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Possible reform of investor-State dispute settlement (ISDS)

Draft code of conduct

Note by the Secretariat

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I. Introduction

1. This document includes a draft code of conduct for adjudicators, with a commentary on the proposed articles. It was prepared jointly by the Secretariats of ICSID and UNCITRAL. A full commentary of the text of the draft code of conduct is available at <https://uncitral.un.org/en/codeofconduct>.
2. By way of background regarding ICSID, the Centre has considered the question of a code of conduct for adjudicators in its recent proposals for rule amendments. The development of a code of conduct was left for further discussion in the context of the joint efforts of UNCITRAL and ICSID in this area, as reflected in this document.
3. By way of background regarding UNCITRAL, the Working Group agreed to discuss, elaborate and develop multiple potential ISDS reform solutions simultaneously (A/CN.9/970, para. 81). In that light, it decided to undertake preparatory work on a number of topics, including the preparation of a code of conduct with ICSID. This work would encompass the implementation of a code of conduct in the current ISDS regime and in the context of potential standing multilateral mechanisms for ISDS (A/CN.9/970, para. 84).
4. The Working Group considered the matter at its thirty-eighth session, in October 2019, on the basis of a document prepared with ICSID (A/CN.9/WG.III/WP.167). General support was expressed for developing a code of conduct, identifying aspects that would apply commonly to ISDS tribunal members as well as elements that would be distinct for ad hoc and permanent members (A/CN.9/1004*, paras. 51 and 68). Proposals for reform have been submitted by Governments in preparation for the deliberations on the development of reform options, and many of these proposals include comments on a code of conduct.
5. The proposed code seeks to reflect the deliberations of the Working Group to date (A/CN.9/1004*, paras. 51–78), 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 provides applicable principles and detailed provisions allowing for flexibility to address unforeseen circumstances (A/CN.9/1004*, paras. 56 and 68).
6. In addition, as requested by the Working Group, the code includes standards applicable to arbitrators, judges and other types of adjudicators (A/CN.9/1004*, paras. 55 and 68). For this purpose, the comprehensive term “adjudicator” is used in the code to ensure its application to all those who adjudicate ISDS cases, regardless of whether they are arbitrators, members of annulment committees, members of an appeal mechanism or judges on a bilateral or multilateral standing mechanism (permanent court).
7. The code has been prepared based on a comparative review of the standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts. It is also based on analyses by the Secretariats of ICSID and UNCITRAL, as contained in document A/CN.9/WG.III/WP.167 (see also document A/CN.9/WG.III/WP.151).
8. This code of conduct contains an initial section that defines relevant terms (article 1) and addresses the applicability of the code (article 2). Article 3 provides an overview of the obligations of adjudicators. Provisions included in the code would apply to all adjudicators. Exceptions are mentioned in the commentary. In addition, the code might need to be further adapted as work progresses on possible reforms to the selection and appointment of adjudicators. Articles 4 to 9 of the code expand on the principles and requirements in article 3. The code requires every adjudicator to be independent and impartial and to avoid conflicts of interest. It includes regulation of repeat appointment, multiple roles (“double hatting”) and issue conflict and requires extensive disclosure. The code requires all adjudicators to apply the highest standards of integrity and diligence, including fairness, competence, civility and efficiency. Article 9 regulates the duty of confidentiality. Articles 10 and 11 on interviews and on fees apply where adjudicators are appointed by the parties, and their fees are paid

by party advances, either directly or through an arbitral institution. Article 12 addresses enforcement of obligations contained in the code. Such procedures may need to be considered further if alternative or additional options for enforcement are adopted, if an advisory centre or other body was given responsibility for enforcement of the code, or if a permanent court with jurisdiction to enforce such sanctions were to be established.

II. Draft code of conduct – Text

9. The text of the draft code of conduct for adjudicators in investor-State dispute settlement reads as follows:

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;
- (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.
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 assistants.

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.]
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