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BOOK REVIEW

Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas*, New York, Springer, 2019, 222 pp, €114.39, ISBN 978-3-319-98127-7
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The President of the International Court of Justice (ICJ), Judge Abdulqawi Yusuf, announced the Court's decision to 'clearly define rules' regulating the 'extrajudicial activities' of ICJ judges, such as taking up appointments on arbitration tribunals, in his speech to the United Nations General Assembly on 25 October 2018.[1] As a result, sitting ICJ Judges can no longer accept any new appointments to serve as arbitrators in investor-state proceedings and can participate by exception only in inter-state adjudication processes.

While President Yusuf justified this decision in light of the 'ever-increasing workload of the Court',[2] it was arguably also made in response to a legal and ethical dilemma referred to by critics of investment arbitration as 'moonlighting': the situation where sitting ICJ judges, in addition to their full-time employment at the Court, perform other functions, including acting as investment arbitrators or sitting on annulment committees at the International Centre for the Settlement of Investment Disputes (ICSID). Recent statistics[3] show that seven of those currently on the bench and 13 former ICJ judges were involved as adjudicators in investor-state dispute settlement (ISDS) in at least 90 cases.[4] The decision to bar current ICJ judges from serving as arbitrators in investor-state proceedings was aimed at placing the impartiality and independence of judges 'beyond reproach', as pointed out by President Yusuf during his speech.

However, this was the solution for only one of the dilemmas that investment arbitrators face in the course of arbitral proceedings – others includes issue conflicts, such as multiple hatting. What makes these dilemmas more difficult to resolve in investment arbitration are two factors: First, unlike the regulation of judicial conduct in national legal systems, there is a plurality of rules originating from different legal orders and giving rise to different legal hierarchies that could shape or direct the actions of investment arbitrators. Second, in contrast with domestic legal systems, there is no entity at the international level akin to a judicial council that can clarify the possible contradictions between such rules so that arbitrators get considerable leeway.

It is in this context that *Key Duties of International Investment Arbitrators* by Katia Fach Gomez offers a valuable approach to understanding the current ethical and legal dilemmas of investment arbitrators. This work breaks down the plurality of rules, including those originating

[1]Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, 25 October 2018.

[2]Ibid.

[3]N. Bernasconi-Osterwalder and M. D. Brauch, *Is "Moonlighting" a Problem? The role of ICJ judges in ISDS* (2017).

[4]Ibid.

in treaties, judicial decisions, and non-binding guidelines, which affect the decisions of arbitrators. The author argues that, as a strategy to prevent the fragmentation of such norms, we need a new Code of Conduct in the field.[5] To develop this argument the author uses an innovative approach combing several methodological choices to produce a work that distinguishes itself in the literature.

Fach's first and fundamental methodological choice is to focus on ethical and legal dilemmas from the perspective of the arbitrator and all 'sources of duties' governing the conduct of the latter, rather than only from the perspective of the international investment law regime.[6] Several ideas about reforming the international investment law regime have primarily focused on international law, including detailed analyses of treaty norms and reforms.[7] In this sense, prior studies refer to insights from the United Nations Commission on International Trade Law (UNCITRAL) Working Group III[8] and/or the United Nations Conference on Trade and Development (UNCTAD) 'paths of reform'[9] initiatives. All these studies share a concern for the reform of the international investment law regime and its treaties as a tool to solve the regime's legitimacy issues.

Taking the perspective of the arbitrator rather than that of the international legal regime, allows the author to unfold an interconnected and multilayered system of rules[10] that includes, in addition to treaties: First, judicial decisions and investment awards that are otherwise only binding on the parties. Second, integrated codes of conduct, such as those provided by the North American Free Trade Agreement (NAFTA); and conduct guidelines, such as those drafted by the International Bar Association (IBA), the Camera Arbitrale di Milano, or by the Spanish Arbitration Club that are usually not the object of attention because they are not formally binding.

The author manages to go beyond the 'hard vs. soft' law dichotomy that characterizes debates related to ethical issues in the judiciary, by focusing not on the binding character of a rule, but rather on its capacity to affect the decisions of investment adjudicators. The study of non-binding guidelines is in itself important because some recent (model) treaties make a direct reference to them. For example, the Comprehensive Economic and Trade Agreement (CETA)[11] or the Netherlands model BIT,[12] make express reference to IBA guidelines, incorporating these by reference into the treaty and thereby transforming them into binding obligations. Following this approach throughout the book, the author offers many references that map out cases where guidelines and similar rules of conduct are integrated with formal treaty obligations either by way of general references, or by inserting provisions in treaties that are inspired by the guidelines.

A second methodological choice in the book is to pass beyond 'independence' and 'impartiality' as the conceptual categories used to examine ethical dilemmas of arbitrators. The categories are crucial to the legitimacy of any adjudicative body. However, confronted with a plurality of 'sources

[5]K. Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (2019), 191–203.

[6]Ibid., at 11.

[7]See, for instance, W. Alschner, 'The Global Laboratory of Investment Law Reform Alternatives', (2018) *AJIL Unbound*, 237–43, at 240; C. Titi, 'Who's Afraid of Reform? Beware the Risk of Fragmentation', ibid., 232–6, at 233.

[8]A. Roberts and T. St. John, 'Uncitral and Isds Reforms: Battles over Naming and Framing', *EJIL:TALK!*, 30 April 2019, available at www.ejiltalk.org/uncitral-and-isds-reforms-battles-over-naming-and-framing/.

[9]UNCTAD United Nations Conference On Trade And Development, IIA 2013, Issue Note No. 3: Reform of Investor-State Dispute Settlement: In Search of a Roadmap (2013).

[10]The author refers to the approach as studying 'duties in any 'systematic sense' (p 7).

[11]See Art. 8.30, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11 (14.1.2017), available at www.ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

[12]A version of the text can be found at www.globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.

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of duties', there could be a problem defining what those categories mean for each one of the stakeholders and epistemic communities involved in international investment disputes. To tackle this issue the author, rather than ignoring this complexity, embraces it by studying the notions of 'independence' and 'impartiality' not in themselves but across four categories of Duties: the Duty of Disclosure,[13] the Duty of 'Personal Diligence and Integrity',[14] the Duty of Confidentiality,[15] and others, such as the Duty of Control of Arbitration Costs.[16]

Illustrative in this respect is the author's dealing with one of the most controversial issues in investment arbitration: the issue of 'multiple hatting', which is understood as the situation when an arbitrator in one case acts as an independent expert in another. The book does not approach this problem from a particular universal definition of 'independence' but maps the different duties that are associated with the latter. The book thus studies, for instance, the degrees of importance that are given to the duty of disclosure of information from different sources.[17] The logic of the book is to tackle issues such as 'multiple hatting' from the perspective of a specific duty, i.e., duty of disclosure, because then the parties in any given dispute can access the information needed to determine the independence of an arbitrator in a specific context.

Finally, applying this 'sources of duties' methodology allows the reader to uncover tensions between stakeholders that goes beyond 'multiple hatting'. For instance, underlying the different positions on the degree of disclosure lies a tension between the interests of the disputing parties, who praise the principle of autonomy of the parties, and other stakeholders, such as NGOs, who favour public scrutiny of the arbitral process. While all stakeholders would agree that 'independence' and 'impartiality' are fundamental in arbitration, the real conflict lies in the contested vision of the nature of the duties of arbitrators, such as that of disclosure, which scope is expressed differently in treaties and different codes of conduct. While this is just one of the tensions that the book studies, it provides an example of how these different contested topics in international arbitration can be addressed.

The author takes one step further and sketches a de-fragmentation strategy to address the conflicts generated by the plurality of arbitrators' duties by arguing in favour of a new code of conduct for investment arbitrators.[18] However, this notion of 'new code' does not materialize in a specific uniform text of articles that ought to be applied. On the contrary, Fach's idea of code operates in a pluralistic and transnational context, moving away of a single hierarchy, where several topics are highlighted as issues that must be regulated when establishing duties for arbitrators.

For example, one of the more complex topics analysed in the book is the one of non-delegation of responsibilities as part of the duty of personal diligence and integrity.[19] While there are several visions on the work that arbitrators can delegate to secretaries or assistants across the different arbitration regimes, the author speaks of an obligation of defining such tasks in advance. In this regard, the author believes that:

> new provisions focusing on arbitral secretaries could be drafted; or key actors such as arbitral institutions could give their active support for a new culture in which, as a general rule, details of the arbitral secretary's profile were agreed on by the arbitration parties.[20]

This idea of a transitional 'code of conduct' gives thus enough flexibility to different actors of adapting to different tensions that are specified through the book.

[13] *Supra* note 5, at 79.
[14] Ibid., at 123–5.
[15] Ibid., at 161–6.
[16] Ibid., at 177.
[17] Ibid., at 26.
[18] Ibid., at 191–203.
[19] Ibid., at 120–54.
[20] Ibid., at 199.

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But if Katia Fach's argument is accepted, a further question could be: what is the role that public law[21] should play in the elaboration of a new code of conduct for investment arbitration? The question is justified since indeed investment arbitrators represent a new type of public authority,[22] able to provide detailed assessments of the lawfulness of all branches of government, that has emerged from within the network of International Investment Agreements (IIAs). The author provides across her book a systematization of different rules of conduct. However, if the function of investment arbitration involves a process legitimation of public authority, a further inquiry could be made into the rules of conduct that are demanded from public law adjudicators, such as constitutional judges. In this regard, while this reviewer finds the 'sources of duties' approach convincing and concurs with the author's recourse to a pluralistic code of conduct as a de-fragmentation strategy, a point that can still be debated is whether additional sources are needed for such a code. If investment adjudicators exercise authority over states, then duties expected from public law adjudicators should also be integrated in such a code. To that end, it would be useful to compare how the duties of investment arbitrators that are identified in the book relate to those of the Judges of the European Court of Human Rights[23] or other similar permanent adjudicatory bodies. The book does not engage in any comparison with rules for public law bodies, leaving the door open for further research on this topic.

In sum, *Key Duties of International Investment Arbitrators* is a valuable contribution for any academic working on legitimacy issues of international investment adjudication, as well to practitioners and arbitrators confronted directly with ethical and legal dilemmas. Its final argument, the New Code of Conduct, should be considered in the course of any future attempt of reform of the international investment law regime.

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[21]For an analysis and critique of public law approaches in International Investment Law see J. E. Alvarez, '"Beware: Boundary Crossings" – a Critical Appraisal of Public Law Approaches to International Investment Law', (2016) 17 *Journal of World Investment and Trade*.

[22]A. Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), 85–90.

[23]For instance, see the Resolution on Judicial Ethics Adopted by the Plenary ECtHR on 23 June 2008, available at www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf.

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