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Back to Basics: Drawing the line between Disclosure, Challenge and Disqualification Standards in International Investment Arbitration

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"To disclose or not to disclose?" no longer seems to be a question for international arbitrators. The narrative and policy space surrounding the independence and impartiality of international arbitrators has been consistently driven towards maximum disclosure obligations. This is evidenced in recent legal instruments seemingly blurring the lines between the recognized ethical standards for arbitrators, their disclosure obligations, and real conflict of interest which could be grounds for challenge and disqualification. Maximum disclosure has also become an inherent expectation of the disputing parties, who have challenged arbitrators for their failure to disclose facts and contacts of little to no consequence to their independence or impartiality. Although most such challenges do not lead to the removal of the arbitrator in question, they cause significant disruptions to the proceedings and expose the arbitrator to additional pressure.

Arbitrators are held to high standards of professional conduct, including the obligation to act with neutrality, "fairly or impartially between the parties; with reasonable efficiency, diligence and industry" and to exercise "independent judgment". These standards are in line with the level of responsibility placed upon arbitrators, but they are also in tension with the fact that they are mostly appointed by the disputing parties. Even if the arbitrators act with utmost integrity, their decisions are always exposed to potential criticism of bias towards the appointing party. Therefore, arbitrators must not only act as independent and impartial adjudicators, but they should also be perceived to do so. Recently, the well-established ethical standard for arbitrators have been supplemented in practice by a broadening notion of the duty to disclose all facts and contacts which could be considered problematic by the opposing party. Although the broad disclosure obligations artificially lower the standard for arbitrators challenge, while the threshold for the removal of arbitrators remains high under the applicable rules and in practice (manifest lack of independent judgment or justifiable doubts of the independence and impartiality of the arbitrator). As a result, these stricter standards of disclosure are increasing the expectations of the parties, regardless of the fact the standards for removal remain unchanged. This is true in particular in investor-state arbitration.

Draft Code of Conduct for ISDS Adjudicators – Too Much or Not enough?

The intensified scrutiny of arbitrator conduct and accountability in recent years has been driven by the states involved in the reform of the investor-state dispute settlement (ISDS) system under the auspices of UNCITRAL Working Group III (ISDS Reform). One of the proposed reform options is

the Draft Code of Conduct for ISDS Adjudicators, which was developed by the secretariats of UNCITRAL and ICSID, with an extensive scope of application and particularly broad disclosure obligations.

For example, in an effort to address the most relevant concerns expressed by States (for instance, conflict of interest, double-hatting, and repeat appointments are among the most commonly raised concern in this area), the Draft Code also provides the option of mandating the disclosure of all publications and speeches.

The placement of the disclosure obligations in the article titled "Conflict of interest: Disclosure Obligations" may create the perception that all the issues that are subject of disclosure are also grounds for challenge. The comments that have been submitted thus far from the relevant stakeholders showcase fundamental differences in the understanding of the nature and purpose of the Draft Code as among States and arbitrators. States have largely been supportive of the disclosure obligations in the Draft Code, while some prominent arbitrators have expressed serious concerns and even disappointment with the provisions of the Draft Code in its current form.

The obligation to disclose all publications and speeches also raises specific practical questions for arbitrators. First, how can they identify all potentially problematic publications and speeches prior to knowing what all the issues will be in the dispute? Second, how will challenges for any failure to identify and disclose all the pertinent materials be managed? Such an obligation also seems obsolete at a time when lists of engagements and publications can be maintained and updated on professional websites (which is done by most arbitrators) making them publicly accessible. Radically expanding disclosure obligations in the new Code would inevitably raise the expectations of the parties, resulting in an increase of challenges. Because the grounds for disqualification remain the same, however, these expanded grounds for challenge would have very little chance of leading to the removal of an arbitrator. However, such a broad disclosure obligation is low hanging fruit for counsel seeking to challenge a particular arbitrator. Despite the fact that the Draft Code is still a work in progress and subject to discussion, as seen below, parties in ISDS proceedings are already relying on its provisions to challenge arbitrators.

The Draft Code of Conduct in Action

The first prominent reference to the Code was seen in an ICSID arbitration against Spain. Following an unsuccessful attempt to disqualify all three members of the tribunal, for allegedly pre-judging issues of the merits in the award on jurisdiction, Spain raised additional challenges in December 2020. Spain challenged all three members of the arbitral tribunal, alleging that the decision to conduct remote hearings demonstrated a lack of high moral character due to their refusal to hold in-person hearings. Spain dismissed the tribunal's risk assessment related to the Covid-19 pandemic as containing "serious misrepresentations and misleading statements" in order to justify its decision to hold virtual hearings. In addition, Spain characterized the inability of one of the arbitrators to travel due to recovery from surgery and mandatory quarantine as "speculative and misleading" and demonstrating that the tribunal "prioritized their private interest" over the due process rights of the parties.

In addition, Spain challenged two members of the tribunal for their failure to disclose their participation as arbitrators in a moot competition organized by the counsel of the opposing side. Spain argued that this was a violation of ethical and disclosure rules under the ICSID Rules, the World Bank's code of conduct, the new, still draft Code of Conduct for ISDS Adjudicators, the

IBA Guidelines, and "rules applicable in any civilized nation." These wide-ranging arguments were not persuasive enough to merit the removal of the arbitrators in question, and all the challenges were ultimately rejected by the President of the World Bank.

This is only a snapshot of the kinds of challenges that may be raised as the lines between disclosure obligations and grounds for challenge are blurred. Parties will seek to remove arbitrators for any omission in their disclosures, only to be reminded by the authority deciding on the challenge that "[a]rbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another."

Although the increasing frequency of arbitrator challenges will not necessarily increase their success rate under the existing standards for removal, they still have a disruptive effect on the course of the proceedings and the legitimacy of the system of party appointments. In cases of continuous and hostile challenges, the challenged arbitrator may respond in a manner which will raise actual doubts of bias and warrant their ultimate removal.

Transparency and Data as the Northern Star

The enhanced transparency and accessibility of non-confidential information about arbitrators and their previous appointments could help mitigate the disclosure expectations and reduce the frequency of unfounded challenges raised against arbitrators. Firstly, this could be accomplished by maintaining a comprehensive and up-to-date list of publications, speeches, and consultancy engagements of the arbitrator on their personal websites, as well as the collection and aggregation of such information by a trusted and neutral third party, which could make it searchable and easily evaluated by parties interest in identifying overlapping issues. Meanwhile, increased publication of redacted awards by arbitral institutions, which would indicate the names of the appointing parties, and other data aggregators that make such information available and easily searchable, will help ease the justifiable angst of parties and bad faith attempts to abuse apparent non-disclosures. As long as this information is equally accessible to all the parties involved, parties could not challenge arbitrators for "failing to disclose" matters which are publicly available.

Secondly, the parties should be able to provide feedback on the arbitrators after the conclusion of the proceedings which would enable the development of a transparent track record. In addition to the factual background of the case and case management, parties could also provide evaluative feedback, which would ensure the full picture of the arbitrator's compliance with the applicable standards of conduct. The potential for feedback would incentivize the arbitrators to self-regulate and to be mindful of their approach to the proceedings from the moment of appointment to the issuance of the award. Arbitral institutions and other appointing authorities could also benefit from the availability of such information in the creation of rosters or individual appointments of arbitrators.

Bright Line Between Disclosure and Conflicts of Interest

The place where the most and most difficult work is needed is in delineating a clearer line between the disclosure obligation and conflicts of interest which should serve as grounds for disqualification. As recent practice has shown, parties seeking to remove an arbitrator are loading the challenges with any and every contact, event, and statement of the arbitrator, which may or may not have any effect on their ability to rule in an independent and impartial manner. This is in large part possible due to the lack of distinction between disclosures which are advisable and those

which indicate conflicts of interest.

Future modifications of the Draft Code of Conduct should provide this clarity by using precise wording and providing voluntary disclosures and conflict of interest in separate provisions. Furthermore, the process and standards for arbitrator challenges in the context of investment arbitration should be given more attention in the ISDS reform process, in pursuit of an internationally acceptable framework.

The transition from standards to rules in the realm of arbitrator conduct and accountability should not foster anxiety, paranoia or distrust on either side. Instead, the expectations of the parties should be balanced against the realistic standards for the challenge and disqualification of arbitrators under the applicable rules. Whatever instrument is adopted to regulate the conduct of arbitrators, it should not create the assumption that the arbitrators who do not "dwell on Mars" are inherently biased and that any disclosure or lack thereof is necessarily an open invitation to challenge. Careful and calibrated solutions in this sphere and the increased transparency of the relevant information could accelerate the ISDS reform process and improve the public perception of ISDS among legal practitioners and the general public.

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