Transparency and Data Analytics: The Keys to the Transformation of the ISDS Adjudicator Appointment Process

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The Changing Landscape of the ISDS System

The ongoing global discussions on the reform of the Investor-State Dispute Settlement (ISDS) system have been broad in scope and covered a wide range of concerns. As previously documented on this blog, the governments participating in the UNCITRAL Working Group III – ISDS Reform (WG III) have determined three main reform areas: consistency and coherence of the awards, costs and efficiency, and the adjudicators and decision-makers. The latter category has solicited the most attention as ISDS adjudicators (primarily arbitrators) have been a "lightening rod" for criticism (both on and off the record) at the sessions of the WG III.

Many concerns have been raised about ISDS adjudicators, regarding such issues as accountability, independence and impartiality, so-called "double-hatting" (appearing in ISDS proceedings in multiple roles), and the enormous size of some monetary awards. Although critiques of ISDS adjudicators in some circles may be exaggerated, there was a consensus in the WGIII that there is a need for a universal set of standards for the conduct of ISDS adjudicators. Among their top

priorities are those areas that they deem to merit special regulation, such as repeat appointments, issue conflicts and double hatting.

These concerns prompted the Secretariats of UNCITRAL and ICSID to develop a Draft Code of Conduct (Draft Code) for ISDS adjudicators, which has recently been released and open for comment.

A Step Towards Transparency: The UNCITRAL and ICSID Draft Code of Conduct for Adjudicators

A brief review of the substance of the Draft Code reveals its sweeping nature with respect to disclosure obligations, coverage of subjects, and flexibility for policymakers in the future.

The definition of „adjudicators“ in the Draft Code encompasses arbitrators, ad hoc committee members, candidates to become adjudicators, appellate judges, and judges in permanent bodies. This broad definition is intended to ensure that the Draft Code can be adapted and applied to various ISDS mechanisms, including ad hoc arbitration or a standing ISDS adjudicative body.

Despite its sweeping nature, the Draft Code provides policy makers a flexible menu of options in acknowledgement that it cannot be one-size-fits all. The options allow regulators to shape some nuances of the most sensitive issues related to ISDS adjudicators, most notably, ensuring their independence and impartiality.

The focal point of the Draft Code is Article 5, which provides for a broad and sweeping disclosure obligations. If adopted, these provisions could dramatically broaden the scope of disclosure as they seem to encompass all past professional encounters (even single encounters of the counsel and adjudicator in proceedings several years ago). Drawing clear and bright lines for disclosure is an appealing way to avoid confusion and reduce conflicts. However, if implemented in their current form, the new rules could potentially establish the duty to disclose professional interactions which would otherwise not raise questions on the independence and impartiality of the adjudicators. Sweeping disclosure obligations can create tensions between the adjudicator’s dueling obligations of confidentiality in one case, and broad disclosure in another.

Nevertheless, several aspects of arbitrator independence and impartiality in ISDS proceedings raise ethical concerns that are unique to ISDS proceedings (which were detailed in a previous blog post), and have not been directly addressed in previous codes.

For instance, the disclosure obligation in the Draft Code includes the past publications and speeches of the adjudicator, in order to reveal any potential issue conflict. On the other hand, "previously expressed legal opinions" are placed on the Green List of the IBA Guidelines on Conflicts of Interest in International Arbitration, which means they cannot lead to disqualification, and thus they are not subject to mandatory disclosure.

Furthermore, Article 10 of the Draft Code limits pre-appointment interviews of the adjudicators to information about their availability. To ensure full transparency of the interview process, it also requires that the content of any interview should be disclosed if the adjudicator is appointed.

Limitations on pre-appointment interviews are not new, but the provisions of the Draft Code go well beyond prior standards. For example, the CIArb International Arbitration Practice Guidelines for the Interviewing of Prospective Arbitrators provide that the pre-appointment interviews may take place, but should not include any discussion about the merits of the case (instead of limiting the interview to questions of availability). Meanwhile, similar to the Draft Code, the Guidelines encourage keeping notes or recording the interview (where appropriate) and they provide that the content of an interview may be disclosed. The CIArb Guidelines stop short, however, of imposing an obligation to disclose the contents of the interview.

In another example, the IBA Guidelines on Party Representation in International Arbitration limit the pre-appointment interviews to communications aimed to determining their expertise, availability or the existence of potential conflicts of interest. Such interviews are specifically identified in the Green List of the IBA Guidelines on Conflicts of Interest in International Arbitration, and thus, they do not have to be disclosed. Unlike the CIArb Guidelines, neither of the above-referenced IBA Guidelines addresses the recording or the disclosure of the content of the interview.

Therefore, in contrast to other existing sources, the Draft Code would significantly

raise the standards for adjudicator disclosures and contacts with the parties.

The Enforcement of the Code of Conduct for ISDS Adjudicators: Who, What and How?

The enforcement of any set of ethical rules and codes of conduct in the realm of ISDS is challenging due to its decentralization and the ad hoc nature of the adjudicator appointment process. The successful application of the Draft Code will largely depend on voluntary compliance, as there are no more direct measures such as monetary or disciplinary sanctions that might exist with other established professions. It is noted in the Draft Code itself that there could be difficulties in the enforcement of monetary or reputational sanctions in the ISDS context. Some government submissions to the WG III recognized that that the strict enforcement of higher ethical standards for adjudicators could reduce the number of practitioners willing to accept appointments to ISDS tribunals. The limited number (and lack of diversity among) ISDS adjudicators is itself an area of concern, which is sometimes linked to concerns about repeat appointments and impartiality.

Enforcement is another area where the international arbitration community is working to develop solutions. Several arbitral institutions have developed internal and sometimes informal sanctions for arbitrators. For example the ICC adopted a policy in 2016, under which the fees of the arbitral tribunal (or sole arbitrator) can be reduced from 5-20% for delays in the submission of the draft award. Nothing would seem to prevent institutions overseeing ISDS cases (which the ICC itself does) from adopting a similar policy.

Institutions acting on an ad hoc basis, however, can only do so much. To fill the void, CIArb has developed a proposal for a two-tiered disciplinary process for arbitrator misconduct in which the complaints would first be heard by the arbitral institution, and then referred to CIArb, if justifiable cause is established. To date, there does not seem to have been public discussion about application of the CIArb proposal to ISDS.

The enforcement of the Draft code will hinge on the availability of the information on the track record of the adjudicators, including their compliance with their disclosure obligations. The UNCITRAL WG III has also indicated that an increased level of transparency of data on the compliance with the code of conduct for

adjudicators may be beneficial for its overall enforcement. To date, one of the few efforts to be address this concern for more transparency about arbitrators' track records is Arbitrator Intelligence.

Arbitrator Intelligence Reports: Filling the information gap with data analytics

The Draft Code creates a framework in which the parties and adjudicators in ISDS proceedings will have to minimize their contacts prior to the dispute (and disclose any communication, including pre-appointment interviews). Therefore, the parties will have to obtain information about adjudicators from a "safe distance", with minimal contacts with the adjudicators. On the other hand, the adjudicators should rest assured that they will be able to attract a meaningful number of appointments, without establishing direct contacts with the parties. Given new proposals to restrict pre-appointment interviews, new sources of information are needed now more than ever.

Arbitrator Intelligence is creating tools that will enhance the effectiveness of the appointment process and therefore potentially aid in efforts to increase confidence in ethics and integrity in ISDS and international arbitration more generally. Through its anonymous online survey called the Arbitrator Intelligence Questionnaire or AIQ, Arbitrator Intelligence is gathering reliable factual and evaluative information about arbitrators' case management and decision making. This information is contributed by arbitrator practitioners worldwide on a voluntary basis.

This data is analyzed and packaged into reports that provide legal practitioners with a comprehensive overview regarding arbitrators' decisional trace records. Arbitrator Intelligence Reports provide practitioners with information that would otherwise have to be gathered through informal phone-calls and/or pre-appointment interviews with adjudicators. The reports could also place lesser-known arbitrators on the radar of arbitration practitioners, thus helping to reduce the number of repeat appointments, which were outlined above as a concern in ISDS.

As the face of ISDS is rapidly evolving, the adjudicator appointment process will inevitably continue to be a focus of intense scrutiny. It appears that new standards

are inevitable and inevitably more exacting than other existing sources. The Draft Code is an admirable effort to address the many concerns in the changing world of ISDS. Public debate over these proposed standards are an excellent opportunity to expand the understanding of the ISDS-specific conduct which should be regulated, and the particular nuances of such regulation. Absent an established enforcement mechanism, greater insights into the track records of adjudicators can encourage self-regulation and voluntary compliance with the provisions of the Draft Code.