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Investor-State dispute settlement (ISDS) reform

Draft code of conduct: Means of implementation and enforcement

Note by the Secretariat

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I. Introduction

1. The Secretariats of ICSID and UNCITRAL have jointly prepared a draft code of conduct for adjudicators handling international investment disputes (“IID”) (hereinafter, the “Code”) as found in document A/CN.9/WG.III/WP.209.¹ The Code reflects the joint discussions organized by the ICSID and UNCITRAL secretariats on the contents of the Code,² taking into consideration that the Code should be binding and contain concrete rules rather than guidelines (A/CN.9/1004*, paras. 52 and 68). It aims at providing a uniform approach to requirements applicable to adjudicators handling IID and to give more concrete content to broad ethical notions and standards used in any applicable instrument.

2. On this basis, article 11 of the Code addresses the consequences of non-compliance with the relevant provisions of the Code. Paragraph 1 establishes the principle of voluntary compliance and paragraph 2 refers to the disqualification and removal procedures that are usually provided for in the applicable procedural rules (see section III below). The Code indeed does not operate in isolation and is meant to apply in conjunction with applicable procedural rules.

3. Article 11 is closely connected to the means of implementation of the Code as such means will have an impact on the available sanctions and their enforcement. The purpose of this note is to outline the possible means of implementation of the Code as a binding standard (section II) and to also explore the possible sanctions in case of non-compliance (section III). The Working Group may wish to note that considerations on sanctions and their application could be further developed in a commentary to the Code.

II. Means of implementation of the Code

A. General comments

4. The Working Group may wish to note that the different means of implementation presented below are not mutually exclusive and could be implemented concomitantly. In that light, the Working Group may wish to consider how to ensure that any revisions made to the Code would be reflected consistently across the various means of implementation if the Code is agreed and implemented through multiple channels (see para. 6 below).

B. Incorporation in investment treaties

1. Incorporation through a multilateral instrument

5. The Code is meant to serve as a unique and universal standard that would permit a harmonized approach to ethical requirements for adjudicators in IID. Implementation of the Code through a mechanism adopted at a multilateral level would be an effective way to achieve harmonized application.

¹ For deliberations by the Working Group on the question of a code of conduct, see documents A/CN.9/1004*; A/CN.9/964; A/CN.9/935; and A/CN.9/930/Add.1/Rev.1; for submissions by States on this matter, see A/CN.9/WG.III/WP.156, Submission from the Government of Indonesia; A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its member States; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.177, Submission from the Government of China.

² See compilation of comments received from delegations, available at <https://uncitral.un.org/en/codeofconduct>.

6. The Code could form part of a multilateral instrument on ISDS reform (see [A/CN.9/WG.III/WP.194](#)), by including in the instrument a general statement of applicability or by incorporating the contents of the Code, reflecting the agreement of the States parties to apply the Code to IID arising under their investment treaties. The Code would then become applicable to IID cases arising under the treaties covered by the multilateral instrument (i.e. treaties between such States that are also parties to the multilateral instrument). A review mechanism would need to be provided for in the multilateral instrument so that the Code could be periodically updated in a flexible way.

7. Under this approach, it would be necessary to address any inconsistencies that exist between the provisions of the Code and ethical requirements contained in applicable procedural rules or in investment treaties which form the basis of consent to the IID settlement. The Working Group may wish to consider article 2(5) of the Code which seeks to address this issue, and to note that the chosen implementation method will have to be consistent with article 2(5) of the Code.

2. Incorporation on a treaty-by-treaty basis

8. The Code could also be used as a template by States parties to investment treaties and could be incorporated in such treaties. In such a case, the Code would apply to all IID cases arising under such treaties, which would thereby reduce the potential for multiple applicable codes.

9. Such means of implementation would rely on States parties to investment treaties and would ensure that disputing parties abide by such provisions in investment treaties. This approach might however take time and might not guarantee wide, uniform (and quick) acceptance at a multilateral level.

10. The Working Group may wish to consider whether incorporation into investment treaties on a treaty-by-treaty basis could be encouraged by a recommendation of the United Nations General Assembly in support of the wide use of the Code and its application through appropriate mechanisms.

C. Agreement of disputing parties on a case-by-case basis

11. If the relevant investment treaty is silent on the application of the Code or does not provide for the application of other standards, disputing parties could still agree to the application of the Code on a voluntary basis, ideally before the adjudicators are appointed. In that case, the Code would be binding on the adjudicators in those disputes and the adjudicator could confirm this by signing the declaration provided in the Code.

12. It may be noted that this case-by-case approach would, however, not guarantee wide and uniform application.

D. Incorporation in procedural rules, adjudicators' declarations or court rules and regulations

1. Incorporation in procedural rules

13. The Code could be incorporated into the procedural rules of arbitral institutions, which may require amending such rules to address possible discrepancies between the rules and the Code. The Working Group may wish to note the following preliminary observations regarding the incorporation of the Code in the ICSID and UNCITRAL Rules.

ICSID

14. The Code could be added as an annex to the ICSID Convention Arbitration Rules and the Additional Facility Arbitration Rules or be incorporated into the

arbitrator's declaration which is referred to in these Rules. Whether any amendment to the Rules will be required or desirable will depend on the final method of implementation and the contents of the Code as finalized.³

15. It should be noted that disqualification procedures are governed by articles 14, and 56 through 58 of the ICSID Convention and that arbitrators (and conciliators) cannot be disqualified for other reasons.

16. It may be noted that there is an outstanding question on whether the application of the Code would extend to contract and foreign law cases, and therefore the question whether the Code would apply just to IID cases at ICSID (as the current version proposes) or whether it would also apply to contracts and foreign law cases would require further consideration.

17. Similarly, if a prohibition on double hatting were to be adopted, ICSID would be unable to appoint designees to the ICSID Panel of Arbitrators who act as counsel and arbitrators. ICSID is called upon to appoint from this Panel in numerous cases under the ICSID Convention. Because many designees on the list act in both roles, such a prohibition would exclude many highly qualified candidates, reducing considerably the pool of potential appointees. Unless the designees resign from the ICSID Panel, ICSID member States would need to wait until the expiration of the mandate (6-year term) of the relevant designee to replace that person.

UNCITRAL

18. The Code could be added as an annex or appendix to the UNCITRAL Arbitration Rules. The Code would supplement the section "Disclosures by and challenge of arbitrators" (arts. 11 to 13 UNCITRAL Arbitration Rules).

19. The Working Group may wish to consider whether, given the generic applicability of the UNCITRAL Arbitration Rules, it would be necessary to clarify that the Code would apply only to IIDs.

20. Further clarifications and adjustments might be needed. For instance, the relationship between article 11 of the UNCITRAL Arbitration Rules and article 10 of the Code on disclosures would need to be clarified, which might result in an amendment to the UNCITRAL Arbitration Rules.

21. Therefore, it should be considered that incorporation of the Code might imply further amendments to the Rules.

Arbitral institutions

22. Should arbitral institutions active in the field of IID agree to incorporate the Code in their procedural rules, similar considerations would apply in relation to consistency of the Code with their own institutional rules (or code of conduct, if available).

2. Incorporation in the arbitrators' declaration, as an annex to the declaration

23. It may be noted that procedural rules of ICSID, UNCITRAL and arbitral institutions active in the field of IID usually include a model declaration by arbitrators regarding their independence, impartiality and availability. In most cases, such a declaration must be filed by arbitrators upon acceptance of nomination. Incorporating the Code in the arbitrators' declaration would mean that arbitrators would undertake to be bound by the Code.

24. Such an approach would require amending the content of the current declarations as annexed to the applicable rules, and might also entail amendment of the relevant rules.

³ Available at https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf.

25. The Working Group may wish to note that the relevant obligations in the declaration are only applicable once the declaration has been signed, likely just prior to or upon the constitution of the tribunal. As a result, candidates would not be bound by the declaration.

3. Incorporation into the legal framework of a standing mechanism

26. The Code has been designed to be applicable to adjudicators in IID, which also includes judges in a standing mechanism if one were to be established.

27. The Working Group may wish to note that the Code could be made part of the founding instruments of the standing mechanism or part of the procedural rules and regulations of the standing mechanism. The latter option would make it easier to revise the Code on a regular basis.

28. Considering that a standing mechanism could include an appellate level, whether the Code should apply, as currently provided for, without any distinction as to the level of adjudication, would need to be considered.

III. Enforcement (sanctions and their application under article 11 of the Code)

A. General remarks

29. The Working Group may wish to recall that, at its thirty-eighth session, it was indicated that the Code should include sanctions that would be sufficiently strict to have a deterrent effect, and that any authority expected to apply the sanctions must have the legal and jurisdictional authority to do so. It was also noted that depending on the type of non-compliance, different types of sanctions could be provided. Another aspect mentioned was that safeguards should be provided to ensure that sanctions are not used inappropriately as a way to delay the proceedings ([A/CN.9/1004*](#), para. 77).

30. The question of possible sanctions should also be considered in light of whether flexibility to adapt or adjust the obligations would be provided for in the Code.

B. Existing sanctions

31. Pending further consideration of possible sanctions in case of non-compliance with the obligations contained in the Code, it may be noted that some sanctions are already provided for in applicable procedural rules and would apply in accordance with the provisions of those rules.

32. One of the prevalent means to enforce obligations in procedural rules is removal through the challenge of arbitrators, which may differ depending on the applicable rules. This comes in addition to the possibility for an adjudicator to resign should a potentially disqualifying fact arise in the course of tribunal constitution or subsequently. The removal of an arbitrator, following a challenge, is the legal consequence of the application of the rules and not the result of a discretionary decision of an authority (a secretariat of an institution or an appointing authority).

C. Possible additional sanctions

33. Other types of sanctions such as reduced remuneration and disciplinary measures have been mentioned at the thirty-eighth session of UNCITRAL Working Group III, ([A/CN.9/1004*](#), paras. 62–64 and 77).

34. Arbitral institutions active in the field of IID may have administrative means of addressing non-compliance, for example by reducing fees, publishing information

about the timeliness of rulings, or otherwise. Parties may have recourse to professional accreditation bodies, for example bar associations, by submitting complaints.

35. Given the ad hoc nature of the UNCITRAL Arbitration Rules, if sanctions, in addition to challenge and removal procedures, were provided for in the Code, consideration should be given as to which authority would have the capacity to impose such sanctions. Similarly, application of sanctions in the context of ICSID arbitration as well as a standing mechanism would require further consideration.

36. Should a standing mechanism be created as part of the reform options, the responsibility of enforcing the Code could be given to its registrar, to the court in its plenary or to its president, depending on its governing structure.
