DRAFT
CODE OF CONDUCT FOR ADJUDICATORS
IN INVESTOR-STATE DISPUTE SETTLEMENT

Annotated comments from the European Union and its Member States to the ICSID and UNCITRAL Secretariats[*]

11.09.2020

[*] Comments from the European Union and its Member States are incorporated **in bold** in the text of this Draft Code of Conduct for adjudicators in Investor-State Dispute Settlement.

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CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT[1]

Introduction

1. This document includes a draft code of conduct for adjudicators, with a commentary on the proposed articles. It was prepared jointly by the Secretariats of ICSID and UNCITRAL.

2. By way of background regarding ICSID, the Centre has considered the question of a code of conduct for adjudicators in its recent proposals for rule amendments. The development of a code of conduct was left for further discussion in the context of the joint efforts of UNCITRAL and ICSID in this area, as reflected in this document.

3. By way of background regarding UNCITRAL, its Working Group III (ISDS Reform) agreed to discuss, elaborate and develop multiple potential ISDS reform solutions simultaneously (A/CN.9/970, para. 81). In that light, it decided to undertake preparatory work on a number of topics, including the preparation of a code of conduct with ICSID. This work would encompass the implementation of a code of conduct in the current ISDS regime and in the context of potential standing multilateral mechanisms for ISDS (A/CN.9/970, para. 84).

4. Working Group III considered the matter at its thirty-eighth session, in October 2019, on the basis of a document prepared with ICSID (A/CN.9/WG.III/WP.167). General support was expressed for developing a code of conduct, identifying aspects that would apply commonly to ISDS tribunal members as well as elements that would be distinct for *ad hoc* and permanent members (A/CN.9/1004*, paras. 51 and 68). Proposals for reform have been submitted by Governments in preparation for the deliberations on the development of reform options, and many of these proposals include comments on a code of conduct.[2]

[1] The draft code and the commentary are the result of cooperation between the secretariats of ICSID and UNCITRAL. The following expert contributed to the preparation of the code: Chiara Giorgetti, Professor of Law, Richmond University and Scholar in Residence, ICSID. The code was also prepared with reference to a broad range of published information, including Chiara Giorgetti and Mohammed Wahab, A *Code of Conduct for Arbitrators and Judges*, Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019 (available here), Chiara Giorgetti & Jeffrey L. Dunoff, *Ex Pluribus Unum? On the Form and Shape of a Common Code of Ethics in International Litigation,* 113 AJIL Unbound 113 (2019) (available here), Jeffrey L. Dunoff and Chiara Giorgetti, *Introduction to the Symposium: A Focus on Ethics in International Courts and Tribunals*, 113 AJIL Unbound, 279-283 (2019) (available here).

[2] See A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia; A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China.

5. The proposed code seeks to reflect the deliberations of the Working Group to date (A/CN.9/1004*, paras. 51-78), taking into consideration that the code should be binding and contain concrete rules rather than guidelines (A/CN.9/1004*, paras. 52 and 68). It provides applicable principles and detailed provisions allowing for flexibility to address unforeseen circumstances (A/CN.9/1004*, paras. 56 and 68).

6. In addition, as requested by the Working Group, the code includes standards applicable to arbitrators, judges and other types of adjudicators (A/CN.9/1004*, paras. 55 and 68). For this purpose, the comprehensive term "adjudicator" is used in the code to ensure its application to all those who adjudicate ISDS cases, regardless of whether they are arbitrators, members of annulment committees, members of an appeal mechanism or judges on a bilateral or multilateral standing mechanism (permanent court).

7. The code has been prepared based on a comparative review of the standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts. It is also based on analyses by the Secretariats of ICSID and UNCITRAL, as contained in document A/CN.9/WG.III/WP.167 (see also document A/CN.9/WG.III/WP.151). Such analyses, including reference to case law, are not repeated in this document. An Annex including the comparative provisions of some of the main ISDS codes of conduct is attached to this document. An ICSID collection of existing codes has already been circulated as an Annex to document A/CN.9/WGIII/WP.167.[3]

8. This code of conduct contains an initial section that defines relevant terms (article 1) and addresses the applicability of the code (article 2).

9. Article 3 provides an overview of the obligations of adjudicators. Provisions included in the code would apply to all adjudicators. Exceptions are mentioned in the commentary. In addition, the code might need to be further adapted as work progresses on possible reforms to the selection and appointment of adjudicators.

10. Articles 4 to 9 of the code expand on the principles and requirements in article 3. The code requires every adjudicator to be independent and impartial and to avoid conflicts of interest. It includes regulation of repeat appointment, multiple roles ("double hatting") and issue conflict and requires extensive disclosure. The code requires all adjudicators to apply the highest standards of integrity and diligence, including fairness, competence, civility and efficiency. Article 9 regulates the duty of confidentiality.

11. Articles 10 and 11 on interviews and on fees apply where adjudicators are appointed by the parties, and their fees are paid by party advances, either directly or through an arbitral institution.

12. Article 12 addresses enforcement of obligations contained in the code. Such procedures may need to be considered further if alternative or additional options for enforcement are

[3] The collection was assembled with the help of the students in Professor Giorgetti's International Law Practicum class at the Richmond School of Law.

adopted, if an advisory center or other body was given responsibility for enforcement of the code, or if a permanent court with jurisdiction to enforce such sanctions were to be established.

General Comments from the European Union and its Member States:

The European Union and its Member States would like to express their gratitude to the Secretariats of ICSID and UNCITRAL for their remarkable work on this draft code of conduct.

Throughout both the ICSID rules amendment process and deliberations within UNCITRAL Working Group III, the European Union and its Member States have been advocating for a reform that, *inter alia*, provides appropriate safeguards for the independence and impartiality of arbitrators and adjudicators, including through a binding code of conduct applicable to all investor-state dispute settlement proceedings.

With regard to the deliberations within UNCITRAL, at the thirty-eighth session of Working Group III in October 2019, "[i]t was mentioned that *relevant distinctions might need to be made* between the rules in a code of conduct for *ad hoc* arbitrators and for adjudicators/judges in a permanent body. […] It was suggested that the Working Group should, in any event, make efforts to develop *in parallel* standards applicable to arbitrators and adjudicators/judges" (A/CN.9/1004*, para. 55, emphasis added). In addition, Working Group III requested that the preparatory work on a code of conduct should "identify aspects that would apply *commonly* to ISDS tribunal members as well as those that would be *distinct* for *ad hoc* and permanent members and accordingly, provide different options" (A/CN.9/1004*, para. 68, emphasis added).

Nevertheless, the current text of the draft code of conduct does not differentiate between *ad hoc* arbitrators and permanent adjudicators. It uses the comprehensive term "adjudicator" for both categories (see draft Article 1, para. 1, and paras. 6 and 15 of the commentary) and applies the same provisions to both categories, without making differentiations. While a few exceptions that are relevant for permanent adjudicators are mentioned in the commentary, there are no differences reflected in the text of the draft Articles (see paragraph 9 of the commentary).

As it will be explained in detail below, a number of provisions of this draft code of conduct appear to be difficult to apply to permanent adjudicators appointed by the Parties to a standing mechanism, who would be employed full-time for long, non-renewable terms of office, with fixed salaries and no outside activities (hereinafter "permanent adjudicators", see A/CN.9/WG.III/WP.159/Add.1).

The European Union and its Member States therefore invite the UNCITRAL Secretariat to differentiate more clearly between rules on ethics that would apply to *ad hoc* arbitrators and rules that would apply to permanent adjudicators. This could be done by differentiating clearly within the code of conduct among those parts or chapters that apply to *ad hoc* arbitration and those that apply to a permanent mechanism. The rules applicable to

permanent adjudicators could draw inspiration in particular from existing rules on ethics adopted by international courts and tribunals with full-time adjudicators.

With regard to the ICSID reform process, the European Union and its Member States suggested that pending the availability of a code of conduct, the acceptance of appointment should include a specific commitment to comply with existing relevant ethic rules, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. This proposal, which was also supported by other ICSID Members, has regrettably not been taken up by the ICSID Secretariat in the most recent version of the draft revised ICSID Rules.

Further comments to particular provisions are incorporated in bold in the text of the commentary to this draft code of conduct, differentiating, where relevant, between comments that relate to permanent adjudicators and comments that concern *ad hoc* arbitrators.

DRAFT TEXT

CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT

Article 1
Definitions

For the purpose of this Code:

1. "Adjudicators" means arbitrators, members of international *ad hoc*, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes;

2. "Assistants" means persons working under the direction and control of the adjudicators, who assist them with case-specific tasks, including research, review of documents, drafting and other relevant assigments as agreed in the proceeding;

3. "Candidates" means persons who have been proposed or contacted for selection and potential appointment as adjudicator but have not yet been confirmed in this role;

4. "Investor-State dispute settlement" (ISDS) means a mechanism to resolve disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO), or any constituent subdivision of the State or an agency of the State or the REIO, whether arising under an investment treaty, domestic law or an agreement by the parties to the dispute.

Commentary:

13. The initial section of the code defines certain terms that are used throughout the text.[4] Additional terms may be defined if necessary.

14. The code applies to adjudicators, defined broadly as arbitrators, ad hoc committee members and judges of standing bodies or mechanisms.[5] It is suggested that the code should not apply to counsel, experts and other participants in the proceedings who would require

[4] Note that definitions are included in, among others, EU-Singapore Annex 14-B; Australia-Japan EPA; CPTPP; CETA, EU-Vietnam (draft).

[5] Regarding standing bodies or mechanisms, candidates will probably go through a screening and nomination process, which can take various forms as discussed in the resumed thirty-eighth session of Working Group III (see documents A/CN.9/WG.III/WP.169, paras. 43-60 and A/CN.9/1004/Add.1, paras. 114-130). Once the candidates have been selected to be part of the standing body or mechanism, there would be a specific selection and appointment process to hear a particular case, as well as specific requirements. The obligations in the code apply to this last phase, when judges are selected to hear a specific case, and the code is not meant to address the screening and nomination process for a standing body or mechanism.

different regulations and who would likely also be bound by applicable ethical rules of bar associations and the relevant applicable law. The code would also not apply to members of arbitral institutions, including secretariats that provide administrative and registrar functions and assist in the proceedings as part of their regular work for the institution. While there might be reasons to develop codes of conduct for other participants in the ISDS process - including counsel, members of the secretariats and staff of arbitral institutions – there are also merits in having separate codes dedicated to each category. Separate codes would allow for a more detailed and targeted regulation of different ethical obligations (see document A/CN.9/1004*, para. 68).

Article 1 Paragraph 1

15. As indicated above (see para. 6), the term "adjudicators" in paragraph 1 signals that the code would apply to all those who are involved in adjudication of an investor-State dispute, including by standing mechanisms that might be established as a result of the current reform process.

16. The code is intended to apply to all levels of proceeding, including first instance, annulment and potential appeal, as well as in ad hoc or institutional proceedings, whether akin to arbitration or to proceedings in a multilateral standing body or mechanism.

Article 1 Paragraph 2

17. Paragraph 2 suggests that the code would apply not only to adjudicators but also to those who are appointed by the adjudicators to assist them and are thus privy to confidential information. "Assistants" would include research and legal assistants over whom the adjudicators have direct control, such as associates in an arbitrator's law firm or clerks in relation to judges on a permanent standing body. However, the obligation to ensure that assistants comply with the code would be on the adjudicators they work for, as expressed in article 2 of the code.

18. The term "assistants" does not include members of arbitral institutions, registries, secretariats or courts that provide administrative or logistical help to adjudicators as part of their daily tasks.

Article 1 Paragraph 3

19. Paragraph 3 defines the term "candidate," as the code also covers requirements during the selection phase, before appointment as adjudicator, as well as when an adjudicator has been proposed or included on a list of potential adjudicators.

Comment No. 1 from the European Union and its Member States:

Footnote 5 in the commentary of this draft code of conduct suggests that "candidates" for permanent adjudicators could refer to adjudicators who are members of a standing mechanism before they are selected *to hear a specific case*.

Conversely, the European Union and its Member States consider that in the context of a standing mechanism, the obligations on "candidates" should apply to individuals who are under consideration for selection *to become permanent adjudicators*. After they have become permanent adjudicators, they would have a continuous obligation to comply with the code of conduct, including before they are selected *to hear a specific case*.

In addition, the definition of "candidates" may also need to cover individuals who apply directly for selection to become permanent adjudicators if the applicable selection process allows for this possibility. The European Union and its Member States therefore suggest inserting the words "or are otherwise aware that they are under consideration" between "have been proposed or contacted" and "for selection and potential appointment" in draft Article 1(3).

Article 1 Paragraph 4

20. Paragraph 4 defines disputes and circumstances to which the code applies.

21. While approximately 75% of ISDS cases rely on a treaty as the basis for consent to arbitration, it is suggested that the same ethical obligations should apply regardless of the basis for the adjudication between an investor and the host State.

22. The provision includes a broad definition of the term "State" in ISDS. As such, it includes States and Regional Economic Integration Organizations (REIO), constituent subdivisions of the State and agencies of the State or the REIO.

Comment No. 2 from the European Union and its Member States:

The rules of the code of conduct should apply also to State-to-State investment dispute settlement, and *mutatis mutandis* also to other amicable settlement mechanisms, such as mediation, conciliation or fact finding proceedings. This change should be reflected in all relevant provisions of this draft code of conduct, including draft Articles 1 and 2 (definitions and scope of application).

Article 2
Application of the Code

1. This Code applies to all persons serving as adjudicators in ISDS proceedings. Adjudicators shall take appropriate steps to ensure that their assistants are aware of, and comply with, the relevant provisions of this Code.

2. Candidates must comply with the relevant provisions of the Code as soon as they are contacted in relation to a possible appointment.

Commentary:

23. Article 2 is a general provision on the application of the code. Paragraph (1) ensures that the code applies to all those who are involved as adjudicators in ISDS and requires adjudicators to ensure that their assistants are aware of and comply with the provisions of the code.

Comment No. 3 from the European Union and its Member States:

The European Union and its Member States suggest to review the code of conduct at the end of the discussions to assess which of its provisions should apply to assistants and which should rather not apply.

24. Paragraph (2) provides that candidates should comply with relevant provisions of the code. This is important because some provisions of the code, including on conflict and the requirement of independence and impartiality, are relevant as soon a candidate is contacted by a party or institution for possible selection as an adjudicator.

Comment No. 4 from the European Union and its Member States:

In line with comment No. 1 above, it is suggested to insert the words "or are otherwise aware that they are under consideration" between "as soon as they are contacted in relation to" and "a possible appointment".

Article 3
Duties and Responsibilities

At all times, adjudicators shall:

(a) Be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias;

(b) Display the highest standards of integrity, fairness and competence;

(c) Be available and act with diligence, civility and efficiency;

(d) Comply with any confidentiality and non-disclosure obligations.

Commentary:

25. Article 3 sets forth the general duties of adjudicators. The enumerated duties are owed to the parties, to the process and to the other adjudicators.

26. These core principles and requirements have been discussed by UNCITRAL Working Group III when identifying concerns pertaining to ISDS and when considering possible reform options.[6]

27. Duties referred to under subparagraph (a) - independence, impartiality, and avoidance of conflict, impropriety and bias - are key to every system of justice. They are further elaborated in articles 4 and 5 below. The code requires extensive disclosure by adjudicators to ensure that parties have all the information necessary to make informed decisions as to the independence and impartiality of an adjudicator.

28. The questions of impropriety, bias and the appearance thereof are referred to in subparagraph (a) and are further addressed in article 6 below.

29. Adjudicators must also comply with the ethical requirements identified in subparagraphs (b), (c) and (d). Reference to these standards is commonly found in international ethics codes,[7] as well as arbitration rules.[8] These include the requirement that adjudicators display the highest standards of integrity, fairness and competence, which are further developed in article 7, below.

30. Regarding the requirement in subparagraph (b), that adjudicators be competent, specific professional qualifications are generally found in the applicable arbitration rules.[9] The duty of competence includes the duty to be competent when selected and the companion obligation not to accept appointments for which one is not qualified, and the duty to maintain that knowledge and competence during the proceeding.

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[6] See documents A/CN.9/WG.III/WP.167 and A/CN.9/WG.III/WP.151; for a discussion by the Working Group, see documents A/CN.9/1004/Add.1, paras. 96-101; A/CN.9/1004*, paras. 51-77; A/CN.9/964, paras. 64-108; and A/CN.9/935, paras. 45-88.

[7] See for example, Article 3 of the 2017 Code of Conduct for Members and former Members of the Court of Justice of the European Union (Stating that "1. Members shall perform their duties with complete independence and integrity, without taking account of any personal or national interest. They shall neither seek nor follow any instructions from the institutions, bodies, offices or agencies of the Union, the governments of the Member States or any private or public entities. 2. Members shall not accept gifts of any kind which might call into question their independence 3. Members shall respect the dignity of their office. 4. Members shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their independence, their integrity or the dignity of their office.") available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:483:FULL&from=FR; See also Article 4 of the "Rules of Court" of the International Court of Justice (ICJ), containing the declaration to be made by members of the court: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously".

[8] Under Rule 6 of the ICSID Convention Arbitration Rules, for example, arbitrators must undertake to "judge fairly as between the parties, according to the applicable law" and article 17(1) of the UNCITRAL Arbitration Rules requires arbitrators to treat parties with equality.

[9] Article 14(1) of the ICSID Convention requires arbitrators to be persons of (…) recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

Comment No. 5 from the European Union and its Member States:

- ***on a permanent adjudicators:***

In a permanent mechanism, the competence of adjudicators would be ensured through relevant statutory provisions and the selection procedures. Adjudicators would be subject to a continuing obligation to maintain their knowledge and competence throughout their terms of appointment, but it would not be possible for disputing parties to challenge an adjudicator for alleged lack of competence.

- ***on ad hoc arbitrators:***

The European Union and its Member States suggest to reflect and investigate further on whether it is appropriate to address issues of competence in a code of conduct for *ad hoc* arbitrators and the possible consequences of doing so (e.g. whether there wold be a risk of abusive challenges of adjudicators for alleged lack of competence).

31. The duties of availability, diligence, civility and efficiency - enumerated in subparagraph (c) - are generally found in codes of conduct. Adjudicators are usually required to perform their duties with diligence, thoroughly and expeditiously during the proceeding; to dedicate time and effort to the proceeding; to refuse competing obligations; to participate constructively in hearings and deliberations; and to be available, and set aside the necessary time to perform their functions. These elements are developed in article 8 below.

Comment No. 6 from the European Union and its Member States <u>on permanent adjudicators</u>:

A "duty of availability" does not seem suitable for full-time adjudicators who would not have other occupations. Rules on conduct for permanent adjudicators should rather draw from similar provisions of international courts. For instance, Article 23(3) of the Statute of the International Court of Justice provides that: "Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court."

32. Article 9 expands on the duty to comply with confidentiality obligations referred to in subparagraph (d).

Comment No. 7 from the European Union and its Member States:

The European Union and its Member States suggest to refer to "any <u>applicable</u> confidentiality and non-disclosure obligations" (emphasis added) in subparagraph (d) of draft Article 3.

Article 4
Independence and Impartiality

1. Adjudicators shall at all times be independent and impartial.

2. In particular, adjudicators shall not:

   (a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism;

   (b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;

   (c) Take action that creates the impression that others are in a position to influence their conduct or judgement;

   (d) Use their position to advance any personal or private interests; or

   (e) Directly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties.

Commentary

33. The duties of independence and impartiality referred to in article 4 are the most frequently cited ethical duties of adjudicators, and they constitute the core elements of ethical conduct.[10] As noted in document A/CN.9/WG.III/WP.167 (paras. 15-28), independence and impartiality are key elements of any system of justice and they are meant to ensure a fair trial and compliance with due process requirements.

34. The most widespread understanding of independence and impartiality is that they are distinct, but closely related, concepts. As articulated in in *Suez v. Argentina*, "The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking,

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, includes it as a basic human right and provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." [10] For example, Article 11 of the UNCITRAL Arbitration Rules refers to the notions of impartiality and independence. The Annex to the Rules contains model statements of independence. Similarly, Article 14(1) of the ICSID Convention provides that those serving on the arbitral panel must be persons who "may be relied upon to exercise independent judgment", which includes both independence and impartiality. All arbitrators in ICSID are subjected to this duty. Rule 6 of the ICSID Arbitration Rules, moreover, requires arbitrators to sign a declaration regarding independence and undertaking to judge fairly as between the parties. Arbitrators must also attach a statement disclosing any relationships and other positions they hold, past and present, that may give rise to a question of their impartiality and independence. The draft amended ICSID rules includes an updated and more detailed arbitrator declaration form. Similar declarations are generally required in ISDS proceedings.

independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties."[11]

35. While independence usually relates to the absence of a business, financial, or personal relationship between an adjudicator and a party to the proceedings, impartiality means the absence of bias or predisposition of the adjudicator towards a party. Lack of independence usually derives from problematic relationships between an adjudicator and a party or its counsel whereas lack of impartiality would arise, for instance, if an adjudicator appears to have pre-judged certain matters (see documents A/CN.9/WG.III/WP.151, para. 11 and A/CN.9/WG.III/WP.167, paras. 15-28).

36. Adjudicators are required to be independent and impartial throughout the proceeding. In the application of these duties, candidates and adjudicators are required to avoid potential conflicts of interest.

37. Paragraph (2) enumerates specific behaviours required of adjudicators to ensure their independence and impartiality. The list includes relations that may undermine independence and impartiality, including financial, professional, familial and social relations. [12]

38. Adjudicators are also required to be pro-active and vigilant, and not to take actions that may create the impression that their conduct and judgment can be influenced or incur an obligation or accept a benefit that could interfere or appear to interfere with the performance of their duties.

Comment No. 8 from the European Union and its Member States on permanent adjudicators:

Rules on permanent adjudicators appointed by the Treaty Parties and not the disputing parties should also provide that adjudicators shall not be influenced by loyalty "to a Party" under subparagraph (a) of paragraph 2 of draft Article 4.

Article 5
Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall

[11] *Decision on the proposal for the Disqualification of a member of the arbitral tribunal*, 22 Oct. 2007, Suez et al. v Argentina, ICSID Case No. ARB/03/17, pp. 13-14.

[12] The language used in this provision is similar to existing codes, see for example CETA, Code of Conduct, Arts. 11-15.

make all reasonable efforts to become aware of such interests, relationships and matters.

2. Disclosures made pursuant to paragraph (1) shall include the following:

   (a) Any professional, business and other significant relationships, within the past [five] years with:
   (i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];
   (ii) The parties' counsel;
   (iii) Any present or past adjudicators or experts in the proceeding;
   (iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];

   (b) Any direct or indirect financial interest in:
   (i) The proceeding or in its outcome; and
   (ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;

   (c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and

   (d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.

4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.

Commentary

39. To be independent and impartial, adjudicators must avoid all direct and indirect personal and financial conflicts of interests. To ensure that they do so, this provision includes a comprehensive and detailed duty of disclosure that applies to both adjudicators and candidates.

40. Disclosure of potential conflicts are commonly required in a system of justice. Disclosures allow parties to fully learn and assess all of the relevant relations of candidates and adjudicators, and to determine whether they will take formal steps to challenge or exclude

the adjudicator or whether they are prepared to waive the potential conflict. Disclosures level the playing field by ensuring that all parties receive the same information.

41. Article 5 requires extensive disclosure on several grounds and by reference to several types of relationships so that the parties are fully informed of relevant facts, as discussed by UNCITRAL Working Group III at its thirty-eighth session (see A/CN.9/1004*, paras. 60 and 75). The approach aims at ensuring that parties have as much information as possible so that they can make an informed decision about conflict of interest. Such an approach is meant to allow for consideration of subjective criteria. Article 5 is drafted so that disclosure can be made with an appropriate level of detail.

42. The mere fact of disclosure does not mean that a conflict exists. The policy reason underlying the disclosure requirement is to permit a full assessment by all parties and to avoid possible problematic situations during the proceedings. For this reason, an adjudicator should err on the side of more extensive disclosure.

Article 5 Paragraph 1

43. Given the fundamental importance of this duty, paragraph 1 reiterates that adjudicators and candidates shall avoid direct and indirect conflicts of interest.

44. All interests and relationships that can reasonably be considered as affecting the independence or impartiality of adjudicators or candidates must be disclosed. The provision adopts a 'reasonableness' standard to direct what types of interests, relationships or matters should be disclosed.

45. Adjudicators and candidates must be pro-active and must make a reasonable effort to become aware of interests, relationships or matters that can create a conflict that could be perceived as affecting their independence and impartiality. It puts a burden on the candidate or adjudicator to make reasonable efforts to become aware of issues that need to be disclosed.

Comment No. 9 from the European Union and its Member States:

Draft paragraph 1 of Article 5 should make it more explicit that adjudicators have to disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality regardless of the specific time or form that such interest, relationship or matter might have occurred.

Article 5 Paragraph 2

46. Paragraph 2 specifies the kinds of disclosure that are required.

47. Subparagraph (a) requires disclosure of any professional, business or other significant relationship that an adjudicator may have or have had with any of the parties to the dispute,

their counsel, other adjudicators or experts in the proceedings, or other relevant third parties. The list conforms with the disclosure requirements found in ICSID's proposed amended arbitration declaration.[13] As drafted, the provision can encompass a variety of relations, and other significant relationships may be added.

48. The draft proposes that adjudicators and candidates be required to disclose any relationships that have existed within the previous five years. The existence of relationships at earlier times is presumed to be too remote to create a conflict. Further, a relationship that existed before the five-year threshold but could reasonably affect the adjudicators' independence or impartiality would still be subject to a duty of disclosure in accordance with paragraph 1.

Comment No. 10 from the European Union and its Member States <u>on ad hoc arbitrators:</u>

The suggested wording in draft Article 5(2)(a) would require disclosure of relationships that have existed within the previous five years. Depending on the case, there may be earlier relationships that could have a bearing on the existence of a conflict. "At least" five years therefore should be a minimum for disclosure.

49. The language in brackets in subparagraphs (a)(i) and (iv) seeks to extend the disclosure requirement to subsidiaries, parent companies and agencies related to the parties as well as any third party that has a direct or indirect financial interest in the outcome of the case.

50. Subparagraph (b) elaborates on the circumstances in which disclosure is required due to a direct or indirect financial interest. In this sense, any relationship in which there exists a financial interest could create a conflict. The issue can also be relevant in situations where barristers or lawyers share financial revenues, such as certain law chambers where profits are shared.

51. Subparagraphs (c) and (d) are innovative. They require the disclosure of participation in ISDS or other cases and a list of publications. Such cases could include other international proceedings or related domestic arbitrations. As such, they also address two identified issues and criticism of ISDS: repeat appointment and issue conflict.

52. Repeat appointment has been identified as a concern by many observers of ISDS. It was also considered by UNCITRAL Working Group III during its deliberations.[14] Article 5 focuses on avoiding conflicts of interest. The issue of repeat appointment is not its primary focus and comes into play in paragraph 2 only as a way to avoid possible conflicts of

[13] The proposed arbitrator declaration in the ICSID Rules Amendment requires arbitrators to sign a statement declaring that "I understand that I am required to disclose a. My professional, business and other significant relationships, within the past five years with: i. the parties; ii. the parties' representatives; iii. other members of the Tribunal (presently known); and iv. any third-party funder disclosed pursuant to [(ICSID Arbitration Rule 14 / (AF) Arbitration Rule 23)]. b. Investor-State cases in which I have been or am currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert; and c. Other circumstances."

[14] *See* documents A/CN.9/964, paras. 70 and 71; and A/CN.9/935, paras. 69-75; see also A/CN.9/1004*, para. 61).

interests. The issue of availability of adjudicators who have numerous appointments to hear a case is dealt with in Article 8.

53. The general concern raised by repeat appointment in ISDS is the existence of possible bias in favour of the nominating party. The primary concern is that a person who has been appointed repeatedly by the same counsel, client or party may develop an affinity with that party and thus decide in their favour. As bias may be unconscious, the concern is difficult to address. More specific concerns are that an adjudicator might feel an obligation towards the appointing party to decide in a certain way, or that the adjudicator may develop a financial dependence on a party and decide in a certain way to secure future appointments. Concern over repeat appointment also exists when an arbitrator is appointed numerous times by the same 'side' (either Claimant or Respondent).

54. As a policy matter, regulating repeat appointments is complex. There are many actors involved in ISDS. Repeat appointments include not only adjudicators and parties, but also experts, mediators, conciliators and any other role that may create financial dependence or may involve the same set of facts. Similarly, the concept of parties can be extended to include subsidiaries and parent-companies.

55. Repeat appointments have been a frequent subject of disqualification requests. In the practice of investment tribunals, what appears to be determinative is not the number of cases on which an adjudicator has sat or the 'side' selecting the adjudicator, but rather how close the cases are in terms of both facts and legal issues.[15]

56. The practice of repeat appointment has been criticised for causing a lack of diversity and creating a barrier to entering the field for new adjudicators. This is also an important policy-related concern and is largely in the hands of those who are nominating adjudicators and choosing candidates.

57. Note, also, that parties often appoint the same arbitrator to ensure experience and competence, as evidenced by their past awards. It is also argued that barring repeat appointment could undermine the confidence of parties in the expertise and competence of nominees, constrain their right of selection, and increase the cost of proceedings by requiring each new adjudicator to obtain practical experience and knowledge in the course of that proceeding.

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[15] In *Caratube v. Kazakhstan*, for example, the issue at stake was the similarities of two cases in which the challenged arbitrator sat and to which he was appointed by the same State, Kazakhstan. The challenge was upheld based on the specific circumstances of the case, but the two unchallenged arbitrators deciding the case observed that multiple appointments by the same firm, without more, did not constitute an objective circumstance that would demonstrate the arbitrator's inability to exercise independent and impartial judgment. *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani* v. *Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, para. 62 (Mar. 20, 2014), available at http://italaw.com/sites/default/ files/case-documents/italaw3133.pdf. -

[15] *See* generally Chiara Giorgetti and Jeff Dunoff, *Ex Pluribus Unum? On the Form and Shape of a Common Code of Ethics in International Litigation,* 113 AJIL Unbound 312-316.

58. The balance among these concerns is sought through requiring extensive disclosure. Paragraph 2 requires extensive and specific disclosure as a way for parties to make an informed decision on when to appoint and when to challenge an adjudicator. This approach is suggested instead of providing for a strict limit on the number of possible appointments by any party. Enhanced disclosure would allow parties to fully comprehend and assess the relationship between adjudicators and each party and actor involved in the proceeding.

    Subparagraph (c), moreover, requires that information may be provided on a wide range of appointments, not only as ISDS adjudicators. All appointments could be included, or only international or arbitral appointments. This is important because international cases may have other overlapping components in terms of both issues and participants. A full disclosure, which includes counsel work in other international matters and other kinds of advisory or expert work, would allow a full assessment of any possible conflict of an adjudicator.

59. Subparagraph (d) addresses issue conflict. The existence of conflict of interest due to a possible issue conflict has been widely debated.[16] Issue conflict may exist when an adjudicator has taken a position on a legal matter relevant to the case or has prior factual knowledge relevant to the dispute at hand. Adjudicators usually have expertise in a subject, and many author academic writings, make presentations or otherwise participate in events that show such expertise. Such academic writings or other public statements as well as past decisions may show a certain bias or prejudgment of certain issues. The concern is that an adjudicator might not address issues at stake in the proceedings with an open mind, as they may have prejudged such issues. Issue conflict may indicate that an arbitrator lacks the necessary impartiality to judge a specific dispute. Challenges of arbitrators based on alleged issue conflict have rarely been accepted.[17] Proving the existence of an issue conflict is difficult.

60. Subparagraph (d) addresses this concern by requiring the disclosure of all publications by adjudicators and candidates. A specific duty of disclosure of relevant publications will provide the parties with knowledge of the writings of a nominated or prospective adjudicator and will therefore enhance the opportunities of parties to learn comprehensively about the adjudicator's work. It will then be for the parties, once they acquire all necessary information, to decide whether to challenge a particular adjudicator.

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[16] On issue conflict, generally, see John Crook and Laurence Boisson de Chazournes, 'ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration' available at: https://www.arbitration-icca.org/projects/Issue_Conflict.html.

[17] An example of a challenge which was accepted because of the existence of issue conflict is *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña (30 Sept. 2013), available at: www.italaw.com/sites/default/files/case-documents/italaw3161.pdf. An example of a challenge based on issue conflict that was dismissed is *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, para. 20 (Aug. 12, 2010) available at: www.italaw.com/sites/default/files/case-documents/ita0887.pdf.

61. A list of relevant public speeches may also be added to the disclosure requirement. This may allow a fuller assessment of the possible existence of issue conflict, but may also create a significant burden for prospective adjudicators.

62. Paragraph 2 may need to be considered further regarding its application in the context of a standing body or mechanism and in light of other reform options on the selection and appointment of adjudicators as discussed by UNCITRAL Working Group III at its resumed thirty-eighth session.[18]

Article 5 Paragraph 3

63. Paragraph 3 provides that the duty of disclosure is a continuous one and adjudicators should disclose all necessary information throughout the proceedings. The duty is not a one-time disclosure at the beginning of the proceedings.

Article 5 Paragraph 4

64. Paragraph 4 directs adjudicators to disclose as much as possible and to err on the side of more disclosure rather than less. However, disclosure of trivial matters is not required. By ensuring that only relevant information is requested and disclosed, paragraph 4 avoids spurious requests for information. This follows the practice of ISDS tribunals, which have held that certain information need not be disclosed and that the duty to disclose only includes relationships and circumstances that an adjudicator reasonably believes would cause their reliability for independent judgment to be questioned by a reasonable third party.[19]

Comment No. 11 from the European Union and its Member States on <u>permanent adjudicators</u>:

The European Union and its Member States consider that the disclosure obligations included in paragraphs 1, 3 and 4 (first sentence) are sufficient in the context of a permanent mechanism. In case of full-time adjudicators with no other professional activities, case-related conflicts of interested will be less frequent. Hence, extensive disclosure obligations for every single case may not be necessary. In this scenario, case-related conflicts of interests

[18] Options to reform the selection and appointment of adjudicators discussed by the UNCITRAL Working Group III include keeping the selection and appointment as such, establishing an open roster of possible adjudicators, providing a closed roster from which the parties or institutions could choose the adjudicators, and putting in place mechanisms for nomination, selection and appointment of adjudicators in permanent bodies (see A/CN.9/WG.III/WP.169). Issues of repeat appointment would be addressed differently, depending on the model (see A/CN.9/1004/Add.1, paras. 95-133).

[19] For example, in the ICSID case *Alpha Projektholding GmbH v. Ukraine*, the tribunal decided that an arbitrator was not obligated to disclose that the counsel of a party had long ago been a classmate; see Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Decision on Proposal for Disqualification of an Arbitrator (19 March 2010), available on the Internet at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/16.

would be covered through the general obligations of draft Article 5(1), (3) and (4) (first sentence) which would warrant disclosure and potential recusals.

Comment No. 12 from the European Union and its Member States <u>on ad hoc arbitrators:</u>

In order to ensure that the relevant information listed in draft paragraph 2 of Article 5 is provided, disclosures should be made through a standardised form annexed to the code of conduct with the possibility to add or enclose any document, and in accordance with any other procedures established by the parties. The 'Declaration' forms currently used in ICSID proceedings could serve as a model.

Comment No. 13 from the European Union and its Member States:

The second sentence of paragraph 4 of draft Article 5 should be deleted. The European Union and its Member States consider that it should not be for the adjudicators to decide what is trivial, but rather for the disputing parties, appointing authority or co-arbitrators (as applicable in an *ad hoc* system), or by the Court and its president (in a permanent mechanism) to assess whether the information disclosed is trivial for potential challenges or removals of the adjudicators.

Comment No. 14 from the European Union and its Member States:

It would be useful to set out in more detail to whom the disclosures shall be made (to the disputing parties, the Parties, the Secretariat, the co-adjudicators, the Court, the president of the Court, etc.). Again, this could be different depending on whether draft Article 5 applies to a permanent mechanisms or to *ad hoc* arbitration.

Article 6
Limit on Multiple Roles

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

Commentary

65. Article 6 addresses the concern that an adjudicator who is involved in other ISDS or other international proceedings in different roles would lack sufficient independence and impartiality because of the multiple roles played. This concern, often called 'double-hatting', has been identified as an issue for consideration in a code of conduct, including during the deliberations of UNCITRAL Working Group III (A/CN.9/1004*, paras. 57, 58 and 69). The concern relates to possible bias and apprehension of bias.

66. Double hatting is usually understood as the practice by which one individual acts simultaneously as an international arbitrator and as a counsel in separate ISDS proceedings. However, there is no comprehensive definition of double-hatting and, for the purpose of the code, there would be a need to better delineate its scope. For example, is double-hatting limited to overlaps between counsel and adjudicator work, or should it also include overlaps between counsel work and serving as an expert or as a mediator? Similarly, should double-hatting arise only out of proceedings under the same treaty or with respect to all ISDS proceedings? Should all international counsel work be prohibited or only investment dispute work? For some, any concurrent representation creates a possible conflict of interest and should therefore be prohibited. Others consider double-hatting problematic only in certain circumstances, for example where the facts or parties are related. As a result, a clear understanding of what double-hatting encompasses is important to determine how it should be regulated in a code of conduct.

67. Regulating double-hatting raises many interconnected questions. First, it is important to determine whether a code should create an outright ban on double-hatting or, conversely, whether it should create an obligation to disclose the overlapping roles and allow the parties to challenge the adjudicator if they find the overlapping roles objectionable. An outright ban is easier to implement, by simply prohibiting any participation by an individual falling within the scope of the prohibition. It also avoids the burden of having to challenge a person who is playing another role and having to determine whether the double roles create a real or perceived conflict in the particular case.

68. On the other hand, an outright ban may exclude a greater number of persons than necessary to avoid conflicts of interest and would interfere with the freedom of choice of adjudicators and counsel by States and investors. A ban on double-hatting also constrains new entrants to the field, as few counsel are financially able to leave their counsel work upon receiving their first adjudicator nomination. Indeed, many arbitrators receive only one ISDS case in their career and requiring them to abandon their other sources of income to accept a case would be a barrier to entry. This may be especially relevant for younger arbitrators (new entrants) and arbitrators who bring gender and regional diversity. A possible way to address this concern would be to introduce a phased approach so that an adjudicator may overlap in a small number of cases at the start of their adjudicator career. However, even a phased approach is hard to justify if the mere fact of double-hatting is considered as creating a conflict of interest.

Comment No. 15 from the European Union and its Member States:

A ban on double-hatting would have the important advantage of reducing the concerns on conflicts of interests. However, as stated in paragraph 68 of this commentary, in the traditional ISDS system, many arbitrators are appointed only once, and requesting any potential arbitrator to withdraw from other cases may hinder entrance of new adjudicators in the arbitration system, and thus be an obstacle to increase gender and geographical diversity, an important goal recognised by UNCITRAL Working Group III and by a majority of ICSID Members in the ICSID discussions. Arbitral Women reports that in a recent survey of 353 registered ICSID cases from 2012-2019, out of 1,055 appointments, only

152 were appointments of 35 women (just 14.4 %) and only two female arbitrators together comprise 45.3% of appointments of women.

A standing mechanism could both address concerns of conflicts of interests by having full-time adjudicators with no outside activities and increase gender and geographical representation by including diversity requirements for the selection of permanent adjudicators in its statute. Examples can be found in several existing statutes and implementing acts of international courts (see, for instance, Article 36(8) of the Rome Statute of the International Criminal Court and the Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6), paras. 20(b) and (c)).

69. A further practical concern arises in the context of the ICSID Panel of Arbitrators. Articles 12-16 of the ICSID Convention give each Contracting State the right to appoint 4 arbitrators and 4 conciliators to the Panels of Arbitrators and of Conciliators. Each appointment is for a renewable term of 6 years, and the appointee cannot be removed unless they resign of their own accord. This security of tenure enhances the independence of such candidates. It also reflects the vital role these arbitrators play under the Convention, especially for selection of presiding arbitrators where the parties have been unable to reach consensus, and the selection of *ad hoc* Committee members, both of which must be drawn from the Panel of Arbitrators. Many of the persons currently named to the ICSID Panel of Arbitrators by States concurrently act as counsel or experts in investment cases or concurrently act as counsel or Judges in other international courts and tribunals. Were their participation to be barred by an absolute prohibition on double-hatting, a significant number of highly expert persons already nominated to the ICSID lists by member States could not be appointed. This would certainly increase the difficulty of selecting adjudicators who are experienced, available, and otherwise meet the requirements of the Convention and the expectations of parties. It would also frustrate the intent of Contracting States who have nominated such persons. A possible way to address this concern might be to introduce a phased approach allowing a member of the ICSID Panel of Arbitrators to finish their 6-year term and to sit on tribunals and *ad hoc* Committees for the remainder of their mandate. Thereafter, States could ensure their selected candidates would meet the requirements of the Code of Conduct.

70. Second, regulation of double-hatting requires precise identification of the roles that cannot be played concomitantly. In addition to counsel and adjudicators, many other players are involved in ISDS proceeding. Experts play an important role in ISDS proceedings and legal experts are frequently introduced in arbitrations. It is less clear when agents, advisers or judges in other international courts and tribunals, both international and domestic, should also be banned from serving as adjudicators in ISDS. Similarly, counsel acting in other international proceedings, such as at the International Court of Justice, may also create the appearance of bias, for example when they plead in front of members of a court with whom they also sit as arbitrators in separate ISDS proceedings. Mediators, conciliators and advisors in investment matters may also raise concern about potential conflict if appointed as adjudicator.

71. Third, regulation of double hatting requires consideration of possible temporal limitations. Would a prohibition on double-hatting be limited to simultaneously playing the inconsistent roles, or would the limitation be based on having played such roles within a certain time period, for example within the past 2 years?

72. A fourth question to address is the scope of cases that would engage the prohibition on double hatting. Should it only apply when the same parties are present; when the same facts are addressed; when the same legal issues arise; or when a combination of these factors are present? In terms of legal instruments, should it include all international disputes, or only those pursuant to the same treaties?[20]

73. Any provision regulating double-hatting would have to be considered further regarding its application in the context of a standing body or mechanism. Such body or mechanism would probably not permit other simultaneous work but would assume that persons named to it will be full-time employees with salary and benefits sufficient to address income foregone by not taking on other work. However, it might have to address recusal where the nominee's prior work would create an appearance of conflict.

Comment No. 16 from the European Union and its Member States <u>on permanent adjudicators</u>:

As stated in paragraph 73 of this commentary, draft Article 6 is not suitable for permanent adjudicators who would be employed full-time with salary and benefits sufficient to address income foregone by not taking on other work. Full-time adjudicators would not be permitted to have other simultaneous work, in line with the rules and practice of existing international courts. For instance, Articles 16 and 17 of the Statute of the International Court of Justice provide for incompatibility rules for judges of the International Court of Justice. More

[20] For example, CETA Article 8.30(1) contains a general prohibition. Differently, CPTPP contains a temporal and treaty-based prohibition is Chapter 9. A similar provision is included in the USMCA (Annex 14-D Mexico-US Investment Disputes Art. 14.D.6.5(c) Arbitrators appointed to a tribunal under Art. 14.D.3.1 "shall "not, for the duration of the proceedings, act as counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter.") The new Dutch Model BIT (2019) provides a temporal restriction that applies to all international agreements. Art.20 (5) affirms that "Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement." Interesting examples are found in other international courts and tribunals, for example, in its practice directions, the International Court of Justice applies a temporal restriction: Practice Direction VII "The Court considers that it is not in the interest of the sound administration of justice that a person act as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court." Practice Direction VIII "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court."

recently, the International Court of Justice has decided that its sitting Members would not act as arbitrators in investor-state dispute settlement or in commercial arbitration. Similarly, Article 40(2) and (3) of the Statute and Article 10 of the Code of Judicial Ethics of the International Criminal Court provide for similar incompatibility requirements.

A code of conduct for permanent adjudicators should also include detailed rules of conduct applicable to permanent adjudicators at the end of their term of office, including the prohibition to exercise specific duties or professions for a specified period of time after the end of their term of office. Inspiration could be drawn from the Codes of Conduct included in EU Agreements for investor-State dispute settlement and Practice Direction VIII of the International Court of Justice, which provides that: "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court […] appear as agent, counsel or advocate in a case before the Court."

Comment No. 17 from the European Union and its Member States on ad hoc systems:

As signalled by the commentary to the draft code of conduct, in the current context of *ad hoc* arbitration, such a rule would require a precise identification of the roles that cannot be played concomitantly and of a time limit. Given the importance of the concerns at stake, the European Union and its Member States would welcome a dedicated discussion among ICSID Members on this aspect.

Article 7
Integrity, Fairness and Competence

1. Adjudicators shall have the highest standards of integrity and fairness. They shall ensure that parties are treated with equality and that each party is given a reasonable opportunity of presenting its case.

2. An adjudicator shall not engage in *ex parte* contacts concerning the proceeding.

3. Adjudicators shall act with competence and shall take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties. Candidates should only accept appointments for which they are competent.

4. Adjudicators shall not delegate their decision-making function to any other person.

Commentary

74. Article 7 requires adjudicators to apply the highest standards of integrity and fairness. These duties are exemplified in the requirement that parties be treated equally and given a reasonable opportunity to present their case.

75. *Ex parte* communications concerning the proceedings are prohibited.

76. The duty of competence is also included in this provision. It requires adjudicators to be competent and to maintain and enhance their command of the necessary knowledge and skills. Candidates should not accept appointments for which they are not qualified.

Comment No. 18 from the European Union and its Member States:

The European Union and its Member States refer to their comment No. 5 above.

77. During the resumed thirty-eighth session of the UNCITRAL Working Group III, the view was expressed that adjudicators should be knowledgeable about international investment law, international arbitration, public international law, international trade and investment law, and private international law. It was further suggested that they should understand the different policies underlying investment, sustainable development, and how governments operate. In addition, it was mentioned that specific knowledge might be required with regard to the dispute at hand, for example, industry-specific knowledge, knowledge of the relevant domestic legal system or of calculation of damages (A/CN.9/1004/Add.1, para. 97). Many of these requirements are found in the applicable treaties and arbitration rules.

78. This provision also requires adjudicators not to delegate their functions. While it is acceptable to delegate certain functions under supervision, such as research, other functions cannot be delegated. In particular, decision-making cannot be delegated, as it is at the core of the role and must be exercised by the individual selected as adjudicator.

Article 8
Availability, Diligence, Civility and Efficiency

1. Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently and expeditiously throughout the proceeding. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.

2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]

3. Adjudicators shall be punctual in the exercise of their functions.

4. Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.

Commentary

79. Article 8 requires candidates to ensure their availability, and if selected, to act in a diligent and punctual manner throughout the proceeding.

Comment No. 19 from the European Union and its Member States on permanent adjudicators:

The European Union and its Member States reiterate their comment No. 6 above on the "duty of availability" for permanent adjudicators.

80. Paragraph 2 addresses the possibility of an absolute limitation on the number of cases an adjudicator can hear simultaneously. The idea is based on the concern that an adjudicator may not be able to dedicate the necessary time when working on many cases. However, introducing a specific number would be controversial. The number of cases an arbitrator can diligently manage depends on a number of factors, including the complexity of the case, the capacity of the individual, and the role played by the adjudicator (presiding or not). Further, cases may settle or become dormant, allowing the adjudicator to manage other cases.

Comment No. 20 from the European Union and its Member States

- ***on a permanent mechanism:***

Paragraph 2 of draft Article 8 is not necessary and therefore not appropriate for a permanent mechanism, where the allocation of cases would be managed through the rules of the permanent mechanism.

- ***on ad hoc arbitration:***

The European Union and its Member States suggest analysing further the possibility to limit the number of cases adjudicators may hear simultaneously, in view of setting out possible limitations.

Article 9
Confidentiality

1. Adjudicators shall not:

   (a) Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding;

   (b) Disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interests of others; and

(c) Disclose deliberations of an ISDS tribunal, or any view expressed by an adjudicator during the deliberations.

2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them. They shall not publicly disclose any decision, ruling or award until it is in the public domain [and they shall not comment on any decision, ruling or award in which they participated].

Commentary

81. Article 9 codifies generally accepted rules of confidentiality for adjudicators. Paragraph 1 provides that they shall not disclose or use confidential information to which they have access by virtue of their role as arbitrator.

82. Paragraph 2 recognizes that adjudicators can disclose decisions once they are in the public domain, but not otherwise. It also proposes that adjudicators not be permitted to discuss rulings in which they participated. While this practice is observed by most adjudicators, it is included in the code for avoidance of doubt.

Article 10
Pre-appointment Interviews

1. Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings.

2. [If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]

Commentary

83. Article 10 addresses pre-appointment interviews with adjudicator candidates. Pre-appointment interviews are not used by all counsel, but some arbitration counsel view such interviews as part of a diligent adjudicator selection process. As indicated under paragraph 1, such interviews should not touch upon substantive matters at stake in the case, nor should they be addressed to the views the potential adjudicator would take if selected. Rather, they should only address availability to accept the appointment and conflict of interest.

84. Paragraph 2 suggests that the contents of a pre-appointment interview should be automatically disclosed to the parties if the candidate is selected. This would require parties to record or make notes of the pre-appointment interview which could be shared upon acceptance of the appointment. Such a practice would ensure that the interview stays

within the proper scope and would reinforce confidence of all parties that no inappropriate information was shared with a candidate.

Comment No. 21 from the European Union and its Member States on permanent adjudicators:

Draft Article 10 would not be applicable in the context of a permanent mechanism staffed with adjudicators appointed by the Contracting Parties who would be employed full-time and would have a continuing duty to disclose conflicts of interests.

Rules on ethics for permanent adjudicators should not include this draft provision.

Article 11
Fees and Expenses

1. Any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, when possible, shall be communicated to the parties through the entity administering the proceeding.

2. Adjudicators shall keep an accurate and documented record of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant.

Commentary

85. In many instances the fee of the adjudicator is set by a pre-determined rate or method contained in the applicable rules. However, where there is discretion as to the fee of the adjudicator, this article would require that the matter be discussed upon constitution and communicated through the administering entity. This ensures early discussion of the rate and allows the parties to replace adjudicators if they cannot agree with the rate requested. Communication through the administering entity avoids *ex parte* contact between adjudicators and parties and avoids parties having to negotiate fees with the individuals charged with determining the case on the merits. The words "when possible" takes account of non-administered proceedings (for instance, under the UNCITRAL Arbitration Rules).

86. This provision also aims at avoiding situations in which adjudicators accept an appointment and request different fees once the tribunal is formed thus disrupting the process and creating a difficult situation for the parties. Each adjudicator shall keep a record and render a final account of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant.

87. This provision would not likely apply in the context of a standing body or mechanism, assuming adjudicators would have a predetermined salary.

Comment No. 22 from the European Union and its Member States on permanent adjudicators:

The European Union and its Member States agree that draft Article 11 would not be applicable in the context of a permanent mechanism with full-time adjudicators. Permanent adjudicators would not receive any fees by the disputing parties for their time worked on a case. They would receive a predetermined, fixed salary paid from the budget of the standing mechanism comparable to the remuneration of judges in other international courts.

Rules on ethics for permanent adjudicators should not include this draft provision.

Article 12
Enforcement of the Code of Conduct

1. Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code.

2. The disqualification and removal procedures in the applicable rules shall continue to apply.

3. [Other options based on means of implementation of the code]

Comments

88. The tools available for enforcement of the code will depend largely on how the code will be implemented. In particular, the creation of a standing body or mechanism or an advisory centre might impact the options available.

89. A primary method of implementing the code is through voluntary compliance. As a result, article 12 reminds candidates and adjudicators of their duty to comply with applicable provisions of the code.

90. In addition, the applicable rules related to the removal or challenge of arbitrators, which are separate and different for each institution, would allow alleged violations of the code to be raised in the context of challenge and removal procedures.

Comment No. 23 from the European Union and its Member States on permanent adjudicators:

Rules on recusal, disqualification and removal of permanent adjudicators would need to be addressed in the Statute establishing the permanent mechanism. Such Statute would also include rules on the implementation of the ethics obligations on former adjudicators, i.e. permanent adjudicators at the end of their term of office.

91. Additional sanctions have been mentioned at the thirty-eighth session of UNCITRAL Working Group III; these include sanctions linked to remuneration, disciplinary measures,

reputational sanctions and notifications to professional associations (A/CN.9/1004*, paras. 62-64 and 77).

92. Monetary sanctions might be difficult to implement, and it should be determined how such sanctions could be imposed.

Comment No. 24 from the European Union and its Member States:

Monetary sanctions might be difficult to implement in general, however, it may be easier to consider potential financial sanctions in the context of a permanent mechanism, in which adjudicators are employed full-time and would receive a fixed salary and probably also a pension.

93. Similarly, reputational sanctions would be difficult to implement at present. For example, the creation of a public list containing the names of arbitrators who are found to have violated the provisions of the code has been suggested. However, it should be clarified who could administer, collect and verify the information to be included in this list.

Comment No. 25 from the European Union and its Member States:

- ***on permanent adjudicators:***

Reputational sanctions might be difficult to implement in general, however, they would not be needed in the context of a permanent mechanism, in which adjudicators could be removed from the mechanism in case of severe and repeated violations of the code of conduct.

- ***on ad hoc arbitrators:***

The possibility of having consequences tied to non-compliance with e.g. time limits has been subject to discussions among ICSID Members in the context of the current rules amendment process. While recognizing the inherent difficulties with the implementation of 'reputational' sanctions, European Union and its Member States would welcome further reflections on this matter.

94. Should an advisory centre be created, the responsibility for compiling such a list could be assigned to it. However, this role is substantially removed from the purpose of an advisory centre and could jeopardize its ability to impartially represent and advise its beneficiaries.

Comment No. 26 from the European Union and its Member States:

It is not desirable that an advisory centre be entrusted with the role of compiling a list of adjudicators who are found to have violated the provisions of the code. This is not the role of an advisory centre.

95. Alternatively, should a standing body or mechanism be created, the responsibility of enforcing the Code could be given to its registrar or to the court in its plenary.

Comment No. 27 from the European Union and its Member States:

- ***on a permanent mechanism*:**

A Court and its president would undoubtedly have the responsibility of enforcing the Code with respect to violations of the Code by permanent adjudicators, in line with the rules and practices of existing international courts (e.g. Articles 18 and 24 of the Statute of the International Court of Justice).

- ***on ad hoc arbitration*:**

It could be possible that a permanent mechanism may have the responsibility of enforcing the Code also with respect to violations of the Code by *ad hoc* arbitrators, but the fact that only the Parties to the Court are financing its activities would need to be factored in.

96. The relationship of the code with existing codes of conduct in investment treaties and other instruments that could simultaneously apply to adjudicators in the same dispute might also need consideration. This question would also relate closely to the scope of application of the code.

Comment No. 28 from the European Union and its Member States:

- ***on a permanent mechanism*:**

Only the rules of the code of conduct and of the Statute establishing the permanent mechanism would apply to permanent adjudicators in the scenario of an international (or "a-national") Court.

- ***on ad hoc arbitration*:**

In the context of *ad hoc* arbitration, the question of the relationship of a code of conduct with other existing rules would require further analysis.

Implementation of the Code

97. Several options might be considered to implement the code.[21] The most likely options would be: (i) to incorporate the code into investment treaties and other instruments of consent; (ii) to have disputing parties agree to its application at the inception of each case; (iii) to append it to the disclosure declaration that adjudicators must file upon acceptance of nomination; or (iv) to incorporate the code into applicable procedural rules. The code could also be made part of a multilateral instrument on ISDS reform, if such instrument were to be developed (see A/CN.9/WG.III/WP.194). In this instance, the applicability of the code would be determined by such instrument.

[21] See generally, Chiara Giorgetti and Jeffrey L. Dunoff, *Ex Pluribus Unum? On The Form and Shape of a Common Code of Ethics in International Litigation*, 113 AJIL UNBOUND 312 (2019).

Comment No. 29 from the European Union and its Member States:

- ***<u>on a permanent mechanism</u>*:**

The European Union and its Member States support the inclusion of a code of conduct for permanent adjudicators into a multilateral instrument on ISDS reform, which would apply to permanent adjudicators of a standing mechanism.

- ***<u>on ICSID arbitration</u>*:**

The European Union and its Member States support making a binding code of conduct for *ad hoc* arbitrators integral part of the ICSID rules. The acceptance of the appointment as ICSID arbitrator could include a commitment to comply with the code of conduct.