

social equality model, guided by collective interests rather than individual rights, underpinning and informing the legal arrangements makes the Swedish prohibition of the buying of sexual services distinct from the international anti-trafficking campaigns that are focused on transborder trafficking and largely inspired by a mix of Anglo-American liberal and radical feminist agendas. Obviously, there are different opinions about the Swedish approach to criminalizing the buying of sexual services, but at least based on my knowledge, one of these opinions is not more ‘well known’ than another.

However, neither the lack of attention to how international human rights law contributes to controlling state behaviour nor the fact that *Freedom in a Fishbowl* is not an easy read for all audiences challenges fundamentally the quality of Kapur’s explorations. I recommend *Freedom in a Fishbowl* to both academic and practitioner colleagues interested in understanding the many workings of human rights and women’s rights in international politics and governance. In my own academic work on women’s rights and gender mainstreaming in the United Nations, I once cited from Margaret Atwood’s *A Handmaid’s Tale*: ‘Better never means better for everyone, he says. It always means worse, for some’.¹ Today, I would probably be more careful with using quotes from dystopian novels to introduce human rights topics, but, at the same time, I am convinced that when assessing the success of regulatory or governance regimes, including human rights, we need to be attentive to, and not shy away from, their unintended and sometimes negative consequences. We need to be aware that our assumptions about human rights and about what it means to be protected by human rights also contribute to creating assumptions about what is outside rights’ regimes and the threats against these regimes. Unintendedly, human rights can turn ‘ropes’ into ‘snakes’. Kapur’s *Freedom in a Fishbowl* challenges naive assumptions about human rights. Kapur clearly shows that the ‘civilising mission’ of human rights is not a thing of the past but, rather, a reality built into all use of ‘rights’. Kapur states that her ‘argument for “thinking freedom” outside the fishbowl and within non-liberal spaces is intended to push the dialogues within human rights discourses closer to the fundamental issues that continue to trouble feminists and critical legal scholars’ (at 235). This is an important intellectual exercise not only to understand the different usages of human rights in contemporary international politics and law but also to be attentive to alternative avenues for freedom.

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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 Statute of the

¹ S. Kouvo, *Making Just Rights? Mainstreaming Women’s Human Rights and a Gender Perspective* (2004), quoting M. Atwood, *The Handmaid’s Tale* (1985).

International Court of Justice¹ and, hence, as a foundational part of international law.² In the context of treaty interpretation,³ 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'.⁴ The VCLT also specifies the universal rule⁵ of *pacta sunt servanda*: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'⁶

In the World Trade Organization (WTO), the 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';⁷ similarly, following a request for consultations at the start of a dispute, members 'shall enter into consultations in good faith'.⁸ Good faith has also arisen in a range of other substantive and procedural contexts in WTO disputes.⁹ 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.¹⁰

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 in chronological sequence through multiple 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 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,

¹ Statute of the International Court of Justice 1945, 33 UNTS 993, Art. 38(1)(c).

² B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987), at 105; J.F. O'Connor, *Good Faith in International Law* (1991), at 1, 123; Ziegler and Baumgartner, 'Good Faith as a General Principle of (International) Law', in A. Mitchell, M. Sornarajah and T. Voon (eds), *Good Faith and International Economic Law* (2015) 9, at 10.

³ See generally Brabandere and Van Damme, 'Good Faith in Treaty Interpretation', in Mitchell, Sornarajah and Voon, *supra* note 2, 37.

⁴ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 31(1).

⁵ See *ibid.*, preamble.

⁶ *Ibid.*, Art. 26.

⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401, Art. 3.10.

⁸ *Ibid.*, Art. 4.3.

⁹ See G. Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (2015) ch 8 (good faith); see also M. Panizza, *Good Faith in the Jurisprudence of the WTO* (2006); Mitchell, 'Good Faith in WTO Dispute Settlement', 7(2) *Melbourne Journal of International Law* (2006) 339.

¹⁰ See, e.g., WTO, *European Communities – Trade Description of Sardines – Report of the Appellate Body*, 26 September 2002, WT/DS231/R and Corr.1, para. 278; cf. WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body*, 11 March 2011, WT/DS379/AB/R, para. 326: '[T]erms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations.'

but she recognizes 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, particularly in grounding the investor's legitimate expectations,¹¹ which is itself a controversial topic.

In Chapter 8 on expropriation, Sipiorski suggests that because provisions on expropriation are designed to protect individual investors against the 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 (for example, proportionate and non-discriminatory measures taken for reasons of public purpose do not constitute indirect expropriation), preambular language, security exceptions and general exceptions¹² drawn from Article XX of the WTO's General Agreement on Tariffs and Trade 1994.¹³ 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.¹⁴

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 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, recognizing 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 International Bar Association's Guidelines on Conflicts of Interest with respect to the disclosure of third party funding.¹⁵ 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

¹¹ Paporinskis, 'Good Faith and Fair and Equitable Treatment in International Investment Law', in Mitchell, Sornarajah and Voon, *supra* note 2, 143, 144–145, 150.

¹² See Mitchell, Munro and Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks', in L. Sachs, L. Johnson and J. Coleman (eds), *Yearbook on International Investment Law and Policy 2017* (2019) 305.

¹³ 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*').

¹⁴ See, e.g., Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?', 59 *Boston College Law Review* (2018) 2825; E. Sheargold, 'Sound and Fury: Assessing the Steps to Safeguard Regulatory Autonomy in the Drafting of Contemporary International Investment Agreements' (2018) (PhD thesis on file at the University of Melbourne), available at <https://minerva-access.unimelb.edu.au/handle/11343/214687>.

¹⁵ International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014).

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'.¹⁶ This seems in line with Bin Cheng's characterization of the concept of abuse of rights (*abus de droit*) as an application of the principle of good faith.¹⁷

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 that is now seen in some investment treaties, although Muthucumaraswamy Sornarajah laments that these have been construed narrowly and not pursuant to good faith requirements.¹⁸ 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.¹⁹ Another mechanism for preventing misuse of corporate structures involves reliance on domestic law, which Stephan Schill and Heather Bray argue is preferable to applying a broad notion of good faith or abuse of rights other than in exceptional circumstances.²⁰ Sipiorski discusses, for example, various US treaty-shopping and forum-shopping measures. She nevertheless sees a role for good faith in 'protecting against misuse as well as ensuring the extension of justice' (at 3.162).

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 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 Treaty²¹ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,²² preventing

¹⁶ PCA, *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case no. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 588.

¹⁷ Cheng, *supra* note 2, at 121.

¹⁸ Sornarajah, 'Good Faith, Corporate Nationality, and Denial of Benefits', in Mitchell, Sornarajah and Voon, *supra* note 2, 117, at 119, 121.

¹⁹ *Ibid.*, at 128.

²⁰ Schill and Bray, 'Good Faith Limitations on Protected Investments and Corporate Structuring', in Mitchell, Sornarajah and Voon, *supra* note 2, 88, at 92.

²¹ Energy Charter Treaty 1994, 2080 UNTS 95, Art. 26(2).

²² Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 575 UNTS 15, Art. 26.

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 despite the earlier resolution of the investment claim.²³ 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 weighs against good faith being used here to prevent multiple proceedings.²⁴

Sipiorski explains in the preface that the ‘need to mention good faith often signifies a deficiency, a failure, in the system’ (at 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 not only 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,²⁵ including as a general principle of

²³ 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 WTO, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Report of the Panel*, 28 June 2018, WT/DS458/R, WT/DS457/R.

²⁴ See Voon, Mitchell and Munro, ‘Good Faith in Parallel Trade and Investment Disputes’, in Mitchell, Sornarajah and Voon, *supra* note 2, 60.

²⁵ See, e.g., R. Kolb, *Good Faith in International Law* (2017); O’Connor, *supra* note 2.

law²⁶ and, more specifically, in the fields of international trade law and international investment law.²⁷ 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. This 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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²⁶ See, e.g., Cheng, *supra* note 2.

²⁷ See, e.g., Mitchell, Sornarajah and Voon, *supra* note 2; Panizzon, *supra* note 9; A. Mitchell, *Legal Principles in WTO Disputes* (2008), ch. 4.