

# BOOK REVIEW

## **Ethical Ordering in Transnational Legal Practice? A Review of Catherine A. Rogers's ETHICS IN INTERNATIONAL ARBITRATION**

CARRIE MENKEL-MEADOW\*

### ABSTRACT

*This Review Essay explores the major contributions of the first systematic effort to describe and call for international and “internal regulation” of ethics standards for international arbitration, including commercial, investor-state and other forms of trans-border arbitration of legal disputes. This Essay first situates the particular ethical dilemmas in international arbitration within the larger jurisprudential questions raised by the legal justifications that create and support international arbitration. It then describes some of the particular ethical issues, including conflicts of interests, use of experts, legal systemic differences in rules, ethics and practices, third party funding of arbitrations, discovery and evidentiary rules and conflicts and variations in treatment of these issues as a form of “comparative ethics” that must be “harmonized” in some way. The Essay concludes with suggestions for thinking through some of the dilemmas in creating a cross-legal system of ethics and standards regime, including questions of content, enforcement, commitment, and transparency, while preserving some of the conflicting values of international arbitration—privacy, party choice, and consent over both process and substantive issues. The Essay raises the worry that macro-ethical concerns about systemic legitimacy and transparency may be different from micro-ethical behavioral and party-level ethical issues. International arbitration ethics concerns demonstrate that modern law and ethics are truly “transnational”—not tethered to a particular legal system, with all the*

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\* Chancellor's Professor of Law (and Political Science), University of California Irvine (“UC Irvine”) and A.B. Chettle, Jr. Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University Law Center. Thanks to Citlalli Ochoa for research assistance, Amanda Hudson for creative assistance and support, and Dianna Sahar for continuing bibliographic and library support par excellence at UC Irvine and to Ivana Djak and the editors of the *Georgetown Journal of Legal Ethics* for a caring and considerate editing process and to my friend and colleague Professor Mitt Regan at Georgetown. © 2016, Carrie Menkel-Meadow.

issues and contradictions that such trans-systemic legal regimes have come to represent.

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INTRODUCTION: DEEP ISSUES AND PRACTICAL REALITIES IN TRANSNATIONAL  
PRACTICE EQUAL ETHICAL LEGAL PLURALISM

Wrapped in the elegant gold-leaf detail of Gustav Klimt’s *Tree of Life* painting,<sup>1</sup> Catherine Rogers’s book, *Ethics in International Arbitration*, contains a world of antinomies, controversies and proposed solutions to the many complex issues involved in transnational legal practice, and whether we can or should make ethical standards to guide such practice. This Review Essay both reviews this important book and situates the book in the larger issues of transnational

1. CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* Cover (2014) (showing Gustav Klimt, *Tree of Life* (1909)). This beautiful cover is itself both an appropriate and an ironic cover for a book about transnational legal ethics. Several of Gustav Klimt’s famous paintings, as well as those of many other artists, have been the subject of much complicated and controversial transnational litigation (and arbitration!) as survivors and heirs of survivors of the Holocaust have sought to recover the art unlawfully confiscated by the Nazis before and during World War II. See, e.g., ANNE-MARIE O’CONNOR, *THE LADY IN GOLD: THE EXTRAORDINARY TALE OF GUSTAV KLIMT’S MASTERPIECE, PORTRAIT OF ADELE BLOCH-BAUER* (2012); LYNN NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

jurisprudence. It explores the sources, justifications, and critiques of a legal dispute resolution regime that is not necessarily tethered to any particular sovereign legal regime.

Like an ever growing tree of life, with deep roots, new generations,<sup>2</sup> and both growing and dying branches and leaves, international arbitration is, in some senses, centuries old, and at the same time, as new as today. Recent international treaties have expanded the substantive and dispute resolving rules and mechanisms for global governance of increasingly complicated issues that span both public and private matters. Globalization of so many domains, including commercial, financial, investment, environmental, criminal, cultural, religious, and even domestic (family) relations has led to many forms of dispute resolution, rule formation,<sup>3</sup> legal enforcement, as well as private, formal state, and hybrid governance.<sup>4</sup> How the increasingly transnational legal world does or could resolve its many disputes is one of the major issues of our growing transnational legal pluralism.<sup>5</sup>

Whether we can find or create ethical standards to govern transnational and multi-cultural legal practice is the focus of Professor Rogers's important book and this review.<sup>6</sup> What exactly are transnational legal ethics? What are the problems or issues that have provoked interest and increasing efforts by leading arbitral institutions to promulgate such rules and guidelines?<sup>7</sup> A variety of

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2. The now classic sociological mapping of generations within the international arbitration field is YVES DEZALAY & BRYANT GARTH *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE MAKING OF A TRANSNATIONAL LEGAL ORDER* (1996) [hereinafter DEZALAY & GARTH, *DEALING IN VIRTUE*], which contrasted the European "grand old men" to the Anglo-American "new technocrats." New empirical and legal scholarship now documents a third generation of "managerial" arbitrators who can manage complex transnational arbitration in more varied contexts than private international commercial arbitration. See e.g., Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezalay and Garth*, 28 *ARB. INT'L* 161 (2012); JOSHUA KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* (2013); Luke Nottage, *The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery*, 16 *ARB. INT'L* 53 (2000) [hereinafter Nottage, *Transnational Commercial Arbitration*]; Luke R. Nottage, *A Weathermap for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms* (July 13, 2015), <http://ssrn.com/abstract=2630401> [<http://perma.cc/R8CD-PLK3>].

3. In the legal jurisprudence of international arbitration there are interesting debates now in both *procedural* or *adjectival law* (process, ethics, rules, evidence production, etc.) and *substantive law* (international common law, *lex mercatoria*, contract theory and interpretation, common vs. civil law norms and legal reasoning, etc.). See, e.g., Nottage, *Transnational Commercial Arbitration*, *supra* note 2.

4. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005) [hereinafter SLAUGHTER, *NEW WORLD*]; NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM (Michael Helfand ed., 2015) [hereinafter STATE AND NON-STATE LAW].

5. Paul Schiff Berman, *Global Legal Pluralism*, 80 *S. CAL. L. REV.* 1155 (2007); Duncan Kennedy, *Three Globalizations of Law and Legal Thought, 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (Alvaro Santos & David M. Trubek, eds., 2006); Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 *U.C. IRVINE L. REV.* 97 (2011) [hereinafter Menkel-Meadow, *Why and How*].

6. See ROGERS, *supra* note 1, at 1-17, 365-72 (2014).

7. See, e.g., INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafce8918> [<http://perma.cc/HFW9-FC5C>]; INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION (2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=2e2e5e72-eb14-4bba-b10d-d33dafce8918> [<http://perma.cc/HFW9-FC5C>].

concerns based on jurisprudential questioning of international arbitration have led to this moment of dialogue, discussion, debate and Professor Rogers's issue-defining book. These concerns range from legitimacy of the private or hybrid international law dispute resolution system (a central concern of Professor Rogers in this book<sup>8</sup>), to international and demographic diversity of practitioners or parties,<sup>9</sup> competition with more formal means of dispute resolution (national courts or other tribunals), transparency of decision-making and process, a desire for more uniformity or universalism in international dispute resolution, and governance or just a more general sense of fairness and justice in legal decision-making.

This Review Essay is written for specialists—those who practice, study and teach international arbitration,<sup>10</sup> legal ethicists both domestic and international, and for more general readers interested in issues about the globalization of judicial and alternative dispute resolution processes or “process pluralism.”<sup>11</sup> Professor Rogers's book seeks to answer two key questions. First, whether dispute resolution systems, like international arbitration, require ethical standards, which are complied with or enforced somehow, in order to secure legitimacy, party and systemic acceptability, compliance, and appreciation of particular justice values. Second, whether such standards can be developed and effectively implemented in trans-cultural legal settings. Answering these ques-

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SENTATION IN INTERNATIONAL ARBITRATION (2013), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F> [<http://perma.cc/WW85-WVXD>]; LONDON COURT OF INTERNATIONAL ARBITRATION ETHICS RULES (2014); *see also* William Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 ARB. INT'L 409 (2014) [hereinafter Park, *Fair Fight*].

8. *See* ROGERS, *supra* note 1, at 3–7.

9. *See, e.g.*, Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014); *see also* SUSAN D. FRANCK ET AL., INTERNATIONAL ARBITRATION: DEMOGRAPHICS, PRECISION AND JUSTICE (2015) [hereinafter FRANCK, INTERNATIONAL ARBITRATION]. Although the International Bar Association began promulgating guidelines and standards for conflicts of interests in international arbitration some years ago, the question of motivations for promulgation of such standards remains an interesting socio-legal question: What harm or damage occurs to clients when there are conflicts of interests (if not consented to), or what damage or harm to the transnational system of justice of arbitration? Critics of these efforts to promulgate standards (*see below*) see a desire to enforce strong conflicts of interests standards in order to disqualify some of the “grand old men,” *see* DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 2, and provide more opportunity for greater diversity among newer, younger and more diverse international arbitrators. *See* Benjamin G. Davis, *American Diversity in International Arbitration 2003-2013*, 25 AM. REV. INT'L ARB. 255 (2014); *see also* Benjamin G. Davis, *Diversity in International Arbitration*, 20 ABA DISP. RESOL. MAG. 13.

10. For a formal statement of how international arbitration has now become not only a field of practice but one of scholarly and pedagogic importance, *see* Thomas Schultz, Editorial, *The Evolution of International Arbitration as an Academic Field*, 6 J. INT'L DISP. SETTLEMENT 229 (2015). From Queen Mary in London to Georgetown and George Washington in Washington, DC and Columbia and NYU in New York, many law schools now offer courses, externships and even degrees in international arbitration.

11. *See* Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L. J. 553 (2006) [hereinafter Menkel-Meadow, *Peace and Justice*]; Menkel-Meadow, *Why and How*, *supra* note 5; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute*].

tions, as Professor Rogers has attempted to do in her book, implicates deeply important questions about the role of the rule of law, the complexity of increasing pluralism in our globalizing legal world, and what levels of enforcement are appropriate in a legally plural world.

Issues of legal pluralism include both more traditional “horizontal” pluralism of multiple nation-states and now more diverse “vertical” pluralism as many international, transnational and regional legal institutions rule simultaneously or serially on the same matters in different fora.<sup>12</sup> Enforcement issues include whether crafting and enforcement of ethical standards can or should be conducted in self-regulating private institutions and processes or whether and how such varieties of practices could or should be regulated in any other way (such as in more public institutions).<sup>13</sup>

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12. See, e.g., Robert Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); STATE AND NON-STATE LAW, *supra* note 4.

13. I am no stranger to these issues having chaired a multi-year effort to craft ethical rules and standards for the practice of “alternative” (now more commonly denominated “appropriate”) dispute resolution, including mediation, arbitration and other hybrid processes, including the promulgation of rules and principles for both individuals (lawyers, mediators, arbitrators, negotiators, witnesses and experts), as well as “provider” institutions. See Center for Public Resources-Georgetown Commission on Ethics and Standards of Practice in ADR, *Model Rule for Lawyer as Third-Party Neutral*, CPR (Nov. 2002), <http://www.cpradr.org/RulesCaseServices/CPRRules/ModelRulefortheLawyerasThird-PartyNeutral.aspx> [<http://perma.cc/D2LQ-8TU4>] (last visited Dec. 19, 2015); Center for Public Resources-Georgetown Commission on Ethics and Standards of Practice in ADR, *Principles ADR Provider Organizations*, CPR (May 2002), <http://www.cpradr.org/RulesCaseServices/CPRRules/PrinciplesforADRProviderOrganizations.aspx> [<http://perma.cc/77BF-F4JG>] (last visited Dec. 19, 2015). That project, dealing primarily with domestic American issues, exposed different legal cultures within the adversary practice of party-selected arbitrators, differences among facilitative and evaluative mediators, and the different “cultures” of different provider organizations, e.g. CPR (non-administered ADR), American Arbitration Association (administered arbitration seeking entry into mediation market), making elucidation of “core” or more controversial ethical rules and standards difficult at best. See Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 111 NAT’L INST. DISP. RESOL. NEWS, no. 2, March/April 1996, at 1; Carrie Menkel-Meadow, *Conflicts of Interest in Mediation Practice*, DISP. RESOL. MAG., Spring 1996. Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949 (2002); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering As Only Adversary Practice*, 10 GEO. J. LEG. ETHICS 631 (1997). Though some private provider organizations have adopted the *CPR-Georgetown Rules and Standards* (e.g. CPR, now International Institute for Conflict Prevention and Resolution) or their own ethical standards (e.g. the American Arbitration Association (“AAA”) *Ethical Rules for Commercial Arbitration*); many years of efforts at ethical rule drafting for the ABA culminated in one very simple and inadequate MODEL RULES OF PROF’L CONDUCT R. 2.4 (2015) [hereinafter MODEL RULES]. Lawyer Serving as Third Party Neutral, which simply advises that lawyers may serve as neutrals and when they do, they are not “representing” clients (so the requirements of all the other lawyer ethical rules, e.g. conflicts of interests, etc. may not be applicable). See Carrie Menkel-Meadow & Elizabeth Plapinger, *Model Rules Clarify Lawyer Conduct When Serving As Neutral*, 5 DISP. RESOL. MAG. 20, Summer 1999. Ethical regulation of domestic mediation and arbitration remains inadequate, complex and plural with litigation, claiming malpractice or other ethical violations. See James Coben & Peter Thompson, *Disputing Irony: A Systemic Look at Litigation About Mediation*, 4 HARV. NEG. L. REV. 43, 94 (2006) (noting that parties sometimes make motions mid-litigation to disqualify attorneys). As reviewed more thoroughly in the text, current ethical claims in international arbitration can occur in challenges to the appointments of arbitrators at various stages in the arbitration and in court challenges for non-enforcement or vacatur of an arbitration award according to the standards of “evident partiality, bias, corruption, denial of notice or fair process or inconsistency with national policy,” according to the provisions of

Professor Rogers's valuable book seeks to propose a relatively modest, but still controversial, call for *private international and internal regulation* of a specific form of transnational legal practice—international arbitration, encompassing primarily private commercial and hybrid state-investor investment arbitration.<sup>14</sup> Her rigorous and detailed book, which will undoubtedly become the field's basic text, touches on many vaster and deeper issues of comparative law, transcultural ethical and legal values, and standards and enforcement of basic norms of legality, legitimacy, fairness and justice. The implications of a search for transnational ethics in international arbitration is no less than a concern with significant jurisprudential issues about sources of transnational law and enforcement of good, fair and moral practices for those who work in transnational legal systems.

Whether transnational disputes are denominated *private* (commercial), *public or state based* (diplomatic, political, treaty-based, human rights, and now even criminal<sup>15</sup>) or *hybrid* (investment), the now common method of using *arbitration* by party selected arbiters of contracts, treaties and other legal undertakings to decide cases and issue awards, orders and rulings, whether voluntarily complied with, or ultimately enforced by a nation-state,<sup>16</sup> has created its own form of transnational legal justice.

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Art. V (and its variable interpretations in national courts) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

14. See ROGERS, *supra* note 1, at 13–14, 365–72.

15. With the growing number of formal international tribunals in a variety of substantive fields, international criminal law has produced perhaps the deepest set of substantive and ethical rules of practice. See, e.g., ARMAN SARVARIAN, *PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR* (2013) [hereinafter SARVARIAN, *PROFESSIONAL ETHICS*]. Many of the newer international and regional adjudicative tribunals, including the International Court of Justice, the European Court of Justice, the European and Inter-American Court of Human Rights, the International Criminal Tribunals for the Former Yugoslavia and Rwanda and now the International Criminal Court have issued their own Ethical Standards or rules of practice and, in some cases, have had to rule on particular ethical issues, often in cases with representatives from different national jurisdictions and ethical traditions. See generally YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* (2014) [hereinafter SHANY, *EFFECTIVENESS*] (for treatment of the issues in judicial independence and judicial selection in international tribunals). Outside the scope of this essay, but relevant to its concerns, are the issues of “conflicts of laws” in application of appropriate ethics standards when foreign lawyers appear in the national courts of another nation (or in the United States, in another state) and a tribunal must decide what ethical rules apply to the professional activity of a lawyer appearing in a particular court. See, e.g., MODEL RULES R. 8.5. Under the American choice of law rules a lawyer may be subject to ethical disciplinary action (or disqualification rules) in more than one jurisdiction at the same time (e.g. the jurisdiction in which the attorney is licensed and the jurisdiction in which the legal conduct is performed).

16. UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, *CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS* (1958), [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) [<http://perma.cc/4QAX-XUPC>]; INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, *ICSID CONVENTION, REGULATIONS AND RULES*, (1965), <http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/> [<http://perma.cc/3984-2YSE>]. THE UN CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS and the ICSID CONVENTION provide treaty authorization for the enforcement of international commercial and investment arbitration awards, respectively, in the state (national) courts of the signatories to the respective



Many argue that such processes of dispute resolution are non-transparent and unfair or unjust for particular parties, both state and private, and should not be supported at all (as exhibited recently in the controversies about the proposed uses of arbitral processes in the Trans-Pacific Trade Partnership and Transatlantic Trade and Investment Partnership (TTIP)).<sup>17</sup> However, others who support the use of arbitral processes (as based in a consensual, party controlled and efficient regime of dispute resolution) are still concerned about its proper uses and practices and its claims for legitimacy. They seek to encourage a more robust debate and conversation about these important issues.<sup>18</sup>

In this Review Essay, I discuss the specific proposals Professor Rogers has made with respect to ensuring greater legitimacy for international arbitration. She proposes that there be more *internal* (by the arbitration “field”<sup>19</sup> itself), *international* (through the various international administrative and professional institutional bodies that currently organize the field), *regulation* (by rule promulgation and various forms of enforcement mechanisms) and *transparency and accountability* (by her own creative organizing of an interactive website, *Arbitrator Intelligence* ©, of published arbitration awards, feedback and information on international arbitrators<sup>20</sup>). Here, I seek to situate this important effort in a much more complex web of jurisprudential concerns about whether it is either descriptively possible or normatively desirable to aim for international or transnational ethical standards in law practice and legal decision-making. This is particularly difficult when practice and decision-making crosses national and legal cultural boundaries, and are utilized in a great variety of different subject matter disputes.<sup>21</sup>

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treaties. Over 145 countries have signed the NY Convention. Recently, some countries, notably Venezuela, Ecuador and Bolivia have attempted to rescind and withdraw their ratification of the Washington Convention for investment disputes, signaling some loss of international acceptability of the international investment arbitration and whole legal regime of investment treaties, law and dispute resolution. See Kendall Grant, *The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration*, 52 OSGOODE HALL L. J. (forthcoming 2015) (describing Ecuador’s proposal for a new parallel and alternative investment arbitration process for Latin American countries).

17. GUS VAN HARTEN, A REPORT ON THE FLAWED PROPOSALS FOR INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN TTIP AND CETA (2015), [www.ssrn.com/abstract=2595189](http://www.ssrn.com/abstract=2595189) [<http://perma.cc/9HDX-C4DG>].

18. See, e.g., Letter from Jose Alvarez et al. to Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, Minority Leader Pelosi and Ambassador Froman (Apr. 2015), <https://www.mcgill.ca/fortier-chair/isds-open-letter> [<https://perma.cc/WU4J-LEHJ>].

19. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805 (1987).

20. ARBITRATOR INTELLIGENCE, <http://www.arbitratorintelligence.org> [<http://perma.cc/H8MB-RYDU>] (last visited Oct. 30, 2015).

21. The issues of trans- or international ethics standards are not confined to legal practice alone. THE ROLE OF ETHICS IN INTERNATIONAL LAW (Donald Earl Childress III ed., 2011). Within international relations more generally there is both academic and practical (e.g. in governmental aid and development work) concern about whether there can or should be “ethics” with appropriate standards or rules for international actions, such as humanitarian, financial and political aid, medical services, criminal law enforcement and even cultural exchanges. See, e.g., ETHICS AND INTERNATIONAL AFFAIRS: EXTENT AND LIMITS (Jean-Marc Coicaud & Daniel

*Ethics in International Arbitration* is structured with two important and discrete sections. First, *Mapping the Terrain*, which is a *tour d’horizon* of ethical issues, controversies, cases, rules, authorities and conflicts that have emerged from the modern international practice of arbitration of transnational disputes, primarily commercial and investment disputes. Second, *Staking Out Theoretical Boundaries and Building the Regime*, is a review of some of the major jurisprudential and comparative law issues implicated in any planned regime of international ethical standards. These two sections can be separately “consumed”—the first section by practitioners, seeking to understand the latest controversies and rules, rulings, decisions and case law on difficult ethical issues in international arbitration, and the second by academics and theorists concerned about the underpinnings of any attempted regime of transnational ordering.

In this Review, I first discuss the important theoretical and jurisprudential issues to elaborate on how deep, complex and difficult these issues are. Like many who come to this subject, I began in this field with my own interest in the practical difficulties of arbitrating disputes where the players come from different legal cultures, rules, and role expectations. These two parts of Professor Rogers’s book, as two possible entry points into the issues, permit focusing on either the *inductive* (case by case derived “rules” and standards from concrete ethical dilemmas) or *deductive* (general rules and standards first, from which one reasons to a conclusion about particular issues) methods for developing ethical rules and standards.<sup>22</sup>

Ten years ago, while I was teaching a course on International Commercial Arbitration in Europe (in Switzerland and at the International Chamber of Commerce (“ICC”) in Paris) with then President of the ICC, Professor Pierre Tercier, to a group of law students from over ten different jurisdictions, we encountered first-hand the conflicts about whether international ethics standards and rules were desirable or even possible in international arbitration practice.<sup>23</sup> As we focused on some of the concrete practice ethics issues raised in

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Warner eds., 2001); THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999); THOMAS CAROTHERS, *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006); THOMAS CAROTHERS & DIANE DE GRAMONT, *DEVELOPMENT AID CONFRONTS POLITICS: THE ALMOST REVOLUTION* (2013). And in the private sector, the modern online businesses that seek to operate in different national regulatory environments are challenging notions of national regulation and practices (with international business and investment, as well as professional, employment, labor and health standards, implications as well. See, e.g., Tracey Lien, *Two Uber Execs Taken into Custody in France over Possible Illegal Operations*, LATIMES.COM (June 29, 2015, 12:50 PM), <http://www.latimes.com/business/technology/la-fi-tn-uber-france-exec-20150629-story.html> [<http://perma.cc/ZF4A-XKPKJ>].

22. Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should (Not) Do About It: Lessons From International and Domestic Fronts*, 14 HARV. NEG. L. REV. 195 (2009); KENNETH WINSTON, *ETHICS IN PUBLIC LIFE: GOOD PRACTITIONERS IN A RISING ASIA* (2015) (using case studies to elaborate practical ethics and good practices and judgment in public administration).

23. Carrie Menkel-Meadow, *Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?*, in *MELANGES EN L'HONNEUR DE PIERRE TERCIER* (Peter Gauch et al. ed. 2008) [hereinafter Menkel-Meadow, *Cross-Cultural Ethics*].



international arbitration, and now reviewed in Part I of Professor Rogers's book, (such as witness interviewing, preparation and rehearsal, cross-examinations, document discovery, arbitrator conflicts of interests, confidentiality, ex parte communications, lawyer-client privilege, selection of and use of experts, fees, costs and, more generally, litigation "manners,") we discovered that cultural and legal differences emerged among and between those of us (professors included) who were educated in different common law or civil law systems, even within similar legal "systems."<sup>24</sup> In the class, differences emerged in areas of very basic practice (document discovery, witness preparation, privilege and confidentiality, and the role of experts) to more "informal" issues of party communications (and meals!) with arbitrators, all with potentially great impact on the conduct and outcome of particular arbitrations.

While some of us (this author and likely Professor Rogers too) were more sanguine about the possibility of finding some "core" or more universal ethical precepts to guide international arbitration practice, others (including Professor Tercier and the ICC as an institution at the time<sup>25</sup>) thought it was unlikely and also undesirable to attempt to codify ethical guidance for a transnational practice drawing on so many different legal cultures and traditions.<sup>26</sup> In this view, "ethics" (as well as etiquette, manners and routines of practice) are so internal to the structure of different legal systems and cultures that a "transnational," universal or core set of principles of good practice is virtually impossible to create, implement, and enforce. In addition, at the instrumental level, those who oppose the development of increased ethical regulation are concerned that complaints, grievances, and claims of unethical behavior will complicate and hinder the promise of expeditious and efficient case processing, which arbitration claims to deliver.<sup>27</sup> Those, like Professor Rogers and myself, who aim to establish some standards of international "ethical" practice, argue that the legitimacy of international arbitration is at stake. At the instrumental level, our argument is that without such standards, increasing numbers of challenges to international arbitration awards in an ever growing number of venues, including international, regional and national (and in the United States and other federal systems state)

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24. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2014) (on "families" of legal systems where "common law" and "civil law" systems still have many differences in both formal law and practices, both between systems and among them, notably discovery rules differences in the United States and United Kingdom).

25. Unlike other international arbitration institutions, which had begun to promulgate ethics standards, the ICC was quite resistant to the development of ethics principles until quite recently. See THE INTERNATIONAL CHAMBER OF COMMERCE, [www.icc.org](http://www.icc.org) [<http://perma.cc/2QPZ-NUHP>] (last visited Oct. 30, 2015). See Menkel-Meadow, *Cross-Cultural Ethics*, *supra* note 23.

26. See Robert W. Wachter, *Ethical Standards in International Arbitration: Considering Solutions to Level the Playing Field*, 24 GEO. J. LEGAL ETHICS 1143 (2011).

27. As some concrete evidence of this, challenges to arbitrators have increased a great deal in recent years; the ICC had thirty-seven challenges to arbitrators in 2004 but reported fifty-seven challenges in 2009. See Nottage, *Transnational Commercial Arbitration*, *supra* note 2, at 3.

courts will also impede the expeditious and fair enforcement of international arbitral awards.<sup>28</sup> Others argue that promulgation of ethics standards might actually increase the numbers of ethics challenges and reduce the promised efficiency of international arbitration.<sup>29</sup>

Although issues of ethics in international arbitration began with a focus on international (private) commercial arbitration, which continues to constitute an overwhelming majority of international arbitrations,<sup>30</sup> recent attention to the controversial aspects of investment (investor-state dispute settlement (“ISDS”)) arbitration and increasing demands for transparency and accountability in such public policy affecting rulings<sup>31</sup> has resulted in increased attention to ethics and standards in all forms of arbitral decision-making.<sup>32</sup> Further complicating the question of specifying ethical standards in international arbitration are the variety of roles within the arbitral process that might be affected by such efforts. This includes the practices and behaviors of representatives-advocates, arbitrators (including party-appointed, neutrals, chairs of panels), experts, witnesses, parties (including both private and public entities and individuals<sup>33</sup>), and now, third-

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28. Despite the fact that generally speaking, arbitration awards are not “appealable” and are considered “final” if they meet the requirements of the NY Convention, international arbitrations awards are in fact challenged or “appealed” at various stages, including at the beginning or during, often in the “seat” (or locale) of the arbitration, or more commonly in proceedings in national courts to enforce or vacate an arbitral award under Art. V of the NY Convention. *See, e.g.,* Christopher Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, 2 WORLD ARB. & MED. REV. 39, 53–55 (2009).

29. *See* Nottage, *Transnational Commercial Arbitration*, *supra* note 2; Park, *Fair Fight*, *supra* note 7; JAN PAULSSON, *THE IDEA OF ARBITRATION* (2013) [hereinafter PAULSSON, *IDEA*].

30. A 2008 study by Queen Mary University of London School of International Arbitration (with PriceWaterhouseCoopers) found that states were involved in only five percent of the total arbitration market. *See* GERRY LAGERBERG & LOUKAS MISTELIS, *INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES* (2008), [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf) [<http://perma.cc/4JXX-WXJV>] (though that figure is likely higher now, with increased investment arbitration from both Argentina’s particular investment defaults and investment arbitrations following on from the economic downturn of 2008, likely contributing to higher caseloads in the investment area).

31. *See, e.g.,* M. SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW IN FOREIGN INVESTMENT* (2015).

32. In the United States, issues of fairness and transparency in private dispute resolution—and now Supreme Court-approved mandatory arbitration in commercial, consumer and employment disputes—have also fueled the debate, sometimes conflating domestic and international issues, but also raising concerns about whether there are essential common values in dispute resolution with third-party decision-makers, whether public or private. *See, e.g.,* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in the Courts and the Erasure of Rights*, 124 YALE L. J. 2804 (2015) [hereinafter Resnik, *Diffusing*]; Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the “Semi-Formal,”* in *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* (Felix Steffek et al. eds., 2013).

33. It is common to think of international arbitration as involving disputes only between legal persons (large companies, states, governmental and non-governmental organizations), but international arbitration also now includes disputes involving natural persons, as multi-national and international organizations now have docketed employment disputes in many of the international arbitral institutions.

party funders and investors in the litigation.<sup>34</sup>

As discussed more fully below,<sup>35</sup> arbitration is governed by its own form of *legal pluralism*<sup>36</sup>—the *contract* (supported by international treaty) and then party chosen *procedural rules*. By specifying the use of arbitration in a transborder contract, dispute resolution is removed from formal court or other institutional adjudication (until, perhaps, if a challenge is later leveled, at the enforcement of the award stage). The conduct of any arbitration hearing is therefore governed by any rules or procedures specified in contractual terms, between the parties, and/or by procedural rules provided by the chosen arbitration institution (such as the ICC, the London Court of International Arbitration (“LCIA”), the Centre for International Dispute Resolution (“CIDR,” the American Arbitration Association’s international arm), or any other chosen rules (e.g. *United Nations Committee on International Trade Law* (“UNCITRAL”) *Model Rules of Arbitration*) or any ad hoc agreed to procedural rules.<sup>37</sup> All of these rules, which may provide explicit or implicit “ethical” practice standards, unfortunately have little provision for enforcement by either arbitral administering institutions or

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34. ROGERS, *supra* note 1, at 177–217 (2014); William Park & Catherine Rogers, *Third Party Funding in International Arbitration: The ICCA Queen Mary Task Force*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION (Gerold Zeiler et al., eds., 2015). See also Jonathan Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L. J. 65 (2010); Mark Kantor, *Third Party Funding in International Arbitration An Essay About New Developments*, 24 ICSID REV. 65 (2009).

35. See *infra* text accompanying notes 43–67.

36. To clarify terms for this review, arbitral “institutions” are the international administrative, non-governmental organizations that manage, “host,” or facilitate arbitrations (e.g., the ICC, the London Court of International Arbitration (“LCIA”), the Centre for International Dispute Resolution (“CIDR”), China International Economic and Trade Arbitration Committee (“CIETAC”) etc.). For a list of arbitral institutions and further discussion of the meaning of the term “arbitral institution,” see Rémy Gerbay, *The Functions of Arbitral Institutions: Theoretical Representations and Practical Realities* (Sept. 10, 2014) (unpublished Ph.D. thesis, Queen Mary, University of London), <https://qmro.qmul.ac.uk/jspui/bitstream/123456789/8143/1/Gerbay%20Rémy%20181214.pdf> [http://perma.cc/LN3Y-BRCQ]. Arbitral “panels” are the constituted decision-makers (usually comprising three arbitrators). The term “arbitration tribunal” is often confusingly applied to both of these very different bodies. The arbitral “institutions” administer the arbitration, can appoint arbitrators where parties so specify (and in the case of the ICC actually provide some review of the award before it is made final) but it is the arbitration “panel” that actually conducts the arbitration, makes awards and interim measures, and issues decisions and opinions where so authorized by the arbitration contract and rules. For general information about all issues in international arbitration, see GARY B. BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* (2d ed. 2015) [hereinafter BORN, *INTERNATIONAL ARBITRATION*].

37. See, e.g., BORN, *INTERNATIONAL ARBITRATION*, *supra* note 36; G.A. Res. 65/22, UNCITRAL Arbitration Rules (as revised in 2010) (Dec. 6, 2010); INTERNATIONAL CHAMBER OF COMMERCE, *RULES OF ARBITRATION* (2012); INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (INCLUDING MEDIATION AND ARBITRATION RULES) (2014); LONDON COURT OF INTERNATIONAL ARBITRATION, *ARBITRATION RULES* (2014); INTERNATIONAL BAR ASSOCIATION, *GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION* (2013); INTERNATIONAL BAR ASSOCIATION, *GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION* (2014); AMERICAN ARBITRATION ASSOCIATION & AMERICAN BAR ASSOCIATION, *CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (2004); INTERNATIONAL BAR ASSOCIATION, *IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION* (2010); INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, *CPR ADMINISTERED ARBITRATION RULES* (2014).

particular arbitral panels or tribunals.<sup>38</sup> The line dividing procedural and practice rules from so-called “ethical” rules is fuzzy and murky in arbitration, as it can also be in formal adjudication.<sup>39</sup> Challenges to arbitrators might be made at the beginning of a case to the arbitral administering institution, or to a court in the “seat” of the arbitration. Challenges also are made at the end (challenging enforcement of an arbitral award under several grounds of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards<sup>40</sup>). However, there is little to no place for ethical complaint or challenge in the middle of a case (except to the arbitration panel, which may or may not think it has the authority to rule on ethical issues during the conduct of a substantive case).<sup>41</sup>

In the last few decades, several organizations have drafted non-compulsory (because there is no formal enforcement mechanism) ethical standards for international arbitration, particularly, but not exclusively, in relation to issues of possible conflicts of interest of arbitrators and more recently for “attorney misconduct” in international practice.<sup>42</sup> Professor Rogers’s earlier work as a scholar in this area has been highly influential in the discussion and drafting of such standards.<sup>43</sup> In addition to the International Bar Association’s *Guidelines on*

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38. Much of the increasing complexity of ethical regulation in international arbitration is canvassed in Part 1 of Professor Rogers’s book. Some arbitral panels have justified ethical rulings and sanctions (e.g. reduction of fees, cost awards, and disqualifications) by claiming either explicit powers (through contract or tribunal rules) or inherent powers to preside over enforceable arbitration awards. See Margaret L. Moses, *The Inherent Powers of Arbitrators to Deal with Ethical Issues*, in *INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014* (Arthur W. Rovine ed., 2014). Most arbitral institutions provide some form of early challenge procedure for parties to raise arbitrators’ conflicts of interest or other disqualifying circumstances, but there are virtually no appeals and little publicity for these cases, unless they become the subject of a post-award challenge under Article V of the New York Convention. For further discussion, see Chapters 2, 3, and 8 of ROGERS, *supra* note 1.

39. FED. R. CIV. P. 11, for example, holds lawyers “responsible” for the veracity of the pleadings they draft and file. The American discovery rules, FED. R. CIV. P. 26–37, provide requirements for disclosures, verifications and duties to update facts and information provided to the other side, with the possibility of disciplinary sanctions being awarded by presiding judges.

40. UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (June 10, 1958).

41. Alan Scott Rau, *Arbitrators Without Powers? Disqualifying Counsel in Arbitral Proceedings*, 30 *ARB. INT’L* 457, 482–83 (2014). Of course, this issue also occurs in American domestic litigation where judges do decide some disqualification motions during the conduct of the case, but many others deem ethical or disciplinary matters to be outside of the scope of substantive judicial treatment and refer such matters to the appropriate disciplinary body. American ethical case law has both traditions of common law rulings on disqualification motions as well as refusals to deal with ethical issues within the confines of a substantive case. See, e.g., LISA LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW*, 643–728 (3d ed. 2012).

42. See, e.g., INTERNATIONAL BAR ASSOCIATION, *GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION* (2013); INTERNATIONAL LAW ASSOCIATION, *HAGUE PRINCIPLES ON ETHICAL STANDARDS FOR COUNSEL APPEARING BEFORE INTERNATIONAL COURTS & TRIBUNALS* (2010) [hereinafter *HAGUE PRINCIPLES*].

43. See, e.g., Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 *MICH. J. INT’L L.* 341 (2002); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 *STAN. J. INT’L L.* 53 (2005); Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 *AM. U. INT’L L. REV.* 957 (2005).

*Conflicts of Interests for International Arbitrators*,<sup>44</sup> several of the international arbitral institutions that have now promulgated their own rules or ethical guidelines (e.g., International Institute for Conflict Prevention and Resolution (“CPR”), LCIA, the ICC and the International Centre for the Settlement of Investment Disputes (“ICSID”)), have been urged to promulgate such standards.<sup>45</sup> Even the ICC, the institution that most resisted development of ethical guidelines because of objections reviewed here, has now contemplated its own process of ethical guideline development. This may be a reaction to the claims that the arbitral institutions are engaged in a competition over the delivery of dispute resolution services and ethical standards are one of the distinguishing features of the competition.<sup>46</sup>

Finally, when and if parties seek enforcement, non-recognition, vacatur, or annulment of an arbitral award under the New York Convention, national courts may rule on challenges to the award, implicating ethical issues, such as “evident partiality,” or “corruption or bias” of the arbitrator or other grounds for non-recognition under the treaty<sup>47</sup> and its applicable case law. Thus, those who may be asked to rule or opine on ethical issues include arbitration institutions, panels of or individual arbitrators, national courts, some international tribunals (ICSID), the World Trade Organization (WTO), formal governmental disciplinary bodies (national or state in the case of federal countries), non-governmental professional associations (e.g. International Bar Association) and other international or transnational bodies, or domestic bar associations and disciplinary bodies, and even private law firms or other practice units.<sup>48</sup>

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44. INTERNATIONAL BAR ASSOCIATION, GUIDELINES ON CONFLICTS OF INTERESTS IN INTERNATIONAL ARBITRATION (2014), [www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) [http://perma.cc/AG7T-6PXZ].

45. See ROGERS, *supra* note 1; Menkel-Meadow, *Cross-Cultural Ethics*, *supra* note 23, at 884–89.

46. Yves Dezalay & Bryant Garth, *Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 LAW & SOC. INQUIRY 285 (1996); Bryant Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. L. POLS. & SOC’Y 367 (1992).

47. Grounds for non-recognition of international (or “foreign”) arbitral awards are found in Article V of the treaty and are interpreted by the relevant national courts, which can include the “seat” of the arbitration, the country in which enforcement is sought or the country in which the arbitration has actually taken place. See Born, INTERNATIONAL ARBITRATION, *supra* note 36.

48. In one of the major conflict of interest cases reported in the international investment field, the tribunal had to rule on the challenge of a respondent represented by a member of a British barrister’s chambers of which the tribunal president was also a member. See *Hrvatska Elektroprivreda v. Republic of Slov.*, ICSID Case No. ARB/05/24, Tribunal’s Ruling regarding the participation of David Mildon QC in further stages of the proceedings (May, 6 2008), 24 ICSID REV. 201 (2009) (ruling that representative, not arbitrator should be excluded); see also *Rompotrol Group NV v. Rom.*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of Counsel (Jan. 14, 2010), 24 ICSID REV. 232 (2010) (rejecting respondent’s objection that claimant’s counsel and arbitrator had been members of the same firm and ruling that, as representative joined proceedings after arbitrator was chosen, arbitrator had no duty to disclose any possible conflict). These cases highlight the difference between conflict rules in the U.K. (where members of barristers’ chambers are independent employees, not “partners” with parity of information and income) and the U.S., the ethics rules of which impute information and income sharing between all members of a firm. See, e.g., MODEL RULES 1.8–1.13.

Thus, any regime of international arbitration ethics is likely to be “plural,” both in substantive content (different legal regimes and different subject matter disputes) and in the bodies or institutions that may ultimately rule on whether some ethical standard, rule or guideline has been transgressed. Despite the likely pluralism of content, interpretation and enforcement, Professor Rogers still proposes that we can and should have “ethics in international arbitration.” Now, let us consider how she proposes we might actually do this.

## I. THE JURISPRUDENTIAL BASIS FOR ETHICS IN INTERNATIONAL AND TRANSNATIONAL DISPUTE RESOLUTION

### A. ARBITRATION’S SOURCE IN TRANSNATIONAL LAW

Perhaps one of the most interesting and contested topics in modern international jurisprudence is whether international arbitration has its own jurisprudential justification or *raison d’être*.<sup>49</sup> This section situates Professor Rogers’s consideration of ethical standards for international arbitration in the larger context of the jurisprudential justification for a legal dispute system that is not tethered to any national or territorial legal system, or even to a single international tribunal. By urging the international arbitration community to adopt ethical standards, Professor Rogers must confront the question of what legal regime can or should have authority over participants in the international arbitration process—what level of law and legal institution can or should regulate the ethical conduct of those engaged in international arbitral processes.<sup>50</sup>

Scholars and practitioners have debated for decades whether international arbitration has its own “transnational” locus, bearing no real contact with any particular nation-state or territory, thought to be required to justify the establishment of a legal regime.<sup>51</sup> The argument is that international arbitration is rooted in either the international “common law” of contract, its transnational substantive law of *lex mercatoria*,<sup>52</sup> or has its legal authority rooted in the “positive law” enactment and ratification by over 145 countries of the United Nations New York Convention for the

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Thus, law practice units with international arbitration and litigation practices may also have to consider ethical issues that may arise as challenges or disputes within proceedings where counsel participate in a variety of different roles, including arbitrator, counsel-representative or even expert witness (in many international proceedings, foreign law is presented through expert testimony of lawyers from a particular jurisdiction).

49. For recent efforts to articulate legal and jurisprudential theories of justification for the regime of international arbitration, see PAULSSON, *IDEA* *supra* note 29 and EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010).

50. And should international arbitral processes be governed, if at all, differently, from those who participate in other international litigation and tribunals. See SARVARIAN, *PROFESSIONAL ETHICS*, *supra* note 15; SHANY, *EFFECTIVENESS*, *supra* note 15; see also *infra* note 110.

51. This is the positivist approach to territorial, formal and legitimate law making. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

52. *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* (Thomas E. Carbonneau ed., 1998).



Recognition and Enforcement of Foreign Arbitral Awards (1958). This in turn authorizes national courts to enforce and recognize (or vacate and not enforce) arbitral awards. Perhaps the image most appropriate for international arbitration's jurisprudence may be the globe balanced on the back of elephants and/or turtles "all the way down," a multi-cultural, infinite regress creation myth<sup>53</sup>:



IMAGE 1: *Turtles All the Way Down.*

Whether international arbitration is sourced in contract (turtles?), or positive law by treaty or state court enforcement (elephants?), it has at least this dualistic essence. In Professor Rogers's clever chapter headings international arbitrators are seen as either ducks (contract service providers) or rabbits (private adjudicators), but are often considered not to be both at the same time.<sup>54</sup> Do you see a rabbit or a duck in the picture below?

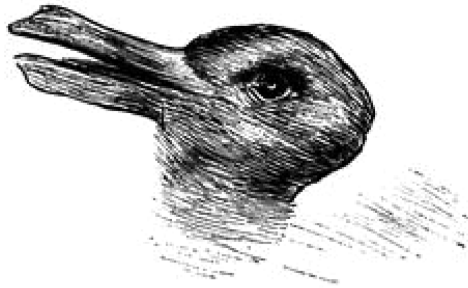
In fact, my view, and ultimately Professor Rogers's view too,<sup>55</sup> follows that of international arbitrator and scholar Gary Born. Born states that "arbitrators'

53. See *Turtles All the Way Down*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Turtles\\_all\\_the\\_way\\_down](https://en.wikipedia.org/wiki/Turtles_all_the_way_down) [<https://perma.cc/GG5V-YCZ7>] (last visited Nov. 24, 2015). The "creation myth" story of the beginning of the earth, balanced on the back of turtles is attributed to Hindu, Chinese and American Indian stories of how the earth came to be, with varying tales of how the earth was formed and how it sustains itself, when we cannot fully "know" how it all began. In the Hindu version the globe rests on an elephant that rests on the "world" turtle. This image may be more apt as it expresses the duality of international arbitration as being supported by both contract and treaty/positive law/state action theories and so is dependent on both elephants and turtles. There is a little more written history to the beginning of international arbitration. See e.g., DEREK ROEBUCK & BRUNO DE LOYNES DE FUMICHON, *ROMAN ARBITRATION* (2004); DEREK ROEBUCK, *EARLY ENGLISH ARBITRATION* (2008); DEREK ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES* (2013); DEREK ROEBUCK, *THE GOLDEN AGE OF ARBITRATION* (2015).

54. ROGERS, *supra* note 1, at 343 ("Duck-Rabbits, A Panel of Monkeys, and the Status of International Arbitrators").

55. *Id.* at 349.

**Welche Thiere gleichen ein-  
ander am meisten?**



**Kaninchen und Ente.**

IMAGE 2: *Duck-Rabbits.*

status, rights and obligations are the result of a contract which operates within, and incorporates, a specialized legal regime—that regime being the international and national law framework governing the international arbitral process.”<sup>56</sup> International arbitration is *sui generis*—it is a thing unto itself, both constituting and being constituted by the transnational legal order of transnational contracts, international treaties and national court enforcement and interpretation.

Notice here I have used the term “transnational”<sup>57</sup>—not “international.” In my view, arbitration is a dispute resolution process that can be used both “inter-state” (in disputes among and between nation states) and among and between entities, states, and individuals, from different nation states, and can involve the application of law that is not tethered to a particular territory. The parties may create or choose their own procedural rules for the conduct of the arbitration, and often may also choose substantive rules to govern their “contractual” relations that are not necessarily tied to their own particular nations. With the ever expanding number of formal state treaties and legal undertakings, as well as less formal “global administrative” or “global governance” agreements,<sup>58</sup> at both state and private levels, (including sub-national compacts or “transnational” groups such as religions, ethnicities, etc.<sup>59</sup>), the “transnational legal order” is pluralistic, multi-layered and organized in many different ways. This includes the

56. GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2022 (2014).

57. Philip Jessup coined the term “transnational law” in his 1956 Storrs Lecture. Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 186 (1996). The term encompasses “all law which regulates actions or events that transcend national frontiers” including “public and private international law” and “other rules which do not wholly fit into such standard categories.” PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

58. SLAUGHTER, *NEW WORLD*, *supra* note 4.

59. For the important argument that globalization occurs often at sub-national as well as transnational levels, see generally WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009); *STATE AND NON-STATE LAW*, *supra* note 4.

turtles and elephants or ducks and rabbits of formal state law, both statutory and decisional; international treaty law, less formal international administrative governance, including private arbitral administrative institutions and private, but cross-border contractual promises.

While many argue that as long as a state may be required ultimately to “enforce” arbitral awards (where there is a contest or challenge to them), international arbitration is ultimately grounded in formal and state-made law through interpretations of the NY Convention by national courts.<sup>60</sup> Professor Rogers’s view (which is mine as well) is that international arbitration, as it currently operates in a legal realist sense, is sufficiently self-constituted and its ethical regime must be responsive to its own particular constitutive elements. To put it more simply, an arbitrator is both more and less than a public state sanctioned “judge,” if what is meant by being a judge is adjudicating in a state or international court of law, subject to formal state appointment and public law regimes. Arbitrators are often “closer” to the parties and usually have more expertise with respect to the matters they are hearing than judges. Arbitrators are not randomly selected. They are chosen by the parties for particular matters and may be “chosen” again. This causes them to owe different, and in some respects, greater duties, to the parties than more formally appointed judges of the public legal system.<sup>61</sup> What the sources of those duties are depends on where international arbitration derives its own legal authority.

Competing theories of the sources of arbitration include the “territorial” model (monolocal or national state law, whether of the “seat” of arbitration<sup>62</sup> or enforcing state), the “pluralist” model (including all of the nation states whose laws may impact or have an effect on the hearing, completion and enforcement of an arbitral award and which are governed by both treaty law and national law), and most controversially, the “autonomous” model (seeing international arbitration as generating and being supported by its own international/transnational

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60. See, e.g., Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31 (2010); Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 18 (2005).

61. At the domestic level in the United States, there remains a controversial and ongoing discussion of whether public judges deliver more justice than private dispute resolvers. See Resnik, *Diffusing*, *supra* note 32; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985). Others argue that it is precisely because the parties have chosen them that arbitrators have more legitimacy and power than “distant and impersonal” judges. See PAULSSON, IDEA, *supra* note 29. What ethical duties are owed by judges (at different levels of court) also remains controversial and variable by legal culture. See, e.g., John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N. Y. U. L. REV. 237 (1987); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrick, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

62. The physical location of the arbitration itself, though even here parties may designate a legal “seat” and then decide to hold some or all of the arbitration hearings in some other location.

jurisdictional, substantive and procedural principles).<sup>63</sup> These competing theories of arbitral jurisprudence reflect both philosophical and practical debates and issues.

To further complicate the debates in traditional legal or jurisprudential terms, modern arbitration theorists<sup>64</sup> (among whom I include legal scholars Professor Rogers and myself) and legal sociologists Yves Dezalay and Bryant Garth,<sup>65</sup> suggest that not all dispute resolution regimes must in fact, tether themselves to a formal legal system of justification at all. In law and society terms, “legal pluralism” has long acknowledged that multiple systems of dispute resolution, whether from formal law or communitarian or industry-wide<sup>66</sup> or other “rules” or “customs,” may co-exist at different levels of a society (e.g. “native” and “colonial” rules and processes) and may be legitimated by non-formal legal principles and legal institutions.<sup>67</sup>

In recent decades the “alternative” or “appropriate” dispute resolution movement, in theory and practice,<sup>68</sup> has argued for, described, and implemented a variety of dispute resolution processes designed to solve people’s problems and resolve or at least “handle” their disputes without necessary recourse to courts, even if law may often structure or affect possible resolutions.<sup>69</sup> Consensual party dispute resolution (with or without third-party facilitation in negotiation or mediation, or decision in arbitration) has its own justificatory or legitimating

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63. Though this last theory is most often attributed to EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2008), it is now often criticized as a “French view” or based on French law. See PAULSSON, IDEA, *supra* note 29, at 42–43 (quoting the ruling of Judge Rix of the Court of Appeals of England and Wales in *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2009] EWCA Civ. 755 on whether the arbitrators had the “power” to decide under “those transnational general principles and usages which reflect the fundamental requirements of justice in international trade” whether the government of Pakistan could be “forced” to be a party to an arbitration after renouncing an earlier contractual commitment to arbitrate). In parallel cases, the UK court held that there was no such “power” while the French courts held there was.

64. PAULSSON, IDEA, *supra* note 29.

65. DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 2.

66. See, e.g., Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (discussing specific dispute resolution mechanisms in particular business contexts, outside of formal litigation). For a history of American developments of non-legal or “extra-legal” forms of dispute resolution, see JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* (1983).

67. See, e.g., Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 878 (1988); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC’Y REV. 719, 720 (1973); see also PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

68. See generally CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2d ed. 2011).

69. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L. J. 950, 988 n.124 (1979).

principles.<sup>70</sup> Legal theorists, arbitrators, and law and economics scholars call this form of legitimation “freedom of contract” or market,<sup>71</sup> rather than state forms of dispute resolution, with a different theory of legitimacy.<sup>72</sup> More progressive or legal process theorists see the legitimating principles for these forms of dispute resolution in party consent, functionalism, “institutional or process competence” or simply “process pluralism,” where one size or process will not fit all needs for effective dispute resolution.<sup>73</sup>

International arbitration, like other consensual forms of dispute resolution, may be a predominantly private form of dispute resolution, which is often desired by the parties, but now often criticized by those outside of the dispute itself, leading to modern demands for greater public accountability.<sup>74</sup> Thus, the jurisprudence of international arbitration, like other forms of non-court dispute resolution, is complicated by whether justification and legitimacy is sought for the parties *in the dispute* or those *outside the dispute* (such as the general public), who might be affected by whatever happens in a private dispute. These individuals may be affected in any number of ways, including external effects, informal precedent setting, resource diminishment, or some other impact on those outside of the dispute (e.g. employees of a company, citizens of an invested-in nation, children of a divorce or future generations in an environmental dispute). The level or unit of analysis for legal legitimacy, justification or jurisprudence is itself plural.<sup>75</sup>

International arbitration’s complex form and structure—being at the same time mostly *consensual* (contractual); *multi-jurisdictional* (touching on different legal systems for laws of formation, procedure, interpretation, enforcement); *private* (in rules, choice of decision makers, and in conduct of hearings and pronouncement of awards and outcomes); and *self-regulating or insular* demarks it as

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70. See LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Kenneth I. Winston ed., 1981) [hereinafter FULLER, PRINCIPLES] (containing essays with philosophical justifications for the different processes of adjudication, arbitration, mediation and other processes); see also Menkel-Meadow, *Peace and Justice*, *supra* note 11.

71. See generally PAULSSON, *IDEA*, *supra* note 29, at 2–4; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

72. Critics of course claim that even consensual dispute resolution rests on the backs of the elephants of the state: contract breaches, including those stemming from mediation, negotiation, and arbitration may ultimately have to turn to courts for enforcement or remediation. See, e.g., Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577 (1997).

73. See FULLER, PRINCIPLES, *supra* note 70; Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 25–30 (2000); Menkel-Meadow, *Peace and Justice*, *supra* note 11.

74. See, e.g., Resnik, *Diffusing*, *supra* note 32, at 2920; see generally SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006) (criticizing the growth, from early middle ages to modern times, of privatizing guild arbitration that enhances “private authority” including multi-national, and therefore ungovernable by states, corporations and other “transnational” bodies operating without public accountability).

75. See Menkel-Meadow, *Whose Dispute*, *supra* note 11.

different from public legal institutions. Many other dispute resolution processes are also not public. These include modern transnational mediation, most diplomatic negotiations,<sup>76</sup> and other hybrid and informal forms of dispute resolution (“good offices,” informal inquiries, etc.).<sup>77</sup> At the same time, in the modern world the expansion of international public tribunals, following the atrocities of World War II and many civil wars, military dictatorships, genocides and multi-national anti-terrorism efforts, has increased our expectations and demands for public accountability in a variety of new forms of adjudication.<sup>78</sup> The parallel growth of many new sites for dispute resolution, especially with the potential of effects and consequences for many other people, beyond the particular disputants (in civil, criminal, commercial and other kinds of disputes) has often led to the demand for greater accountability, publicity and ethical requirements for those who work in those sites and systems.<sup>79</sup> The question remains for internationalists, ethicists, and dispute resolvers whether all processes require the same or different governing and ethical principles. In legal process terms, does each form of dispute resolution require or generate its own form of “institutional or ethical competence?”<sup>80</sup>

#### B. MAKING TRANSNATIONAL ETHICS RULES AND STANDARDS: A FUNCTIONAL APPROACH

Just as the initial framers of our *Federal Rules of Civil Procedure* sought to develop “trans-substantive” procedural rules for all types of civil cases,<sup>81</sup> the drafters of the American Bar Association’s *Model Rules of Professional Conduct* have sought for decades to provide a universal set of ethical norms for all kinds of lawyers.<sup>82</sup> More recently, the American Law Institute and UNIDROIT (in Europe) have attempted to craft a transnational set of civil procedure rules.<sup>83</sup>

76. J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 1-25 (5th ed. 2011).

77. MARY ELLEN O’CONNELL, *INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS* (2006) at 53-77; 79-101; JACQUELINE NOLAN-HALEY, HAROLD ABRAMSON & PAT K. CHEW, *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* (2005).

78. See SHANY, *EFFECTIVENESS OF INTERNATIONAL COURTS*, *supra* note 15.

79. See SARVARIAN, *PROFESSIONAL ETHICS*, *supra* note 15.

80. FULLER, *PRINCIPLES*, *supra* note 70; see also Menkel-Meadow, *Mothers*, *supra* note 73.

81. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2047 (1989); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 379 (2010).

82. MODEL RULES. This comes with a few notable exceptions, such as in the recognition of particular ethical requirements for prosecutors, MODEL RULES R. 3.8 (to seek justice and turn over exculpatory information to criminal defense lawyers), and special duties for lawyers representing organizations, MODEL RULES R. 1.13.

83. AMERICAN LAW INSTITUTE & UNIDROIT, *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (2004). UNIDROIT and other bodies have also attempted codification of more uniform or harmonizing rules of substantive law too, as in regional (European) or even international rules for contract formation and interpretation. See, e.g., UNIDROIT, *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (2004); STUDY GROUP ON A EUROPEAN CIVIL CODE & THE RESEARCH GROUP ON EC PRIVATE LAW, *DRAFT FRAME OF REFERENCE*



Those seeking to consider or impose ethical standards or guidelines on international dispute resolvers, like arbitrators (or mediators), have to confront the question of whether one size will fit all. For many years, as a domestic legal ethicist, I argued against totally uniform rules for different kinds of practitioners.<sup>84</sup> I suggest, as Professor Rogers has here,<sup>85</sup> with respect to international arbitrators, that we do better by matching ethics to function, so that the greater specifics of particular roles can be addressed in a more tailored and appropriate fashion and can provide more detailed guidelines for behavior than a more abstract, if universal, set of aspirational norms.<sup>86</sup>

Applying a *functional approach* to the development of ethical standards in international arbitration, as Professor Rogers has done, raises issues of the levels of functionality to be addressed. As Professor Rogers's duck and rabbit images and metaphors suggest that international *arbitrators* are seen as either *adjudicators* (with the possibility of judicial ethics being applied to them in that role) or *contract service providers* (with a contractual, disclose and consent ethic administered by the arbitrators, parties and their administering institutions), the ethics of the arbitrators themselves is only one function to be considered.<sup>87</sup> To the extent that international arbitration is now frequently used not only in private commercial disputes, but also in more public or hybrid investment, trade and even state-to-state and citizen-to-citizen disputes (e.g. Israel-Lebanon,<sup>88</sup> the US-Iran Claims Tribunal,<sup>89</sup> and the UN Iran-Iraq Claims Tribunal<sup>90</sup>), the *function of arbitration* itself at a *systemic* level is also relevant to the framing of ethical standards and guidelines. Thus, the jurisprudential basis of international arbitration ethics is plural—claims of legitimacy, acceptability and justice must be satisfied at both *individual* (party and arbitrator) levels and *systemic levels* at the same time. And, adding to the unit of analysis challenges, the complexity of multi-cultural legal systems, comparative law and conflicts of laws questions, Professor Rogers has set herself a difficult set of challenges indeed.

There can be no doubt, however, that whatever the jurisprudential, choice of law, comparative law or multicultural legal system challenges presented here, Professor Rogers has greatly clarified, explicated and mapped the terrain to move

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FOR EUROPEAN PRIVATE LAW, [http://ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf) [<http://perma.cc/MS79-C79E>] (last visited Oct. 30, 2015).

84. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE* (Deborah Rhode ed., 2000).

85. ROGERS, *supra* note 1, at 274–310 (Chapter 7).

86. *See id.*

87. *Id.* at 177–217 (third-party funders); 99–138 (attorney representatives); 139–76 (experts and witnesses).

88. *See generally* GABRIELLA BLUM, *ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES* 190–241 (2007).

89. *See generally* Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEG. L. REV. 171, 174–76 (2009).

90. *Id.* at 171.

us forward in consideration of clearer ethical standards and practices for transnational arbitration. In the following sections I will review her specific contributions to this ongoing effort, focusing on some of the specific ethical and functional dilemmas that exist. I will then suggest some concerns or further questions to be considered in what I regard to be an important and continuing effort to deal with these complex set of problems.

## II. CONTRIBUTIONS FOR A PROGRAM OF ETHICAL “SELF-REGULATION OF THE INTERNATIONAL ARBITRATION COMMUNITY”

Professor Rogers’s book *Ethics in International Arbitration* will likely be the “go to” resource for ethical issues in international arbitration for many years to come for several reasons. Aside from her own very important proposals to create a system of international professional self-regulation through a variety of institutional and other methods, this book is a valuable compendium of research and detail of reports of the leading ethical issues, cases, tribunal rules, and controversies in a wide variety of international arbitration settings.

The book’s organization is valuably user friendly by using the more European method of treatise writing—every paragraph in the book is numbered by chapter and paragraph number, making location of particular issues, rules, cases, and scholarly sources easy to find, as well as logically developed. Each paragraph follows from the one preceding and leads to the one following. This organization makes both the factual material and more scholarly and argumentative material easy to find, consider, and react to. Stylistically, this book could serve as a model for many other scholarly books that, like this one, attempt to combine case law, policy discussion, and factual and didactic materials with analysis, review of competing views and presentation of different scholarly positions and proposals. American scholars should take heed of the more common format of comparative legal scholarship. In addition, Professor Rogers’s catchy chapter titles, using antinomies of concepts, metaphors and images, introduce well the concerns and controversial issues of each of her chapters, e.g., “Arbitrators, Barbers and Taxidermists,”<sup>91</sup> “Attorneys, Barbarians and Guerrillas,”<sup>92</sup> “Gamblers, Loan Sharks and Third-party Funders,”<sup>93</sup> “Chanticleer, the Fox and Self-regulation,”<sup>94</sup> “Duck-Rabbits, a Panel of Monkeys and the Status of International Arbitrators,”<sup>95</sup> and finally, “Castles in the Air and the Future of International Arbitration.”<sup>96</sup> From this lively list of characters, Professor Rogers reviews and

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91. ROGERS, *supra* note 1, at 57–98 (Chapter 2).

92. *Id.* at 99–138 (Chapter 3).

93. *Id.* at 177–217 (Chapter 5).

94. *Id.* at 221–73 (Chapter 6).

95. *See id.* at 343–44.

96. *See id.* at 365.

discusses such issues as selection of arbitrators, conflicts of interests for both arbitrators and representatives, diversification of the practice, roles of experts, practices of document discovery, witness preparation, confidentiality and professional privilege norms, rules of evidence and procedure, newer issues of third party funding and investment in arbitration, and other uses of arbitration processes. She explores the issues in locating the appropriate venues for ethical regulation—national courts, professional associations, disciplinary bodies, or the many international administrative institutions that manage most of modern international arbitration.<sup>97</sup> With this vast and incredibly interesting but complex set of issues, Professor Rogers makes it easy to find the relevant materials, understand who has argued what, who is regulating or deciding what issues, and what possibilities remain for future confusion or clarification.

This book provides good material for a specialist who seeks to see how different jurisdictions or venues have dealt with the various issues described above. There is also ample information for a generalist who is curious to know more about the comparative ethics issues of how different legal cultures resolve such issues in transnational settings, with no clear appellate or “uniform”<sup>98</sup> authority. Professor Rogers has given us a deep and rich description, explication and documentation of the current world of international arbitration, with its history, the variations of institutions and tribunals that facilitate it, the modern growth and diversification of the field,<sup>99</sup> both in the types of matters that are arbitrated and the participants in the process (Chapter 1). She provides an excellent review and summary of the current ethical rules of a variety of international institutions including the International Bar Association (Guidelines for Conflicts of Interests and Presentation of Rules of Evidence), the Council of Bars and Law Societies of Europe (CCBE) (declaration of general principles of ethical conduct for European lawyers<sup>100</sup>), American Arbitration Association (International Center for Dispute Resolution-ICDR), CPR-Georgetown Model Rules for Lawyer as Third-party Neutral and Provider Principles; and the London

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97. *See id.* at 17–18.

98. Very few of us in this field would ever speak of “uniformity” of arbitral rules or practice, but some leading practitioners and scholars have argued that international arbitration does have the promise of creating a “uniformity” of international dispute resolution practices and protocols, which at its most aspirational (or pretentious) could be called a “uniform” system of private international justice. *See e.g.*, Jan Paulsson, The Alexander Lecture at the Chartered Institute of Arbitrators, Universal Arbitration—What We Gain, What We Lose (Nov. 29, 2012), [http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan\\_Paulsson\\_Universal\\_Arbitration\\_-\\_what\\_we\\_gain\\_what\\_we\\_lose.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan_Paulsson_Universal_Arbitration_-_what_we_gain_what_we_lose.pdf) [<http://perma.cc/S5TL-TGBF>]; ADR, ARBITRATION, AND MEDIATION: COLLECTED ESSAYS (Julio César Betancourt & Jason A. Crook, eds. 2014).

99. For another recent study of the increasing diversification of the field, see Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann & Anne van Aaken, *International Arbitration: Demographics, Precision and Justice* LEGITIMACY: MYTHS, REALITIES, CHALLENGES, 2–3 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2611174](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611174) [<http://perma.cc/Z8KH-PP7X>]; Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann & Anne Van Aaken, *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 434 (2015).

100. *See* ROGERS, *supra* note 1, at 33–34.

Court of International Arbitration.<sup>101</sup> She also reviews the efforts and failures of other international groups to promulgate ethical rules or standards to deal with such issues as arbitrator and attorney conflicts of interest, such as the ICC. She notes that many of the newer international tribunals in Singapore, China, Cairo, and more regional centers have developed standards to compete with the older institutions.<sup>102</sup>

Descriptions of efforts to promulgate standards in international arbitration are located in Chapter 1 where Professor Rogers discusses the ethical issues in other forms of transnational practice in “foreign,” courts<sup>103</sup> and the ethical standards which have been promulgated for the newer international courts, such as the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals.<sup>104</sup> International legal ethics thus includes the complexity of ethical issues arising from lawyers practicing outside of their own national (or regulatory) territories, in the courts of another nation, in international and regional courts (e.g., European Court of Justice and European Court of Human Rights, Inter-American Court of Human Rights), international arbitral panels and now international mediation.<sup>105</sup> It also includes the ethics issues of transactional work in international or “global” law firms,<sup>106</sup> or sites of international global administrative governance. The terrain of international legal ethics is layered, complex, context-dependent, and also given to infinite regresses, as multiple jurisdictions, legal institutions, and sources of rules may have an interest in ethical standard development and enforcement.

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101. See *supra* note 37.

102. See ROGERS, *supra* note 1, at 45–49.

103. See Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 LEGAL ETHICS 29, 30 (1999); H. W. Arthurs, *A Global Code of Legal Ethics for the Transnational Legal Field*, 2 LEGAL ETHICS 59, 60 (1999); Laurel S. Terry, *An Introduction to the European Community Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 4 (1994); Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 752–755 (1994); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 418 (1994); GRAINNE DE BURCA, CLAIRE KILPATRICK & JOANNE SCOTT, *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM* DAVID TRUBEK (2014).

104. See ROGERS, *supra* note 1, at 38–43; Arman Sarvarian, *Common Ethical Standards for Counsel Before the European Court of Justice and the European Court of Human Rights*, 23 EUR. J. INT'L L. 991, 1013–14 (2012); SARVARIAN, *PROFESSIONAL ETHICS*, *supra* note 15.

105. See Council Directive 2008/52/EC, *The European Directive on Cross-Border Mediation* (May 8, 2008); *International Mediation Institute, IMI CODE OF PROFESSIONAL CONDUCT*, <https://imimediation.org/imi-code-of-professional-conduct> [http://perma.cc/Y7PG-VQQ4] (last visited Oct. 30, 2015); see generally, STEFFEK ET AL., *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT A CROSSROADS* (2013) (describing international, European and regional proposals for ethics standards).

106. See Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT'L LAW 943, 957–61 (2010); see generally, Carole Silver, Nicole De Bruin Phelan, & Mikaela Rabinowitz, *Between Diffusion and Distinctiveness in Globalization: US Law Firms Go Global*, 22 GEO. J. LEGAL ETHICS 1431 (2009) (for a study analyzing how globalization affects U.S.-based global law firms).

Professor Rogers also provides some excellent “thick descriptions” in the anthropologic sense<sup>107</sup> of a few case studies of both national (Singapore, Chile, India, China, and US) and international (international arbitration institutions, panels, professional associations) specific efforts to deal with an array of specific ethical issues. These case studies focus on issues such as privilege, document production, witness preparation and efforts to write rules, and standards to both attract and discourage the use of international arbitration.<sup>108</sup> She introduces the important issues of comparative law and ethics that are inherent in any discussion of these issues by also addressing the demographics of international law work, including the increasing number of women, third-world parties, lawyers and arbitrators, and the growing number of legal practitioners who have been trained in multiple jurisdictions.<sup>109</sup> By doing so, she demonstrates how practice, substantive rules, and legal ethics must be considered from an increasingly broader scope and a greater number of sources. The days of the “grand old men” may be slowly evaporating, but so also may be the more recent domination of the Anglo-American “technocrats.”<sup>110</sup> Legal colonialism and domination by a few legal systems (English and U.S. common law, French and Swiss civil law) may be giving way to more diverse legal and hybrid systems (Asian, Islamic, Israeli) that have already affected substantive and procedural law, and thus also have had an impact on ethical rules and practices.<sup>111</sup>

Professor Rogers explicates how efforts at “harmonizing” some of these ethical differences, in the particularities of witness preparation, document production, and confidentiality through “international” (International Bar Association) or “transnational” standards, has already and can further result in transnational “compromises” (such as in witness preparation practices and rules) that may approximate the kinds of “universal” rules of transnational practice that some practitioners and scholars think are desirable.<sup>112</sup>

Professor Rogers is a legal realist, however, and she just as carefully reviews some of the newer challenges to any hopes for more uniform ethical standards. Exploring in an up-to-date chapter<sup>113</sup> on third party investments in both private commercial arbitration and more hybrid or public investment arbitration, the differences in both practices and nascent regulations of outside financial backers of large stakes international dispute resolution, she demonstrates just how complex transnational regulation can be, with widely varying national rules and

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107. See CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* (1983).

108. See ROGERS, *supra* note 1, at 43–52.

109. See *id.* at 53–54.

110. See DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 2, at 38.

111. See generally UNIDROIT, *ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (2006) (explaining more information of how international institutions have incorporated diverse legal systems); see also SARVARIAN, *PROFESSIONAL ETHICS*, *supra* note 15.

112. See PAULSSON, *IDEA*, *supra* note 29, at 24.

113. See ROGERS, *supra* note 1, at ch. 5.

customs on the role of “outside” investors and interested parties in financing high stakes dispute resolution. Professor Rogers goes further than many scholars and practitioners in this area by also taking on the question of whether ethical standards should be developed and applied to other “third parties” in arbitration, such as experts and witnesses, especially when legal traditions differ dramatically about their appointment (by tribunal or by party) and evidentiary value.<sup>114</sup> Related to the issue of financial participation is the growing demand by many “outside” parties (including employees, citizens, advocacy groups, and non-governmental organizations) to simply participate in arbitration through amicus briefs, presentations, testimony, and arguments, accompanied by demands for more public, and transparent proceedings.<sup>115</sup>

Given the increasing use of arbitration processes in a wider variety of transnational disputes, now including not only private commercial disputes or public diplomatic disputes, the use of international arbitration or Investor State Dispute Settlement in investment disputes also challenges many hopes for universal or more uniform ethical standards. While “micro” ethics may be similar (the behavior and conduct of lawyers, arbitrators, witnesses and experts) in the conduct of hearings, more “macro” ethical issues, such as the publicity or transparency of the proceedings, documents and awards<sup>116</sup> in hybrid investment disputes, now so significant in the political debates about trade agreements, are quite different than in private commercial arbitration. Whether international ethics in arbitration can be so capacious, plastic, or transcendent so as to include both these macro/policy concerns and more micro/behavioral concerns remains to be seen. Professor Rogers exposes these issues here, even if there are no obvious solutions.<sup>117</sup> As observed above, the challenge of her proposed “functionalist” model of ethics in international arbitration might suggest that when the functions are different (resolving private commercial disputes vs. resolving state regulation of foreign direct investments) there might be a need for more diverse and context-specific ethics standards.

The challenge of any statement of ethics standards is the level of generality in which those standards are expressed. It is relatively easy to identify some “core”

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114. Discussed more fully below is the rather big divide between most civil law systems in which experts are appointed by the arbitrators (or judges) as “neutral” experts in service to the fact finding process, and common law and adversarial systems where they are appointed by the parties to serve more partisan processes for fact finding.

115. See World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, <http://www.sice.oas.org/dispute/comarb/icsidlicsid2a.asp>. [<https://perma.cc/LG6P-D4KC>] (last visited Oct. 30, 2015); *Rules of Procedure for Arbitration Proceedings*, ICSID, <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm> [<https://perma.cc/J6YW-6VP3>] (last visited Oct. 30, 2015).

116. See S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT’L L. (forthcoming 2016) (examining an account of differences in legal systems and types of cases in international arbitration award and opinion writing and transparency).

117. See ROGERS, *supra* note 1, at ch. 10.



values of most legal proceedings (fairness, integrity, honesty, respectful behavior, equality of evidence production opportunity (if not equality of “arms” and quality of representation)). But, even at the most general level there are potentially conflicting values of “ethics.” Consider as examples of these potentially conflicting duties: loyalty to clients and duties to tribunals; keeping client information confidential and being honest and transparent to tribunals; treating others with integrity and respect and American-style “zealous” representation<sup>118</sup> in the form of rigorous cross-examination; duty to protect clients (think corporate clients with many different individuals) and their information (documents, trade secrets etc.) and varying duties of disclosure to opposing parties or to the tribunal; duties to present, past and possible future clients; conflicts presented by role changes, from lawyer to arbitrator, from lawyer to judge, and movement from one law firm to another or movement from private law work to engagement by the state; movement from one “side” or argument on an issue to the “other” (known as issue conflicts).<sup>119</sup> These tensions exist in any legal ethics regime but may be even more intensely experienced in international arbitration as lawyers serve as both representatives and arbitrators or work in different kinds of practice units (barrister chambers and multi-national law firms).<sup>120</sup>

Professor Rogers does not propose a specific draft set of rules or principles for international arbitration in her book. She does illustrate, in Chapter 3, how these issues have been treated in the existing case law, decisions and available rulings from arbitral bodies, to suggest how international arbitral institutions might deliberate on these issues and resolve at least some of the tensions, with more specific guidance than general platitudes of good behavior. The more general the formulation of a rule or standard, the less helpful it may be for specific behavioral guidance. (This is the tension of “macro” ethics in expression and “micro-ethics” in practice.). Any attempt to specify some “global” universal or international standards may conflict with more local and national formulations of such rules. A few examples follow to demonstrate her descriptive care and review of the issues.

In what long has plagued international arbitral practice, American ethical and professional malpractice rules of witness preparation (and likely testimonial rehearsal and coaching) have openly collided with several legal traditions of explicitly prohibiting this practice. To varying degrees, France, Belgium,

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118. Within the American ethics rules the former duty of “zealous advocacy” in the *Code of Professional Responsibility* has been replaced with the more toned down requirement of “diligence” for the client, see MODEL RULES R. 1.2, with the “zealous advocacy” language being relegated to the comment section. Despite the change of language in the rule, however, most American lawyers still think their duty is to be a “zealous” and adversarial advocate and the popular cultural images of the aggressive cross-examiner have long survived the demise of Perry Mason on TV. See PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES xix (1996); MICHAEL ASIMOW, LAWYERS IN YOUR LIVING ROOM: LAW ON TELEVISION 331 (2009); DAVID PAPKE ET. AL., LAW AND POPULAR CULTURE, 365–66 (2d ed. 2011).

119. See ROGERS, *supra* note 1, at 321–23.

120. See *id.* at 63.

Germany and the United Kingdom,<sup>121</sup> have placed restrictions on how much pre-testimonial contact a lawyer may have with witnesses. Professor Rogers reviews the variations in treatment of this issue through national rules and practice and then explores “the elusive international consensus” that has gradually emerged from deliberations in the non-governmental International Bar Association.<sup>122</sup> She then deftly explores how often compromise language in multi-system legal ethics formulations does not fully deal with the problem. Does the permitted witness “interviewing” allow payment for expert testimony? Does it permit access to confidential information held by an employee or former employee of an organizational client?<sup>123</sup> Professor Rogers digs deep when she describes a simple solution recognized by bar rules in Switzerland, Paris and Brussels, which, recognizing this conflict of laws problem, allows an exception to the no preparation of witness rules if the lawyer is appearing in an international tribunal that has different rules.<sup>124</sup> Professor Rogers describes these international “compromises” as too often taking a “binary” view of an issue without more fully exploring its complexity and possible variations. Disclosure of documents or “American-style” discovery is another such example explored here.<sup>125</sup> While American lawyers (and increasingly British lawyers too) are permitted to “root around” in the documents, even if adverse, of the other party, most civil lawyers are not and many such documents are independently protected by corporate and general privacy laws in Europe.<sup>126</sup> Another product of our differentially technologized world includes variable duties to return documents (whether paper or electronic) that have inadvertently been delivered to the wrong parties, with different ethical and procedural traditions of document production.<sup>127</sup> This too raises legal and cultural differences that probably require more specific, rather than more general, drafting in ethical standards.

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121. One of the classic John Mortimer RUMPOLE stories brought to television with Leo McKern in the starring role demonstrates how a barrister seen speaking to a witness during a break in proceedings can get into a lot of trouble. See RUMPOLE: RUMPOLE AND THE EXPERT WITNESS (BBC Radio 1981), <http://www.bbc.co.uk/programmes/b01pfx04> [<http://perma.cc/K34G-YS89>] (last visited Oct. 30, 2015); RUMPOLE: RUMPOLE ON TRIAL (BBC Radio 1992), <http://www.bbc.co.uk/programmes/b01r1b3c> (last visited Nov. 25, 2015) [<http://perma.cc/4Y9P-A7ZJ>].

122. Article 4(3) of the International Bar Association’s *Rules on the Taking of Evidence in International Arbitration* provides, “It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.” International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (May 29, 2010).

123. See ROGERS, *supra* note 1, at 172, 175–76. What might happen to a Belgian counsel who prepared and rehearsed a witness in an international arbitration when national ethics rules still prohibit such practices? See *id.* at 112–14.

124. *Id.* at 116.

125. *Id.* at 118–20.

126. This is a part of much larger cultural-legal issue currently being played out in different privacy laws and rights in Europe and the United States, affecting data access, Google searches and “the right to be forgotten.”

127. See ROGERS, *supra* note 1, at 118–20.

Similar ethical cultural divides are explored in the book with respect to conflicts of interests. The United States has the most detailed and particularized rules about what constitutes a conflict (prior clients, former government service, law firm imputation conflict if one member has a conflict, business dealings with clients, acceptance of gifts or payments for legal services by third parties, organizational conflicts).<sup>128</sup> Other nations have either a different conception of “conflicts of interest” (France’s notion of avoidance of “indelicacy”) or an absence of formal regulation and sanction. Different configurations of practice in different countries, including Asia, South America, and Europe with smaller units of practice or shared office arrangements without stringent conflicts rules have led in recent years to more complicated challenges to international arbitrators coming from the same legal “chambers” or offices as some of the advocating lawyers.<sup>129</sup> At the level of award enforcement and challenges, some national systems discipline such conflicts (as does the U.S. in some contexts) only when actual harm has been shown (e.g., revelation of confidential information, disloyal conduct, rulings in favor of former clients, actual financial interests in outcomes).<sup>130</sup> As Professor Rogers suggests, some arbitral bodies are reluctant to rule on such challenges, claiming lack of authority or lack of standards in international settings.<sup>131</sup> I would suggest they are also reluctant to rule on this issue because they are often implicitly ruling on their own potential conflicts of interest (of either the past, or the future, as they contemplate further work in the field, as either arbitrators or representatives, known as “upstream” conflicts).<sup>132</sup>

Another area of different understandings of basic principles occurs with client confidentiality and attorney-client privilege, especially as it affects representatives of corporate or organizational bodies. In many civil law countries confidentiality is both broader and narrower than in the United States. Corporate or trade secrets communicated from client to lawyer are often protected from disclosure by the lawyer, but the advice from the lawyer to the client is not.<sup>133</sup> Also contrary to American rules and practices, in some jurisdictions, lawyers may have to keep their own communications with each other across adversary lines confidential from their own clients! And, not unlike the variations among states in the United States, different national<sup>134</sup> systems require different

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128. See MODEL RULES, R. 1.7–1.13.

129. *Id.* at 123 (discussing a move to disqualify a barrister who shared “office door” with President of an arbitral tribunal in the case *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue (June 12, 2009), <http://www.italaw.com/documents/Hrvatska-Interpretation.pdf> [<http://perma.cc/JGA9-YP8K>] (last visited Oct. 30, 2015)).

130. See *Commonwealth Coatings Corp. v. Cont’l Casualty Co.*, 393 U.S. 145 (1968); *Al-Harbi v. Citibank*, 85 F.3d 680 (D.C. Cir. 1996).

131. See ROGERS, *supra* note 1, at 82–86, 90–98; PAULSSON, IDEA, *supra* note 29.

132. See MENKEL-MEADOW, *supra* note 22.

133. See ROGERS, *supra* note 1, at 124–26.

134. *Id.*

responses from lawyers who learn about client wrongdoing.<sup>135</sup> Issues of what can be argued or treated as evidence in international arbitrations may turn on different ethical rules and practices in different national systems which require international arbitrators to make evidentiary rulings that may, in fact, implicate ethical requirements, with potential for discipline or other penalty within a lawyer's (or witness's) home country.

Perhaps the trickiest and most common ethical differences have over time been the rules and practices of *ex parte communication*. American parties and lawyers have moved into international arbitration with their domestic customs of choosing partisan arbitrators with whom they continued to have private and advocacy conversations during the arbitration proceedings.<sup>136</sup> The tradition of international arbitration most often requires "impartiality" or "neutrality" at least after all the arbitrators are chosen. Over time even the American arbitration institutions, such as the American Arbitration Association and its international arm, International Center for Dispute Resolution, have moved to a notion of "impartiality" and prohibition of most *ex parte* communication between representatives and arbitrators.<sup>137</sup> Ironically, *ex parte* communications continues to be a cultural issue as tradition and practice has not generally prohibited meals and social contacts among arbitrators, lawyers and parties in Continental practice. Now, in some cases involving China and other Asian countries, blurring of roles from mediator to arbitrator or other function has blurred some of the lines of communication, both prohibited and permitted. Just as in American med-arb (mediation-arbitration hybrids) dispute resolution practice, there can be issues with separate meetings (caucuses) with mediators who try to settle cases and then later serve as arbitrators deciding matters on the basis of secret or non-shared or responded to information.<sup>138</sup> These issues, described with several case examples, demonstrate the great variety of practices and confusion that may occur when different nationals, subject to different, or no rules at all, participate in an international hearing. Particular arbitral tribunals can set their own single case "rules" for their proceedings. Increasingly, the rules of each of the arbitration institutions may provide for default rules on the issue of *ex parte* communications and expectations of impartiality. However, if the lawyers have different cultural expectations about what is appropriate (conversations, sharing a meal, staying in the same hotel), there may be different behaviors with respect to communications that can have an effect on outcomes, and can lead to post-award challenges. Professor Rogers does not offer a specific solution to these issues, but she demonstrates how cultural practices may differ, but also may be converging, in

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135. *Id.* at 125.

136. *Id.* at 126–28.

137. *Id.*

138. See CARRIE MENKEL-MEADOW ET AL., *supra* note 68.

practice, if not in formal rules or decisions.<sup>139</sup>

Harder to regulate in any realistic way is the issue Professor Rogers calls “creativity, aggression and bad manners.”<sup>140</sup> These are the different cultural practices in the legal profession and within different corporate cultures. Non-Americans complain both about the aggressiveness of American lawyers generally and about cross-examination practice in particular in international arbitration. Non-Americans also are often surprised by the “creativity” of legal arguments, departing from formal rules, contracts and laws, with creative interpretations of evidence and contract terms as “zealous representation” of clients.<sup>141</sup> As Professor Rogers notes, arbitrators and American courts in enforcement proceedings are now more likely to “sanction” with fines or other penalties (including reduced attorney’s fees) particularly outrageous behaviors. Still, it remains unclear what powers arbitrators or arbitration institutions have to either curb this behavior or socialize for greater “civility.”<sup>142</sup> Related to using sanctioning powers is the issue of variations in how attorney’s fees are provided for in different national cultures, including American style contingent fees or British and some Continental “loser pays” attorneys’ fees shifting rules. These kinds of fee issues are more likely to be dealt with explicitly in international institutional rules but the effects of attorneys’ fees rules on different behavioral assumptions in practice is less easily reconciled.

Professor Rogers notes that the arguments made for and against more specificity in international arbitration rules are often contradictory. Many of the first (and now second generations) of the “old guard” often argue that when international arbitration was dominated by a small circle of mostly European grand men (and often legal scholars, as well as distinguished lawyers), there was more of an “informal common culture” of civility, good manners and accepted norms of practice (as well as legal argumentation).<sup>143</sup> But it is the very existence

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139. See generally ROGERS, *supra* note 1, at 132–38.

140. See *id.* at 128–30.

141. This is not only an issue of practice or ethics. There is now vibrant scholarship on the different jurisprudential approaches to contract interpretation in international arbitration from a substantive perspective. See, e.g., Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6 J. INT’L DISP. SETTLEMENT 4 (2015); ROBERT HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (1997); P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS* (1987); Nottage, *Transnational Commercial Arbitration*, *supra* note 2. Both the law of *lex mercatoria*, and the doctrines of *ex aequo et bono* or conferred powers of *amiable compositeur*, now less frequently invoked or provided for in arbitral agreement, provide for more “discretionary” interpretations of contract terms in international arbitration. See BORN, *INTERNATIONAL ARBITRATION* *supra* note 36.

142. See Patrick Schlitz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (the discussion of civility in American legal practice has been an issue for decades); Erwin Chemerinsky, *Justice Scalia: Why He’s a Bad Influence*, L.A. TIMES (July 14, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0714-chemerinsky-scalia-bad-example-20150714-story.html> [http://perma.cc/52VT-MSPJ].

143. See arguments by leading arbitrators Jan Paulsson and Emanuel Gaillard on these issues, *supra* note 64.

of the closed “old boy network” of the repeat players<sup>144</sup> of international arbitration that produced the first claims of conflicts of interest, and calls for diversification of the profession, both from the arbitrator and representative side of the legal work. Then ironically, more diversity in demographics of parties and litigators, nations, and the types of matters in arbitration in turn has led to a greater need for some rules to make the process more transparent and to level the playing field for more diverse parties and matters, not necessarily schooled in the same “old boy culture.” Recently, Emmanuel Gaillard has suggested that with the increased diversification of the field, there is a more polarized, less “solidaristic” understanding of expected role behavior.<sup>145</sup> Thus the “cure” for the increasingly less legitimate closed system of international arbitration of more diversification and transparency of practice may in turn require even more regulation or attempts at standardization in order to produce a system of transnational dispute resolution that is predictable, efficient, transparent, and accessible to all parties. But the actual content of such regulation may, just because of that increased diversification, be more difficult to craft and negotiate as new entrants, both parties and lawyers, seek to compete for arbitration work and offer their more diverse ideas of what is fair and just.

Professor Rogers also explores a series of new issues brought to the forefront in international arbitration by focusing on new players in the system. These include third party investors in arbitration-litigation, increased use of experts and technical witnesses, and the complex role of public parties (states and state agencies in international investment disputes) and non-parties (e.g., NGOs and other “interest groups”) in arbitrations that involve public issues.<sup>146</sup> The arbitration institutions have now all had to focus on new rules, at the intersection of ethical and procedural rules, for allowing third party participation, both from a financial and interest basis in order to structure systems with integrity and to satisfy demands for due process and public participation, important values from the “macro-ethical” perspective.<sup>147</sup> To the extent that international arbitration has become more “judicialized,”<sup>148</sup> “Americanized” or “complexified” (all critiques leveled at current administration and conduct of both investment and commercial arbitration), the leading international arbitration institutions (ICC, LCIA, ICSID, ICDR AAA) have all had to confront making new rules for the participation (either financially or on an amicus-interest basis) by those beyond the actual parties. Professor Rogers explores these new frontiers in arbitration practice in

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144. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

145. Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 15 (2014).

146. See ROGERS, *supra* note 1, at 177–217.

147. *Id.*

148. See, e.g., Remy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration*, 25 AM. REV. INT'L ARB. 223 (2014) (looking at increases in costs and administration of high stakes matters at the ICC, LCIA, ICDR and Stockholm Chamber of Commerce).



Chapters four and five, once again providing good summaries and source material for these complicated issues.<sup>149</sup>

The use of expert witnesses in arbitration is another illustration of the cultural complexity in transnational litigation. Classically “adversarial” cultures like the U.S., Australian, and Canadian cultures are more likely to seek to use partisan, party-chosen and paid-for experts for a variety of technical issues (market information, valuation, architects and engineers for construction and other kinds of disputes, as well as lawyers and law professors as experts on foreign law). Conversely, the civil law courts (and to some extent the U.K.) have traditionally used judge or arbitration panel appointed experts to “report” more directly to the decisional body.<sup>150</sup> This is not merely an issue of procedural difference, but can be one of serious epistemological differences. The American adversarial model argues that the truth emerges best from contests of “facts” and in the case of experts, even “opinions,” about technical matters. Civil law systems are more likely to approach “expertise” as “truth” or “fact” to be presented to the decision maker who has chosen the appropriate scientist or expert more “neutrally.”<sup>151</sup> This is also the result of some of the other basic differences at the systemic (“family” of legal traditions) level—American adversarial preferences for attorney controlled evidence production versus the conventional conceptions of the inquisitorial model where judges are more in control of evidence production and management. Professor Rogers chronicles a growing convergence in practice and rules among the major arbitral institutions.<sup>152</sup> However she notes that within her framework of “functional analysis” of ethics issues, that national traditions of tribunal versus party appointed experts continue to present difficulties at both the procedural and ethical levels<sup>153</sup> and remain problematic in many arbitrations where rules of procedure, evidence, and ethics are not governed by either contract or acceptance of one of the major arbitral institutions’ rules.

Recent practices of third party investors in both investment-state arbitration and commercial arbitration also demonstrate the continuing tensions of different national rules and traditions. A few jurisdictions (Australia and the U.K.) have now authorized non-lawyer investments in law firms<sup>154</sup> and in litigation. In others (U.S.), the practice of “investing” in litigation (and arbitration) has begun without clear regulation as it is often difficult to pinpoint who is really paying for

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149. See generally ROGERS, *supra* note 1, at 139–217.

150. *Id.* at 141–57.

151. The American system of expert witnesses and the dangers of “junk science” have more recently been addressed in a series of cases, following on from *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), requiring judges to do some initial screening of the qualifications of the expert witness and the degree of certainty and scientific merit of the proffered testimony, perhaps another example of some “convergence” internationally in the rules of litigation and practice.

152. See generally ROGERS, *supra* note 1, at 157–76.

153. *Id.* at 171–75.

154. *Id.* at 178–79.

the lawyers or legal proceedings in international proceedings. Parties outside of a particular dispute see the importance of controlling or seeking to affect particular rulings with potentially precedential or other “external” effects. Note again the irony of increased complexity and regulation in international arbitration. With a call for greater transparency and disclosure of awards, opinions and rulings, the stakes of those outside of the particular disputants to affect those outcomes becomes even greater. This applies particularly in investment arbitration where arbitrators may, in effect, overrule national laws or at least award large amounts of compensation to foreign investors when national laws seek to regulate their conduct.

Thus, desires for greater transparency and disclosure of the entire arbitration process also demand disclosure of funders of the litigation, which deprives international arbitration of one of its key advantages—privacy and confidentiality. Note again, the tensions and antinomies endemic to international arbitration practice—desires to make the system more transparent and accountable to those outside the dispute itself inevitably run up against the qualities that make arbitration particularly attractive to those inside who seek confidentiality or privacy. While progressive “globalists” and advocates for more informal global governance seek to make international dispute resolution and governance more accountable by disclosures of various kinds, there is an inevitable tension when at least some processes (especially diplomatic negotiation and mediation) often work better when the parties are assured some secrecy and confidentiality and freedom of action.<sup>155</sup>

Though somewhat beyond the scope of this review, these issues do provide an opportunity for further exploration of what Professor Rogers’s terms the “functional ethics” divide between arbitral proceedings and those of other dispute resolution processes. To the extent that decisional processes like international arbitration (in both commercial and investment disputes) are more like adjudication, with command orders and awards (more like rabbits?), they may require more disclosure and transparency in all issues, than mediation or some forms of negotiation, which are designed to be more “consensual” and controlled by the parties. The argument is that if parties must “consent” to agreements in negotiation and mediation, they must be permitted to choose their rules of engagement and degree of disclosure (allowing more freedom to move away from stated positions and to consider future-oriented and more creative solutions than adjudication of “past” facts and contractually or legally based

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155. See commentary emerging from recently agreed to Iranian-Nuclear Agreement on what was accomplished by secret and confidential negotiations and what should now be disclosed in more public approval stages; see, e.g., David Sanger & Michael Gordon, *Clearing Hurdles to Iran Nuclear Deal With Standoffs, Shouts and Compromise*, NEW YORK TIMES, July 16, 2015, at A1; Robin Wright, *Tehran’s Promise*, THE NEW YORKER, July 27, 2015, <http://www.newyorker.com/magazine/2015/07/27/tehrans-promise> [http://perma.cc/UZ7B-FCGK].

liabilities).<sup>156</sup> Of course, mediated and negotiated agreements, just like arbitral awards, also have impacts on third parties and thus demands for full disclosure and transparency have also been made with respect to those processes as well.<sup>157</sup> However, I, like Professor Rogers, have argued that different functions of these different processes may necessitate different ethical requirements.<sup>158</sup>

Professor Rogers's treatment of the third party funding issues is a good, exhaustive review of the current issues that stem from outside funding in arbitration (and all litigation). It provides extensive review of the current differences in national laws that govern these practices and reviews the myriad of ethical issues that occur when there are outside investors, whether silent or known. These ethical concerns include conflicts of interests between and among investors and arbitrators, lawyers, witnesses (the "repeat player" phenomenon of interests in continuing work and support), manipulation of cases for issue precedents, moral hazard when those who are not paying for the litigation are the principal parties, corporate governance issues when others "control" corporate policy or dispute resolution strategy without board or governance approval, "concentrations" of influence and power on particular disputes or issues, and among other issues, the potential for increased enforcement challenges as hidden funders are discovered after the fact, and conflicts of interest become apparent after the earlier challenge periods have passed under arbitral rules.<sup>159</sup> Most concerning to Professor Rogers and many scholars is that "massive funds being injected into international arbitration have the potential to restructure the entire field. On the other hand, those who control those funds are completely unregulated and beyond the effective reach of any regulator."<sup>160</sup> She references the recent multi-year, multi-venue litigation between Chevron and Ecuador over environmental damage in foreign investment on indigenous land as a "cautionary tale."<sup>161</sup>

Professor Rogers has given us a *tour de force* of description of the ethical issues implicated in transnational arbitration practice, still rooted in national

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156. See generally, WHAT'S FAIR: ETHICS FOR NEGOTIATORS (Carrie Menkel-Meadow & Michael Wheeler, eds., 2006) [hereinafter WHAT'S FAIR]; ELLEN WALDMAN, MEDIATION ETHICS (2011).

157. See generally, WHAT'S FAIR, *supra* note 156.

158. See Menkel-Meadow, *Whose Dispute*, *supra* note 11; Menkel-Meadow, *Peace and Justice*, *supra* note 11. For decades ethicists have argued for more honesty and disclosure in legal negotiations, with little success, as legal negotiators argue that parties must be able to change positions, dissemble their real interests, because that is part of the universal and empirical negotiation culture, see Carrie Menkel-Meadow, *Ethics, Morality and Professional Responsibility in Negotiation*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE (Phyllis Bernard & Bryant Garth eds., 2002); Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L. J. 979 (2001).

159. See ROGERS, *supra* note 1, at 188–209.

160. *Id.* at 210.

161. *Id.* at 215. For further reading on the Chevron-Ecuador litigation, see Judith Kimerling, *Lessons from the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective*, 1 STAN. J. COMPLEX LITIG. 241 (2013); PAUL M. BARRETT, LAW OF THE JUNGLE: THE \$19 BILLION DOLLAR BATTLE OVER OIL IN THE RAIN FOREST AND THE LAWYER WHO WOULD STOP AT NOTHING TO WIN (2014).

regulation or an absence of clear ethical guidance at the international level. She also exposes the absence, at the present time, of any clear or uniform set of enforcement procedures, outcomes or institutions to manage any enforcement of any regulations that might be developed.<sup>162</sup> Her basic thesis and proposal to remedy these concerns is for international arbitration to follow on from its foundational roots—*voluntary, internal and international self-regulation*, with the promulgation of standards, rules and guidelines by the international non-governmental organizations that currently define the field (e.g. the ICC, LCIA, IBA, China International Economic and Trade Arbitration Committee (CIETAC), UNCITRAL, Singapore International Arbitration Centre (SIAC); Hong Kong International Arbitration Centre (HKIAC) and others). Then there should be *self-enforcement* by internal processes within these organizations and the arbitration panels that they administer.<sup>163</sup> She illustrates how this might work with some recent examples of more or less successful efforts at self-regulation, such as by the Association of Litigation Funders of England and Wales (ALF), which, in 2011, promulgated a voluntary ethics code for external funders of litigation, but which has also been criticized for its vague standards and lack of effective enforcement mechanisms.<sup>164</sup> Thus, the key questions for the field and this reviewer remain: how can international arbitration ensure its integrity, legitimacy and acceptability? Can transnational ethics regulation perform this function and if so how? In the final section below, I offer some critiques and concerns about what remains to be addressed after reading Professor Rogers's excellent descriptions and analyses—just what are the possibilities of success for her prescriptions?

### III. QUESTIONS, CRITIQUES, AND CONCERNS: IS TRANSNATIONAL ETHICAL PRACTICE REGULATION POSSIBLE IN A WORLD OF LEGAL PLURALISM?

This review began with the question: “When we talk about ethics in international arbitration, what are we concerned about?” Professor Rogers has illustrated and described our concerns with the challenges to the legitimacy and acceptability of an important transnational system of dispute resolution which now affects the commercial, industrial, environmental, human rights, and personal wellbeing of much of the world's population, whether in developed or still developing nations. Those challenges include conflicts of interests of repeat players, those who would manipulate both national and international rules of trade, commerce and regulation for their own economic gain. It also includes lack of transparency and participation in rulings and awards that can affect millions of

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162. Rogers, *supra* note 1, at 132–38.

163. *Id.* at 365–72 (proposing a regime of “self-regulation” by administering arbitral organizations and tribunals).

164. *Id.* at 210.

people, decentralization and privatization of decision-making that many believe should be in the public sphere, and the domination of global legal decision-making by a small, if growing, group of professionals, primarily from the western and developed world. This is, in part, a story of “the relationship between insiders and outsiders” of a transnational system of justice, affecting potentially billions of people. Professor Rogers tells us her own interest in the subject came from her own “nightmarish lesson in ethics” when the partner she worked for in an international arbitration practice was being sent to jail for committing “serious criminal offenses in a client-related matter.”<sup>165</sup> Many serious scandals have made the public aware of what can happen in transnational dispute resolution when the proceedings are private and controlled by the parties within the disputes. These range from corporate misconduct (Enron, London Interbank Offer Rate (LIBOR)<sup>166</sup>, MCI, HSBC Bank, Yukos oil), to political and economic failures (Argentina crisis of 2000, world economic recession 2008), as well as more “ordinary” but financially significant disputes (credit defaults, private investment and governmental corruption).

Professor Rogers proposes a relatively modest solution to some of these issues. International arbitration originated in voluntary contracts, agreements and undertakings between commercial partners and then states, bolstered by also voluntary agreements to enter into public law treaties (both investment and commercial treaties with both substantive and procedural commitments and general enforcement treaties, The New York Convention for Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention). Given its origins, she suggests that ethical regulation, though clearly necessary, should also be voluntary and internal to those who practice or use the system of international arbitration.<sup>167</sup>

Using a Functional Theory of the purposes and roles of international arbitrators (who are both contract service providers and private adjudicators) in the global system of justice, she suggests that the major international arbitration institutions should develop a “more robust and meaningful definition of arbitrators’ duty of impartiality”<sup>168</sup> to reduce bias or appearances of bias. These institutions should also address a variety of other specific issues (uses of partisan arbitrators, third party investment in arbitration cases, conflicts of interest, corruption), as well as to resolve some issues of cultural differences in legal practice (e.g., production of documents and discovery, evidence production, confidentiality and privilege, cross examination, use of expert witnesses, attorney’s fees and other issues of attorney conduct).<sup>169</sup>

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165. *Id.* at ix.

166. *Id.* at 5.

167. *See id.* at 13–14, 17–56, 365–72.

168. *Id.* at 60–63.

169. *See generally id.* at 57–98.

Acting on her own prescriptions, she has, as a separate, but related, activity from her book, established an important new website, ArbitratorIntelligence.org. This website is intended to correct some of the information and power asymmetries between the insiders and outsiders by publishing arbitration awards and feedback on particular arbitrators.<sup>170</sup> This is an important attempt of a private person's (within the arbitration community) public intervention into the privacy of the international arbitration system.

Professor Rogers acknowledges in her final chapter, she may be building "castles in the air—pretty, ethereal aspirations that have little to do with the serious, practical business of resolving international arbitral disputes."<sup>171</sup> Yet, at the same time, her book<sup>172</sup> demonstrates that there has been change and development in the regulation of international arbitration ethics: "The absence of a duty for arbitrators to investigate potential conflicts seemed reasonable, until it was not."<sup>173</sup> Arbitration institutions have changed rules to require investigation and disclosure of conflicts of interest, as national courts also increased scrutiny of investigation and disclosure in enforcement proceedings, as more and more challenges (and academic commentary) raised questions about the conflicts of interest and self-dealing of both arbitrators and counsel in many proceedings. The work of the IBA, ILA, the ICC, CPR, LCIA, UNCITRAL and many other international bodies in recent years has included dozens of internal committees and inquires to draft rules and guidelines at varying degrees of specificity to deal with many of the issues outlined in Professor Rogers's book (and including other important issues like powers to grant interim measures, injunctions, justiciability and arbitrability in cases alleging corruption and other public law matters). Some of these organizations have also provided internal ethics committees to provide ethical guidance and even rulings on challenges. Professor Rogers describes places and issues where there was difference and contest (e.g. witness preparation, document production and appointment of partisan arbitrators and experts) and now there is more convergence (IBA Guidelines on Evidence Rules, Conflicts of Interest) in practice and in rules. This demonstrates how the informal processes of private professional organizations, interacting with public litigation and legal scholarship, has indeed accomplished rule (and we hope, but don't really know) and behavioral change.<sup>174</sup>

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170. See ARBITRATOR INTELLIGENCE, [www.Arbitratorintelligence.org](http://www.Arbitratorintelligence.org) [<http://perma.cc/5FR9-TQFX>] (last visited Oct. 1, 2015).

171. ROGERS, *supra* note 1, at 365.

172. *Id.* at 367, 247–49.

173. *Id.*

174. Though there clearly has been an increase in ethical sensitivity, rule drafting and litigation about ethical behavior, there are also many claims that behavior in arbitration has actually gotten worse—called "guerrilla tactics" by some commentators, *see, e.g., supra* Part III; PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION (Loukas Mistelis & Julian Lew eds., 2006).



Thus, Professor Rogers sees an evolutionary process of dialogue, engagement, and drafting by the leading arbitration institutions and professionals to slowly create the “common law” as it might be (including particular codes and decisions) of an international ethics regime for international and transnational practice as called for by many commentators over the last few decades.<sup>175</sup> Her book presents evidence of this work in progress, with the fits and starts of conflicting and competing codes and resolutions of complicated issues by arbitration panels and enforcing national courts.<sup>176</sup> This book introduces the possibility of an ongoing treatise (European style) and reporter of ethics decisions in international arbitration from around the world.<sup>177</sup> Perhaps some junior scholar or arbitration institution will take on that important project.<sup>178</sup> It also demonstrates how international arbitration ethics “law” may become as cumbersome and casuistic as American legal ethics, with different state codifications of the *Model Rules of Professional Conduct* and great varieties in case law interpretations in different locations of practice.<sup>179</sup>

For all these strengths, and there are many, this reader was still left yearning for more. Many readers who labor in these fields would have wished for a suggested formulation of actual and specific rules, guidelines and standards, especially from one, like Professor Rogers, who has already written so much about the specific issues treated here and who has served on many of the international drafting or

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175. See, e.g., Detlev Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 677 (2000); Detlev Vagts, *The International Legal Profession: A Need for Governance?*, 90 AM J. INT'L L. 250 (1996); LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW (John J. Barceló III & Roger Cramton eds. 1999); John Toulmin, *A Worldwide Common Code of Conduct for Professional Ethics?*, 15 FORDHAM INT'L L. J. 673, 673 (1992); W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 861 (1971); Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM REV. INT'L ARB. 214 (1992); Carolyn Lamm et al., *Has the Time Come for an ICSID Code of Ethics for Counsel?*, in 2009-2010 Y. B. INT'L INV. L. & POL'Y (Karl Sauvant ed. 2010); Menkel-Meadow, *supra* note 22.

176. See ROGERS, *supra* note 1, at 86–87.

177. Structurally the Table of Cases at the beginning of this volume provides, by country, and international body, the outline for such a text. It would have been helpful to have cases listed specifically by issue as well (the outline of a possible treatise for the future). The index at the back might also have provided more categories of subjects for ease of finding cases, specific rules, scholarly articles etc. Though I have applauded the use of European style numbered paragraphs in the text, the book might have benefitted from an alpha organized bibliography at the back of all articles, books and cases cited, as well as listings by subject area. Professor Rogers's research is comprehensive but as a research tool it is often difficult to “refind” a particular source buried in a footnote in the text. These are stylistic quibbles for what is still a comprehensive and excellent research tool but authors and editors should take note of different methods of organizing such field defining works.

178. Leading arbitration casebooks, textbooks and treatises now report some of the leading cases and issues but there is as yet no comprehensive single international treatise that reports on all ethical issues and decisions in international arbitration. See generally, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2014); THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION (5th ed., 2014).

179. Including particular agencies like the IRS or SEC that promulgate their own rules of practice and ethics. Many have long argued for national bar standards for admission and ethical regulation in the United States where legal practice now transcends state lines.

policy committees.<sup>180</sup> How should third party funders be regulated in international arbitration? How does the “functional analysis” she proposes affect possible standards for conflicts of interest or non-governmental organizational participation rules in commercial versus investment arbitrations? Is one set of ethical rules possible for these very different subject matter arbitrations? While she makes important specific suggestions that national legal professional regulations should make “exceptions” or choice of law rules for international practice venues,<sup>181</sup> she might further specify how actual enforcement of ethical rules and standards can be productively shared by arbitration panels, institutions, national, regional and international courts (fines, sanctions, disqualifications), especially where scholars are exploring the relations of national courts to international tribunals in so many other areas.<sup>182</sup> Who will regulate and enforce ethical standards and conduct in ad hoc, non-administered international arbitration? Should ethical standards that evolve in international commercial and investment arbitration be applied to state to state arbitration (still used in border/boundary and other public law disputes)? What rules and standards could or should be applied in the newer treaties that provide for arbitration as one of a tiered set of alternative forms of dispute resolution in public law disputes, as in the Law of the Sea Treaty, many environmental and other treaties?<sup>183</sup>

Explorations of a few larger issues might have nested this important work in significant issues of global governance. Who is actually harmed by ethical “violations” or transgressions? Why do we care about international arbitration ethics from the perspective of a cost/benefit analysis? Who benefits from the current system of amorphous or vague standards of ethics and enforcement; other counsel, would-be new international arbitrators, multi-national corporations, indigenous parties in investment arbitrations, local citizens, the judiciary, national or international courts and tribunals, the international commercial world order? Who are the interested players and how does international arbitration ethics contribute to questions of international substantive justice or access to justice for aggrieved parties?<sup>184</sup> How do “ethical” international arbitrators or lawyers contribute (or not) to global peace, security, predictability, innovation,

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180. In my years of writing scholarship on rules in ADR I learned that the best test of scholarship is participation in actual rule drafting and I thank Professor Geoffrey Hazard for his work on the CPR-Georgetown Commission on Ethics in ADR and his demonstration of rule drafting acuity and precision, as well as his work in chairing the ABA Committees for revision of the *Model Rules* so many times. Professor Rogers is currently a Reporter for the American Law Institute’s Restatement of the Law of International Arbitration, Third.

181. See ROGERS, *supra* note 1, at 114–17.

182. Ahdieh, *Between Dialogue*, *supra* note 12; SARVARIAN, PROFESSIONAL ETHICS, *supra* note 15; SHANY, EFFECTIVENESS, *supra* note 15.

183. See, e.g., United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm) [<http://perma.cc/K7YT-FUEJ>].

184. The World Bank now maintains a special body, the World Bank Inspection Panel to receive complaints and investigate claims of World Bank investment funds being used to the disadvantage of local communities.

justice, wealth enhancement or redistribution or human flourishing?<sup>185</sup> While treatment of these issues may be implicit in the text, there is an absence of some of the most pointed critics of the international investment and arbitration system, seen by some to be a tool of the hegemonic order of western world capitalism.<sup>186</sup> What are the alternatives to which the international arbitration regime could be compared? Transnational litigation?<sup>187</sup> Mediation or other forms of dispute resolution?<sup>188</sup>

What other models of ethical regulation of arbitration might there be? What are comparisons to the current efforts at ethical regulation of counsel and judges in international tribunals?<sup>189</sup> Are there other examples of transnational professional regulations such as international pilots, admiralty rules, public health professionals (World Health Organization), private international medical and emergency service providers, e.g. International Red Cross, Medicins Sans Frontiers, Antarctic and other research scientists, Interpol, anti-terrorism transnational professionals, amongst others, we should look to? In my own work on legal ethics over the decades it has been instructive to look not only at the pluralism within our own profession (differences for prosecutors, big firm lawyers, mediators) but to see how other professions within our own country deal with similar issues (accountants for disclosure of economic fraud, doctors and nurses for informed consent and patient-client counseling, engineers and architects for substantive liability and outcome assessment, clergy for confidentiality protections, etc.). To what other professions might international arbitrators be compared? Is there a danger that American legal ethics, more developed in both codifications and case law, will “dominate” the development of international legal ethical standards, as American adversary practice has affected the conduct of arbitration practice? How can we insure full international participation in the creation and implementation of ethical standards for international arbitration?

Professor Rogers’s book does address the pluralism of comparative legal profession regulation and the different choices made by different national systems, but I wonder if some of the big comparative and substantive law questions might have been more foregrounded because they are so significant for

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See THE WORLD BANK INSPECTION PANEL, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> [<http://perma.cc/6FEU-4ADZ>] (last visited Oct. 30, 2015).

185. These are big empirical and philosophical questions which are difficult to operationalize and measure, but see generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013); David S. Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014).

186. See SORNARAJAH, *RESISTANCE*, *supra* note 31; Kennedy, *Three Globalizations*, *supra* note 5. Though I do not think it entirely fair, some readers might think that Professor Rogers has been too deferential to the “establishment” of the international arbitration community in their more tepid writings on ethics in arbitration.

187. See generally DONALD EARL CHILDRESS III, MICHAEL RAMSEY & CHRISTOPHER WHYTECK, *TRANSNATIONAL LAW AND PRACTICE* (2015).

188. See generally NADJA ALEXANDER, *INTERNATIONAL COMPARATIVE MEDIATION LEGAL PERSPECTIVES* (2009).

189. HAGUE PRINCIPLES, *supra* note 42; SHANY, *EFFECTIVENESS*, *supra* note 15; SARVARIAN, *PROFESSIONAL ETHICS*, *supra* note 15.

this project. Substantive issues of privacy regulation, corporate confidentiality, rules of contract interpretation and discretion, common law versus civil law reasoning,<sup>190</sup> duties to clients and tribunals, allocation of fees and costs are all issues about which legal regimes differ and how they will be harmonized (or not) in both ethical rules and procedural rules for international arbitration remains unclear here, both substantively and in terms of what processes will be used to “harmonize” different legal traditions.<sup>191</sup>

### SOME CONCLUDING OBSERVATIONS

Professor Rogers’s *Ethics in International Arbitration* is about more than ethics and international arbitration. For skeptics, and there are many, of anything that can be called “transnational law,”—law not tethered to a particular territory—her book provides a clear illustration that there is “transnational law.” Such law resides in the interlocking and related rules and practices within arbitral tribunals and institutions, as interpreted by arbitrators and then sometimes (in enforcement or other proceedings) by national judges. Those practices and rulings influence and affect others in transnational, trans-organizational and trans-institutional settings where substantive, procedural and ethical issues are debated, drafted and decided. Transnational legal development is more than “dialogic.” It is “multi-logic” with an international common law developing at all of these levels of the law.

At the same time, her book also demonstrates that although there are areas of some “convergence” in ethical standards (treatment of corruption in arbitration and in international commercial dealings, witness preparation, document production), hopes that there will be any easy “core” of ethical standards applicable to all of international arbitration are likely naïve. Legal ethics are complicated enough in most domestic settings (and in the United States are variable by state). Legal ethics applied across a variety of different families (common, civil, hybrid, religious) of legal systems necessarily implicates difficult questions of comparative law, also at all levels of substantive, procedural and ethical “law,” (duties to clients vs. organizations or the state, disclosure and confidentiality, fees and costs structures, code versus decisional law argumentation, and ultimately, perhaps even legal reasoning itself).

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190. See generally K. ZWIEGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998) (for a comparative introduction to common and civil law systems).

191. Some descriptions of some of the harmonizing comparative law projects, UNIDROIT-ALI might have been useful here, or as comparison the acrimony of the negotiations for the Hague Convention on the recognition of Foreign Judgments. See Hague Conference on Private International Law, *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Feb. 1, 1971), [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=78](http://www.hcch.net/index_en.php?act=conventions.text&cid=78) [<http://perma.cc/7G92-DJ4S>] (last visited Oct. 30, 2015).

The examples in this well-structured book make patently clear that there is legal practice that now crosses national borders and exists in a space either not regulated at all (no formal ethical rules currently enforceable in any supranational international arbitral review board or court) or regulated or ruled-on in many different spaces, either sequentially or contemporaneously (arbitral institutions, tribunals, panels, national courts and professional disciplinary bodies). The field of international arbitration is no longer dominated by a generation of “grand old men” of Europe, politely observing their own versions of gentlemanly practice with each other (“the invisible college”<sup>192</sup>), if they ever did. The subject matters of international arbitration are increasingly complex. Often they involve multiple parties, including states as formal parties and other interested groups seeking to intervene and influence the process.<sup>193</sup> The use of arbitration has moved globally with an increasing market for arbitration proceedings in Asia, South America, and the Middle East, with new arbitral bodies competing for caseloads and governance over the process.<sup>194</sup> There has been a slow growing diversification of the parties, their lawyers and even their arbitrators,<sup>195</sup> as newer entrants to both commercial activity and the legal profession come from a wider range of countries, ethnic backgrounds, and legal or commercial traditions, as well as from different classes, genders, and religions.<sup>196</sup>

The transnational legal practice of international arbitration is, in my view (and I think in Professor Rogers’s too) *sui generis*. It now has various forms and subject matter variations, including commercial-contract, investment, and public law treaty disputes, as well as a few very specialized compensatory tribunals (torts, human rights), such as the Iran-U.S. Claims Tribunal and U.N. Claims Tribunal for the Iraq-Iran War.<sup>197</sup> Forms of arbitration are used in some public international organizations, such as the WTO and the Law of the Sea Tribunal. From these diverse locations of the uses of international arbitration procedures and processes, a body of law (rules, codes and decisional law), scholarly commentary, and professional association deliberations has begun to develop a

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192. ROGERS, *supra* note 1, at 17 (citing Oscar Schacter, *The Invisible College of International Lawyers*, 72 Nw. U. L. REV. 217 (1977)).

193. The World Trade Organization, not formally part of Professor Rogers’s subject here, as well as some of the hybrid arbitral institutions, including ICSID, have promulgated rules allowing participation of third parties, some with permission or vetoes of the parties and others by rulings of the arbitral panel. World Bank, *ICSID Rules of Procedure for Arbitration Proceedings*, [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [<http://perma.cc/473U-LQFW>] (last visited Oct. 1, 2015).

194. See REMY GERBAY, *THE FUNCTIONS OF ARBITRAL INSTITUTIONS: THEORETICAL REPRESENTATIONS AND PRACTICAL REALITIES* 10–14 (2014) (Ph.D. thesis, Queen Mary, University of London, School of International Arbitration).

195. See FRANCK, *INTERNATIONAL ARBITRATION*, *supra* note 9; cf. Benjamin G. Davis, *Diversity in International Arbitration*, 20 DIS. RESOL. MAG. 13 (Winter 2014).

196. The impact of shari’a law and Islamic finance is a growing issue in international arbitration. See, e.g., WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005).

197. McGovern, *Dispute System*, *supra* note 89.

jurisprudence of ethics for this practice. Professor Rogers well describes those processes and the development of that jurisprudence in her book.

Legal ethics jurisprudence in international arbitration appears to be developing at both inductive (from particular cases) and deductive (general rules laid down in advance) levels at the same time, with the enactment of generalized ethics codes by arbitral institutions and the decisions and cases of arbitrators and national court rulings. At a philosophical level these developments could be analyzed from a deontological (specific duties) or ontological (essentialism or natural law, e.g. are arbitrators ducks or rabbits?) rationale, or both. At a practical level, the field of ethics in international arbitration must confront the important question of whether to draft and regulate in aspirational, general and transsystemic<sup>198</sup> language, or whether to aim, with greater specificity, to provide behavioral guidance through clear guidelines. The danger of the first is to be so vague as to provide no guidance; the danger of the latter is that significant ethical issues cannot be dealt with by specific, brittle, binary rules, when nuance, wisdom and judgment may be called for.<sup>199</sup>

For further development of a jurisprudence of legal ethics, Professor Rogers has well outlined the leading ethical issues that international arbitration presents from her conceptualization of a “Functional” (role-defined) approach, often exploring the conflation or complication of ethics and procedural matters. These include:

- *Role of arbitrator*—impartiality, integrity, non-bias and independence, conflicts of interest, disqualifications, fees, confidentiality (privacy), competence, diligence, and liability, selection procedures, decisional powers (written awards, interim measures), dealing with corruption and other illegal activities (e.g. bribes);
- *Role of attorney* in international arbitration—conflicts of interest, duty to client, tribunal, others (state, organization), privilege, competence, diligence and experience, practice duties (e.g., witness preparation, disclosure and information exchange, ex parte communications), litigation “manners” (e.g. cross-examination), fees;
- *Role of experts*—competence, neutrality, loyalty, selection, duty to tribunal or party, fees;
- *Role of Third Party Funders*—disclosure, relation to parties, attorneys and arbitrators, conflicts of interests, manipulation of cases and issues, fee-splitting, confidences.

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198. Peter Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. LEGAL. EDUC. 161 (2006).

199. This tension has long been present in the American *Model Rules of Professional Responsibility*, moving over time from *Canons*, *Disciplinary Rules* and *Ethical Considerations* to Blackletter Rules with Commentary and permitting casuistic reasoning in bar opinions and legal decisions.



Beyond this “micro” role-based functional approach, Professor Rogers also adduces the “macro” or systemic ethical issues raised by international arbitration, even as these are less susceptible of rule or standard drafting:

- *System Legitimacy*—procedural justice, participation, fairness, transparency, rule of law or other decisional justification, outcomes, different measurements of “justice”—to parties, others affected, public, reviews and appeals;
- *Licensing, certification of arbitrators/attorneys*;
- *Enforcement*—venues, locations and levels of enforcement of ethical, procedural and other standards; finality, appeal; self-regulation (proposed by Professor Rogers), arbitral institutions, courts, international bodies or other/sanctions/external regulation-national courts?

Professor Rogers’s “functional” and “self-regulating” approaches provide a useful framework for assessing the specific role-based ethics issues of the participants inside arbitral processes and provide a useful resource for considering alternative issues and formulations of rules and policies for those roles. This functional approach, however, provides less guidance for consideration of the systemic and public issues implicated in the use of international arbitration. Thus, issues of accountability or transparency, including publication of awards, creation of appeals bodies and participation of outsiders to the immediate dispute, get less attention here, but are the subjects of much of the current debate about the use of arbitration in international trade treaties. Professor Rogers book is *Ethics in International Arbitration*; not “ethics of international arbitration.”

Thus, much work remains to be done to elaborate on particular, micro-behavioral and inductive approaches to specific ethical rules for the conduct of arbitration (in different contexts). Scholars must also continue to debate the larger jurisprudential questions of the “ethics” of the use of a private dispute resolution process, international arbitration, for the resolution of a wide variety of transborder disputes, many with public policy issues and effects on those *outside* of the system.

*Ethics in International Arbitration* is a magisterial collection of issues, arguments, legal sources and a modest regulatory proposal, which enlightens and informs on many important issues, even if it doesn’t fully resolve important issues of transnational norm creation, systemic legitimacy, and enforcement. Professor Rogers has clearly established several important principles with her book:

- Legal ethics standards in international arbitration are required for systemic legitimacy.
- Legal ethical standards can be discursively and plurally created in a transnational legal system.
- Legal ethics standards may be plurally enforced in several venues (national courts, professional associations and arbitral institutions).

Professor Rogers prefers to keep creation and enforcement of arbitral ethical standards within the *sui generis* transnational legal process that created international arbitration—internally within the international arbitration “community.”<sup>200</sup> As a member of that community she has begun to further that project, both with this comprehensive book and her new webpage endeavor,<sup>201</sup> seeking to make international arbitration more transparent, and providing information to those who might enter the field.

As one who has long urged the creation of ethical standards, best practices, and principles in the practice and conduct of international arbitration (and all forms of dispute resolution), I applaud this work and look forward to the diverse reactions it is likely to inspire as we aim to create standards for both good practice and systemic legitimacy in a world of plural transnational legal dispute resolution.

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200. This, of course, tracks the general idea of professional regulation within the American legal profession (self-regulation by the Bar with occasional forays into discipline, disqualification and other sanctions by public courts). This is also how the modern international tribunals have thus far dealt with their ethical regulation of lawyers appearing before international bodies. *See* SARVARIAN, PROFESSIONAL ETHICS, *supra* note 15.

201. ROGERS, *supra* note 1.