Book Reviews

Emily Sipiorski, *Good Faith in International Investment Arbitration*. Oxford: Oxford University Press, 2019. Pp 304. £125. ISBN 9780198826446.

Good faith is a subject matter which most approach with trepidation. As Vaughan Lowe once wrote, in a review of JF O'Connor's book on good faith, '[t]he principle of good faith is an awful subject for a narrowly focused monograph'.¹ However, the increase in the frequency of reliance upon the principle by investment arbitral tribunals makes Emily Sipiorski's monograph on good faith in investment arbitration both timely and necessary. The main object of the book is to provide a 'comprehensive overview' of the practical application of good faith across the full range of legal issues to which it has been applied by arbitral decisions (p. 18), and it achieves this well.

The opening chapter defines good faith (Chapter 2), and introductory and concluding chapters bracket the argument. Chapters 3 through 12 track the principle's application at each successive stage of the arbitral process.

The chapter defining good faith (Chapter 2) is impressively wide-ranging. It examines a variety of situations in which good faith appears in international law, private international law and domestic law. It does so rapidly, but with a level of detail and a succinct style which is reflective of the book in general. The chapter persuasively illustrates the diverse sources, public/private and national/international, which influence the principle's operation within investment arbitration (p. 238). The object of the chapter, however, is not simply to illustrate the diverse influences of good faith in investment arbitration. Sipiorski's stated objective is to bring 'a level of coherence to the understanding of good faith across legal systems and legitimizes its use and placement in the practice of investment law' (p. 20). After grappling with difficulties of defining good faith, she concludes that 'honesty and fairness' represent a common core

1 Vaughan Lowe, 'Review: Good Faith in International Law – By JF O'Connor' (1992) 41 ICLQ 484.

across legal systems, international and domestic (p. 45). The chapter becomes most interesting when Sipiorski raises the question of whether investment arbitrators ought to decide cases on the grounds of good faith. She writes that good faith enshrines a 'culturally understood' sense of justice (p. 46), and observes that there may be a problem of a diversity of views on how good faith ensures justice arising from the different national legal backgrounds of the participants in the investment system. When set against general criticisms of a lack of diversity among investment arbitrators and evidence which suggests that education, career background and life experience influence arbitrator decision-making,² the impact of arbitrators' background on their conception of good faith is an important consideration when assessing whether it ought to be relied upon by tribunals. However, after alluding to these difficulties, Sipiorski leaves them unanswered.

Chapters 3 through 6 cover preliminary issues typically arising in connection with jurisdiction and admissibility. They address in turn the definition of 'investor' and problem of treaty shopping (Chapter 3), the definition of 'investment', corruption and other *mala fide* conduct in its establishment or subsequent operation (Chapter 4), preconditions to arbitration (such as exhaustion of local remedies and good faith negotiation) (Chapter 5), and parallel proceedings (Chapter 6). Chapters 8–10 address issues of good faith on the merits, addressing expropriation (Chapter 8), fair and equitable treatment (FET) (Chapter 9) and good faith as a defence (Chapter 10). Chapter 11 is mainly concerned with the good faith behaviour of arbitrators and counsel, but also covers other actors such as witnesses and third parties, including third party funders and *amicus curiae*. Chapter 12 addresses good faith and the allocation of costs.

Where the book excels is in identifying the problems of good faith which arise within international investment law, and situating them within their broader context. For example, in Chapter 4 several issues of good faith are identified: corruption and fraud in securing the investment, good faith as a criterion for what constitutes an investment, and bad faith in the maintenance of the investment. The analysis goes into detail on the relevant cases pertaining to each issue, but Sipiorski also draws the issues together as particular instances of a broader difficulty faced by tribunals over the lack of clear definition of the concept of 'investment' in the Convention on the Settlement of Investment

2 See eg Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper <<https://www.semanticscholar.org/paper/Are-Arbitrators-Political-Evidence-from-Investment-Waibel-Wu/0be8b7c939d4943917b9879ebd4183afeg8b8c55>> accessed 20 November 2019.

Disputes Between States and Nationals of Other States (ICSID Convention) and a resulting uncertainty over the scope of the term. Moreover, as Sipiorski argues, this uncertainty is often left unresolved by the expansiveness of language of bilateral investment treaties (BITs), and may produce an imbalance in BITs which negatively affects developing states (pp. 89–91).

The book shows considerable range and displays Sipiorski's extensive command of the subject. It is clearly written and well-organised, making it easy for the reader to locate the important authorities on each topic. It is mostly very good as a resource for an academic or practitioner interested in discovering where good faith has been applied. However, for a book that aims to be comprehensive (p. 18), there are a small number of omissions. One merits attention: in the chapter dedicated to parallel proceedings (Chapter 6), there is no discussion of the important recent decisions in *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria* and *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v Republic of Kazakhstan*.³ In these cases, the tribunals expressly countenance the use of good faith to resolve the problem of parallel (or successive) proceedings – even if they differ as to the proper approach. Instead of engaging with these authorities, the discussion of whether good faith regulates concurrent arbitral proceedings is limited to what is now, in light of these developments, a somewhat outdated recapitulation of the *Lauder* and *CME* decisions.⁴ The consequence is that Sipiorski's conclusion, seemingly based on *Lauder*, that '[a]buse of the arbitral process may only enter the situation where the ... parallel matter seems to serve the limited purpose of disrupting the arbitration' (p. 149) is directly at odds with *Orascom*, requiring further justification and not reflecting the debate as it stands today.⁵ It is unfortunate, because in many ways recent cases support Sipiorski's broader thesis in the chapter – that '[g]ood faith can be applied as a means of ensuring that the fair process of the dispute resolution is adhered to' (p. 149) – better than *Lauder* does. That said, these are small reservations about an otherwise impressive work.

3 *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016); *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria*, ICSID Case No ARB/12/35, Award (31 May 2017); *Caratube International Oil Company LLP and Mr Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13, Award (27 September 2017) ('*Caratube II*').

4 *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001); *CME Czech Republic BV v The Czech Republic*, Partial Award (13 September 2001).

5 *Orascom* (n 3) para 543. See also Emmanuel Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 ICSID Rev 17.

The book's comprehensiveness, however, is also its disadvantage, to the extent that exposition is prioritized over analysis. Exposition is not necessarily a problem in itself – no less an authority than Bin Cheng held that what good faith means can only be determined by the manner in which tribunals have used the principle⁶ – and Sipiorski's exposition is excellent. The author promises, however, to do more: to address the question of whether good faith is 'beneficial ... or [creates] uncertainty for both investors and states' (p. 47). It is this promise that remains somewhat unfulfilled.

First, the cases selected for the case studies, which make up the bulk of the content of each chapter, tend to point in one direction: in favour of the benefits of the application of good faith. This is in contrast with the author's claim that the book will consider where 'good faith has not been or should not be applied' (p. 18). Inconsistencies between different applications of good faith are covered quite well – a particularly nice example is the table in chapter 12 charting inconsistencies in costs allocation (pp. 217–223). But cases in which good faith has not been and, in particular, should not be applied are few and far between. The result is that positive instances of the application of good faith tend to weigh more heavily than negative ones, with nearly every chapter resulting in an affirmative answer to the question of whether good faith is beneficial. One sort of limitation which Sipiorski does say applies is that good faith has lesser relevance where the treaty language is more precise. However, she does not clarify whether this is an empirical observation or a normative claim, and suggests, at points, that good faith ought to be used in place of precise language. For instance, when noting that narrowly drafted clauses in BITs providing for domestic litigation as a precondition to arbitration limit recourse to good faith (Ch 5), she appears to argue in favour of silence as an 'opportunity' for tribunals to use good faith (p. 129). It is unclear, however, why tribunals are better placed to have an opportunity to use good faith than states to specify the conditions they wish to be fulfilled before an investor may commence arbitration. Sipiorski implies that by using good faith in these situations it is possible to establish a 'more cohesive system of investment arbitration' (p. 129). Recent investment treaty practice, however, tends to suggest that states do not share Sipiorski's confidence, preferring the enumeration of more precise and detailed obligations than leaving matters to a tribunal's determination of good faith.⁷

6 Bin Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (first published 1953, reprint CUP 2006) 105.

7 See discussion in Tarald Laudal Berge and Wolfgang Alschner, 'Reforming Investment Treaties: Does Treaty Design Matter?' (International Institute for Sustainable Development,

Secondly, it is not always clear what the author thinks about whether good faith is being applied correctly by investment tribunals, or which of two different approaches is better. In the concluding chapter (Chapter 13), Sipiorski writes that ‘the legitimacy of the principle may be left vulnerable’ if it is ‘applied for the mere purpose of achieving an end that cannot be otherwise achieved’ (p. 237), but she does not identify cases where this has occurred. Sipiorski’s discussion of FET is another example of a controversial issue where she does not make a critical assessment of the different ways in which good faith is used. Sipiorski, correctly, highlights several different ways in which good faith is used by tribunals: (1) as a rule of conduct, (2) as a requirement to protect legitimate expectations, (3) and as a guiding principle. The declared object of the analysis is merely to set out ‘the tribunals’ perceptions of the usefulness of applying good faith’ (p. 180), without engaging with the question of which of the ways good faith is used is best or correct. Sipiorski concludes that ‘the system itself benefits from acknowledging the close connection between the principle of good faith and the standard of FET’ (p. 186). But this claim is difficult to derive from the preceding analysis. There is no clear evaluation of whether the ways good faith is used are consistent, albeit different aspects of the same principle. Nor is there any analysis of whether investment law benefits from using good faith, in all its forms, in connection with FET, and so does not contradict or support the conclusions of other literature in the field, such as the argument that FET is best served by a narrower use of particular elements of good faith, such as ‘discrimination, due process, and transparency’, than by having recourse to good faith in its broadest forms.⁸

Thirdly, the general positive case Sipiorski makes – that good faith ‘maintains justice’ – is, to this reader at least, largely unpersuasive in the form it is presented (p. 236). That some tribunals perceive their use of good faith to be one which maintains ‘justice’ within the investor-state dispute settlement system is undoubtedly true. The tribunal in *Phoenix Action, Ltd v The Czech Republic* no doubt thought that denying access to arbitration to an investment claim based on an investment which the tribunal considered not to be *bona fide* was a just result.⁹ Moreover, as Sipiorski shows rather persuasively throughout the book, the sorts of problems which good faith is used to address are problems

17 October 2018) <www.iisd.org/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-berge-wolfgang-alschner/> accessed 20 July 2019.

8 Martins Paparinskis, ‘Good Faith and Fair Equitable Treatment in International Investment Law’ in Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith in International Economic Law* (OUP 2015) 171–172.

9 *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras 106–113.

of justice – even if they are matters over which reasonable people may disagree. But it does not follow from this that allowing tribunals a large amount of subjective discretion actually succeeds in maintaining justice in investment arbitration, either in individual cases or at a systemic level. In Chapter 2, Sipiorski acknowledges that good faith might, due to its vagueness, produce arbitrary decision-making by tribunals. The problem is rarely addressed directly, but it is an issue that requires further consideration in order that conclusions such as ‘good faith plays a legitimizing role’ (p. 237) can be adequately justified. The overall result of this is that the positive normative conclusions arrived at in Chapter 13 in favour of a beneficial role of good faith in investment law are in need of further development.

The criticisms in this review, however, are the result of the wide range of difficult and interesting issues which the book touches upon, and could not perhaps reasonably be expected to answer in their entirety. Sipiorski herself alerts the reader to this, when she acknowledges that the questions are ones the book ‘may not fully answer but nonetheless explores and deconstructs’ (p. 47). The book does not provide a satisfactory answer to questions such as whether good faith is beneficial, or whether it is appropriate for investment arbitrators to place extensive reliance upon it. But it is excellent at exploring the range of issues with which good faith is connected and analysing why issues of good faith arise in such circumstances. As a result, it is likely to be useful and informative for practitioners or readers interested in the role of good faith in investment arbitration. Sipiorski concludes the book by writing that ‘[g]ood faith holds a valuable place in the dialogue of international law’ (p. 238), and on this point she is certainly correct. Regardless of whether good faith actually maintains justice, it allows tribunals to articulate and engage with problems of justice and, therefore, to contribute to debates over the proper direction of the investment regime.

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