

SYMPOSIUM: A FOCUS ON ETHICS IN INTERNATIONAL COURTS AND TRIBUNALS

EX PLURIBUS UNUM? ON THE FORM AND SHAPE OF A COMMON CODE OF ETHICS IN INTERNATIONAL LITIGATION

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In April 2019, member-states of UNCITRAL Working Group III requested the UNCITRAL Secretariat to undertake preparatory work for a Code of Conduct for Investor-State Dispute Settlement focusing on the implementation and enforceability of such a code.¹ This groundbreaking development signals that, for the first time, a consensus exists that a code of ethics for Investor-State dispute settlement is desirable and needed. This contribution addresses three threshold questions that such preparatory work raises, namely: the preferred form of the code, the code's substantive reach, and the optimal process for bringing a code to fruition. As set out below, we urge that states adopt a mandatory common code of ethics for disputes involving states, and that arbitral institutions adopt this code as part of their rules for administering arbitration.

A Multitude of Possibilities

In 1980, Richard Baxter famously detailed how international law manifested itself in “her infinite variety.”² Baxter was referring, in part, to the bewilderingly wide variety of ways that states and other actors expressed international legal normativity, ranging from traditional instruments like treaties and joint communiqués to resolutions of international organizations and innovative forms of soft law. Baxter usefully explained that different forms of international law contained different levels of precision, enjoyed varying degrees of acceptance, and reflected various shades of normative commitment.

Surveying the field of legal ethics in international adjudication nearly four decades later, it is tempting to conclude that ethical rules likewise exist in a nearly infinite variety.³ Variation is found in the scope and precision of rules; their normative weight; their genesis, specifically whether they are promulgated by states, judges, or other actors; and whether they are consolidated in a separate code or, rather, scattered across various texts not specifically devoted to ethics issues.

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¹ UN Comm'n on Int'l Trade Law, [Report of Working Group III \(Investor-State Dispute Settlement Reform\)](#), UN Doc. A/CN.9/970, para. 84 (Apr. 9, 2019). States requested that this work be undertaken in conjunction with the International Centre for Settlement of Investment Disputes.

² R.R. Baxter, *International Law in “Her Infinite Variety”*, 29 INT'L & COMP. L.Q. 549 (1980).

³ For general introductions to the field, see CATHERINE A. ROGERS, [ETHICS IN INTERNATIONAL ARBITRATION](#) (2014); ARMAN SARVARIAN, [PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR](#) (2013).

International arbitration, in particular, is marked by fragmented and decentralized clusters of “institution specific” rules, as each arbitral institution determines whether and how to address ethics issues. The International Centre for Settlement of Investment Disputes, UNCITRAL, and the International Chamber of Commerce, for example, have each adopted their own set of rules, although each addresses only a narrow set of ethical issues. Adding to the complexity, a variety of soft law instruments exist, including the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) and the Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals.⁴

As calls for ethics reform gain momentum, attention should focus on lessons learned from past drafting attempts and on strategies for consolidating this multiplicity of forms and contents into one viable code—how to move, in other words, from a plurality to one.

In this essay, we do not attempt to resolve all the complex and longstanding normative debates over the codification of ethics norms in international litigation.⁵ Instead, we identify and explore three threshold questions that we believe should shape discussions over a common code of ethics for disputes involving a state as a party. First, in terms of *form*, we explore the legal nature of the proposed norms, and specifically whether or not they should be binding.⁶ Second, we examine whether one general code is preferable to numerous institution-specific codes; we explore particularly how an ethics code’s substantive *content* has implications for the code’s *scope* of application. Third, we delve into the issue of *process* and thus how a code could become part of the applicable procedural law.

We highlight these threshold issues because absent reasonably clear agreement on them, it is difficult to engage meaningfully in any discussion of whether it is descriptively possible or normatively desirable to develop ethical standards applicable to international adjudication. Issues of form, content, scope, and process in these debates are intrinsically related, and changes in one of these variables has unavoidable implications for the others.

Soft or Hard Law?

The initial question we consider is whether a binding code is preferable to nonbinding guidelines. There are strong arguments in favor of regulating ethics through nonmandatory guidelines. Chiefly, guidelines can be more flexible—an important consideration given the wide variety of international adjudication fora. Moreover, nonbinding ethical rules could attract a larger and more diverse set of parties.

However, at least three arguments tip the balance towards a mandatory code. First, several previous attempts by well-respected institutions to develop nonbinding guidelines have had only limited success. Although the IBA Guidelines have been invoked more frequently than other soft law instruments, they cover only a small fraction of the ethics universe, and even they are applied relatively rarely. Absent the authority and legitimacy that attaches to state-negotiated solutions, parties have proven reluctant to incorporate ethics codes into the resolution of their disputes. Second, ethical issues are too important to be left to voluntary standards. Recent cases that focused on ethics questions, and the widespread public interest in certain ethical issues, strengthen the argument that a comprehensive and binding code is needed. Third, and most importantly, tribunals may, and do, disregard soft law when they consider ethical issues.

⁴ Int’l Bar Ass’n, [Guidelines on Conflicts of Interests in International Arbitration](#) (2014); Int’l Law Ass’n, [Hague Principles On Ethical Standards For Counsel Appearing Before International Courts and Tribunals](#) (2010).

⁵ For one argument in favor of a more decentralized approach, see Catherine A. Rogers, [Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration](#), 39 STAN. J. INT’L L. 1, 1 (2003).

⁶ The resolution of this question of form, of course, has implications for questions concerning the process through which the rules should be created, although given space constraints we do not further address the issue here.

The recent *Chagos* arbitration is instructive in this regard.⁷ In 2010, Mauritius filed a claim alleging that the United Kingdom had violated the 1982 UN Convention on the Law of the Sea (UNCLOS) by establishing a Marine Protected Area in the Chagos Archipelago.⁸ A tribunal was established under Annex VII UNCLOS and administered by the Permanent Court of Arbitration (PCA).

The United Kingdom appointed Judge Sir Christopher Greenwood as arbitrator, triggering a challenge by Mauritius, based on Sir Christopher's "long, close, and continuing relationship with the Government of the United Kingdom," including prior work as counsel for the British government. Mauritius argued that in applying the obligation of independence and impartiality, the tribunal should refer to the standards reflected in international arbitration rules and statutes, including those found in soft-law instruments such as the IBA Guidelines.⁹

After careful review, the tribunal determined that the law and practice of tribunals "not seized of inter-State disputes" was "not directly relevant." It further determined that Mauritius had not demonstrated that the rules adopted by non-governmental institutions such as the IBA have been expressly adopted by States, that they form part of a general practice accepted as law, or fall within any other of the sources of international law enumerated in Article 38(1) of the Statute of the ICJ.¹⁰ The tribunal therefore concluded that the IBA rules were neither directly applicable nor "relevant for the purposes of its analysis in the present proceedings."¹¹

In sum, the tribunal declined to consider soft law instruments, even for analytical purposes. The tribunal's conclusion shows that, absent a clear prior agreement by the parties, a tribunal can decide not to rely on soft law even when requested to do so by one of the parties. To guarantee consistency and foreseeability, ethics rules should be adopted via mandatory code that can be known and readily identifiable by the parties and the tribunal alike before any disputes ensue.

General or Specific Code?

A second threshold question concerns the scope of the applicability of an ethics code, and specifically whether a series of specialized codes, each intended for a particular forum, is preferable to a general code that can be used by a multiplicity of fora addressing disputes involving states. On balance, we favor an approach that would broadly apply to all proceedings involving a state.

First, proceedings where at least one party is a state share a number of similarities, and these proceedings differ in a number of important respects from those not involving states. Most obviously, these disputes all involve a sovereign, a unique entity under international law that is regulated by various rules and legal regimes not applicable to other actors. As such, cases that involve a state often share similarities in terms of applicable rules of procedure, applicable provisions addressing immunities, the tribunal's power, and the collection of evidence, among other topics. Moreover, disputes that involve states inevitably possess a public character, which increasingly captures the interest of broader publics, and as such these proceedings also often raise recurring issues concerning transparency, third party access, cost and funding, and related issues.

⁷ [Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea \(Mauritius v. UK\)](#), Reasoned Decision on Challenge (Nov. 30, 2011).

⁸ The Chagos Archipelago is a group of atolls in the Indian Ocean (the largest is Diego Garcia) administered by the United Kingdom as the British Indian Ocean Territory. In 2010, the United Kingdom established the Marine Protected Area, which covers an area of more than half a million square kilometers around Chagos in which fishing and other activities are prohibited. Mauritius argued that the establishment of the Marine Protected Area violated international law and UNCLOS. *See id.* at paras. 31-32.

⁹ *Id.* at paras. 40, 42, 45-46.

¹⁰ *Id.* at para. 167.

¹¹ *Id.* at para. 165.

The reasoning of the Chagos challenge decision is illustrative in this regard. In looking for an appropriate standard, the tribunal referred to ICJ practice and other interstate arbitrations, including a number of PCA-administered arbitrations, such as the Eritrea-Ethiopia Boundary Commission, the *OSPAR* case, and the *MOX Plant* case. Each of these disputes used rules based on the UNCITRAL Arbitration Rules, but with certain modifications “to reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes.”¹² The tribunal looked to these actions because the standards that they employed “can be considered to form part of the practice of inter-State arbitral tribunals.”¹³

A second, and even more important, reason to regulate ethics generally in disputes involving a state as a party is systemic: One of the most potent critiques of international litigation is that judges and arbitrators are often appointed repeatedly and that they and counsel may engage in double-hatting. Repeat appointments of the same person by the same party, the same counsel, or even in the same kind of proceedings may result in unacceptable conflicts of interest or, at a minimum, the appearance of a lack of impartiality. Likewise, double-hatting, the practice by which individuals act both as international arbitrators and as counsel in separate proceedings, is roundly criticized but remains unregulated.¹⁴

In the current institution-rich environment, only a general code of conduct that applies to all proceedings involving a state can properly address systemic concerns. A general code could bring at least two specific advantages. First, it could require full disclosure of all cases in which an arbitrator is involved regardless of the forum, thus providing comprehensive information to all parties of any possible conflicts and addressing both repeat appointments and double-hatting. Second, a general code could regulate comprehensively the number of cases in which an arbitrator may simultaneously participate. For example, a general code could include provisions that limit the number of cases on which a potential arbitrator can concurrently sit, or the number of appointments that could come from the same party or counsel. Alternatively, a general code could also specify a period of time—for example, two or three years—during which an arbitrator could not work as counsel or a counsel could not accept appointments.¹⁵ For current purposes, the details of any rules eventually adopted are less important than the fact of a system-wide approach. If the goal is to tackle repeat appointments and double-hatting, only a generally applicable framework can provide the necessary and effective regulation for international litigation that involves states.

The Choice of Process

A final threshold issue to consider is what process should be adopted to ensure the implementation and success of the code.

At first blush, it is reasonable to think that incorporating a code into a treaty would give it the strongest support and chance to succeed. Treaties are strictly regulated sources of international law, whose applicability and enforcement processes are clear.

¹² *Id.* at para. 151.

¹³ *Id.* at paras. 163-65. The tribunal did not differentiate between commercial and investment arbitration and concluded that rules pertaining to them are not relevant to the consideration of interstate cases. We think, to the contrary, that investment arbitration, which involves a state as a litigant and has strong public law overtones, has more in common with other proceedings involving states than with wholly private international commercial arbitration.

¹⁴ Criticisms of this practice are explored in greater detail in John R. Crook, *Dual Hats and Arbitrator Diversity: Goals in Tension*, 113 AJIL UNBOUND 284 (2019); Hélène Ruiz Fabri, *Conflicts of Interest: Navigating in the Fog*, 113 AJIL UNBOUND 307 (2019).

¹⁵ This is the approach that the ICJ adopted in its Practice Directions.

In this context, the multifaceted approach to adoption used for the Rules on Transparency in Treaty-based Investor-State Arbitration (the Rules) is instructive.¹⁶ The Rules were developed by UNCITRAL and aim at increasing transparency in the investment arbitration process. Interestingly, they can be incorporated into arbitral proceedings in a variety of ways. As a matter of treaty law, they apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded on or after April 1, 2014.¹⁷ States have negotiated about fifty such new treaties, but only sixteen have entered into force.¹⁸ Also, parties to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) agree to apply the Rules to disputes arising under treaties concluded before April 1, 2014. However, the Mauritius Convention has only entered into force for five countries.¹⁹ The implementation of the Rules through the treaty option seems to be of limited impact so far. This is unsurprising, as substantial time often passes between the conclusion of a treaty and the start of treaty-based disputes.

In conjunction with the treaty-based approach, arbitral institutions could adopt the Code in their rules so that it could apply to all future proceedings administered by that institution.²⁰ By way of example, in 2013 the UNCITRAL Arbitration Rules were amended to incorporate the new transparency rules. Adoption of a common code of ethics by arbitral institutions would promote a more expeditious and uniform application of the Code.

Conclusion

In this essay, we have attempted to provide an initial assessment of the normative desirability and practical feasibility of adopting a general code of ethics for proceedings involving a state. We have addressed three threshold questions related to the possible form, scope, and process of adopting a future code of ethics and have argued that an ethics code should be mandatory, general, and open for adoption by arbitral institutions.

As the ICJ has recently released its Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, we close with one final thought on litigation concerning the Chagos.²¹ The Advisory Opinion is ground-breaking in many respects. For current purposes, it also underscores the importance of comprehensive regulation of international litigation processes. Before his election to the ICJ, Judge Crawford acted as counsel for Mauritius in the PCA Arbitration in which Judge Greenwood sat as an arbitrator. As it turned out, Judge Greenwood's term at the ICJ ended and he was not reelected to the bench, and Judge Crawford did not participate in the ICJ proceedings. However, one can easily imagine scenarios in which the fact that individuals could possibly serve in different roles in an arbitration and a subsequent litigation involving the same fact pattern and presenting many of the same legal issues would be deeply problematic.²² The existence of a general code would assist in the disposition of such cases and provide the means to effectively address any potential ethics concerns.

¹⁶ [UN Comm'n on Int'l Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration](#).

¹⁷ *Id.* art 1.

¹⁸ [Status – UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration](#).

¹⁹ [UN Convention on Transparency in Treaty-based Investor-State Arbitration](#), Dec. 10, 2014, GA Res. 69/116.

²⁰ We believe that most arbitral institutions have authority to adopt a code of ethics, without seeking member state approval, although we recognize that the issue is not free from doubt and that each institution is governed by different legal instruments.

²¹ [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 \(Request for Advisory Opinion\)](#), Advisory Opinion (ICJ, Feb. 25, 2019).

²² See generally Dapo Akande, [Composition of the Bench in ICJ Advisory Proceedings: Implications for the Chagos Islands Case](#), EJIL:TALK! (Apr. 10, 2017).