

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

Good faith and its counterpart—bad faith—play an important role in international economic law and public international law more generally. Good faith is widely accepted as one of the ‘general principles of law recognized by civilized nations’ within the meaning of the ICJ Statute<sup>1</sup> and hence as a foundational part of international law.<sup>2</sup> In the context of treaty interpretation,<sup>3</sup> the Vienna Convention on the Law of Treaties (VCLT) provides as a general rule that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.<sup>4</sup> The VCLT also specifies the universal rule<sup>5</sup> of *pacta sunt servanda*: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.<sup>6</sup>

In the World Trade Organization (WTO), use of the dispute settlement system is not intended to be contentious, and Members are obliged to engage in the dispute settlement procedures ‘in good faith in an effort to resolve the dispute’;<sup>7</sup> similarly, following a request for consultations at the start of a dispute, Members ‘shall enter into consultations in good faith’.<sup>8</sup> Good faith has also arisen in a range of other substantive and procedural contexts in WTO disputes.<sup>9</sup> However, the WTO Appellate Body has been reluctant to find an absence of good faith—or bad faith—on the part of any WTO Member, going so far as to state repeatedly that a *presumption* exists that Members are acting in good faith in disputes and in carrying out their treaty obligations.<sup>10</sup>

In international investment law, good faith also plays a prominent role in a wide range of circumstances, as made clear by Emily Sipiorski’s *Good Faith in International Investment Arbitration*. Although focused on arbitration, the book covers a range of issues that arise in arbitral proceedings, including substantive questions. The author walks through in chronological sequence multiple

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<sup>1</sup> *Statute of the International Court of Justice (ICJ Statute)* art 38(1)(c).

<sup>2</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius, reprint 1987) 105; JF O’Connor, *Good Faith in International Law* (Ashgate, 1991) 1, 123; Andreas R Ziegler and Jorun Baumgartner, ‘Good Faith as a General Principle of (International) Law’ in Andrew Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press, 2015) 9, 10.

<sup>3</sup> See generally Eric De Brabandere and Isabelle Van Damme, ‘Good Faith in Treaty Interpretation’ in Mitchell et al (n 2) 37.

<sup>4</sup> *Vienna Convention on the Law of Treaties*, opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (VCLT) art 31(1).

<sup>5</sup> See VCLT preamble.

<sup>6</sup> VCLT art 26.

<sup>7</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*Understanding on Rules and Procedures Governing the Settlement of Disputes*’) (DSU) art 3.10.

<sup>8</sup> DSU art 4.3.

<sup>9</sup> See Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press, 2015) ch 8 (Good Faith). See also Marion Panizzon, *Good Faith in the Jurisprudence of the WTO* (Hart, 2006); Andrew Mitchell, ‘Good Faith in WTO Dispute Settlement’ (2006) 7(2) *Melbourne Journal of International Law* 339.

<sup>10</sup> See, eg, Appellate Body Report, *European Communities – Trade Description of Sardines*, WTO Doc WT/DS231/R and Corr.1 (circulated 26 September 2002, adopted 23 October 2002) [278]; cf Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/AB/R (circulated 11 March 2011, adopted 25 March 2011) [326] (‘terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations’).

scenarios in which the concept of good faith could arise in a dispute, going beyond procedural matters to the substance of various investment protections. In particular, chapters 8 and 9 address good faith in the context of expropriation and fair and equitable treatment respectively. The role of good faith in these two core investment protections is largely connected to the conduct of the host state rather than the claimant investor.

In chapter 9, Sipiorski explains that tribunals tend to see good faith as either falling within or subsuming the fair and equitable treatment standard. While meeting that standard may require acting in good faith, a violation of the standard is not dependent on the showing of *bad* faith. Sipiorski regards the application of good faith in assessing the fair and equitable treatment standard as beneficial in connecting international investment law with public international law, but she recognises that it adds little clarity to this broad and ambiguous standard. That is because the principle of good faith is itself not easily defined. It can be invoked in various ways in investment treaty arbitrations, in particular in grounding the investor's legitimate expectations,<sup>11</sup> itself a controversial topic.

In chapter 8 on expropriation, Sipiorski suggests that because provisions on expropriation are designed to protect individual investors against inappropriate use of power by host states, the obligations are not easily adjusted to promote sovereign autonomy. Therefore, she says, states are increasingly including explicit 'exceptions' in their international investment agreements (IIAs) that affect the obligations regarding expropriation. In this category she includes tools such as clarifications with respect to expropriation itself (eg proportionate and non-discriminatory measures taken for reasons of public purpose do not constitute indirect expropriation), preambular language, security exceptions, and general exceptions<sup>12</sup> drawn from Article XX of the WTO's General Agreement on Tariffs and Trade 1994.<sup>13</sup> She sees good faith as a useful principle in interpreting and applying these exceptions, whether or not expressly referred to in the text, although she notes that good faith tends to impose a 'higher burden' on the host state than might otherwise be the case. Greater clarity might have been achieved here by distinguishing further between these different types of 'exception' provisions, as they play distinct roles, for example potentially affecting the burden of proof in different ways.<sup>14</sup>

Apart from these two chapters on substantive obligations, the bulk of the book addresses more 'procedural' questions, as well as threshold issues of jurisdiction and admissibility, such as the definitions of 'investment' and 'investor'. Many of these other chapters focus on good faith in connection with the conduct of the claimant investor rather than that of the host state. However, chapter 11 targets instead the good faith conduct of arbitrators, counsel, expert witnesses and third

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<sup>11</sup> Martins Paparinskis, 'Good Faith and Fair and Equitable Treatment in International Investment Law' in Mitchell et al (n 2) 143, 144–145, 150.

<sup>12</sup> See Andrew D Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2017* (Oxford University Press, 2019) 305.

<sup>13</sup> GATT Doc LT/UR/A-1/A/1/GATT/2, signed 30 October 1947, as incorporated in the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*').

<sup>14</sup> See, eg, Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59 *Boston College Law Review* 2825; Elizabeth Sheargold, 'Sound and Fury: Assessing the Steps to Safeguard Regulatory Autonomy in the Drafting of Contemporary International Investment Agreements' (PhD Thesis, The University of Melbourne, 2018) University Repository <<https://minerva-access.unimelb.edu.au/handle/11343/214687>>.

parties, while chapter 12 examines the implications of good faith with respect to either party in the allocation of costs in international investment arbitration.

In chapter 11, recognising the difficulties with the amorphous concept of good faith, Sipiorski writes that 'it is frequently well-worded rules and straightforward guidelines that prevent the need to rely on good faith' (at 11.85). For example, she refers to the Guidelines on Conflicts of Interest of the International Bar Association with respect to the disclosure of third party funding. In this chapter, as in some others, the breadth of the material covered necessarily precludes an in-depth treatment of each issue. More elaboration would have been helpful, for instance, regarding the importance of good faith in arbitrators' conduct, given ongoing concerns about legitimacy matters such as arbitrators' potential conflicts of interest.

Chapters 3 and 4 address foundational matters: treaty shopping and the definition of investment respectively. In chapter 3, Sipiorski explains how good faith may help distinguish legitimate from illegitimate forms of treaty shopping. For example, while 'pre-dispute planning does not challenge the good-faith behaviour of an investor' (at 3.135), a complex corporate restructuring close to the dispute arising may 'camouflage a bad-faith appearance' (at 3.136). She mentions the example of *Philip Morris Asia Ltd v Australia*, where the tribunal found an 'abuse of rights' because corporate restructuring occurred 'when there was a reasonable prospect that the dispute would materialise' and 'for the principal, if not sole, purpose of gaining Treaty protection'.<sup>15</sup> This seems in line with Bin Cheng's characterisation of the concept of abuse of rights (*abus de droit*) as an application of the principle of good faith.<sup>16</sup>

Incorporating analysis of numerous cases, Sipiorski concludes that good faith is a valuable universal principle in the absence of clearer rules regarding treaty shopping in investment arbitration, while noting that additional 'more developed mechanisms for controlling treaty shopping' may better 'protect the state's legitimate expectations regarding the cases that will be brought before it' (at 3.162). One such mechanism may be the denial of benefits clause now seen in some investment treaties, although Sornarajah laments that these have been construed narrowly and not pursuant to good faith requirements.<sup>17</sup> Sornarajah also proposes as a means of avoiding fraudulent claims of nationality the *siège social* theory, 'emphasiz[ing] the place of actual management of the company in determining corporate nationality', as in most civil law countries of Europe.<sup>18</sup> Another mechanism for preventing misuse of corporate structures involves reliance on domestic law, which Schill and Bray argue is preferable to applying a broad notion of good faith or abuse of rights other than in exceptional circumstances.<sup>19</sup> Sipiorski discusses, for example, various US treaty-shopping and forum-shopping measures. Does Sipiorski agree with these more specific suggestions (by Sornarajah, Schill etc? If so, does she accept that good faith is perhaps not so helpful after all? Or does it work like you say/she notes in chapter 4, in the next para., as providing 'additional legitimacy'?)

In chapter 4, Sipiorski identifies a number of cases that suggest an investment not only must have been secured in good faith (a matter of jurisdiction) but also must be maintained in good faith (a

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<sup>15</sup> *Philip Morris Asia Limited v Commonwealth of Australia*, PCA Case No 2012–12, Award on Jurisdiction and Admissibility (17 December 2015) [588].

<sup>16</sup> Cheng (n 2) 121.

<sup>17</sup> M Sornarajah, 'Good Faith, Corporate Nationality, and Denial of Benefits' in Mitchell et al (n 2) 117, 119, 121.

<sup>18</sup> Ibid 128.

<sup>19</sup> Stephan W Schill and Heather L Bray, 'Good Faith Limitations on Protected Investments and Corporate Structuring' in Mitchell et al (n 2) 88, 92.

question at the merits stage). Thus, corrupt behaviour in securing an investment will often lead to denial of jurisdiction, and failure to comply with the host state's laws may lead to denial of protection, whether based purely on the principle of good faith or specifically on a provision requiring compliance with such laws. Sipiorski highlights both advantages and disadvantages of incorporating the notion of good faith into the definition of investment, concluding that good faith provides 'additional legitimacy in difficult cases', depending on the circumstances (at 4.112).

Chapter 6 considers 'parallel proceedings': the potential for multiple dispute resolution forums to be used contrary to procedural good faith requirements. Sipiorski explains how the conduct of either the investor or the host state might be inconsistent with good faith, for example in using domestic courts to hinder arbitration proceedings. Some of these problems are addressed by specific treaty provisions, such as in the Energy Charter Treaty<sup>20</sup> and the ICSID Convention,<sup>21</sup> preventing disputes from proceeding in multiple forums. Sipiorski examines various cases in which parallel proceedings have arisen, for example, due to the existence of a separate contract or concession agreement in addition to the relevant IIA, or in the form of concurrent arbitral proceedings, sometimes brought under two different IIAs. She points out intrinsic difficulties in the existence of overlapping IIAs and multiple parties to an investment, which may mean that good faith needs to be relied on to ensure a fair process even in the absence of specific treaty language. Going beyond the good faith of the investor and host state, she also suggests that an arbitral tribunal itself might act contrary to good faith if it declined jurisdiction because a matter had been raised in domestic courts, given 'the inherent purpose of the investment arbitral process to provide a neutral forum for the resolution of disputes of international nature' (at 6.90).

Another example of parallel proceedings is those that may arise simultaneously under international trade law (particularly in the WTO) and international investment law, relating to essentially the same facts and sometimes similar legal obligations. Such disputes have arisen in practice and create the potential for inconsistent outcomes. The case of *Philip Morris Asia Ltd v Australia* provides a good example, where some WTO proceedings continue<sup>22</sup> despite the earlier resolution of the investment claim. Although a trade or investment tribunal might have regard to judicial comity in deciding to decline jurisdiction where a dispute has been raised in a corresponding forum, the need to fulfil the quasi-judicial function and the objectives of the relevant regime tends to weigh against such an approach, much as Sipiorski suggested with respect to domestic court proceedings. The fact that the claimants may be different in the two forums and that the underlying law is not identical also weigh against good faith being used here to prevent multiple proceedings.<sup>23</sup>

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<sup>20</sup> *Energy Charter Treaty* (opened for signature 17 December 1994, entered into force 16 April 1998) art 26(2).

<sup>21</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) art 26.

<sup>22</sup> See WTO, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Notification of an Appeal by Honduras (25 July 2018) WT/DS435/23; WTO, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Notification of an Appeal by the Dominican Republic (28 August 2018) WT/DS441/23. See also Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Australia – Tobacco Plain Packaging)*, WT/DS458/R, WT/DS457/R (circulated 28 June 2018, adopted 27 August 2018).

<sup>23</sup> See Tania Voon, Andrew D Mitchell and James Munro, 'Good Faith in Parallel Trade and Investment Disputes' in Mitchell et al (n 2) 60.

Sipiorski explains in the preface that the ‘need to mention good faith often signifies a deficiency, a failure, in the system’ (at p vii). Where the relevant rules of public international law or international investment law are unclear, or where the relevant IIA is silent on a particular question, the principle of good faith may be used to assist, notwithstanding its own ambiguity. In the concluding chapter, she writes that good faith ‘sustains the system of investment arbitration’, ‘maintains justice’, and ‘grounds international investment law in public international law’ (at 13.01). But in areas where the system of international investment arbitration is working well, good faith need not be invoked.

This book provides a comprehensive study of the many ways in which good faith plays a role in international investment arbitration, from the procedural to the substantive, the jurisdictional to the merits-based. It shows how surprisingly versatile the notion of good faith is, but also that its generality as a principle sometimes detracts from its utility. The book brings together a range of materials and ideas about good faith that would not often be considered alongside each other, enlightening the reader along the way. It is a welcome addition to existing literature on good faith in international law,<sup>24</sup> including as a general principle of law<sup>25</sup> and more specifically in the fields of international trade law and international investment law.<sup>26</sup> Sipiorski’s account in the context of international investment arbitration may provide the basis for additional targeted studies looking exhaustively at some of the individual issues she has raised. Rather than providing a deep dive into any one use of good faith, the book may be of particular use to practitioners as they encounter good faith at various stages throughout individual arbitral proceedings. That role accords with its intention: ‘to fill in the limitations of a singular study by offering a broader scope of examination—encompassing procedural, substantive, and theoretical considerations of good faith in investment decisions’ (at 1.61).

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<sup>24</sup> See, eg, Robert Kolb, *Good Faith in International Law* (Hart Publishing, 2017); O’Connor (n 2).

<sup>25</sup> See, eg, Cheng (n 2).

<sup>26</sup> See, eg, Mitchell et al (n 2); Panizzon (n 9); Andrew Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008) ch 4.