

BOOK REVIEW

Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas

Ina C Popova¹ and Berglind Halldórsdóttir Birkland²

Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) ISBN 978-3-319-98128-4, 91, 62 €

Professor Katia Fach Gómez's monograph about the duties of international investment arbitrators is a timely contribution to the ongoing debate about the future of the investor–State dispute resolution system (ISDS).

As Professor Fach Gómez notes in her introduction, '[t]he ISDS regime is at a particularly tumultuous stage in its existence'.³ The debate about how and by whom investment disputes should be resolved has arguably never been fiercer or more public. After decades of operating in relative obscurity, the system has attracted the attention of the public and even become a topic of political campaigns. While ICSID membership continues to grow, three Latin American States have withdrawn from the ICSID Convention, the United States has refused to join new agreements and is seeking to renegotiate old ones, and the European Union is advocating for significant changes in the way disputes are resolved, including by proposing the creation of a permanent investment court. The International Centre for Settlement of Investment Disputes (ICSID) is likewise in the process of amending its Arbitration Rules in an effort to 'modernize, simplify, and streamline' them.⁴

In all these debates and discussions, the character of the investment arbitrator looms large. Whether it is accurate or not, there is a growing perception that the people appointed to the role are too elite, too investor friendly, too keen on reappointment, and not sufficiently diverse properly to represent the interests of the nations affected by their decisions. Concerns have also been expressed about 'double hatting'—the practice of serving simultaneously as advocates and adjudicators in different cases—and the possibility that an arbitrator may be

¹ Debevoise & Plimpton LLP, Partner, International Dispute Resolution Group, Debevoise & Plimpton, New York. Email: ipopova@debevoise.com.

² Debevoise & Plimpton LLP, Associate, International Dispute Resolution Group, Debevoise & Plimpton, New York. Email: bhbirkla@debevoise.com.

³ Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 1.

⁴ ICSID, 'ICSID Rules and Regulations Amendment Process' <<https://icsid.worldbank.org/en/amendments>> accessed 2 July 19.

predisposed to decide an issue in a manner favorable to her clients' interests, although the incidence of such challenges succeeding is relatively limited. Together, however, these critiques have fueled efforts to replace the traditional system of *ad hoc* party-appointed arbitrators with standing investment tribunals.

It is against this backdrop that Professor Fach Gómez offers her helpful survey of the role of the investment arbitrator. She also draws on the rules applicable to international commercial arbitration as a model for the investment context, identifying best practices that can be imported into the ISDS regime. Indeed, while the stakes are often considered to be higher in investment disputes than in commercial disputes, the job of the arbitrator in both systems is essentially the same.

Professor Fach Gómez focuses in particular on three duties: the duty of disclosure, the duty of personal diligence and integrity, and the duty of confidentiality. In doing so, she aspires to more than a theoretical discussion and focuses on the specifics of what these duties look like in practice and what improvements can be made to the current system.

Professor Fach Gómez's proposals illustrate how attention to the more mundane aspects of managing individual arbitrations can help to shore up the system and lend it greater credibility. For instance, one of the most frequent critiques of the ISDS regime concerns arbitrators' perceived or real conflicts of interest. Professor Fach Gómez makes the case that the process of identifying potential conflicts of interests would be less fraught if it were made both more rigorous and more routine, including by shifting some of the burden from the parties to the arbitrator herself. The duty of disclosure, she argues, should be 'dedramatized' and disclosure 'should not be considered a synonym for a lack of independence or impartiality'⁵ but as integral to the arbitrators' obligation as 'a well-organized professional'.⁶ Thus, Professor Fach Gómez argues that the duty to investigate any potential conflicts of interests is 'a personal obligation' that 'can only be fulfilled by the arbitrator-obligor'.⁷ For example, arbitrators should be expected to disclose any publicly available arbitral appointments and not expect parties to go hunting for them. Arbitrators should also be expected to disclose their full updated *curriculum vitae*—a requirement that arbitral institutions can help to police. Imposing the burden on the challenging party of identifying any information that is considered to be 'publicly available' is a 'a huge burden and could also lead to false negative results as a consequence of the inability to access certain sources due to data protection or confidentiality'.⁸

Similarly, Professor Fach Gómez advocates for a shift away from an arbitrator-centered standard of the materiality of the disclosure toward a party-centered standard. Rather than defer to the arbitrator's subjective view about whether a relationship is sufficiently material to warrant disclosure, the rule should be full disclosure. '[E]rring on the side of pedantry and over-disclosure would seem preferable to carelessness or opacity',⁹ she observes, because fulsome disclosure reduces the risk that parties will file disruptive disqualification requests down the line, based on facts that the arbitrator chose not to disclose at the outset.

⁵ Fach Gómez (n 3) 52.

⁶ *ibid* 63.

⁷ *ibid* 62.

⁸ *ibid* 51.

⁹ *ibid* 52.

In her discussion of the duty of personal diligence and integrity, Professor Fach Gómez considers the practice of delegating portions of the arbitrators' work to secretaries and assistants, and the extent to which existing guidance reflects the heated debate about the appropriateness of delegating anything more than the most superficial administrative tasks. She also advocates for putting in place mechanisms to prevent over-scheduled and on-demand arbitrators from delaying the resolution of disputes, including encouraging arbitrators and parties to confer about schedules before the appointment phase.¹⁰ On the duty of confidentiality, Professor Fach Gómez describes the potentially conflicting but ultimately complementary principles of confidentiality and transparency, which, when appropriately balanced, can each have a 'positive impact on the legitimacy of the investment arbitration system'.¹¹

Ultimately, Professor Fach Gómez concludes that a common code of conduct for investment arbitrators could be a welcome development. She notes that although there has been 'a clear rise in expectations with respect to investment arbitrators' conduct', the regulatory framework 'has reflected this increasingly significant reality only in partial and piecemeal fashion'.¹² Indeed, her survey of existing rules and guidelines highlights the diversity in the level of specificity, scope and practical application of the duties of investment dispute adjudicators, be they party-appointed arbitrators or standing tribunal members.

To the extent that codes of conduct for investment tribunal members have been proposed to date, they have generally not remedied the perceived disconnect between heightened expectations and concrete rules that Professor Fach Gómez identifies. For example, the North American Free Trade Agreement Code of Conduct¹³ and the codes of conduct attached to the EU–Singapore Investment Protection Agreement,¹⁴ the EU–Vietnam Investment Protection Agreement,¹⁵ and the Comprehensive Economic and Trade Agreement,¹⁶ all require that arbitrators avoid impropriety or the appearance of impropriety, that they be independent and impartial, and that they avoid direct and indirect conflicts of interest, but none of these codes actually defines what the terms 'impropriety', 'independence', 'impartiality' or 'conflict of interest' mean. Moreover, they impose on arbitrators a continuing duty to disclose any interest, relationship or matter that is likely to affect their independence or impartiality, or that might reasonably create the appearance of impropriety or bias, but they do not describe the disclosure process in any detail, or define the level of diligence expected from the arbitrators or the standard by which the reasonableness of their disclosures will be tested. It remains to be seen, therefore, whether standing investment courts can bridge the perceived gap between expectations and practice to which they were, in part, designed to respond.

¹⁰ *ibid* 141.

¹¹ *ibid* 168.

¹² *ibid* 192.

¹³ North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) (NAFTA) Code of Conduct.

¹⁴ Free Trade Agreement between the European Union and the Republic of Singapore (signed 19 October 2018, not yet entered into force).

¹⁵ Free Trade Agreement and Investment Protection Agreement between the European Union and Viet Nam (signed 30 June 2019, not yet in force).

¹⁶ Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, provisionally entered into force 21 September 2017) (CETA).