

In summary, the strengths of the book lie in its meticulous analysis of a whole host of questions pertaining to the law of treaties. Anyone working in the field of international law will benefit from the fine-grained analysis of the many different aspects under analysis here. Due to its clear structure, which follows the course of the VCLT, the work is easy to navigate. The book is also animated by enviable confidence in the future of international law understood in a very traditional manner. And, in some places, it is written with a wonderful sense of humour, including an excerpt of one of the classic dialogues between Minister James Hacker and his ever-faithful servant Sir Humphrey, with the latter setting out the basic rationale for British membership in the European Economic Community and – for the purpose of the book – setting the scene for the extremely insightful section on the *Wightman* case before the European Court of Justice (at 279).¹⁷ *Treaties in Motion* will be particularly useful for anyone engaging with the most recent work of the ILC with respect to the law of treaties, which is the subject of careful and balanced exegesis throughout. It can also be read as a refresher for anyone who wishes to take a tour de force through the VCLT and be brought up to date with respect to the central doctrinal debates surrounding the ‘treaty on treaties’ in the last couple of years.

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¹⁷ Case C-621/18, *Andy Wightman and Others v. Secretary of State for Exiting the European Union* (EU:C:2018:999).

Katia Fach Gómez. **Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas.** Cham, Switzerland: Springer, 2019. Pp. 222. €109,99. ISBN: 978-3-319-98127-7

One decade ago, an eminent scholar and practitioner underscored the importance of tackling moral hazards in international arbitration.¹ This endeavour is acutely pressing in the field of investor-state arbitration since much of the criticism and mistrust currently surrounding this field of international dispute settlement relates to the (un)ethical conduct of arbitrators.² The independence and impartiality of decision-makers are vital to ensure the confidence of disputing parties and the legitimacy of the system as a whole. Adjudicators are required to disclose to the parties, prior to appointment but also throughout the arbitral proceedings, any facts or circumstances that could impair their ability to fulfil their duties. Traditional ethical standards

¹ Paulsson, ‘Moral Hazard in International Dispute Resolution’, 25(2) *ICSID Review* (2010) 339.

² See, e.g., G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 167ff; Eberhardt and Olivet, ‘Modern Pirates: How Arbitration Lawyers Help Corporations Seize National Assets and Limit State Autonomy’, 77(2) *American Journal of Economics and Sociology* (2018) 279.

– namely, the duties of independence and impartiality – were developed in the context of commercial arbitration and serve as reference points for evaluating the appropriateness of investment arbitrators' behaviour. However, any ethical charter must be flexible enough to adjust to the evolution of the field and address new professional temptations.

Katia Fach Gómez's latest book, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas*, contributes to the ongoing reflection on the legal and ethical conundrums associated with investment adjudicators' *métier*. While this discourse normally focuses on the principal duties of impartiality and independence, there are a number of other relatively fluid, but important, ancillary duties. Fach Gómez wisely decides to skip a detailed analysis of impartiality and independence, as they have already been exhaustively addressed in the literature and arbitral practice.³ Instead, the book concentrates on ancillary duties arising pre- and post-appointment, which have hitherto received less attention from scholars and practitioners; the overarching duties of impartiality and independence are only referred to when they are directly implicated. The book analyses and systematizes the following duties: the duty of disclosure, the duty of personal diligence and integrity, the duty of confidentiality as well as duties to control arbitration costs and engage in continuous training.⁴ These obligations are meticulously examined taking into account applicable arbitration rules, ethical guidelines and arbitral case law. While the focus is on investment arbitration, the author draws inspiration from relevant provisions found in the realms of commercial arbitration and national and international courts.

The resolution of investment disputes is one of the most dynamic and rapidly changing areas of international dispute settlement. Fach Gómez engages with time-worn regulations as well as novel provisions found in the most recent international investment agreements. Her goal is to document the evolution of investment adjudicators' ethical standards, which, the author argues, should result in the creation of an explicit code of conduct. This work is particularly timely and valuable since the International Centre for the Settlement of Investment Disputes (ICSID), the major provider of investment arbitration services, is revising its rules and regulations,⁵ and the United Nations Commission on International Trade Law (UNCITRAL) is mulling over the adoption of a code of ethics and even the creation of a new institutional framework – a permanent investment court.⁶ Regardless of the reform options that eventually come to be implemented, one thing is certain: the figure of the investment arbitrator is undergoing a

³ See, e.g., Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (2017); Malintoppi, 'Independence, Impartiality, and Duty of Disclosure of Arbitrators', in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 789; Park, 'Arbitrator Integrity', in M. Waibel *et al.* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 189.

⁴ Examples of duties excluded from the analysis include the duty to decline or resign from an appointment, the duty to grant equal treatment to the parties, the duty to render a decision that is enforceable and post-award duties.

⁵ See International Centre for the Settlement of Investment Disputes, *ICSID Rules and Regulations Amendment Process*, available at <https://icsid.worldbank.org/en/amendments>.

⁶ See United Nations Commission on International Trade Law (UNCITRAL), *Working Group III: Investor-State Dispute Settlement Reform*, available at https://uncitral.un.org/en/working_groups/3/investor-state.

significant shift. There seems to be a consensus that the current system is unable to regenerate itself and needs improvement or even reform: 'We are at a crucial point, and the machinery of change is unlikely to come to a complete standstill' (at 7). Whether this will be a tranquil evolution or a dramatic revolution remains to be seen. Be it in an ad hoc context or in the framework of a permanent bench, reinforced ethical standards will be at the core of investment arbitrators' craft in the years to come.

The argument emerging from different chapters of the book is that existing ethical duties are neither sufficiently clear nor efficiently enforced. While there has been an increase in stakeholders' expectations regarding the behaviour of arbitrators, current provisions, and the way they are being interpreted and applied, leave much to be desired. As discussed in the first chapter, ethical standards are presently scattered across a variety of sources, creating uncertainty and promoting inconsistency. In addition, there is no general consensus about how the breach of such duties should be sanctioned and by whom. These shortcomings explain the interest in the adoption of a code of conduct. Such instruments, common in highly regulated professions, compile, in a systematic fashion, the ethical and legal duties and responsibilities of members in what might be termed a 'charter of virtuous professionalism'.

A significant portion of the book (Chapters 2 and 3) is devoted to the duty of disclosure, which cannot be dissociated from the fundamental duties of impartiality and independence. This duty is as important as it is complex and thus will receive particular attention in this review. The duty of disclosure seeks to ensure that decision-making by arbitrators is not clouded or influenced by any sensitive relation to the disputing parties or to the case under discussion. However, as arbitrators are appointed by the disputing parties, some (even a close) connection is inevitable, and it must be asked at which point they become 'too intimate'. Where to draw the line between serious challenges and futile scrutiny of arbitrators' independence and impartiality? How to balance the parties' right to appoint their 'own' arbitrator with the guarantees of due process? The exact scope and formal and substantive requirements of the duty of disclosure are uncertain and vague, both in theory and practice. Fach Gómez suggests that prospective arbitrators be required to sign a declaration that is clearer and more detailed as to its contents. However, the author herself acknowledges that arbitral case law has hitherto not allowed the distilling of clear guidelines regarding the scope of the duty of disclosure, and different stakeholders have opposing views about how intense this scrutiny should be. Codes of conduct seek to draw the line between some facts and circumstances that require disclosure (so as to safeguard due process concerns) and others that are irrelevant (to avoid imposing an excessive burden on arbitrators and arbitral proceedings more broadly). What is difficult is to achieve true consensus about where that line should fall and not let exaggerated formalism and concern with transparency slip into an exhausting and intrusive scrutiny of the candidates' every past and present personal and professional relationship.

Another suggestion proposed in *Key Duties of International Investment Arbitrators* is that potential arbitrators bear the burden of providing up-to-date information about their professional track record and investigate relevant information since they are in a better position to do so than arbitral institutions or the parties. Again, most arbitrators

are conscious of the need to comply with high ethical requirements to ensure the reputation and credibility of the professional class (and their own, naturally), but it is difficult to offer precise answers when what is actually being asked from them is unclear. While probably many will agree with the author that it is preferable to err on the side of over-disclosure, some arbitrators undergoing scrutiny may not sympathize with the proposition that ‘the duty of disclosure should be dedramatized’ (at 52). The scope of the duty of disclosure remains vague and imprecise. Moving forward, its exact parameters may be refined in the context of institutional measures against conflicts of interest.

The book then proceeds to examine the close relationship between the duty of disclosure and conflicts of interest (Chapter 3). This issue is at the centre of the system’s current predicaments and essentially results from the fact that arbitrators are service providers, not tenured judges. Arbitrators are individuals who sell their services to disputing parties. They are normally lawyers in private practice, practitioners with a background in governmental positions, former judges at the national or international level or academics. The functions of an investment arbitrator do not require exclusivity, as investment arbitration is not functionally specialized. This may give rise to professional temptations and conflicts of interest. While the International Bar Association (IBA)’s Guidelines on Conflicts of Interest in International Arbitration provide helpful guidance, they are not always taken into account when deciding on challenges. Looking to the future, this chapter suggests that compliance with the guidelines should be required in the framework of the creation of an investment court or the reform of ICSID’s regulations or that the guidelines be revised by the International Bar Association to reflect investment arbitration’s specific vicissitudes.

Three such vicissitudes, each reflecting a traditional conflict of interest, are discussed. The first is the phenomenon of ‘repeat appointment’. The community of investment adjudicators is frequently described as small and close-knit. As a result, a small number of practitioners are repeatedly appointed by the same disputing parties.⁷ The second problem is ‘issue conflict’ – a conflict of interest stemming from an arbitrator’s relationship to the subject matter of the dispute rather than his/her relationship with the disputing parties.⁸ The arbitrator’s perceived ability to exercise impartial and independent judgment may be affected by his/her prior interaction with an issue that is pertinent to the case at hand. The third problem is ‘multiple hatting’:⁹ investment practitioners may appear in some proceedings as arbitrators, while, in others, they act as counsel, provide expert knowledge as law professors or influence policy-making as government representatives. The exercise of distinct roles in different investment disputes raises the concern that individuals might misuse their role in

⁷ See Kapeliuk, ‘The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators’, 96 *Cornell Law Review* (2010) 47.

⁸ See Kim, ‘Issue Conflict in Investor-State Dispute Settlement: Focusing on the Challenges against Professor Francisco Orrego Vicuña in *CC/Devas et al. v. India* and *Repsol v. Argentina*’, 27 *Georgetown Journal of Legal Ethics* (2014) 621, at 622.

⁹ See Langford, Behn and Lie, ‘The Revolving Door in International Investment Arbitration’, 20(2) *Journal of International Economic Law* (2017) 301.

one case for the benefit of another. In the author's view, emphasizing the continuous character of the duty of disclosure may serve to address all three problems. However, the author does not really explain how a 'reinforced' duty of disclosure would help to clarify the lines of acceptable/impermissible behaviour in each one of the three cases. Tribunals and commentators have been expressing different views about where such exact lines should fall. Such discussion is yet to shed light on several grey areas of arbitral conduct.

Fach Gómez took on the arduous task of examining and systematizing some of the main duties of arbitrators. This work is particularly useful now that a draft Code of Conduct for Adjudicators has been released by the Secretariats of ICSID and UNCITRAL.¹⁰ Drawing on a comparative analysis of codes of conduct included in investment treaties, arbitration rules and rules of international courts, the draft covers issues such as the duties of independence and impartiality and the duty to conduct proceedings with integrity, fairness, efficiency and civility. It is meant to be binding, imposing concrete rules rather than guidelines. Its provisions are designed to be applied to all types of investment adjudicators, whether they are working under the traditional ad hoc mechanism or on the bench of a bilateral or multilateral permanent investment court. The Secretariats of UNCITRAL and ICSID will be receiving comments from stakeholders until 30 November 2020. Feverish academic commentary can be expected in the coming months.

Drafting a code is always a complex and ambitious undertaking, and its success is dependent on several factors. While it is impossible to predict which policy options will be implemented in the (more or less near) future, one factor that should feature in this discussion – and which is partially addressed by Fach Gómez – is the potential impact of a fully fledged code of conduct on the 'market' for investment adjudication services. This is even more the case if, instead of being a simple restatement of current practice, the code goes beyond current practice, introducing more stringent standards. There are, indeed, several questions that should be discussed by the different stakeholders with an interest in the reform process.

First, if the party-appointment mechanism is to be abandoned, how will the selection and appointment of adjudicators be conducted, and can these processes ensure the independence and impartiality of recruits? A court model would replace the current regime – where every arbitral panel is purposefully established by the parties after the dispute emerges – with a system where the adjudicatory body is already in place when proceedings are initiated. The main goal is to 'break the link' between the parties and the adjudicators, which seems to be at the root of many of the system's perceived shortcomings. However, this drastic paradigm shift, which 'dynamites one of the foundations of the classic ISDS' (at 4), runs the risk of turning states into the exclusive gatekeepers of the composition of the adjudicatory body. As a result, seats on the bench of the investment court could be filled only with those who share the appointing states' preferences and priorities. If political preferences speak louder, the

¹⁰ See UNCITRAL, *Code of Conduct*, available at <https://uncitral.un.org/en/codeofconduct>.

technical expertise and experience of adjudicators may be overlooked. Prospective adjudicators may start pulling strings in political circles in the hope of being appointed. Adjudicators themselves may feel (even if unconsciously) compelled to favour the positions of the state that appointed them and that decides on any potential extension of their mandate. After all, members of the permanent court will be aware that the court itself is a creation of states. While the new appointment model seeks to address accusations of bias, it will not automatically remove the risk of biased decisions. The selection process for members of the investment court might be plagued by the very same flaws that allegedly affect the current system and even create new types of biases.

The second set of questions relate to the profile, experience and expertise of the next generation of investment adjudicators. Experience in the doctrinal and practical nitty-gritties of the field is possibly the most critical ingredient for the quality and reputation of international arbitration. Repeat players are a side effect of professional specialization. The European Union (EU), one of the strongest advocates for radical change, seems to be keen on ‘changing the investment arbitrator profile’ (at 7). But will it be possible or desirable for the EU to sidestep the existing pool of investment arbitrators? Should some sort of ‘background check’ be conducted before entrusting the new adjudicators with the resolution of investment disputes? Should there be some type of ‘quarantine’ period for current arbitrators, as suggested by Fach Gómez, to address the problem of double hatting (at 111–115)? And, if so, who should be subject to this period of isolation on account of having been too intimate with the previous regime? If the code of conduct is overly restrictive, it will result in a clear separation of professional paths but also make the duty of disclosure less relevant and onerous (at 115). The insistence that adjudicators wear a single hat may also deprive the arbitration community of some of its best talents, who, when forced to choose, may opt for more profitable roles (at 110–111). An adjustment in the market for legal services may be the ‘price to pay’ to address concerns about the ethical conduct of arbitrators. Naturally, legal professionals will ponder over how undertaking a role as an investment adjudicator might affect their chances of pursuing (or maintaining) other careers (for instance, as counsel). In practice, the adoption of stringent criteria and of an unrealistic remuneration scheme may end up excluding some of the most experienced practitioners. Forcing practitioners to choose between the role of arbitrator and other professional endeavours may give rise to a whole new set of difficulties without effectively remedying existent problems.

The investment adjudicators’ professional guild is in the midst of a profound paradigm change. Concerns about the suitability of selection processes to retain independent and impartial adjudicators have moved from the academic realm to the policy-making arena. The codification of specific standards applicable to investment adjudicators is seen as a necessary step to increase compliance with the highest levels of professionalism and ethical probity. The new code of conduct reflects a trend towards the professionalization of this activity and might even ‘become an essential part of a new legal sector dealing with adjudicators’ ethics’ (at 9). While there are valuable lessons to learn from the experience of other adjudicatory settings, the fact

is that concerns about the independence and impartiality of adjudicators also exist in domestic and other international courts.

The author's stated aim with this book was to make a significant contribution to the study of the duties of investment adjudicators, provide theoretical and practical foundations for reform and suggest lines for further research (at 10). Mission accomplished. The book summarizes many of the ethical dilemmas to which investment adjudicators are currently subject. Based on a careful analysis of the applicable rules and jurisprudential interpretations, it lays down the basis for a reflection about how the profession should be regulated in the future. Investor-state arbitration has been said to be going through 'growing pains'.¹¹ This book offers an accurate diagnosis and discusses some potential treatments that have been proposed. Now is the time to dissect the draft Code of Conduct for Adjudicators and decide on the best therapeutic course of action.

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¹¹ Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', 73 *Fordham Law Review* (2005) 1521, at 1523.