

Reform of Investor-State Dispute Settlement

ISDS Academic forum– ICSID - UNCITRAL

THE DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN ISDS

Webinar on 18 November 2020, 2-4 pm (CET)

The ICSID and UNCITRAL Secretariats together with the ISDS Academic Forum are organizing a webinar on the draft code of conduct for adjudicators in ISDS. The webinar will focus in particular on the key issues covered by the draft code.

See attached:

- Text of the draft code of conduct for adjudicators in ISDS (Annex 1)
 - Background information (Annex 2)
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The webinar is open for participation to all UNCITRAL Working Group III member and observer States delegations as well as inter-governmental and non-governmental organizations with observer status. Please, contact the Secretariat for the connection details at uncitral@un.org and join on 18 November 2020, from 2-4 pm (CET).

Programme

Opening of the session (2.00-2.10)

Welcome remarks, by:

- Anna Joubin-Bret, Secretary, UNCITRAL
- Meg Kinnear, Secretary-General, ICSID
- Malcolm Langford, ISDS Academic Forum

Consideration of topics

1) *Conflicts of interest and disclosure, Issue conflicts (2.10-2.40)*

- Background information on *articles 4 and 5* of the draft code of conduct, by Meg Kinnear.
- Comments by Chiara Giorgetti (University of Richmond), including on the broader context and question whether disclosure requirements are “too demanding or too lax”, should issue conflicts be defined more closely.

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- Opening of the floor to participants.

2) *Limits on multiple roles (double hatting) and availability (2.40-3.10)*

- Background information on *articles 6 and 8* of the draft code of conduct, by Anna Joubin-Bret.
- Comments by Mohamed Wahab (Cairo University)(tbc) /Daniel Behn (Queen Mary University of London), including on the questions of how stringently double hatting and commitments to availability would be regulated, and the extent to which the draft code would more generally contribute to address the issue of lack of diversity in ISDS.
- Opening of the floor to participants.

3) *Application to both arbitration and judges, Sanctions for non-compliance (3.10-3.40)*

- Background information on *articles 2 and 13* of the draft code of conduct, by Anna Joubin-Bret and Meg Kinnear.
- Comments by Maria Chiara Malaguti (Catholic University of Rome) on application to all types of adjudicators, the feasibility of enforcing sanctions against adjudicators and on the possible types of sanctions.
- Opening of the floor to participants.

4) *What additional topics would need to be addressed in a code of conduct (3.40-3.50)*

- Opening of the floor for comments by all participants.

Concluding remarks (3:50-4:00 pm)

Shane Spelliscy, Chairperson, Working Group III.

Annex 1 – Draft code of conduct for adjudicators in ISDS

Article 1 Definitions

For the purpose of this Code:

1. “Adjudicators” means arbitrators, members of international *ad hoc*, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes;
2. “Assistants” means persons working under the direction and control of the adjudicators, who assist them with case-specific tasks, including research, review of documents, drafting and other relevant assignments as agreed in the proceeding;
3. “Candidates” means persons who have been proposed or contacted for selection and potential appointment as adjudicator but have not yet been confirmed in this role;
4. “Investor-State dispute settlement” (ISDS) means a mechanism to resolve disputes involving a foreign investor and a State or a Regional Economic Integration Organization (REIO), or any constituent subdivision of the State or an agency of the State or the REIO, whether arising under an investment treaty, domestic law or an agreement by the parties to the dispute.

Article 2 Application of the Code

1. This Code applies to all persons serving as adjudicators in ISDS proceedings. Adjudicators shall take appropriate steps to ensure that their assistants are aware of, and comply with, the relevant provisions of this Code.
2. Candidates must comply with the relevant provisions of the Code as soon as they are contacted in relation to a possible appointment.

Article 3 Duties and Responsibilities

At all times, adjudicators shall:

- (a) Be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias;
- (b) Display the highest standards of integrity, fairness and competence;
- (c) Be available and act with diligence, civility and efficiency;

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- (d) Comply with any confidentiality and non-disclosure obligations.

Article 4

Independence and Impartiality

1. Adjudicators shall at all times be independent and impartial.
2. In particular, adjudicators shall not:
 - (a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism;
 - (b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;
 - (c) Take action that creates the impression that others are in a position to influence their conduct or judgement;
 - (d) Use their position to advance any personal or private interests; or
 - (e) Directly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties.

Article 5

Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.
2. Disclosures made pursuant to paragraph (1) shall include the following:
 - (a) Any professional, business and other significant relationships, within the past [five] years with:
 - (i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];
 - (ii) The parties' counsel;
 - (iii) Any present or past adjudicators or experts in the proceeding;
 - (iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];
 - (b) Any direct or indirect financial interest in:
 - (i) The proceeding or in its outcome; and
 - (ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;

- (c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and
 - (d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].
3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.
 4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.

Article 6

Limit on Multiple Roles

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

Article 7

Integrity, Fairness and Competence

1. Adjudicators shall have the highest standards of integrity and fairness. They shall ensure that parties are treated with equality and that each party is given a reasonable opportunity of presenting its case.
2. An adjudicator shall not engage in *ex parte* contacts concerning the proceeding.
3. Adjudicators shall act with competence and shall take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties. Candidates should only accept appointments for which they are competent.
4. Adjudicators shall not delegate their decision-making function to any other person.

Article 8

Availability, Diligence, Civility and Efficiency

1. Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently and expeditiously throughout the proceeding. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.

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2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]
 3. Adjudicators shall be punctual in the exercise of their functions.
 4. Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.

Article 9 Confidentiality

1. Adjudicators shall not:
 - (a) Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding;
 - (b) Disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interests of others; and
 - (c) Disclose deliberations of an ISDS tribunal, or any view expressed by an adjudicator during the deliberations.
2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them. They shall not publicly disclose any decision, ruling or award until it is in the public domain [and they shall not comment on any decision, ruling or award in which they participated].

Article 10 Pre-appointment Interviews

1. Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings.
2. [If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]

Article 11 Fees and Expenses

1. Any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, when possible, shall be communicated to the parties through the entity administering the proceeding.
2. Adjudicators shall keep an accurate and documented record of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant.

Article 12

Enforcement of the Code of Conduct

1. Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code.
2. The disqualification and removal procedures in the applicable rules shall continue to apply.
3. [Other options based on means of implementation of the code]

Annex 2 – Background information

The following documents contain information on the history and current status of the discussion on a draft code of conduct in Working Group III and provide for a basis for the discussions.

- Material can be found on the UNCITRAL website (<https://uncitral.un.org/en/codeofconduct>).
 - See also bibliographic references published by the Academic Forum, available under “Additional resources” at https://uncitral.un.org/en/working_groups/3/investor-state or <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/> and <http://bit.ly/isds-academic-forum>
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