# ICSID and UNCITRAL Publish the Anticipated Draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement

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On May 1, 2020, the Secretariats of ICSID and UNCITRAL released the first draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement (ISDS). I had the privilege of working extensively on the drafting of the Code as a Scholar in Residence at ICSID, and I think this is an important development in the ISDS reform process.[fn]The views expressed herein are solely those of the author and do not represent the views of the ICSID or UNCITRAL Secretariats.[/fn]

As many readers of this blog would know, UNCITRAL Working Group III (WGIII) has been working on an ISDS reform process for the past several years. After preparing some background work and collecting comments by Member States, the Secretariat of UNCITRAL was requested, together with the Secretariat of ICSID, to prepare a draft Code of Conduct for Adjudicators at WGIII's thirty-eighth session in October 2019. The result of this common effort is now available on the websites of the two Secretariats.

The draft Code addresses many key ethical and contested issues identified by

WGIII members, and more generally by the ISDS's critics and provides policy makers with numerous choices on how to best regulate adjudicators' behavior through a Code of Conduct. In this post, I briefly review the draft Code and highlight some of its most noteworthy provisions.

The proposed Code has 12 articles, and includes helpful commentaries for each article, explaining the rationale for each provision as well as the tensions and concerns that each provision addresses. Article 1 defines essential terms and Article 2 addresses the applicability of the Code. Article 3 provides an overview of adjudicators' obligations, which are then expanded in Articles 4 to 9. Article 10 and 11 regulate pre-appointment interviews and fees. Finally, Article 12 addresses the fundamental issue of how to enforce the Code.

Many issues are notable.

First, the Code applies to all (and only) adjudicators. The term "adjudicators" purposefully encompasses a broad category of existing and possible future participants in ISDS adjudicatory processes, including arbitrators, *ad hoc* committee members, candidates to become adjudicators, appeal judges, and judges in permanent bodies. In this way, the Code can easily be applied regardless of the type of reform that might be adopted as a result of the WG III discussions. At the same time, the Code is drafted only with adjudicators in mind. The regulation of counsel, experts and other participants in ISDS proceedings is not part of this Code, as it requires different and more targeted provisions. The Code also requires adjudicators to ensure that their assistants are aware of and comply with the Code. Given some criticism concerning the role of arbitrator assistants, this is a welcome specification.

In Article 3, the draft Code includes a series of general duties, similar to those found in existing codes of conduct, such as those of CETA and CPTPP. Above all, adjudicators must be at all times independent and impartial (as specifically defined in Article 4) and avoid direct or indirect conflicts of interests. Other duties include the duties of integrity, fairness, competence, diligence, civility and efficiency.

The Code requires, at Article 5, extensive adjudicator disclosure as a key policy tool to ensure the avoidance of conflicts of interest and ensure that parties know as much as possible prior to an adjudicator's appointment. In terms of disclosure, adjudicators 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. Adjudicators also have a continuous duty of disclosure and should opt in favor of disclosure in case of doubt. Yet disclosures that would be trivial are not required.

The provision is drafted so as to give several choices to policy-makers on how extensive disclosure obligations should be in the final version of the Code. For example, disclosure could be limited (or not) to activities that occurred during a specified number of prior years. Similarly, disclosure requirements could be extended to include relationships with 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. Importantly, Article 5 could also require the disclosure of the adjudicator's participation in ISDS and other international proceedings or related domestic arbitrations. This is very important because international cases may have overlapping components in terms of both issues and participants. A full disclosure, which includes work as counsel, adjudicator, expert or other function in other international matters, would allow a full assessment of any possible conflict of interest of any adjudicator by the parties so that they can be fully satisfied with their choice, or, alternatively, raise their concerns and decide to challenge the adjudicator. The provision would also give direction and important guidance to adjudicators on what should be disclosed.

In requiring extensive disclosure, Article 5 also addresses two important issues that have generated much debate in ISDS: repeat appointments and issue conflict. Repeat appointments raise the concern that an adjudicator who is repeatedly appointed by the same counsel, client, party or 'side' may develop a dependence or affinity with the nominating party, or become biased in its favor. As bias may be unconscious, the concern is difficult to address. Additionally, repeat appointments include not only adjudicators and parties, but can also include experts, mediators, conciliators and any other role that may create financial dependence or may involve the same set of facts. The prevalence of repeat appointments is also seen by some commentators as a barrier to entrance for new or more diverse adjudicators.

Repeat appointments raise complex policy matters. Rather than banning repeat appointments altogether, the Code requires extensive disclosure of past and present appointments. Enhanced disclosure would allow parties to assess fully the relationship between adjudicators and each party and actor involved in the

proceeding. Because draft Article 5 is flexible, other significant relationships may be added if desired by policy makers. Additionally, draft Article 8 regulates repeat appointments from the perspective of ensuring the availability of adjudicators.

Issue conflict is another central issue which is equally complex to regulate. Concerns over issue conflict may arise if an adjudicator has taken a position on a legal matter relevant to the case, for example in a publication or a speech. At the same time, adjudicators are also expected to be experts. Writing and making public presentations or otherwise participating in events usually demonstrate expertise. The concern over issue conflict is that the position taken may demonstrate bias or prejudgment of certain issues so that an adjudicator might not address the issues at stake in the proceedings with an open mind. The duty of disclosure proposed in Article 5 will give parties specific knowledge and will therefore enhance parties' opportunities to learn about the adjudicator's work comprehensively. If a party believes after disclosure that an adjudicator may have an issue conflict, it can decide to raise a challenge.

A further significant issue addressed by the draft code is double hatting, which has attracted significant criticism. Double hatting refers to the practice of an adjudicator to simultaneously act as (and thus wear the hats of) counsel, expert, adjudicator or in other roles in other ISDS or other international proceedings. Double hatting is not a technical term, and in fact Article 6 carries the title "Limit on Multiple Roles." As a policy question, regulating double hatting is complex and is also in tension with other priorities. For example, a strict ban on double hatting would adversely affect diversity of adjudicators, as newly nominated adjudicators would often be unable to forego other sources of income after their first nomination and until they become established. A time-phased or number-of-total cases approach might provide more flexibility. Article 6 is formulated to give policy makers a range of options from a complete ban on practice and possibly other roles (such as expert or agent) to requiring disclosure of any work on other cases. The provision could also include a time element for disclosure. The draft also provides a range of options to define what kinds of matters may lead to a double hatting (for example those involving the same parties, facts, or treaty). Given the interest in this issue, the provision will surely be debated among delegates at UNCITRAL. Finding the right balance between ethical priorities, concerns over unconscious bias and appearance of bias, interest in enhancing diversity, and freedom of the parties to select an adjudicator will require in-depth discussion.

A final fundamental issue included in the draft Code is enforcement. Enforcement is key to the success of the Code. Article 12 starts by highlighting the importance of voluntary compliance. It then underlines that the applicable rules related to the removal or challenge of arbitrators, which are separate and different for each institution, continue to apply. The provision is then opened to further suggestions. Some Member States have suggested monetary sanctions, disciplinary measures and reputational sanctions. These sanctions, however, would be difficult to implement in the present system. This is another complex issue, which will depend also on how the Code is implemented. The creation of a permanent court, other new institutions, or the establishment of an advisory center might also affect available options.

At this stage, the Code is drafted in a flexible way and provides several policy options for discussion between Member States. It includes and addresses all the major issues identified as concerns by WGIII and other stakeholders. It will be for Member States now to agree on standards that they commonly find acceptable and would provide the necessary ethical standards to strengthen and support ISDS and meaningfully address its criticism.