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The Draft Code of Conduct for Adjudicators in International Investment Disputes: Low-Hanging Fruit or Just an Appetizer?

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In the forest of reform deliberations at the UNCITRAL Working Group III (ISDS Reform), the development of a draft Code of Conduct for decision-makers in investment disputes (Draft Code) was considered a low-hanging fruit. WGIII delegates and commentators frequently used this metaphor to reflect on the consensus among the key stakeholders that the Code should be attainable as a comprehensive, universal, and binding instrument. However, at the end of the deliberations, the Draft Code was split into two instruments (one for arbitrators and one for judges in standing investment courts) and finalized as the clock ran down as a hard-earned compromise. The drafting process revealed all the complexities and underlying tensions that may impede progress, even on widely accepted reform options.

While the scope and critical provisions of the Draft Code have already been analyzed in detail here, this post will highlight the challenges and trade-offs that emerged during its negotiation and drafting, placing them in the broader context of the ISDS reform process. These observations will be complemented by possible lessons that can be drawn from the journey of the Draft Code for the instruments pursued in other fields of reform.

Draft Code of Conduct: From Unity to Bifurcation

During the preliminary WGIII discussions, it was uncontroversial that the Draft Code should address all of the main concerns identified by the WGIII and apply commonly to ad hoc arbitrators in ISDS proceedings and eventually to the judges of a multilateral investment court (MIC) that the European Union (EU) has been fiercely promoting as a systemic reform for ISDS. In this sense, the Draft Code would be viable regardless of the broader implications and dynamics of the ISDS reform process. At the same time, the proponents of systemic reform remarked that the Draft Code is indeed a “healthy and low-hanging fruit within reach” but that it is only an “appetizer” while the EU is waiting for the establishment of MIC as the “main course.”

Rather than delaying the adoption of the Draft Code of Conduct in pursuit of a harmonized and universal instrument, the WGIII opted to move forward and present the Code of Conduct for Arbitrators to the UNCITRAL Commission in July 2023 for adoption, and to submit the Code of Conduct for Judges for adoption in principle, pending finalization at a later stage. The final provisions of the draft Code(s) suppose a delicate balancing act, reflective of the trade-offs and

compromises that marked the deliberations and drafting process. Such an approach was necessary in light of the broader dynamics of ISDS reform.

Drafting a Code of Conduct in a Polarized the ISDS Reform Process

While the views among WGIII delegations differed on the scope and terminology of certain provisions, a unified Code was considered as an attainable and non-controversial milestone in the ISDS reform process. However, the EU and its member states made it clear in their submissions that the judges of a multilateral investment court (MIC) would require different rules than those applicable to arbitrators. Thus, in the comments to the second Draft Code the EU proposed adjusted language for multiple provisions that should apply to judges or exclude them from the scope of specific provisions altogether.

The EU has consistently infused considerations of different options for WGIII reform instruments, accommodating the intended functions of the MIC and carving out space in all the reform areas for the hypothetical standing investment court and its judges. Nevertheless, such polarizing views pose a viable risk to the progress on attainable and targeted reforms that could, in fact, improve the practice of ISDS and mitigate some of the issues and concerns previously highlighted within the WGIII.

While the WGIII is deliberating reform options in the context of both *ad hoc* arbitration and a potential MIC, it is impossible to adopt unified reform instruments at a moment when the structure, features, and functions of a standing investment court are not yet clearly defined or widely accepted outside the EU (or, for that matter, even within its borders). While it has been discussed from the conceptual perspective and in various procedural contexts, the WGIII delegations have not yet discussed in detail the mandate, procedural rules or financing of the MIC, or the functions of its judges.

Therefore, the WGIII would not be able to accomplish significant strides in the ISDS reform process if the development and adoption of the reform instruments applicable to *ad-hoc* ISDS arbitration were to be delayed in anticipation of further deliberations on the MIC.

Rather than delaying the adoption of the Draft Code of Conduct until it can be crafted into a single instrument, the WGIII opted to move forward and present the Code of Conduct for Arbitrators to the UNCITRAL Commission in July of 2023 for adoption, and to submit the Code of Conduct for Judges for adoption in principle, pending finalization at a later stage.

The Draft Code of Conduct for Arbitrators: A Roadmap for Future Reform Instruments

The thoughtful and transparent development of the Draft Code reflected the common understanding of the concerns related to the conduct and accountability of decision-makers in investment disputes. However, once it became apparent that a unified and harmonized instrument would not accommodate the proposals on both reform tracks, the WGIII did not allow the derailment of the significant progress made on the Draft Code for arbitrators. The timely decision of the WGIII to proceed with the finalization of the Draft Code for arbitrators affirms the value of compromise and targeted reform, even in the face of solid currents pulling in the opposite

direction.

Since the dichotomy of gradual and systemic reform has become an integral part of the WGIII dynamics, it is worth noting some possible lessons for the broader ISDS reform process that can be drawn from the journey of the Draft Code. First, it would be useful to determine whether the relevant reform option is equally viable for the ad hoc and standing dispute resolution mechanism and make the separation early, if the simultaneous deliberation of both will derail the adoption of the reform instrument. Although it was clear early on that a unified Code of Conduct could not accommodate both reform directions, the codes were finally separated at the very latest stages of the process. Second, the drafters could consider the degree of integrated flexibility of the reform instrument at the outset to avoid circular discussions and impasses related to specific contested details (such as timeframes or exceptions). For example, if a provision is subject to waiver or party agreement, the default rule can be a compromise between polarized views (which was ultimately accomplished with the rules on double hatting in the Draft Code).

Third, the implementation and enforcement mechanisms for the relevant reform options should be defined early to anchor the relevant reform instrument in a normative framework. Deliberating concrete norms in a legal vacuum without a clear enforcement mechanism can only delay or hinder the desired outcome. This is also likely to reduce the effectiveness even of the most robust provisions if they will still be subject to (and potentially in tension with) the existing standards. Unfortunately, the Draft Code does not provide a defined implementation and enforcement mechanism, leaving space for fragmentation and uncertainty, which it was meant to eliminate.

Finally, there is no need to reinvent the wheel for issues already regulated elsewhere. For example, after two years of deliberating an all-encompassing and alternative disclosure standard, the final text of the Draft Code was aligned with the standard adopted in the UNCITRAL Arbitration Rules. This general provision is now complemented with additional guidance in the commentary, which clarifies the specific disclosure requirements and references the IBA Guidelines for Conflict of Interest in International Arbitration as a valuable resource for decision-makers. It was a long detour to the best outcome, which was already within reach.

Conclusion

The trajectory and progress of the Draft Code is a good roadmap for other areas of ISDS reform to avoid the pitfalls and delays associated with a two-track reform, pursuing gradual and systemic solutions. It remains to be seen whether the Commission will adopt the Draft Code for arbitrators and how it will interact with the existing rules and procedures until a special enforcement framework is established. In any case, it stands as an important milestone for the WGIII as we await further progress on instruments that will shape the future of ISDS as we know it.

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