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Possible future work in the field of dispute settlement: Ethics in international arbitration

Note by the Secretariat

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I. Introduction

1. At its forty-eighth session, in 2015, the Commission had before it a proposal for future work on a code of ethics for arbitrators in investment arbitration (A/CN.9/855), which suggested that work on the topic could relate to the conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.[1] After discussion, the Commission requested the Secretariat to explore the topic in a broad manner, including in the field of both commercial and investment arbitration, taking into account existing laws, rules and regulations, as well as any standards established by other organizations. The Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[2]

2. At its forty-ninth session, in 2016, the Commission considered a note by the Secretariat, which outlined the concept of ethics in international arbitration as well as existing legal frameworks on ethics (A/CN.9/880). The note also posed some questions to be considered by the Commission before possibly engaging in future work in that area. After discussion, the Commission requested the Secretariat to continue exploring the topic further, in close cooperation with experts including those from other organizations working actively in that area, and to report to the Commission at a future session on the various possible approaches.[3]

3. In accordance with that request, the purpose of this note is to explore the concept of ethics in international arbitration, to identify existing legal frameworks, and to raise questions with regard to the topic as an item for possible future work by the Commission.[4] This note is limited to exploring ethics of arbitrators, and does not address other participants in the arbitration process, such as counsel, experts, or third-party funders.

II. Existing legal frameworks and possible future work

A. Existing legal frameworks on ethics in international arbitration

4. With the expansion of international arbitration, a variety of texts on ethics have been developed by various actors, including local bar associations, arbitral institutions and international organizations. Ethical standards have been either formulated in a stand-alone text, or included in national legislation on arbitration, in arbitration rules, in guidelines and, more recently, in investment treaties as a complement to investor-State dispute settlement provisions. Some texts have a binding effect, whereas others are meant to provide general guidance. State court decisions on challenge to arbitrators as well as on setting aside or enforcement of arbitral awards are also relevant as such decisions often constitute a last resort review of the arbitrators' conduct, thereby providing a source of information on the application of ethical standards.

1. National legislation

5. The UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration" or "Model Law") has been enacted in a large number of jurisdictions[5] and its articles 12 and 13 on grounds for challenge and challenge

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 148.
[2] Ibid., para. 151.
[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 182-186.
[4] The Commission may wish to note that the Secretariat consulted, among others, with the International Council for Commercial Arbitration (ICCA) for the preparation of this note.
[5] The list of jurisdictions which have enacted legislation based on the Model Law on Arbitration can be found on the Internet at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

procedure shed light on the conduct expected of arbitrators. Article 12 imposes on each arbitrator a continuing duty to disclose to the parties circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence.[6] The Model Law also makes it clear that arbitrators cannot be challenged for reasons other than those mentioned in article 12(2).[7] Article 12(2) pursues two additional objectives. The first is to reinforce party autonomy in the choice of arbitrators by providing that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he or she does not possess qualifications required by the parties. The second is to prevent parties from abusing the trust of their opponents by engaging in contradictory behaviour. That objective is achieved by forbidding a party from challenging an arbitrator appointed by it, or in whose appointment it has participated, on the basis of circumstances known to that party at the time of the appointment.

6. The procedure applicable to challenges to arbitrators is addressed in article 13 of the Model Law, which sets out a two-stage procedure. In a preliminary phase, challenges are handled by the arbitral tribunal, according to either a procedure agreed to by the parties or the default procedure set out in article 13(2). Challenges that have not been successful at that preliminary phase may subsequently be brought to a court or competent authority, whose decision on the matter is final.

7. The Model Law has also influenced jurisdictions that have yet to enact legislation based on it. Accordingly, national arbitration laws usually have provisions that address disclosures by, and challenges to, arbitrators. In addition, certain national arbitration laws impose specific obligations on arbitrators, for example, when arbitrators have knowledge about criminal wrongdoing by the parties.

2. Arbitration rules

8. Most arbitration rules include general principles on impartiality and independence of the arbitrators and detailed rules on the procedure for challenging an arbitrator. For instance, the UNCITRAL Arbitration Rules (as revised in 2010) deal with disclosure by, and challenge of, arbitrators in articles 11 to 13. An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence in accordance with article 12(1). If the other party does not agree or the arbitrator does not withdraw voluntarily, the party challenging the arbitrator may seek a decision on the challenge by the appointing authority. Institutional arbitration rules contain similar provisions, sometimes with slight variations.[8]

9. In the investor-State dispute settlement context, article 14 of the ICSID Convention, for example, requires arbitrators and conciliators to be "persons of high moral character and recognized competence (…) who may be relied upon to

[6] Article 12(1) of the Model Law on Arbitration provides: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."

[7] Article 12(2) of the Model Law on Arbitration provides: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made". The *travaux préparatoires* indicate that proposals were made to delete the word "only" in article 12(2) but it was considered preferable to retain that word to clearly emphasize that possible additional grounds for challenge provided for in domestic law should not apply in the context of international commercial arbitrations (see *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), paras. 116-119).

[8] For instance, the Arbitration Rules of the ICC International Court of Arbitration in effect as of 1 March 2017 refer to "an alleged lack of impartiality or independence".

exercise independent judgment". This requirement is supplemented by filing a declaration of independence at the beginning of the proceedings, as provided for under ICSID Arbitration Rule 6(2). Article 57 of the ICSID Convention further provides a mechanism by which a party may seek disqualification of an arbitrator by showing "a manifest lack of the qualities required (…)".

3. Guidance texts

10. In line with the provisions found in national legislation and arbitration rules, standards addressing the question of professional ethics and conflicts of interest have been developed by international organizations referring to the principle that arbitrators have a continuing obligation to remain impartial and independent.[9]

11. Recently, a number of arbitral institutions have established codes of conduct for arbitrators. Some of these codes are general moral guidelines, while others cover specific situations that occur during arbitration.

4. Case law

12. As mentioned above, the Model Law on Arbitration, including its articles 12 and 13, has been enacted in a number of jurisdictions. The Model Law, however, does not define terms such as "justifiable doubt", "impartiality", "independence", and thus State courts have used their respective standards to interpret those notions.

13. National courts have developed jurisprudence regarding arbitrator's obligations, specifically on the impartiality and/or independence requirements, and the level of proof required to establish a violation. The 2012 Digest of Case Law on the Model Law on Arbitration provides an analysis of the relevant court decisions.[10] Courts have highlighted the mandatory nature of impartiality and independence. Some decisions have underlined that there should be objective circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator for a challenge to be successful. For example, the notion of "justifiable doubts" has sometimes been interpreted to require a showing of objective facts that a reasonable, well-informed person would regard as constituting a bias on the part of the arbitrator. Some jurisdictions require a real manifestation of bias before an arbitrator can be removed. In certain jurisdictions, an analysis of circumstances that may affect the arbitrator's judgment and raise reasonable doubts in the mind of the parties as to the arbitrator's independence and impartiality is required.[11]

14. Decisions by courts with regard to article 36 of the Model Law on Arbitration on grounds for refusing recognition and enforcement of arbitral awards may also be relevant in relation to the interpretation of ethical standards. Article 36, which mirrors article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"), does not include provisions that specifically address arbitrators' ethical obligations. Hence, in order to challenge the arbitrator's conduct, parties must argue that the arbitrator's conduct violates one of the exceptions for enforcing the award. Under article 36, the two provisions that are most often invoked are that the non-disclosure of information by the arbitrator caused the tribunal to not be constituted in compliance with the parties' agreement or the law at the place of arbitration (article 36(1)(a)(iv)) or that the arbitrator's conduct violated the public policy of the enforcement jurisdiction (article 36(b)(ii)). Parties have also argued that the arbitrator's alleged partiality prevented the party from presenting its case (article 36(1)(a)(ii)) or that

[9] For instance, the American Arbitration Association/American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes (2004), the Code of Professional and Ethical Conduct of the Chartered Institute of Arbitrators (2009), the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

[10] See 2012 UNCITRAL Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, available on the Internet at: http://www.uncitral.org/uncitral/en/case_law/digests.html.

[11] Ibid.

the conduct of the arbitrator was outside the scope of the arbitrator's power (article 36(1)(a)(iii)).[12]

15. The most common basis for claims under the New York Convention has been that the alleged misconduct violates the public policy of the enforcement jurisdiction. However, these defences to enforcement presented on the basis of article V(2)(b) of the New York Convention have been rarely successful. Courts have sometimes underlined that the conduct of the arbitrator was not covered by public policy and that the party should have raised the matter during the arbitral proceedings.[13]

16. There have been a number of cases in different jurisdictions, in which parties have challenged arbitrators based on their past or existing experience, including as arbitrator or counsel. This matter is sometimes referred to as issue conflict. Issue conflict, also described as "inappropriate predisposition",[14] has been raised in cases where parties allege that an arbitrator's past publications or participation in prior awards indicate a lack of impartiality (see also below, para. 23).[15] In different circumstances, parties have challenged arbitrators based on their service as counsel either for or against one of the parties or in previous disputes involving issues that are related to the pending dispute. Courts have rendered divergent decisions on the matter. Some decisions sustain the challenges and note that the issue can pose legitimacy concerns for the arbitral process. Others have adopted the opinion that having a dual role as arbitrator and counsel is a common and acceptable practice in international arbitration.[16] The case law reviewed by the Joint ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration indicated "reluctance on the part of decision makers in investor-State cases to sustain challenges involving claims of three types of alleged inappropriate predisposition: (i) past publications, (ii) past advocacy as counsel and (iii) participation in prior awards, absent unusual circumstances".[17]

5. Code of ethics in investment treaties

17. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement arising under that treaty, thereby complementing the provisions of the applicable arbitration rules (see above, paras. 8 and 9).[18] Those codes usually address the standards of conduct for arbitrators (and other persons), their duties in the conduct of the arbitration, the disclosure obligations and the obligations of confidentiality.[19] They usually do not

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[12] Ibid.

[13] Relevant case law available on the Internet at: http://www.newyorkconvention1958.org.

[14] See ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No. 3, 17 March 2016, available on the Internet at: http://www.arbitration-icca.org.

[15] Ibid.

[16] Ibid., paras. 128-133. See also 2012 UNCITRAL Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, available on the Internet at: http://www.uncitral.org/uncitral/en/case_law/digests.html.

[17] ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No. 3, 17 March 2016, available on the Internet at: http://www.arbitration-icca.org, para. 151.

[18] See, for instance the European Union-Singapore Free Trade Agreement (Annex 15-B, Code of Conduct for Arbitrators and Mediators, version as of May 2015); and Canada-European Union Comprehensive Economic Trade Agreement (CETA) (Annex 29-B, Code of Conduct for Arbitrators and Mediators).

[19] The following provides a brief introduction of the structure and matters covered in the CETA Code of Conduct: The first section of the Code states the fundamental principle that "[e]very candidate and member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved." The second section addresses the disclosure obligations for arbitrator candidates. The third section requires arbitrators to perform their obligations thoroughly and

provide for sanctions, other than the right of both parties to demand replacement of the arbitrator.

B. Possible approaches for future work

18. Two possible approaches could be considered for future work on ethics: the first being the preparation of a substantive code of ethics seeking to provide harmonization and clarity, for instance with regard to the disclosure and challenge procedures; and the second being the preparation of guidelines on relevant and applicable ethical standards.

1. Possible topics for a code of ethics for arbitrators

(a) Impartiality and independence

19. Impartiality and independence are the core elements of integrity and ethical conduct of arbitrators. Arbitrators are expected to avoid direct and indirect conflicts of interest. Such conflicts usually result in the lack of impartiality or the lack of independence. Impartiality means the absence of bias or predisposition towards parties. Lack of impartiality would arise, for instance, if an arbitrator appears to have prejudged some matters in favour of one of the parties. Independence usually relates to the business, financial, or personal relationship of an arbitrator with a party to the arbitration, and lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel. Standards on ethics usually provide that ethical duties remain applicable throughout the duration of the arbitral proceedings.

20. A code of ethics would state that all arbitrators have to be independent and impartial, and comply with the same ethical standards. It could further explain how that key principle articulates with party autonomy on which arbitration is founded, achieving a proper balance between party autonomy and impartiality.

21. Sources sometimes differ concerning terminology. Regarding legislative texts, the UNCITRAL Model Law uses both the terms “independence” and “impartiality”.[20] The 1996 English Arbitration Act refers to the duty to be “impartial.”[21] The Swiss Federal Statute on Private International Law uses the term “independence”.[22] Courts and institutions have often used the terms “impartiality” and “independence” interchangeably, and their meanings have further developed through application.

22. A code of ethics could seek to address specific situations, to the extent this would be feasible. For instance, it is sometimes difficult to delineate information and knowledge that may have an impact on the impartiality and independence of the arbitrator, and to draw the line between acceptable knowledge and unacceptable knowledge that could lead to partiality or lack of independence.

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expeditiously and to ensure that their assistants and staff comply with the provisions of the code. The fourth section focuses on the independence and impartiality requirement of arbitrators. It states that arbitrators shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party, or fear of criticism. Arbitrators shall not accept any benefit that would interfere or appear to interfere with her or his duties. Arbitrators may not allow financial, business, professional, family, or social relationships or responsibilities to influence her or his conduct or judgment. The fifth section requires former arbitrators to avoid actions that may create the impression that they were biased in carrying out their duties or that they derived benefits from the arbitral decision. The sixth section requires arbitrators to maintain any information of the proceedings, or acquired during the proceedings, confidential and prohibits using such information for personal gain or for adversely affecting others’ interests. The seventh and eighth sections focus on expenses and mediators, respectively.

[20] UNCITRAL Model Law on International Commercial Arbitration, Article 12.

[21] Arbitration Act 1996, Chapter 23, provision 24 (1)(a).

[22] Swiss Federal Statute on Private International Law, Chapter 12, Article 180(c).

23. In this regard, the report of the ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration notes that formal 'bright line' rules regulating inappropriate prejudgment are unnecessary and would be counterproductive. The Task Force noted that its review of case law suggested that "it is not likely to be fruitful to try to articulate hard and fast rules about time periods triggering disclosures, blanket endorsements or preclusions of certain types of activities", due to the highly fact-dependent nature of the outcomes in challenge cases.[23] The 2004 AAA/ABA Code of Ethics draws the line by distinguishing between views on general issues and views on specific factual or legal points. The Code states: "A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration."[24]

(b) Disclosure obligations

24. The obligation of impartiality and independence is usually accompanied by a requirement that the arbitrator shall disclose circumstances, past or present, that could give rise to justifiable doubts as to his or her impartiality or independence. It is then for the arbitrator to declare that the disclosed circumstances do not affect, in his or her opinion, his or her independence and impartiality.[25] Most national laws and arbitral rules have adopted objective standards for disclosure.

25. Investment treaties may contain additional requirements regarding disclosure in the context of investor-State dispute settlement, specifying, for instance, that the arbitrators shall disclose any financial interest in the proceeding or in its outcome, and in any other proceedings that involve issues that may be decided in the case for which the arbitrator is under consideration.[26]

26. Specific requirements are also sometimes found in guidance texts on ethics,[27] such as that a prospective arbitrator shall disclose personal or business relationships with "any person known to be a potentially important witness in the arbitration".[28]

27. It is questionable whether arbitrators have a duty to investigate potential conflicts of interest. Some courts have found that arbitrators can be deemed impartial if they do not have knowledge about a certain conflict and that arbitrators do not have the duty to investigate unknown facts. Other courts have found that

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[23] See ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No. 3, 17 March 2016, para. 183, available on the Internet at: http://www.arbitration-icca.org.

[24] AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Comment to Canon 1.

[25] See, for instance, the model statement of independence contained in the Annex to the UNCITRAL Arbitration Rules (as revised in 2010) which gives an indication as to the elements that would be required to be disclosed: "Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances."

[26] See, for instance, Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Annex 29-B, Code of Conduct for Arbitrators and Mediators, Section on "Disclosure obligations", para. 4.

[27] See for instance, the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes; and the IBA Guidelines on Conflict of Interest in International Arbitration which indicate specific relationships that should be disclosed (the Red List in the IBA Guidelines shows circumstances that give rise to a conflict of interest; some circumstances in the Red List may be waived upon disclosure; the Orange List shows circumstances where a candidate has a duty to disclose and, after the disclosure, the parties are assumed to have waived their concerns after a period of thirty days; the Green List shows situations where there is no appearance of conflict from an objective viewpoint and the arbitrator has no obligation to disclose).

[28] See for instance the Code of Ethics for an Arbitrator, Singapore International Arbitration Centre 2.2 (a).

since standards for impartiality also include possible perceptions of bias, arbitrators should investigate potential conflicts of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 7(d) states that "(f)ailure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."

28. Disclosure standards and disqualification standards are generally not the same. The scope of the matters that should be disclosed is generally broader than the scope of matters that would constitute a basis for disqualification. Not all information that should be disclosed would result in disqualification. Conversely, even if the information would not disqualify an arbitrator, it may nonetheless have to be disclosed. The disqualification standards provide a basis to determine whether an arbitrator is not sufficiently impartial to serve in a dispute.

29. For example, the Model Law on Arbitration makes a distinction between information that must be disclosed and information that must be disclosed under the disqualification standard. Article 12(1) on disclosure states that arbitrators should disclose any circumstances "likely to" give rise to justifiable doubts as to the arbitrator's impartiality or independence. Article 12(2) on disqualification, on the other hand, refers to "existing circumstances" that give rise to justifiable doubts as to an arbitrator's impartiality and independence. Having the disclosure standard cover a broader scope helps to avoid situations in which information may otherwise be benign if it were not inadvertently discovered later.

30. In the same vein, the explanation to the IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 3(c) states that: "… a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue."

(c) Other obligations possibly relevant to ethics of arbitrators

Fairness and diligence, confidentiality

31. Requirements of fairness and diligence, as well as provisions on confidentiality can be found in national legislation and arbitration rules which, in substance, usually oblige the arbitrator to: (i) perform his or her duties with fairness and diligence, thoroughly and expeditiously during the course of the proceeding;[29] and (ii) keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others.

Professional qualifications

32. In addition to the requirements of impartiality and independence, professional qualifications are also sometimes mentioned as part of ethical standards. For example, Article 14(1) of ICSID states that arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

Nationality

33. In investor-State arbitration, there is the general presumption against appointing a chairperson or sole arbitrator who would share the nationality of one of the parties, unless the parties agree to do so. Article 39 of the ICSID Convention states that "[t]he majority of the arbitrators shall be nationals of States other than the

[29] See, for instance, article 17 (1) of the UNCITRAL Arbitration Rules (as revised in 2010), as well as their Annex (which provides that any party may consider requesting from the arbitrator a statement confirming that "on the basis of the information presently available, that arbitrator can devote the time necessary to conduct the arbitration diligently, efficiently and in accordance with the time limits in the Rules.").

Contracting State Party to the dispute and the Contracting State whose national is a party to the dispute […]"[30] Parties may waive this requirement by agreement. A similar principle can be found more generally in international arbitration. For instance, article 6(7) of the UNCITRAL Arbitration Rules (as revised in 2010) provides that "[t]he appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties".

Involvement of arbitrators in settlement

34. As underlined in the UNCITRAL Notes on Organizing Arbitral Proceedings (2016),[31] different legal systems have different views on whether arbitrators should refrain from encouraging the parties to settle. Some legal systems require judges and arbitrators to aid parties in reaching a settlement. The process of encouraging settlement, however, may involve ex parte communications with the parties, which may compromise the arbitrator's impartiality. The IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 4(d), provides that arbitrators may assist the parties in reaching a settlement if the parties consent to do so.

(d) Challenge procedure — Non-compliance with ethical standards

35. The typical measure to address non-compliance with ethical standards after the appointment of an arbitrator is the resignation and/or replacement of the arbitrator. Almost all national arbitration laws and arbitration rules contain provisions on procedures for challenging arbitrators who do not comply with the standards therein including ethical standards. They also include safeguards aimed at preventing abuse of the challenge procedures, as dilatory tactics, by parties.

36. Generally, parties have to challenge an arbitrator as soon as they become aware of relevant information. Parties cannot wait and assert the challenge when they find the award unfavourable. If parties fail to raise a challenge within a stipulated period of time, then the party is deemed to have waived the right to challenge.

2. Preparation of guidelines on existing ethical standards

37. At the forty-ninth session of the Commission, it was highlighted that different ethical norms and standards might be applicable, and there was currently no clear guideline for determining how they interrelated or which would prevail in a given situation. In that light, it was suggested that one possible form of work could be to address the interrelationship of multiple norms and standards providing guidance on which ethical standards would be applicable.[32]

38. Different approaches could be envisaged, for instance, providing guidance to determine whether and when the ethical standards are applicable, while noting the limits of application of such standards, since arbitrators are likely to come from different jurisdictions and would thus be subject to different ethical standards.

39. Work could be undertaken to provide clarity regarding the interrelationship among ethical rules (i) of the arbitrator's home jurisdiction, (ii) of the jurisdiction in which the arbitration is being held (both the legal seat and physical venue), (iii) provided for in the applicable law, (iv) of the arbitral institutions, and (v) contained in soft law standards agreed to by the parties or set by the arbitral tribunal.

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[30] ICSID Rules of Procedure for Arbitration Proceedings, Chapter IV, Article 39.

[31] See Note 12 of the UNCITRAL Notes on Organizing Arbitral Proceedings (2016), available on the Internet at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html

[32] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 184.

III. Questions in relation to possible future work

40. With the development of international arbitration and the variety of sources and texts on ethics, no guidance has been provided on which approach arbitrators should adopt, for instance whether arbitrators dealing with international arbitration may disregard their home jurisdictions' ethical rules in favour of international texts. As noted by the Commission at its forty-eighth session, arbitral tribunals could be bound by more than one ethical standard depending on the nationality of the arbitrators, affiliation with bar associations, as well as the place of arbitration.[33] Therefore, multiple norms may apply at the same time, without any clear indication on which shall prevail in case of conflict.

41. The expansion of international arbitration has also resulted in the diversification of parties involved in the arbitration process. As such, their perspectives on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions. While there seems to be a general agreement about the fundamental ethical standards of international arbitration, in practice, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. Increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to ethics and conduct of arbitrators.

42. In addition, while the standards described above in section II contain statements of principle, they usually lack explanatory contents about their practical implications.

43. In that light, the Commission may wish to consider the following questions:

(a) Whether there is a need for a harmonized and authoritative source on ethics in international arbitration, or whether guidance on articulation among the possible applicable ethical standards would be more appropriate;

(b) Whether existing instruments sufficiently define the scope of disclosure and the disqualification process;

(c) Whether the purpose of undertaking work in the field of ethics in international arbitration would be to reduce any identified uncertainty and inconsistency in the existing ethical standards, and their application; if so, whether a new instrument should cover any or all of (i) persons concerned (in addition to the arbitrators), (ii) content of ethical standards (limited to impartiality and independence, or expanded to encompass other obligations), (iii) methods and extent of disclosure, (iv) challenge procedures, (v) effect of breach of ethical standards, and (vi) enforcement mechanisms (how should ethical rules be enforced and by whom (arbitrators, parties, institutions, others)?);

(d) Whether the consequences of non-compliance with ethical standards are addressed in sufficient detail in existing instruments; if this is considered not to be the case, whether working on a compilation and digest of case law would be a possible way forward.

44. Ethical standards in investor-State arbitration and in commercial arbitration largely address the same obligations with some variation. The Commission may wish to consider whether any work on the topic should encompass both commercial and investor-State arbitration, or deal with them separately.

[33] Ibid., para. 150.