ 25 October 2019
Report of PricewaterhouseCoopers dated 21 January 2020
Order of the Court of Appeal of Brussels dated 3 December 2019

3. From these documents it transpires that a new set of evidence has become available to Kazakhstan since the date of the Award and up until late October 2019, which reflects that in the arbitration proceedings under the Energy Charter Treaty ("**ECT Arbitration**") the Stati Parties submitted materially false statements and evidence to obtain the Award in their favour. Among such new evidence is the correspondence between the Stati Parties'

former auditors at KPMG Audit LLC ("**KPMG**"), the Stati Parties and counsel for Kazakhstan in the period of February 2016 and October 2019 ("**KPMG Correspondence**"). By virtue of the KPMG Correspondence, the auditors withdrew all audit reports issued for twenty six financial statements of Tristan Oil Ltd., Tolkynneftegaz LLP and Kazpolmunay LLP (collectively "**Stati Companies**") in the period of 2007 – 2009 ("**Financial Statements**") due to a number of material misrepresentations made by the Stati Parties during the audit process. Additionally, in its letter of 21 August 2019 addressed to Anatolie Stati, KPMG made the following demand:

> We are therefore writing to inform you that you should immediately take all necessary steps to prevent any further, or future, reliance on the following audit reports issued by KPMG Audit LLC…

4. I understand from the Report of PricewaterhouseCoopers LLP ("**PwC**") dated 21 January 2020 that this action of KPMG demonstrates that the Financial Statements and the financial record of the Stati Companies have been materially misstated.

5. I also understand that the audit reports and the Financial Statements were submitted to the Arbitral Tribunal by the Stati Parties during the ECT Arbitration and have been relied upon by the parties, their experts, witnesses and the Arbitral Tribunal. I note that in assessing these and other facts, PwC has come to the conclusion that the KPMG Correspondence inter alia "*entirely remove[s] confidence in the reliability of Tristan's, TNG's and KPM's overall financial information and anything derived therefrom or based thereon (including but not limited to, any written and oral testimony in the ECT Arbitration, expert opinions and statements from counsel based on such financial information).*"

6. I have no independent knowledge of the facts. My legal assessment is based purely on the factual evidence made available to me by counsel for Kazakhstan and as described in the Report of PwC dated 21 January 2020. For purposes of this legal opinion, I assume the information made available to me to be true.

7. A statement of my qualifications to write this opinion is attached.

## A. The Significance of Good Faith

8. Good faith is a fundamental legal principle. Black's Law Dictionary[1] defines good faith in the following terms:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. – Also termed *bona fides*.

9. Good faith finds expression in one form or another in all legal systems and cultures.[2] In international law, it is enshrined in a number of basic documents such as the United Nations Charter[3] and the Vienna Convention on the Law of Treaties (VCLT).[4] The Friendly Relations Declaration[5] emphasizes that the *bona fides* principle permeates the entire structure of international law. Therefore, good faith is a fundamental constituent principle of international law.

10. The Max Planck Encyclopedia of Public International Law describes the applicability of good faith (or *bona fides*) in international judicial proceedings in the following terms:

> Bona fides is the most fundamental principle of substantive law also applicable to the proceedings before international courts and tribunals. The general duty of loyalty between the parties can be seen as a crucial good faith standard. However, bona fides has a 'series of "concretizations" in the field of procedural law (…). Among these are the prohibition to wrongfully abuse procedural means, the principle of *venire contra factum proprium*, or estoppel, and the maxim of *nemo ex propria turpitudine commodum capere potest*, the latter ones also having counterparts in substantive law.[6]

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[1] 10th ed. (2014) p. 808.

[2] *M. Kotzur*, Good Faith (Bona fides), Max Planck Encyclopedia of Public International Law, Vol. IV, p. 509.

[3] Article 2(2).

[4] Articles 18, 26, 31.

[5] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970. Resolution 26/25 (XXV).

[6] *M. Kotzur*, Good Faith (Bona fides), Max Planck Encyclopedia of Public International Law, Vol. IV, p. 514.

11. Good faith is applied in numerous decisions of the International Court of Justice and other international courts and tribunals.[7] In the *Nuclear Tests* case, the International Court of Justice (ICJ) affirmed that:

> [o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.[8]

12. In *Certain Questions of Mutual Assistance in Criminal Matters*, the ICJ found that even if treaty provisions provided a state with considerable discretion, 'this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties'.[9]

13. There is also extensive authority for the importance of good faith in investment arbitration.[10] Arbitral tribunals have confirmed, for example, that good faith is inherent in fair and equitable treatment.[11]

14. In *Oostergetel v. Slovakia*,[12] the Tribunal described the requirement of *bona fides* and found that the use of legal instruments for purposes other than those for which they were created were examples of action in bad faith which may violate the fair and equitable treatment standard:

> 227. Finally, although it is a general principle of national and international law, the notion of good faith has been analyzed by investment tribunals as an element of the FET standard. Actions such as conspiracy of state organs to inflict damage on an investment, or the use of legal instruments for purposes

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[7] *Kotzur*, *op.cit*. p. 512.

[8] *Nuclear Tests* (Australia/New Zealand *v.* France), 1974 ICJ para. 46 (Judgment of 20 December).

[9] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti *v.* France), 2008 ICJ 177, 229, para. 145 (Judgment of 4 June).

[10] See *E. Sipiorski*, Good Faith in International Investment Arbitration (2019).

[11] *Nordzucker* v. *Poland*, UNCITRAL, Second Partial Award (Merits), 28 January 2009, paras. 92-94; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, paras. 828-863; *Genin, Eastern Credit Ltd. Inc. and AS Baltoil* v. *Republic of Estonia*, Award, 25 June 2001, para. 367; *Técnicas Medioambientales Tecmed S. A.* v. *The United Mexican States*, Award, 29 May 2003, para. 123; *Waste Management, Inc.* v. *United Mexican States*, Award, 30 April 2004, para. 138; *Saluka Investments BV (The Netherlands)* v. *the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 307; *Siemens* v. *Argentina*, Award, 6 February 2007, para. 308; *Frontier Petroleum* v. *Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 300.

[12] *Jan Oostergetel and Theodora Laurentius* v. *The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012.

> other than those for which they were created, have been cited by tribunals as examples of actions performed in bad faith which may constitute a violation of the standard. This said, it is clear that the FET standard may be violated even when the State does not act in bad faith.[13]

15. In *Sempra* v. *Argentina*,[14] the Tribunal, in discussing the FET standard, referred to good faith as the 'common guiding beacon'. It also found that a misrepresentation by the Claimant violated the principle of good faith 'which is at the heart of the concept of fair and equitable treatment'. Moreover, the requirement of good faith 'permeates the whole approach to the protection granted under treaties and contracts.'[15]

16. The principle of good faith is an important tool in dealing with the wrongdoing of an investor.[16] *Attila Tanzi* has described this situation in the following terms:

> The notion that a claim (*actio*) cannot arise from a wrongdoing (*causa turpi*) is a straightforward application of the principle of good faith. Likewise, it stands to reason that a right cannot arise from a wrongdoing, let alone from fraudulent behavior. … Good faith appears as a hermeneutic tool which allows the tribunal to find justice in any specific case and identify the instances of wrongdoing that warrant a denial of protection.[17]

17. A publication by UNCTAD[18] describes the consequences of dishonest behavior by the investor as follows:

> Fraud or misrepresentation on the part of an investor may form the basis of a legitimate regulatory interference with its rights. In such cases, even the outright termination of the investment may be justified, provided it is a proportionate response to the investor's conduct in light of the relevant domestic laws of the host State.[19]

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[13] At para. 227.

[14] *Sempra Energy International* v. *Argentina*, Award, 28 September 2007.

[15] At paras. 297-299. In a similar sense: *Siag* v. *Egypt*, 1 June 2009, para. 450.

[16] *A.C. Cohen Smutny* and *P. Polášek*, Unlawful od bad faith Conduct as a Bar to Claims in Investment Arbitration, in: A Liber Amicorum Thomas Wälde, Law Beyond Conventional Thought (*J. Werner, A. Hyder Ali* eds. 2009) p. 277.

[17] *A. Tanzi*, The Relevance of the Foreign Investor's Good Faith, in: General Principles of Law and International Investment Arbitration (*A. Gattini, A. Tanzi, F. Fontanelli* eds. 2018) p. 193, 202.

[18] Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2012.

[19] At p. 84.

18. The Tribunal in *Inceysa* v. *El Salvador*[20] attributed the highest importance to the principle of good faith:

> Good faith is a supreme principle, which governs legal relations in all of their aspects and content.[21]

19. The Tribunal found that by offering false information about its capacity to conduct the investment, the investor had violated the principle of good faith leading to the loss of rights under the BIT:

> It is clear to this Tribunal that the investment made by Inceysa in the territory of El Salvador, which gave rise to the present dispute, was made in violation of the principle of good faith. … Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT, …[22]

20. Other investment tribunals that detected *mala fide* conduct on the part of investors have also condemned this behavior in no uncertain terms. In all these cases the tribunals decided against the investors.

21. In *Plama* v. *Bulgaria*,[23] the investor had concealed his true identity from the host State. The Tribunal found that this amounted to a violation of good faith:

> The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law … but also of international law – as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, *inter alia,* the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment.[24]

22. In *Phoenix* v. *Czech Republic*,[25] the claimant tried to obtain the protection of a favourable BIT after the dispute had arisen. The Tribunal found that the *ex post facto*

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[20] *Inceysa Vallisoletana, S.L.* v. *Republic of El Salvador*, Award, 2 August 2006.

[21] At para. 230.

[22] At paras. 234, 239.

[23] *Plama Consortium Limited* v. *Republic of Bulgaria*, Award, 27 August 2008.

[24] At para. 144.

[25] *Phoenix Action, Ltd.* v. *The Czech Republic*, Award, 15 April 2009.

creation of a company for the purpose of obtaining treaty protection was not an investment in good faith.[26] The Tribunal said:

> In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance.[27]
> …
> The unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.[28]

23. In *Cementownia* v. *Turkey*,[29] the Tribunal dismissed the claim because it was based on a fabricated transaction. It said:

> Parties to an arbitration proceeding must conduct themselves in good faith. This duty, as the *Methanex* tribunal found, is owed to both the other disputing party and to the Tribunal.[30]

24. The Tribunal in *Malicorp* v. *Egypt*[31] also gave utmost importance to good faith:

> It is indisputable, and this Arbitral Tribunal can do no more than confirm it, that the safeguarding of good faith is one of the fundamental principles of international law and the law of investments.[32]

25. The clearest endorsement and application of the principle of good faith occurred in *Sanum* v. *Laos*.[33] In that case, the investor had dealt in bad faith with the government in the

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[26] At para. 100.

[27] At para, 106. See also para. 113.

[28] At para. 142.

[29] *Cementownia "Nowa Huta" S.A.* v. *Republic of Turkey*, Award, 17 September 2009.

[30] At para. 153.

[31] *Malicorp Limited* v. *The Arab Republic of Egypt*, Award, 7 February 2011.

[32] At para. 116.

[33] *Sanum Investments Limited* v. *Lao People's Democratic Republic*, Award, 6 August 2019.

making and conduct of the investment as well as in the proceedings before the Tribunal.[34] The Tribunal said:

> The principle of good faith arises in investment treaty arbitrations in various contexts. Tribunals, of course, regularly refer to Article 31(1) of the VCLT for the rule that treaties shall be interpreted in good faith. The obligation extends to a duty of parties to arbitrate in good faith. In *Phoenix v. Czech Republic*, the tribunal referred to Phoenix's "initiation and pursuit of this arbitration" as "an abuse of the system of international ICSID investment arbitration."[35]
> …
> It is well established that the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty.[36]
> …
> the Tribunal wishes to leave in no doubt its conclusion that Mr. Baldwin and Sanum exhibited manifest bad faith in various efforts not only to manipulate the Government to advance their gambling initiatives but, in the instance of Madam Sengkeo, to manipulate the arbitration process itself.[37]

26. In other cases, tribunals investigated accusations of bad faith on the part of investors but found that respondents had not proven any violations of good faith.[38]

27. The above evidence demonstrates that, despite its high level of abstraction, investment tribunals have made the requirement that an investor must act in good faith, operational. Findings of bad faith on the part of investors have invariably resulted in the dismissal of their claims.

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[34] At para. 171.

[35] At para. 172. Footnotes omitted.

[36] At para. 175. Footnote omitted.

[37] At para. 177.

[38] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited* v. *Republic of Kenya*, Award, 22 October 2018, paras. 303-308; *Glencore International A.G. and C.I. Prodeco S.A.* v. *Republic of Colombia*, Award, 27 August 2019, paras. 748, 826, 844, 855, 859, 1534-1537.

## B. The Clean Hands Principle

28. A concretization of good faith is the principle of clean hands. The 'clean hands' principle precludes a claim in a situation that has been brought about by the claimant's wrongdoing. This is mandated by the principle of good faith. The clean hands principle also finds expression in the Latin maxim *nemo auditur propriam turpitudinem allegans*. Analogous concepts in international arbitral practice are the principles *ex iniuria ius non oritur* and *ex dolo malo non oritur actio, nullus commodum capere potest de iniuria sua propria.*[39]

29. The policy behind this maxim is twofold. As a matter of principle, courts and tribunals will not lend their arm to offer a remedy in situations brought about by illegal or immoral methods. In addition, the knowledge that no remedy will be available in a situation of this kind is designed to act as a deterrent against illegal or unethical behaviour.

30. According to Bin Cheng in his seminal study on general principles of law:

> 'an unlawful act cannot serve as the basis of an action in law.' The principle ex *delicto non oritur actio* is generally upheld by international tribunals. [40]

31. Sir Gerald Fitzmaurice stated in his lectures at the Hague that:

> 'He who comes to equity for relief must come with clean hands.' Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it.[41]

32. The principle of clean hands has been considered on a number of occasions by the PCIJ and ICJ. Most prominent in this context is the *Diversion of Water from the River Meuse* case, where the PCIJ interpreted a 1963 treaty relating to the regime of diversion from the river Meuse. The Netherlands brought the proceedings against Belgium, alleging that Belgium had carried out certain works contrary to the treaty. This was rejected by

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[39] *S. Schwebel*, 'Clean Hands, Principle', in online version of *R. Wolfrum* (ed.), Max Planck Encyclopedia of International Law Vol. (updated 2013), para. 1.

[40] *B. Cheng*, General Principles of Law as Applied by International Courts and Tribunals (1953) 155.

[41] *G. Fitzmaurice*, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 RdC (1958) 119.

Belgium, pointing out that the Netherlands had constructed the Borgharen barrage in breach of the treaty, and that therefore the submissions of the Netherlands were ill-founded. The PCIJ agreed with Belgium. In light of the Netherlands' wrongful conduct it found

> it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.[42]

33. In its *Namibia* Advisory Opinion, the ICJ explained that

> [o]ne of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights it claims to derive from the relationship.[43]

34. Judge Schwebel relied heavily on the clean hands doctrine in his dissenting opinion in *Nicaragua* v. *United States*. Judge Schwebel argued forcefully that Nicaragua should be denied standing before the ICJ because it came with 'unclean hands'. According to Judge Schwebel: 'Nicaragua's unclean hands require the Court in any event to reject its claims.'[44] In arguing the firm rooting of the 'clean hands doctrine' in international law, Judge Schwebel pointed to numerous authorities, *inter alia* to Sir Gerald Fitzmaurice:

> 271. More recently, Sir Gerald Fitzmaurice – then the Legal Adviser of the Foreign Office, shortly to become a judge of this Court [ICJ] – recorded the application in the international sphere of the common law maxims: 'He who seeks equity must do equity' and 'He who comes to equity for relief must come with clean hands' and concluded:
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> > 'Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it.' ('The General Principles of International Law', 92 *Collected Courses*, Academy of International Law, The Hague, (1957-II), p. 119. For further recent support of the

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[42] *Diversion of Water from the Meuse*, 1937 PCIJ, Series A/B (No. 70) (Judgment of 28 June), p. 25.

[43] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ 16, 46, para. 94 (Advisory Opinion of 21 June)

[44] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v*. United States of America) (Merits), 1986 ICJ 259, 391 (Judgment of 27 June) (Diss. Op. of Judge Schwebel).

> authority of the Court to apply a 'clean hands' doctrine, see Oscar Schachter, 'International Law in the Hostage Crisis', *American Hostages in Iran*, 1985, p. 344.)[45]

35. Likewise, Judge Schwebel affirmed:

> The 'clean hands' doctrine finds direct support not only in the *Diversion of Water from the Meuse* case but a measure of support in the holding of the Court in the *Mavrommatis Palestine Concessions* case. …[46]

36. Also, Judge Anzilotti held in his dissenting opinion in the *Legal Status of Eastern Greenland* case, in regard to Norway's request for a declaration from the Court that the occupation effected by the Norwegian Government was lawful and valid, that 'an unlawful act cannot serve as the basis of an action at law.'[47]

37. In addition, the ICJ stated in the *Gabčikovo-Nagymaros Project* case that it could not:

> disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation – or the practical possibilities and impossibilities to which it gives rise – when deciding on the legal requirements for the future conduct of the Parties. This does not mean that facts—in this case, facts which flow from wrongful conduct—determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.[48]

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[45] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v*. United States of America) (Merits), 1986 ICJ 259, 394, para. 271 (Judgment of 27 June) (Diss. Op. of Judge Schwebel).

[46] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v*. United States of America) (Merits), 1986 ICJ 259, 393, para. 270 (Judgment of 27 June) (Diss. Op. of Judge Schwebel). His statement is based on the following passages from the *Diversion of Water from the Meuse* case: 'It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party […] a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.' (*Diversion of Water from the Meuse*, 1937 PCIJ, Series A/B (No. 70) (Judgment of 28 June), Individual Opinion of Mr. Hudson, p. 77). As mentioned above, the majority agreed with this opinion. In *Mavrommatis*, the Court held that: 'M. Mavrommatis was bound to perform the acts which he actually did perform *in order to preserve his contracts from lapsing as they would otherwise have done.*' [emphasis added by Judge Schwebel].

[47] *Legal Status of Eastern Greenland*, 1933 PCIJ, Series A/B (No. 53) (Judgment of 5 April) (Diss. Op. by Judge Anzilotti), at p. 95.

[48] *Gabčikovo-Nagymaros Project* (Hungary *v*. Slovakia), 1997 ICJ 7, 76, para. 133 (Judgment of 25 September).

38. Various Claims Commissions have also relied on the clean hands doctrine. In *The Medea* (or *The Good Return Cases*),[49] the US citizen Captain Clark had illegally captured Spanish vessels in the war between Spain/Portugal and Oriental Banda/Venezuela. Clark then tried to assert his 'rights' before different Claims Commissions.[50] Especially striking are the words of the American Commissioner Hassaurek of the Ecuadorian-United Claims Commission. Hassaurek pointed out that Clark's conduct was in violation of US municipal law as well as treaty provisions between United States and Spain, and stated:

> What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian Republics? Can he be allowed, as far as the United States are concerned, to profit his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit*. … I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. *A party who asks for redress must present himself with clean hands*.[51]

39. In the *Pelletier* case in 1885, the United States Secretary of State dropped pursuit of a claim of one Pelletier against Haiti on the ground of Pelletier's wrongdoing:

> *Ex turpi causa non oritur actio*: by innumerable rulings under Roman common law, as held by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied.[52]

40. Reference to the principle *ex delicto non oritur actio* is furthermore made in a number of other cases in international practice.[53]

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[49] 3 Int. Arb. 2731 *et seq.*, as cited by B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953) 155 *et seq*.

[50] Although Clark's claims were allowed before the first Grenadine-United States Claims Commission (1857), all subsequent Commissions between the United States and Grenada (1864) as well as between the United States and Venezuela (1885) rejected his claims relying on the clean hands theory.

[51] 3 Int. Arb. 2731, at 2738-2739.

[52] Foreign Relations of the United States, 1887, p. 607 (as cited by B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953) 157).

[53] *E.g. The Lawrence* (1855), which concerned the seizure of a ship engaged in slave trade, an act prohibited by the law of the Claimant's own State and by the law of nations. 'The owners of the 'Lawrence' could not claim the protection of their own Government, and, therefore, in my judgment, can have no claim before this commission.' (Brit.-US Claims Commission (1853), Hornby's Report, 397, at 398). The *Brannan* Case, where the claim was arising out of unneutral services rendered in violation of the law of the Claimant's own State: 'The Umpire cannot believe that this international commission is justified in countenancing a claim founded

41. There is also authority for the clean hands principle in international investment law. A number of authors have concluded that the doctrine of unclean hands is firmly established. *Richard Kreindler* has drawn the following conclusion from practice:

> Under the Unclean Hands Doctrine, a tribunal can and should deny relief to a claimant "whose conduct in regard to the subject-matter of the litigation has been improper" … As the Unclean Hands Doctrine is encountered in the domestic legal orders of many States, it should as a rule qualify as a general principle of law, and thus as a source of international law pursuant to Article 38(1)(c) of the ICJ Statute.[54]

42. *Aloysius Llamzon* has drawn the following conclusion from the clean hands principle:

> Once an investor's wrongdoing—corruption, fraud or some other illegal or, even legal conduct done in bad faith—is proven, its claims may be dismissed in their entirety, without any further inquiry into any illegalities the host State may have committed.[55]

43. *Lamm*, *Pham* and *Moloo* have articulated the principle in the following terms:

> A claimant having engaged in significant fraud or corruption in relation to its investment would not be entitled to rely on the substantive legal protections contained in an investment treaty, *i.e.* their claims will be inadmissible as a result of the "clean hands" doctrine in international law. … Under this doctrine, a claimant who comes to the tribunal with unclean hands in relation to its investment, should not be permitted to pursue its claims to protect that investment. Under this proposition a claimant who has engaged in significant fraud or corruption in relation to its investment, independent of whether those acts are in breach of transnational public policy, has engaged in wrongful conduct sufficient to prevent it from pursuing claims which have been tainted by that conduct.[56]

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upon the contempt and infraction of the of the laws of one of the nations concerned.' (Mex.-US Claims Commission (1868), 3 Int. Arb. 2757, at 2758). See for further reference B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953) 155 *et seq*. See also the dissenting opinions of Judges Morozov and Tarazi in *United States Diplomatic and Consular Staff in Tehran* (United States of America *v*. Iran) (Merits), 1980 ICJ 51 (at 53-55), 58 (at 62-63) (Judgment of 24 May).

[54] *R. Kreindler*, Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine, in: Between East and West: Essays in Honour of Ulf Franke (*K. Hobér, A. Magnusson, M. Öhrström* eds. 2010) 309, 316-317.

[55] *A. Llamzon*, Yukos Universal (Isle of Man) v The Russian Federation *The State of the 'Unclean Hands' Doctrine in International Investment Law*: Yukos *as both Omega and Alpha*, 30 ICSID Review (2015) 315, 317.

[56] *C.B. Lamm, H.T. Pham, R Moloo*, Fraud and Corruption in International Arbitration, in: Liber Amicorum Bernardo Cremades (*M.Á. Fernández-Ballesteros*, *D. Arias* eds. 2010) 699, 720, 724.

44. Other authors, although favouring the doctrine of clean hands, have left open the question whether it has matured into a general principle of law.[57]

45. There is also support for the principle of clean hands in the practice of investment tribunals. In *Fraport* v. *Philippines*,[58] the claimant had employed tactics to circumvent limits under the host State's law on foreign control in major infrastructure projects. The Tribunal found that this deprived the investor of treaty protection:

> Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international law, such as the "clean hands" doctrine or doctrines to the same effect.[59]

46. *Hesham Talaat M. Al-Warraq* v. *Indonesia*[60] is the clearest endorsement of the clean hands principle in international investment law. The Tribunal found that the claimant had breached the local laws in the banking sector. He had thereby deprived himself of the protection of the OIC Agreement.[61] The Tribunal said:

> the Tribunal is of the view that the doctrine of *"clean hands"* renders the Claimant's claim inadmissible. As Professor James Crawford observes, the *"clean hands"* principle has been invoked in the context of the admissibility of claims before international courts and tribunals. Also the Tribunal refers to the decision of Lord Mansfield in Holman v Johnson (1775) which states:
>
> > *"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted".*

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[57] *P. Dumberry*, State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award, 17 The Journal of World Investment & Trade (2016) 229-259; *A. Tanzi*, The Relevance of the Foreign Investor's Good Faith, in: General Principles of Law and International Investment Arbitration (*A. Gattini, A. Tanzi, F. Fontanelli* eds. 2018) p. 193;

[58] *Fraport AG Frankfurt Airport Services Worldwide* v. *Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014.

[59] At para. 328. Footnotes omitted.

[60] *Hesham T. M. Al Warraq* v. *Republic of Indonesia*, Final Award, 15 December 2014.

[61] Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (1981).

> The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement.[62]

47. The *Al-Warraq* Tribunal emphasized that even though the claimant had not received fair and equitable treatment, he could not pursue his claim since the doctrine of clean hands prevented the awarding of damages.[63]

48. In *Churchill Mining* v. *Indonesia*,[64] the Tribunal found that the claimant had submitted forged documents.[65] In dismissing the claim, it also relied on the doctrine of clean hands:

> particularly serious cases of fraudulent conduct, such as corruption, have been held to be contrary to international or transnational public policy. The common law doctrine of unclean hands barring claims based on illegal conduct has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals.[66]

49. The practice of tribunals on the principle of clean hands is not, however, entirely consistent. Some tribunals have defined it restrictively[67] or have questioned the existence of a general principle of law. Thus, in the *Yukos* case,[68] the Tribunal held:

> The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands."[69]

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[62] At paras. 646, 647.

[63] At paras. 648, 652, 654.

[64] *Churchill Mining PLC and Planet Mining Pty Ltd* v. *Republic of Indonesia*, Award, 6 December 2016.

[65] The case is discussed in more detail below at paras. 61-64.

[66] At para. 493.

[67] *Niko Resources (Bangladesh) Ltd*. v. *People's Republic of Bangladesh*, Decision on Jurisdiction, 19 August 2013, paras. 476-485.

[68] *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*, Final Award, 18 July 2014, paras. 1357-1363. See also *Guyana v. Suriname*, PCA, Award of 17 September 2007 (under UNCLOS Ch VII), para. 418.

[69] At para. 1358. See also *South American Silver Ltd. (Bermuda)* v. *The Plurinational State of Bolivia*, Award, 22 November 2018, paras. 439-453, where the Tribunal held that Bolivia had not submitted sufficient evidence to establish that the clean hands doctrine enjoys the status of a general principle of law.

50. Despite considerable evidence for the existence of a clean hands principle in international law, the authority is not unanimous. Even if the unclean hands doctrine as such has not found universal acceptance, certain emanations based on its principal idea are well established. As stated by *Ori Pomson*:

> Whereas certain forms of the clean hands doctrine have relatively well-established recognition in the jurisprudence of international courts and tribunals, this is not the case for all forms of the clean hands doctrine.[70]

51. One of the forms of the clean hands doctrine that is well established, is the condemnation of corruption with the consequence that, if established, it will lead to a rejection of the claim.[71] Another form of the clean hands principle that is well established is the loss of protection for investments made by illegal means, especially fraud and deception.[72] A third expression of the clean hands principle that is generally accepted is the rejection of a claim where the claimant has submitted false or fraudulent evidence to the tribunal.

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[70] *O. Pomson*, The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry, 18 Journal of World Investment & Trade (2017) 712, 726.

[71] For detailed treatment see *R. Kreindler*, Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine, in: Between East and West: Essays in Honour of Ulf Franke (*K. Hobér, A. Magnusson, M. Öhrström* eds. 2010) 309; *B.K. Greenwald*, *J.A. Ivers*, Addressing Corruption Allegations in International Arbitration, 2.3 International Investment Law and Arbitration (2018) 1; *E. Gaillard*, The emergence of transnational responses to corruption in international arbitration, 35 Arbitration International (2019) 1.

[72] *B. Cremades*, Investment Protection and Compliance with Local Legislation, 24 ICSID Review (2009) 557; *A.C. Cohen Smutny* and *P. Polášek*, Unlawful od bad faith Conduct as a Bar to Claims in Investment Arbitration, in: A Liber Amicorum Thomas Wälde, Law Beyond Conventional Thought (*J. Werner, A. Hyder Ali* eds. 2009) p. 277; *J. Kalicki*, *D. Evseev* & *M. Silberman*, Legality of Investment, in: Building International Investment Law, The First 50 Years of ICSID (*M. Kinnear et al*. eds., 2016) 127.

## C. False Evidence

52. Investment tribunals have consistently dismissed claims based on irregular or false evidence.[73] The reasons put forward by Tribunals were that claimants had acted contrary to the principle of good faith, that their conduct constituted and abuse of process and that procedural fraud was contrary to public policy.

53. Irregularities extended to the mode in which claimants had obtained the evidence. In *Methanex* v. *United States*,[74] the claimants had illegally entered property to collect evidence from dumpsters. The Tribunal dismissed the evidentiary value of documents obtained by way of trespass. The Tribunal said:

> The 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.[75]

54. In *EDF* v. *Romania*,[76] the dispute about evidence related to the manner in which claimant had obtained it as well as to its authenticity. The Tribunal said:

> The proffered audio was obtained illegally having been made secretly in violation of the fundamental right to privacy of the person recorded. Lastly, the audio is not authenticated, is incomplete and is riddled with manipulations that rob it of all evidentiary value.[77]

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[73] By contrast, it appears to be the practice of the ICJ not to address instances of false evidence put before it in its published decisions. The reason is said to be fear of insulting the national honour of sovereign nations. See *M. Reisman* and *C. Skinner*, Fraudulent Evidence before Public International Tribunals (2014).

[74] *Methanex Corporation* v. *United States of America*, Final Award, 3 August 2005.

[75] Award, Part II, Chapter I, para. 58.

[76] *EDF (Services) Limited* v. *Romania*, Procedural Order No. 3, 29 August 2008; Award, 8 October 2009.

[77] Procedural Order No. 3, para. 4. See also Award at paras. 221-237.

55. In *Europe Cement* v. *Turkey*,[78] the Tribunal concluded that the claimant had attempted to base its claim of share ownership of "inauthentic documents and that the claim was fraudulent."[79] The Tribunal said:

> It is well accepted in investment arbitrations that the principle of good faith is a principle of international law applicable to the interpretation and application of obligations under international investment agreements. In the Tribunal's view, this applies equally to cases brought under the Energy Charter Treaty.[80]
> …
> The lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic. The Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith.[81]
> …
> In the view of the Tribunal, conduct that involves fraud and an abuse of process deserves condemnation. In the present case, the Tribunal has concluded that the claim to ownership of shares in CEAS and Kepez was based on documents that on examination appear to have been back-dated and thus fraudulent.[82]

56. The Tribunal held that a claim based on false assertions of ownership was an abuse of process[83] and dismissed the claim in its entirety for lack of jurisdiction.

57. *Cementownia* v. *Turkey*[84] involved similar facts. The claimant had fabricated a transaction whereby it would have acquired the purported investment.[85] The Tribunal found that the relevant transactions never took place and that the claim was a sham.[86] The Tribunal said:

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[78] *Europe Cement Investment & Trade S.A.* v. *Republic of Turkey*, Award, 13 August 2009.

[79] At para. 163.

[80] At para. 171. Footnote omitted.

[81] At para. 175.

[82] At para. 180.

[83] At para. 175.

[84] *Cementownia "Nowa Huta" S.A.* v. *Republic of Turkey*, Award 17 September 2009.

[85] At para. 136.

[86] At para. 147.

> Here the Claimant's conduct is not even close to proper conduct. … The transaction that would pose the issue of whether the corporate veil should be pierced was fabricated.[87]

58. The claimant's conduct failed to meet the good faith standard and was an abuse of right.[88] The Tribunal's conclusion was:

> In light of all the above-stated considerations, the Arbitral Tribunal is of the opinion that the Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case. This constitutes indeed an abuse of process. In addition, the Claimant is guilty of procedural misconduct: once the arbitration proceeding was commenced …[89]

59. The Tribunal dismissed the claim. Additionally, it made a declaration to the effect that the claimant had filed a fraudulent claim.[90]

60. In *Levy and Gremcitel* v. *Peru*,[91] the claimants had submitted fabricated evidence to the Tribunal to manufacture the Tribunal's jurisdiction. The relevant documents were backdated to establish that a share transfer had taken place at a time when the dispute had not yet arisen nor was foreseeable. The Tribunal said:

> A global evaluation of the facts relating to the Claimants' attempts to establish jurisdiction thus evinces a pattern of manipulative conduct that casts a bad light on their actions.
> 195. In light of the foregoing facts, the Tribunal cannot but conclude that the corporate restructuring by which Ms. Levy became the main shareholder of Gremcitel on 9 October 2007 constitutes an abuse of process. Therefore, the Tribunal is precluded from exercising jurisdiction over this dispute.[92]

61. The most detailed discussion of false evidence in an investment case came from *Churchill Mining* v. *Indonesia*.[93] The Tribunal found that 34 documents submitted by the

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[87] At para. 156.

[88] At paras. 157, 158.

[89] At para. 159

[90] At para. 163.

[91] *Renée Rose Levy and Gremcitel S.A.* v. *Republic of Peru*, Award, 9 January 2015.

[92] At paras. 194/195.

[93] *Churchill Mining PLC and Planet Mining Pty Ltd* v. *Republic of Indonesia*, Award, 6 December 2016.

claimants to substantiate their case were "not authentic and not authorized".[94] The Tribunal undertook a detailed examination of the forensic evidence relating to the documents[95] and found "a recurrent pattern of forgery".[96]

62. The Tribunal found that fraudulent behaviour was contrary to the principle of good faith and constituted an abuse of process:

> International tribunals have found fraudulent behavior to breach the principle of good faith, to constitute an abuse of right or, under certain circumstances, an abuse of process. Various tribunals have underlined the fundamental nature and the long-standing recognition of the principle of good faith as a matter of domestic and international law, including investment law.[97]

63. The Tribunal also found that claims based on fraud and forgery were contrary to public policy:

> The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy.[98]

64. In the Tribunal's view, the seriousness of the fraud tainted the entire investment:

> the seriousness, sophistication and scope of the scheme are such that the fraud taints the entirety of the Claimants' investment in the EKCP.[99] As a result, the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible.[100]

65. These authorities show convincingly that the submission of false evidence in proceedings before investment tribunals is contrary to the principle of good faith, is an abuse of process and a violation of public policy. A tribunal that identifies such practices

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[94] At paras. 254.

[95] At paras. 255-443.

[96] At para. 444.

[97] At para. 491. Footnotes omitted.

[98] At para. 508. Footnote omitted.

[99] East Kutai Coal Project.

[100] At para. 528. See also para. 509.

will invariably dismiss a claim that is tainted by fraudulent behavior in its entirety (*fraus omnia corrumpit* – fraud corrupts all).

66. *Lamm*, *Pham* and *Moloo* have summarized the legal consequences of fraudulent evidence as follows:

> In international arbitration, there is a well-established transnational public policy against fraud and corruption which is relevant to consider. This transnational public policy applies in the treaty arbitration context as part of the applicable law. … If a tribunal finds that a party before it has engaged in significant fraud or corruption in relation to the subject matter of the dispute, that party should not be permitted to bring its claims. In the treaty arbitration context, a tribunal may deny the claimant the ability to invoke a State's consent in the investment treaty, thereby denying jurisdiction. … If the tribunal finds that it has jurisdiction, the claimant's claims will likely be deemed inadmissible, whether as a result of the clean hands doctrine or transnational public policy.[101]

## Conclusion

67. The principle of good faith is fundamental to all legal systems including international law. Fraudulent behaviour of a claimant before an investment tribunal, notably the submission of false evidence, is a violation of the good faith principle and contrary to public policy. Investment tribunals have consistently dismissed claims by investors that involved elements of bad faith.

68. The principle of clean hands excludes a claimant who seeks to rely on his own wrongdoing. It is a specification and development of the good faith principle. Investment tribunals have unequivocally embraced the principle of clean hands in the contexts of corruption, illegal investments as well as false or fraudulent evidence.

69. In investment arbitration, the submission of false or fraudulent evidence by claimants has invariably led to the dismissal of claims. Tribunals have based their decisions to disallow claims under these circumstances on the principles of good faith and clean hands, on the doctrine of abuse of process and on the finding that reliance of fraudulent evidence is contrary to public policy.

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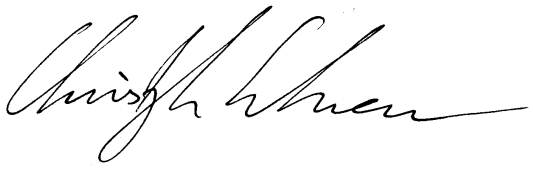
[101] *C.B. Lamm, H.T. Pham, R Moloo*, Fraud and Corruption in International Arbitration, in: Liber Amicorum Bernardo Cremades (*M.Á. Fernández-Ballesteros*, *D. Arias* eds. 2010) 699, 731.

70. As a matter of public policy, an arbitral award that is the result of fraudulent evidence submitted to the tribunal should not be enforced. To do so would be irreconcilable with the consistent practice of investment tribunals. Enforcement of an award brought about by false evidence would moreover fly in the face of the principles of good faith and clean hands.

71. In the present case, the conclusion seems inevitable that the KPMG Correspondence would have had a material impact on the ECT Arbitration and the Award. The unusual and serious step of auditors withdrawing their audits, because their client has provided them with false information, renders the entire financial information relating to the investment unreliable and thus deprives the Award providing compensation for losses relating to such investment of any reliable basis.

72. The evidence that has now become available, including the KPMG Correspondence and the false Financial Statements, clearly demonstrates the Stati Parties' illicit conduct and bad faith. The availability of this evidence to the Arbitral Tribunal would have been critical for the determination of its jurisdiction, the admissibility of the Stati Parties' claims and the liability of Kazakhstan.

Vienna, 21 January 2020



Christoph Schreuer

# STATEMENT OF QUALIFICATIONS

## Christoph Schreuer

| | |
|---|---|
| October 2009 to present | **Independent Arbitrator and Legal Expert** |
| October 2000-September 2009 | **University of Vienna, School of Law, Department of International Law and International Relations:** Professor of Law |
| July 1992-June 2000 | **School of Advanced International Studies, The Johns Hopkins University:** Edward B. Burling Professor of International Law and Organization; Director: International Law and Institutions |
| September 1970-September 2000 | **University of Salzburg, School of Law, Department of International Law:** Professor of Law (January 1978-Sept. 2000); Head of Department (October 1982 – June 1986); Universitätsdozent (Associate Professor) (June 1976 – January 1978); Universitätsassistent (Assistant Professor) (September 1970 – May 1976) |

### EDUCATION

1979 J.S.D. Yale Law School
1976 Universitätsdozent (venia legendi) University of Salzburg
1972 Diploma in International Law University of Cambridge
1970 L.L.B. University of Cambridge, redesignated LL.M. in 1986
1966 Dr. iur. University of Vienna

### ARBITRATION EXPERIENCE

- Member, Permanent Court of Arbitration 2008-2014
- Member, ICSID Panel of Conciliators and Arbitrators
- Chairman, ILA Committee on the Law of Foreign Investment (2003-2008)
- Member, International Arbitration Institute
- Arbitrator in ICSID and UNCITRAL arbitrations
- Numerous legal opinions in ICSID and non-ICSID investment arbitrations
- Appointing authority in an UNCITRAL arbitration

### PRINCIPAL PUBLICATIONS

- Die Behandlung internationaler Organakte durch staatliche Gerichte 381 pp. (Duncker & Humblot, 1977).
- Decisions of International Institutions before Domestic Courts 407 pp. (Oceana 1981).
- State Immunity. Some Recent Developments, 200 pp. (Grotius, 1988).
- Principles of International Investment Law (with R. Dolzer) 433 pp. (Oxford University Press, 2008, second edition 2012).
- The ICSID Convention: A Commentary, 1466 pp. (Cambridge University Press, 2001).
  Second Edition with Loretta Malintoppi, August Reinisch & Anthony Sinclair, 1524 pp. (Cambridge University Press, 2009).
- Over 100 articles on a variety of subjects of international law.
- Numerous articles on international investment law.