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The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement?

Chiara Giorgetti (Richmond School of Law) · Saturday, May 29th, 2021 · Institute for Transnational Arbitration (ITA)

On April 19, 2021, the Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) released the second draft of the Code of Conduct for Adjudicators in International Investment Disputes, a key feature of the Investor-State Dispute Settlement (ISDS) reform process which is presently under way at UNCITRAL Working Group III (WGIII).

The second draft builds on the first draft that was published in May 2020 and reflects extensive comments received by the two Secretariats (organized by State/commenter here, and by Article and Topic here), as well as important disseminations and discussion events (for example here) that the ICSID and UNCITRAL Secretariats organized with member States and other stakeholders. The new version is streamlined and more concise and reflects the general consensus that has so far been shown to exist among stakeholders. The second draft will be discussed next on June 7th, 2021 at a joint event organized by ICSID and UNCITRAL. It will then go for further review at the next meeting of WGIII in November with a possible early adoption of a Code of Conduct to follow shortly thereafter.

In this contribution, I will briefly explain and assess the most salient novel aspects of the new draft.

Changes to the Overall Format and Structure of the Code

The format of the second Draft has changed as compared to the first Draft: it now has 11 articles instead of the 12 articles, and overall the language is tighter and clearer. There are fewer repetitions and the Code is more readable. The second draft also includes some significant changes related to the definition of certain terms and the applicability of certain provisions.

The new version of the Code rearranges its provisions so that the substantive provisions of the Code are now grouped together in the central part of the Code (Articles 3-9) followed by the obligations related to disclosures, which are now contained in Article 10 (of which more later). Article 11 relates to the enforcement of the Code (with some interesting new language analyzed below) after which a new Annex I containing a Declaration, Disclosure and Background

Information is introduced.

The revised Code also includes clearer definitions of key terms. In Article 1, containing definitions, for example, there is a clearer definition of the term ‘adjudicator’ which includes ‘arbitrator’ and ‘judge’. The meaning of ‘arbitrator’ is further defined as “a member of an *ad hoc* tribunal or panel, or member of an ICSID *ad hoc* Committee who is appointed to resolve an ‘International Investment Dispute’ [IID].” IID is then defined in the same provision as “a dispute arising pursuant to the investment promotion and protection provisions in an international treaty.” This new language means that the Code will only apply to disputes arising from certain provisions of international investment treaties, and will not apply – as the previous draft did – to those arising from contracts or domestic law provisions.

Article 1 also introduces a separate definition of ‘judge’ as a person “appointed to a standing mechanism for IID settlement.” This is a helpful clarification which takes into consideration the comments of those countries, especially from the European Union, whose ISDS reform agenda includes the creation of a permanent court for investment. This distinction is carried out throughout the commentary of the second draft to explain what provisions specifically apply to judges versus adjudicators. Throughout the explanation of the changes to the second draft, moreover, there are ample references to a future commentary to be written to clarify the content of each provision. This highly desirable commentary will be an invaluable tool for the application of the Code.

Article 2 then specifies in details which provisions apply to adjudicators and candidates, and which provisions will continue to apply after the conclusion of proceedings. It also stipulates that adjudicators must take reasonable steps to ensure that their assistants (defined in Article 1 as a person working under the direction and control of the Adjudicator) are aware of and comply with the Code.

Article 3 sets out, in a new a tighter language, the fundamental obligation of independence and impartiality, which is the key to any ethics code and common in all such codifications. It also sets out the related obligations to take reasonable steps to avoid bias, conflict of interest, impropriety and the appearance of bias.

Other general duties included in the Code are the duty of diligence (which in this version has its own provision in Article 4) the duties of integrity, fairness and competence, the obligation for adjudicators to engage in continued education activities, the duty to treat the parties with civility and the obligation to refuse an appointment should one be too busy or lack competence and necessary skills (Article 6). Article 8 addresses confidentiality and Article 9 relates to fees and expenses.

Three Key Issues

In my previous contribution to this blog on the first draft of the Code (here), I highlighted three key ethical issues that have generated strong views from State negotiators and other stakeholders, namely: issue conflict, double-hatting and repeat appointments.

The new draft makes some important changes on each of these issues.

Issue conflict was addressed only indirectly in the first draft by requiring an adjudicator to disclose

all publications and all relevant public speeches. The commentary of the first draft also referred to issue conflict directly. Issue conflict generated a lot discussion. The second draft of the Code does not contain similar disclosure obligations and there is no reference to issue conflict at all. Issue conflict is notably difficult to define and regulate (see the excellent explanations and discussions here) and the new draft reflects the lack of agreement expressed by States on this topic. Besides, an issue conflict would continue to be challengeable as it amounts to a lack of independence and impartiality.

Double hatting is regulated in Article 4 of the new draft, with the heading 'limit on multiple roles,' which is the same as the prior draft, where it was regulated in Article 6. There are several significant modifications in the new draft. First, as suggested by some delegates, disputing parties may expressly agree to an adjudicator serving in multiple roles. Second, the limitation on multiple roles is narrowed to counsel and expert only, and does not include 'witness, judge, agent or any other relevant role.' While some of the prior drafting was redundant (e.g. judge) the general (though possibly too open-ended) reference to 'any other relevant role' was useful in including other positions (such as advisor to third party financing firms). Third, the new limitation only includes concurrent representations and eliminates the reference (which in the first draft was in bracketed text) to a temporal limitation. Fourth, the text now provides bracketed text that can limit the otherwise extensive prohibition on double hatting. Without the bracketed text, no adjudicator will be able to serve concurrently as counsel or expert in other IID cases without the disputing parties' agreements. Conversely, the bracketed text, if added, would limit considerably the provision by restricting the prohibition of multiple roles to cases involving the same factual background and at least one of the same parties, subsidiary, affiliate or parent entity. This new, and clearer, provision tries to strike a new balance among the multiple ways to regulate double hatting and will be surely discussed extensively in the forthcoming negotiations. The text without the bracketed language seems to be more in line with the most recent treatment of the issue in new investment treaties (see here for some examples).

The issue of repeat appointment is still (as in the first draft) treated as a matter of disclosure. Article 10 requires ample and continuous disclosure, including of all prior and concurrent appointments as adjudicator, counsel and expert witness. The provision contains numerous instances of bracketed text that would restrict or broaden the required disclosure to non-IID proceedings and introduce a temporal limitation to disclosure obligations of 5 to 10 years. The Code does not prohibit repeat appointments, which would remain permissible unless is raises concerns related to lack of independence and impartiality. In the previous draft, repeat appointment was regulated when it interfered with the availability of the adjudicator (in former Article 8), which was difficult to assess. This prohibition is not included in the new draft.

Disclosure Obligations and Enforcement of the Code

Disclosure obligations play an important role in the architecture of the Code, even if the provision was moved to the back of the Code. Adjudicators are required to provide extensive disclosure and have a continuous duty to disclose and should err in favor of disclosure.

In addition to the comments made above in relation to issue conflict and repeat appointments, the new draft contains some noteworthy novelties. First, it specifies that adjudicators disclosure is to be seen as related to matters that could give rise to doubts as to their independence and impartiality

in eyes of the parties. Second, it states specifically that the mere fact of non-disclosure does not establish a breach of the Code. Indeed, Article 11 on enforcement indicates that disqualification and removal procedures will not apply to Article 10. It is therefore unclear what the consequences of a lack of disclosure would be under the system. A failure of disclosure would be relevant to assess the provisions in articles 3 to 8, but by itself it cannot give rise to challenges. Third, a new Annex 1 appointment includes a simplified disclosure form to be filled prior to or upon accepting appointments.

Article 11 addresses enforcement. It still includes the bracketed text for further consideration of possible sanctions. A new section indicates the limits of disqualification and removal procedures to the specific breaches of Article 3-8. A new Draft Note on the implementation and enforcement of the Code has just been released by the UNCITRAL Secretariat.

Both Articles 10 and 11 will surely be the focus of substantial discussions in the forthcoming negotiations. Indeed, the negotiations themselves and their outcome will play an important part for the success and viability of the Code.

Next Steps

The second draft of Code of the Conduct advances the drafting process towards a final text, agreeable to all parties. It is a compromise that reflects well the comments received from multiple stakeholders. The upcoming negotiations in June and November 2021 remain key to finalize an approved common text, yet a WGIII agreement on a Code of Conduct seems closer.

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