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BOOK REVIEW

Emily Sipiorski, *Good Faith in International Investment Arbitration*, Oxford University Press, 2019, 304 pp., ISBN 9780198826446, £125.00
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In recent years, the issue of good faith in international investment law has formed the subject of an ever-growing debate. Despite being a well-established general principle of (international) law,[1] good faith – as pointed out by Loukas Mistelis in the book's introduction – has nevertheless 'received mixed responses from arbitral tribunals in investment disputes'.[2] The deep roots of such varied responses to *bona fides* and its related doctrines by arbitral tribunals can be traced back to various factors: the lack of a clear definition, the fear of incurring arbitrariness, the uncertainty with regard to its normative autonomy, as well as the different legal culture and training of arbitrators.[3] As a result, the application of this general principle in international investment arbitration lacks consistency. In this regard, Bernardo Cremades stresses how the 'omnipresence of good faith does not mean (rather quite the contrary) that it is clearly understood, that we know how to use it, or that we are able to predict how an arbitral tribunal may apply [it] in a particular case'.[4]

Against this backdrop, in her monograph, Emily Sipiorski tries to shed some light on the use of good faith in international investment arbitration with the aim of providing a 'comprehensive overview of many of the ways in which tribunals apply [it]'.[5] In this respect, the book achieves the desired result. Originally conceived as a PhD thesis at Martin Luther University, *Good Faith in International Investment Arbitration* contains 13 chapters which cover the whole arbitral process: in Chapters 1 and 13, the author respectively introduces the discussion and offers some brief conclusive remarks; Chapter 2 is concerned with the definition of good faith; Chapters 3 to 5 deal with the role of good faith in jurisdictional and admissibility matters; Chapter 6 is devoted to parallel proceedings; Chapter 7 addresses the application of good faith by arbitral tribunals in evidentiary decisions; Chapters 8 to 10 consider issues of good faith on the merits; in Chapter 11, Sipiorski considers the behaviour of the actors involved in the arbitration process; and Chapter 12 examines good faith and the allocation of costs. In dealing with such an array of issues, the book

[1]M. Kotzur, 'Good Faith (Bona fide)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008, online edition, available at opil.ouplaw.com/home/mpil); R. Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)', (2006) 53 *Netherlands International Law Review* 1.

[2]E. Sipiorski, *Good Faith in International Investment Arbitration* (2019), at v.

[3]A. R. Ziegler and J. Baumgartner, 'Good Faith as a General Principle of (International) Law', in A. D. Mitchell, M. Sornarajah and T. Voon (eds.), *Good Faith in International Economic Law* (2015), 9, at 14–17; A. F. M. Maniruzzaman, 'The Concept of Good Faith in International Investment Disputes – the Arbitrator's Dilemma', (2012) 89 *Amicus Curiae: Journal of the Society for Advanced Legal Studies* 16.

[4]B. Cremades, 'Good Faith in International Arbitration', (2012) 27 *American University International Law Review* 761.

[5]Sipiorski, *supra* note 2, at 18.

is supported by extensive case law research and provides the reader with a clear overview of how good faith operates at all the stages of the arbitral process.

While a chapter-by-chapter analysis is beyond the scope of this review, it is worth looking at some chapters to better outline the unquestionable strengths as well as some criticisms of the book. In Chapter 2, recognizing the difficulties in applying good faith because of its varying meanings and nuances, Sipiorski undertakes the difficult task of establishing a definition of this principle in order to bring coherence to its understanding as well as to legitimize its use in the practice of international investment law. To this end, the author carries out a remarkable quantitative analysis of good faith-related sources in the realms of public international law, private international law, and domestic law, concluding that the core meaning of good faith lies in 'honesty and fairness'.[6] This seems a reasonable – although of limited practical use – result to the extent that both honesty and fairness, on par with good faith, lack a clear legal definition. In this respect, the author seems to only partially achieve the ambitious task of bringing coherence to the notion of good faith.[7] Indeed, her own conclusion reflects this position when she states that 'honesty and fairness are then left open for specific interpretations'.[8] Instead, where this chapter excels is in providing the reader with a comprehensive overview of the ways in which good faith plays a role in domestic and international contexts.

Such a breadth of analysis characterizes Chapter 12, in which the author grapples with the issue of how good or bad faith behaviours influence the allocation of costs in international investment arbitration. Starting with a survey of ICSID awards issued from January 2010 to March 2018, Sipiorski shows how arbitral tribunals, in the choice of cost allocation methods (i.e., 50:50 allocation, costs follow the event, and factor-dependant approach), increasingly often take into account good or bad faith pre-dispute,[9] and procedural[10] conducts of the parties.[11] This was even corroborated by several decisions subsequent to the publishing of this monograph, including *B-Mex* v. *Mexico*[12] and *Itisaluna and Others* v. *Iraq*.[13] In this respect, the author convincingly points out that a tribunal may either 'choose to directly reference the principle of good faith as a means of justifying power granted under the respective arbitral rules'[14] or 'make a direct reference to the bad-faith behaviour [to issue a] cost awards as a means of sanctioning that behaviour'.[15]

Similarly, both Chapter 4 on the role of *bona fides* in the securement and maintenance of an investment, and Chapter 5 on preconditions to arbitration (such as the exhaustion of local remedies or the duty to enter pre-submission negotiations) confirm the author's capability of dealing with a wealth of cases in which good or bad faith issues arose. Such an effort is all the more notable if one considers that Sipiorski's work is the very first monograph devoted to the issue of good faith in investment arbitration.

Nevertheless, it should be pointed that while the choice to deal with such a variety of issues gives the reader a clear and comprehensive overview of good faith, it also represents a defect of this monograph. In some chapters, indeed, the necessary survey of cases prevails over their in-depth assessment, thus sacrificing a thorough and overarching analysis of the issue at stake. In this sense, the author raises but does not fully answer certain interesting questions: despite her closing *caveat*

[6]Sipiorski, *supra* note 2, at 45.

[7]However, one has to consider that, according to B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (1953), 105: '[w]hat exactly this principle implies is perhaps difficult to define'.

[8]Sipiorski, *supra* note 2, at 47.

[9]*Metal-Tech LTD v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, paras. 421–2.

[10]*Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016, paras. 271–9.

[11]See J. Commission and R. Moloo, *Procedural Issues in International Investment Arbitration* (2018), 182 ff.

[12]*B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, para. 271.

[13]*Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020, paras. 253–61.

[14]Sipiorski, *supra* note 2, at 234.

[15]Ibid., at 235.

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that '[t]here are times when the application of good faith has adverse results',[16] little explicit attention is paid to these instances; likewise, in dealing with the relationship between good faith and fair and equitable treatment (FET) (Chapter 9), her analysis as to how this principle can serve the purposes of justice could have been more developed.[17]

Moreover, and arguably because of the wide scope of the book, some hot or central topics did not receive proper consideration and a few relevant decisions are omitted. In this context, one may mention Chapter 11 which, interestingly, deals with the actors involved in the arbitral process and the consequences of their good or bad faith conduct. In light of the current debate on the arbitrators' duty of impartiality and independence, one would expect that the author would have placed an emphasis on the importance of their good faith conduct. Indeed, the lack of impartiality and independence of arbitrators due to potential conflicts of interests is often listed amongst the main causes of the current investor-state dispute settlement legitimacy crisis. In this respect, multiple appointments and double-hatting are serious concerns which could have been addressed (in-depth) through the prism of good faith. The same holds true with regard to the disclosure of third-party funding agreements, to which just two paragraphs are devoted (Chapter 11, paragraphs 79–80).[18]

In Chapter 6, Sipiorski addresses the role of good faith in managing parallel proceedings, which have attained increasing attention since 'they incur very high costs, generate the risk of conflicting outcomes and also undermine the credibility of the adjudicatory system'.[19] In this respect, the author contends that '[r]egulation of parallel proceedings is well accepted in international law, and is seen in both tribunal decisions and treaties'.[20] This statement could be misleading: indeed, while there is a broad consensus on the need to avoid parallel proceedings,[21] international tribunals – and, notably, investment tribunals – are a long way from being able to satisfactorily manage them, at least through the lenses chosen by the author (*lis pendens* and *res judicata*). That is because the doctrines of *lis pendens* and *res judicata* have found limited application in investment arbitration to the extent that the so-called triple-identity test – which requires identity of *petitum*, *causa petendi* and parties – is often not fulfilled.[22] This seems to be confirmed by the author herself: most of, if not all, the reviewed judgments rejected requests to decline jurisdiction based on *lis pendens*. In this context, what is a bit surprising, as likewise pointed out by another reviewer,[23] is the lack of any reference to *Ampal* v. *Egypt*,[24] *Orascom* v. *Algeria*[25] or *Caratube and Devincci Hourani* v. *Kazakhstan*.[26] In all these cases, the tribunals expressly dealt with the principle of good faith as a means to solve the issue of parallel proceedings. Notably, in *Orascom*, the tribunal came to the conclusion that the claimant committed an abuse of rights in 'impugn[ing] the same host state measures and claims for the same harm at various levels

[16]Ibid., at 238.

[17]As for the relationship between good faith and FET, see *passim* F. M. Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (2018) (particularly, Ch. 4 on Legitimate Expectations).

[18]T. Voon, 'Emily Sipiorski, *Good Faith in International Investment Arbitration*, 2019', (2019) 30 *European Journal of International Law* 1447, moves a similar criticism.

[19]G. Zarra, *Parallel Proceedings in Investment Arbitration* (2016), 3.

[20]Sipiorski, *supra* note 2, at 137.

[21]H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013), para. 1.06.

[22]See C. Schreuer, 'Multiple Proceedings', in A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and Investment Arbitration* (2018), 152; Zarra, *supra* note 19, at 117–21.

[23]See J. Crampin, 'Emily Sipiorski, *Good Faith in International Investment Arbitration*', (2019) 20 *Journal of World Investment & Trade* 935, at 955.

[24]*Ampal-American Israel Corporation and Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016.

[25]*Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Award, 31 May 2017.

[26]*Caratube International Oil Company LLP and Mr Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No ARB/13/13, Award, 27 September 2017.

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of the chain in reliance on several investment treaties concluded by the host state'.[27] This is a pity in as much as it supports Sipiorski's general contention that the principle of good faith 'maintains justice where justice could not otherwise be maintained'.[28]

Similarly, Chapter 3 merits a minor criticism. There, the author provides a clear and well-organized overview of the role of good faith in the definition of 'investor' (nationality) and treaty shopping, distinguishing among pre-investment, pre-dispute and dispute manoeuvring. In concluding her analysis, Sipiorski maintains that, in situations of treaty shopping, 'a state may be treated with less discretion ... where they are unfavourably taken to an ICSID tribunal [since] that state likely has other BITs'.[29] While this is a comprehensible factual observation, its legal scope is not clear. In this sense, this position could seem as a 'sanction' for states entering several BITs. As for this issue, further elaboration may have clarified it.

In conclusion, Emily Sipriorski has certainly written an interesting and well-researched book on the role of good faith in investment arbitration, which 'serves to uphold the integrity and purpose of the system of international investment law'.[30] Despite the criticisms in this review, it represents a valuable contribution to investment law scholarship as a starting point for future thorough and targeted studies. In this sense, the book is well suited to academics looking for a wide overview of how this principle has been applied in the field, as well as to practitioners who may tackle good faith-related issues at different stages of the arbitral process.

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[27]*Orascom*, *supra* note 25, at para. 542.
[28]Sipiorski, *supra* note 2, at 238.
[29]Ibid., at 81.
[30]Ibid., at 238.

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