

Malgosia Fitzmaurice and Panos Merkouris. ***Treaties in Motion: The Evolution of Treaties from Formation to Termination***. Cambridge: Cambridge University Press, 2020. Pp. 376. £95. ISBN 9781108495882.

Despite a certain ‘treaty fatigue’ in the international community,¹ there has been renewed interest in the sources of international law in recent years, and the number of scholarly works revolving around the law of treaties is breathtaking. Publications range from general compendia² over dedicated monographs³ and edited collections⁴ to a rich panoply of articles in the various journals of international law. Of course, this does not mean that all questions are settled. International law scholarship has debated issues pertaining to the law of treaties for decades, and it can be expected that this discourse will continue to further unfold. Nonetheless, new books enter what is already a dense field. The motivation for Malgosia Fitzmaurice and Panos Merkouris, the co-authors of the monograph under review, is to study treaties in the light of their motion. As the authors put it up front in their work, law, in general, as well as international law, in particular, sits ‘at the oscillation point between competing forces: stability and change, rest and motion’ (at 1). The idea for the book, they continue, ‘resulted from an observed bias in international authorship to examine treaties in a relatively static and fragmented way’ (at 2). This static and fragmented assessment of treaties would conflict, they write, with the fact that treaties – as any rule of international law – ‘are in a constant state of motion’ (at 2).

The book is informed by Aristotle’s typology of motion (*kinesis*). Following the Greek philosopher, the authors distinguish between six different forms of motion: generation (*genesis*), destruction (*phthora*), increase (*auxesis*), diminution (*meiosis*), alteration (*alloiosis*) and change of place (*kata topon metabole*) (at 5). Aristotle’s six categories of motion are then translated into specific phases in the life of a treaty that will be familiar to every international lawyer: the formation of a treaty (Chapter 2), the issue of consent to be bound (Chapter 3), the interpretation of a treaty (Chapter 4), its amendment/modification/revision (‘A/M/R’, Chapter 5) and the unilateral withdrawal from a treaty (Chapter 6). The ambition of the authors is to provide an overview of the development of treaties ‘from cradle to grave’ (at 16).

¹ Pauwelyn, Wessel and Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, 25 *European Journal of International Law* (2014) 733, at 739.

² C.J. Tams, A. Tzanakopoulos and A. Zimmermann (eds), *Research Handbook on the Law of Treaties* (2014); M. Bowman and D. Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Law of Treaties* (2018); D. Hollis (ed.), *The Oxford Guide to Treaties* (2nd edn, 2020).

³ E. Bjorge, *The Evolutionary Interpretation of Treaties* (2014); S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (2014); C. Djelfal, *Static and Evolutive Treaty Interpretation* (2015); I. Buga, *Modification of Treaties by Subsequent Practice* (2018); G. Nolte, *Treaties and Their Practice: Symptoms of Their Rise and Decline* (2018); L.E. Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools* (2018).

⁴ E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011); G. Nolte (ed.), *Treaties and Subsequent Practice* (2013); H.P. Aust and G. Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016).

The book is rich with very fine-grained analyses of a host of issues in the law of treaties. Wherever the reader turns, she will find valuable information on the doctrinal working of this field of law, replete with references to the relevant case law, preparatory work for the Vienna Convention on the Law of Treaties (VCLT),⁵ the work of international bodies like the International Law Commission (ILC) and the Institut de Droit International as well as a whole host of literature in the field, clearly showing the depth of the engagement that the two authors bring to this topic, certainly a fruit of their long-standing work with respect to the law of treaties. Overall, the book is anchored in a stringent theory of the law of treaties that puts the intention of the parties first when it comes to determining the meaning of treaty provisions (see, for instance, the very clear discussion on evolutive interpretation, at 140). The positions taken are always carefully and persuasively argued and make it apparent why the matters under deliberation are not just relevant for discussions in academia but have real-life implications. A case in point is the discussion on ‘soft law’ that makes the very valid point that it is necessary to distinguish between soft law *stricto sensu* and ‘soft provisions’ in binding treaties (at 89), an issue of great practical relevance, for instance, for the Paris Agreement on Climate Change.⁶

For the remainder of this review, I would like to focus on four critical points that strike me as potentially important avenues to think about ‘treaties in motion’ and that the book under review has not fully explored. These issues pertain to (i) the distinction between treaties and the law of treaties; (ii) the allegedly statist and ‘frozen-in-time’ image of international law against which the authors develop their claims; (iii) a conversely rather traditional understanding of international law underlying the analysis; and, finally, (iv) the question of whether the ‘notion of motion’, as labelled by the authors themselves (at 3), is a promising analytical criterion.

First, I wonder whether the book could have unpacked further whether motion plays a different role with respect to individual treaties and with respect to the law of treaties. The VCLT is often understood to be the ‘treaty on treaties’.⁷ It contains the general rules for the various states of the life cycle of treaties, which are – as the authors acknowledge – not confined to the VCLT but can also emanate from customary international law. But the discussions in the book seem to shift at times from looking at the evolution of specific treaties to the analysis of the dynamic evolution of the law of treaties. The different chapters to the book seem to follow different rationales here, with the chapter on interpretation having a clearer focus on the VCLT as opposed to the one on ‘A/M/R’, which delves more into the details of specific regimes. There may be good reasons for the different emphases of specific chapters of the book, but I would have appreciated a more direct engagement with the question of what constitutes the focus – that is, the general law of treaties or specific treaty regimes. *Nota bene*, the two can be closely interrelated, and the latter certainly impacts on the former. But, at

⁵ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

⁶ Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1 (12 December 2015).

⁷ R.D. Kearney and R.E. Dalton, ‘The Treaty on Treaties’, 64 *American Journal of International Law* (1970) 553.

times, I would have appreciated a clearer and more articulated distinction between the two and what this means for the main focus of the book (that is, going beyond the discussion where it is acknowledged that the VCLT also provides the rules that govern treaties [at 15]). Would it be conceivable, for instance, that the motion of individual treaties is much more dynamic than the movement within and of the law of treaties? Or are the rules of the VCLT as volatile as any given treaty regime? The authors come to the conclusion that the rules of the VCLT certainly are not ‘immutable’, as they put it at various points in the book. But a more fine-grained analysis of the different degrees of motion, distinguishing between the level of primary norms – that is, the commitments in individual treaty regimes – and the secondary level of the VCLT as well as other sources of a general international law of treaties, setting forth the law governing the transactions of states in the forms of treaties, would have been a further asset for the book under review.

Second, I am wondering to what extent the authors are engaged in fighting a straw-man. The main justification for the focus of the book on the theme of motion is that most other works on the law of treaties would view them as static creatures, frozen in time and with a similar certitude about the content of the law of treaties as being stable and fixed. In the context of interpretation, for instance, the authors write that it is their purpose to show ‘that the rules of interpretation are themselves also amenable to interpretation and change. If this can be demonstrated, then another critical blow will have been struck against the claim of immutability of the rules of interpretation in the pre-VCLT era, but this also proves the possibility of change of the existing rules in the future’ (at 168). I am not sure whether the authors would need to convince many colleagues of the second point – that is, the possibility of changing these rules in the future. The authors admit as much a couple of pages later: ‘The inescapable conclusion of accepting the immutability of the rules on interpretation would be that they are something entirely different from any kind of rules that we are accustomed to. If they are not affected by the passage of time and if they cannot change, then they clearly are not conventional rules, or customary rules, or principles. They would have to be a unique set of rules falling outside the classical sources with which we are familiar. *However, no State or the ILC or international courts and tribunals have adopted this kind of logic*’ (at 174; emphasis added). Precisely, one wishes to exclaim! The authors also give no references to scholars who would hold such a capricious claim.

What is more, most of the recent works on the sources of international law, in general, and of the law of treaties, in particular, seem to have focused precisely on the rather unstable dimensions of treaties and their law: if we focus only on the work of the ILC in the last two decades, one can already note that the project on reservations paid a lot of attention to temporal dynamics, especially with respect to the moment at which a state that had filed an invalid reservation could decide whether or not to remain bound by the treaty without the benefit of the reservation.⁸ In addition, the

⁸ International Law Commission (ILC), Guide to Practice on Reservations to Treaties, UN Doc. A/66/10 (2011), para. 75.

project on fragmentation dealt precisely with the intervention of different rules on a subject matter, these various rules necessarily emanating at different moments in time.⁹ The study group of the ILC on the topic of ‘treaties over time’ and the ensuing work on subsequent agreements and subsequent practice in relation to the interpretation of international agreements tackled the time factor head on.¹⁰ Provisional application of treaties is another topic of the ILC that has an obvious time aspect woven into its DNA.¹¹ And the project on *jus cogens* also paid particular attention to the dynamic in this area of international law, both in general and with respect to specific issues like the emanation of new norms of a peremptory nature.¹² All these projects generated significant academic writing with a keen interest for the aspects of motion, dynamic, temporal factors and the like.

My third point builds on the previous one. Given that the work aspires to focus on the motion of treaties, it adopts a surprisingly traditional and, hence, also quite static – and, indeed, statist – image of international law. This is regrettable insofar as motion – as understood by the authors – might well also be induced by factors emanating from more informal aspects of international cooperation and global governance. Where the book is dealing with the relationship between binding and non-binding, it does so in a rather classical manner. There are certainly references to memoranda of understanding, to decisions of Conferences of the Parties and to the notion of ‘soft law’. The authors also acknowledge in Chapter 2 of the book that there are ‘all sorts of instruments that are as a group and *ab initio* neither binding nor non-binding, but whose legal bindingness has to be determined *ad hoc*, on the basis of the factual background of each individual case’ (at 95). This is certainly correct, but, in the preceding discussions, the authors did not seem to make much use of the many excellent works that have been published in this connection in recent years and that have tested the outer limits of international law and the dynamics for the development of the law that have thus been created.¹³

Rather, ‘the conclusion on the debate on the various character of legal instruments is said to be best captured’ by the ninth edition of Oppenheim’s *International Law* (at 61, n. 125). Now this is certainly a classic work meriting attention today, but it begs the

⁹ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006).

¹⁰ ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc. A/73/10 (2018), para. 51.

¹¹ ILC, Provisional Application of Treaties: Texts and Titles of the Draft Guidelines Adopted by the Drafting Committee on First Reading, UN Doc. A/CN.4/L.910 (28 May 2019).

¹² ILC, Peremptory Norms of General International Law (*Jus Cogens*). Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, UN Doc. A/CN.4/L.936 (29 May 2019).

¹³ Many works could be cited here, see, e.g., M. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (2011); M. Young (ed.), *Regime Interaction in International Law* (2012); E. Johns, *Non-Legality in International Law: Unruly Law* (2013); E. Benvenisti, *The Law of Global Governance* (2014); A. Rodiles, *Coalitions of the Willing in International Law: The Interplay between Formality and Informality* (2018).

question of whether there have been developments in the real world and the accompanying literature since then and why the characterization of legal instruments stands frozen in the early 1990s.¹⁴ It is indeed even a bit puzzling to write about treaties in motion to only then adopt a classic, but arguably also a bit dated, text as authority for a highly dynamic subject matter. The authors also cut short any attempt to make use of political science and international relations literature on this regard,¹⁵ insisting on a rather clear-cut distinction between the disciplines of law and political science (at 59) or making generic references to the field of ‘political science’ without footnoting any specific works (at 87). Major research projects like the momentous ‘IN-LAW’ approach¹⁶ are relegated to a single reference in the footnotes (at 82, n. 214) with no apparent engagement with their substance, which would seem to have been quite apoposite for studying the issue of motion surrounding treaties and their law. Projects like IN-LAW have taken insights from political science on board much more directly, which arguably has also allowed them to develop a clearer picture of the dynamics involved in contemporary law-making and law application.

Finally, it can be wondered what work the analytical prism of ‘motion’ is doing. Motion is understood in this book in such a wide sense that it encompasses every conceivable state of aggregation of a given treaty or question of the law of treaties. The chapter on the interpretation of treaties is introduced, for instance, with the sentence that ‘motion is to be understood not only through space but also through time’ (at 121). In all likelihood, this will not meet with much opposition. The problem with framing the issue in this way, however, is that there is not really a passage on ‘motion through space’ in the book. There are more examples for the limited insights that the ‘notion of motion’ entails: “[M]otion” can be understood not only as motion through time and as change of one’s content but also in relation to identifying the hard, soft, or no lines at all, between different sets of legal rules, law of treaties and State responsibility’ (at 295). What is the reader to take away from this passage, for example? Accordingly, motion appears to be another term for an attempt to distinguish between (or not) two different fields of public international law and to illustrate that the boundaries between the two can be blurred. In another part of the book, a related understanding conveys the meaning that motion is generated through the ‘interaction between various concepts and sets of rules’ (at 319). In yet other places, motion simply means change – as when it is stipulated that, in a particular section, the concept is understood ‘in the sense of further clarification and confirmation by international jurisprudence’ (at 314). All of this culminates in the finding that ‘motion is not a mono-dimensional concept and that nothing exists in absolute clinical isolation’ (at 333). I am not entirely convinced that the ‘multifariousness of the term “motion” was well-suited to the object and purpose of the book’, as the authors hold towards the end of their work (at 336).

¹⁴ For an overview of the state of the art, see Goldmann, ‘Relative Normativity’, in J. d’Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019) 740.

¹⁵ For a particularly useful work in this regard, but which has been published simultaneously to the work under review, see C.B. Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance Are Shifting, and Why It Matters* (2020).

¹⁶ Pauwelyn, Wessel and Wouters, *supra* note 1; J. Pauwelyn, R. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012).

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.