United Nations A/CN.9/WG.III/WP.167

General Assembly

Distr.: Limited
31 July 2019

Original: English

United Nations Commission on International Trade Law
Working Group III (ISDS Reform)
Thirty-eighth session
Vienna, 14–18 October 2019

Possible reform of investor-State dispute settlement (ISDS)

Background information on a code of conduct

Note by the Secretariat

Contents

V.19-08209 (E)

I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.[1] The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and its Addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively. At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

2. At its thirty-seventh session, the Working Group agreed that it would discuss, elaborate and develop multiple potential reform solutions simultaneously (A/CN.9/970, para. 81). In that light, the Secretariat was requested to undertake preparatory work on a number of topics, including on the preparation of a code of conduct, jointly with the International Centre for Settlement of Investment Disputes (ICSID). It was suggested that this could cover how such a code could be implemented in the current ISDS regime and also in the context of a structural reform, and how obligations in such a code would be enforced, particularly when the function or term of an arbitrator or adjudicator was terminated (A/CN.9/970, para. 84).

3. Accordingly, this note addresses matters for consideration regarding the preparation of a code of conduct for ISDS tribunal members, in the context of both the existing ISDS regime based on international arbitration and a standing mechanism with full-time adjudicators. As is the case for other documents provided to the Working Group, this note was prepared with reference to a broad range of published information on the topic,[2] and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. General remarks

A. Deliberations at UNCITRAL

4. By way of background, at its forty-eighth session, in 2015, and forty-ninth session, in 2016, the Commission had before it proposals for future work on a code of conduct for arbitrators in investment arbitration (A/CN.9/855 and A/CN.9/880, respectively) which outlined the concept of ethics in international arbitration as well as existing legal frameworks.[3] At its fiftieth session, in 2017, the Commission had before it a note by the Secretariat on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916). The note was included in the list of documents cited by the Commission when defining the mandate of the Working Group (see above, para. 1).

5. At the thirty-fifth and thirty-sixth sessions of the Working Group, broad agreement was expressed on the importance of codes of conduct for ISDS tribunal members (A/CN.9/935, para. 64; and A/CN.9/964, paras. 74–83, respectively). At those sessions, it was suggested that measures enhancing confidence in the

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

[2] This Note was prepared with reference to a broad range of published information on the topic, including the CIDS Supplemental Report on *The composition of a multilateral investment court and of an appeal mechanism for investment awards*, 15 November 2017, Gabrielle Kaufmann-Kohler and Michele Potestà ("CIDS Supplemental Report") available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf, as well as the publication from members of the Academic Forum, available at https://www.cids.ch/academic-forum-concept-papers. Publications from members of the Academic Forum include Chiara Giorgetti and Mohamed Abdel Wahab, *Codes of Conduct for Arbitrators, Judges and Counsel in ISDS*, Academic Forum on ISDS Working Paper 2019/8.

[3] *Official Records of the General Assembly*, *Seventieth Session, Supplement No. 17* (A/70/17), para. 148; Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 182–186.

independence and impartiality of ISDS tribunal members would be in the interest of both States and investors. Taking note of existing texts on the conduct of arbitrators, the need for coordinated efforts and harmonized solutions at a multilateral level was underlined (A/CN.9/964, para. 78). Suggestions were made to the effect that the Secretariats of ICSID and UNCITRAL should cooperate in preparing background information on, and in developing model provisions for, a code of conduct, so as to develop consistent harmonized solutions (A/CN.9/935, para. 64; and A/CN.9/964, para. 78).

6. The Working Group may wish to note that submissions from Governments further highlight the need for the development of a code of conduct at a multilateral level, so as to harmonize existing models and also provide for sanctions in case of non-compliance.[4]

B. Status of reform at ICSID

7. By way of background regarding ICSID, the Centre has considered the question of a code of conduct for arbitrators in the context of proposals for rule amendments. In August 2018, ICSID made public a comprehensive proposal to modernize its rules (referred to as the "ICSID Working Paper").[5] The main innovations in the ICSID Working Paper with respect to conflicts of interest are increased disclosure obligations for arbitrators and an express obligation upon the disputing parties to declare third-party funding and the name of the third-party funder so that arbitrators can avoid inadvertent conflicts of interest.

8. The development of a code of conduct was left for further discussion in the context of ICSID's and UNCITRAL's joint efforts in this area, as reflected in this note.

C. Remarks on standards applicable to arbitrators and adjudicators

9. As noted by UNCITRAL at its forty-eighth session, arbitral tribunals and each of their members could be bound by diverse ethical standards depending on the nationality of the arbitrators, affiliation with bar associations as well as the place of arbitration.[6] Therefore, multiple norms may apply at the same time, without any clear indication on which shall prevail in case of conflict. In addition, increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to the conduct of arbitrators (A/CN.9/916, paras. 40 and 41).

10. The Working Group may wish to note that, while there seems to be a general agreement about the fundamental standards on conduct of arbitrators, 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. Furthermore, while the existing standards contain statements of principle, they

[4] 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.

[5] "Proposals for Amendment of the ICSID Rules" prepared by the ICSID Secretariat, dated 2 August 2018, available at https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf and https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf.

[6] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 150.

usually lack explanatory content about their practical implications (A/CN.9/916, para. 41).

11. It may be noted that some recently concluded investment treaties contain a code of conduct for ISDS tribunal members.[7] These codes generally define procedures to be followed in order to ensure that factual circumstances with the potential to give rise to real or perceived conflicts of interest are fully disclosed. They also include concrete steps to determine whether a conflict of interest could arise or has arisen and standards of conduct for ISDS tribunal members (and other persons), the duties in the conduct of ISDS proceedings, the disclosure obligations and the obligations of confidentiality. They usually do not provide for sanctions, other than the right of either party to demand replacement of the arbitrator or adjudicator (A/CN.9/916, para. 41).[8]

12. In that light, the Working Group may wish to consider that the development of a code of conduct could aim at providing a uniform approach to requirements applicable to ISDS tribunal members and to give more concrete content to broad ethical notions and standards used in the applicable instruments, including the ICSID Convention, investment treaties, applicable laws and applicable rules. This would be in line with the preference expressed by the Working Group that one general code is preferable to numerous institution-specific codes. In addition, such a code could apply to the different options for reform being considered by the Working Group.

13. In particular, a code of conduct could aim at: (i) clarifying the content of the standards, thereby furthering harmonization and clarification of the different existing requirements; (ii) ensuring that all stakeholders understand the thresholds for when independence, impartiality and integrity would be impaired; (iii) developing requirements for qualification; (iv) determining the mechanisms for disclosure, and the sanctions in case of non-compliance; (v) as far as arbitrators are concerned, providing clarity on their roles, in particular regarding the question of double-hatting and repeat appointments; and (vi) as far as adjudicators (i.e., full-time adjudicators in a standing mechanism) are concerned, establishing requirements in a fashion that would be consistent with those of international courts, taking also into account requirements found in the existing ISDS regime.[9]

[7] See, for instance, Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (Annex 7, Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators); Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (Annex 29-B, Code of Conduct for Arbitrators and Mediators); Treaty between the Republic of Belarus and the Republic of India on Investments, September 2018 (Article 19, Prevention of Conflict of Interest of Arbitrators and Challenges); Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, April 2018 (Section C: Provisions on the Conduct of Arbitrators, Articles 34–40); Agreement between Australia and The Oriental Republic of Uruguay on the Promotion and Protection of Investments, April 2019 (Article 14 (16), Annex C, Code of Conduct); Agreement between The Republic of Rwanda and The United Arab Emirates on the Promotion and Reciprocal Protection of Investments, November 2017 (Article 18, Ethical Duties of Members of the Arbitral Tribunal and Any of Their Assistants); Agreement between the Government of China and the Government of the Republic of Korea, June 2015 (Article 20.7 (4) d, Annex 20-B, Code of Conduct for Panellists and Mediators).

[8] See the e-book prepared by the ICSID Secretariat with codes of conduct collected.

[9] See also A/CN.9/964, para. 78 (on a suggestion made at the thirty-sixth session that if a code of conduct were to be prepared at a multilateral level, it should be comprehensive, encompassing all issues related to decision makers including: independence and impartiality and other ethical requirements; conflict of interest and issue conflicts; double-hatting; disclosure requirements including relationships between decision makers and counsel; the protection of decision makers from undue pressure; challenge procedures; and possible sanctions in case of non-compliance).

III. Possible content of a code of conduct

14. This section provides insights on the possible content of a code of conduct. Most requirements discussed below are obligations and duties of arbitrators that derive from the law or rules governing the arbitration. Their application in the context of full-time adjudicators is also discussed where relevant.

A. Independence and impartiality

1. Existing framework

(i) International arbitration

15. The duties of independence and impartiality are the most frequently cited of the ethical duties of arbitrators, as they constitute the core elements of ethical conduct. Independence and impartiality are key elements of any system of justice, meant to ensure fair trial and compliance with due process requirements. The Working Group emphasized that sufficient guarantees of independence and impartiality on the part of arbitrators is essential in ISDS (A/CN.9/935, para. 48). It may therefore wish to consider how these requirements should be addressed in a code of conduct.

16. Lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel and lack of impartiality would arise, for instance, if an arbitrator appears to have pre-judged some matters.

17. Although existing legal standards differ in exact wording, they all seek to impose broad rules of independence and impartiality at the outset of the proceedings. Generally, arbitrators are required to be free of evident conflicts before and during proceedings and should disclose any potential conflicts before appointment. Most rules also impose an obligation to keep this disclosure current if the arbitrator is appointed and a subsequent matter for disclosure arises (see below, paras. 45–51 and 58–61 on disclosure and disqualification). Below are illustrations of how this principle is enshrined in the ICSID Convention and Rules as well as in the UNCITRAL Arbitration Rules:

- Article 14(1) of the ICSID Convention provides that those serving on the arbitral panel must be persons who "may be relied upon to exercise independent judgment." The phrase "independent judgment" has universally been interpreted to include independence and impartiality. Article 57 of the ICSID Convention makes Article 14 applicable to all arbitrators in ICSID cases, not just those on the Panel of Arbitrators. Under Rule 6 of the ICSID Arbitration Rules, each arbitrator is required to sign a declaration regarding independence and undertaking to judge fairly as between the parties. As a part of this declaration, the arbitrators must also attach a statement of any relationships and other positions they hold, past and present, that may give rise to a question of their impartiality and independence. In that respect, it may be noted that the draft amended ICSID rules includes an updated arbitrator declaration form that requires arbitrators to declare their independence and impartiality, and specifically request arbitrators to disclose professional, business and other significant relationships with the parties, party representatives, other members of the arbitral tribunal, and any third-party funder that occurred in the past five years. They must also declare their involvement in other ISDS cases in any capacity (witness, arbitrators, expert, etc.) and any other circumstances that might cause their independence or impartiality to be questioned. This is a continuing obligation.
- Article 11 of the UNCITRAL Arbitration Rules refers to the notions of impartiality and independence. The Annex to the Rules contains model statements of independence. Article 12 of the UNCITRAL Model Law on International Commercial Arbitration contains provisions on "impartiality and independence" that have been widely enacted.

18. Similar requirements may also be found in guidelines or codes. For instance, General Standard 1 of the IBA Guidelines on Conflicts of Interest in International Arbitration provides that "every arbitrator shall be impartial and independent at the time of appointment and shall remain so until the final award has been rendered or the proceedings have otherwise terminated." Similar provisions can be found in other fields, for instance, the procedural rules of the Court of Arbitration for Sport provide that: "Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties".[10]

19. The standard for disqualification based on "justifiable doubts", which reflects a transnational consensus, may be considered as a benchmark for assessing independence and impartiality.[11] It may be noted, however, that the ICSID Convention, by contrast, does not refer to this standard, but to the "manifest lack of qualities", including independence and impartiality; nevertheless, some ICSID tribunals have applied tests similar to the justifiable doubts standard (see below, para. 51).[12]

(ii) Full-time adjudicators in a standing mechanism

20. Adjudicators in a standing mechanism need to be impartial and independent in respect of a dispute brought before them in the same fashion as arbitrators in the current ISDS regime. Therefore, an adjudicator in a standing mechanism may not adjudicate a specific dispute if circumstances exist that give rise to reasonable or justifiable doubts as to her or his impartiality or independence. The standard for disqualification based on "justifiable doubts", which reflects a transnational consensus, may also be relevant in a standing mechanism (see above, para. 19).

21. Examples of requirement of independence and impartiality for adjudicators may be found in existing international or regional courts. The European Convention on Human Rights, which enumerates the rights adjudicated by the European Court of Human Rights and regulates the Court's functioning, contains a provision on judicial impartiality.[13] According to the Court's constant case-law, "the existence of impartiality must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality."[14] The International Court of Justice addresses the

[10] See Court of Arbitration for Sport, Code of Sports-related Arbitration (2019), R33.

[11] The "justifiable doubts" test is expressly included in the UNCITRAL Arbitration Rules, article 11.

[12] See, for instance, Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, Decision on the Challenge to the President of the Committee of 3 October 2001, ICSID Case No. ARB/97/3, paras. 20–21; Urbaser S.A. and others v. Argentine Republic, Decision on Claimant's Proposal to Disqualify an Arbitrator, of 12 August 2010, ICSID Case No. ARB/07/26, paras. 43–44; Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, Decision on the Proposal for Disqualification of an Arbitrator, of 20 March 2014, ICSID Case No. ARB/13/13, para. 54. See also CIDS Supplemental Report, para. 94.

[13] European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, which provides as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[14] See the case *Micallef v. Malta*, 15 October 2009, (Application no. 17056/06), European Court of Human Rights (ECHR), at para. 93.

independence and impartiality of its judges in Articles 2 and 20 of its Statute.[15] The Rome Statute of the International Criminal Court refers to the independence of judges in Article 40.[16] The Statute of the International Tribunal for the Law of the Sea (ITLOS) foresees an oath of impartiality in Article 11.[17]

2. Possible aspects to be covered in a code of conduct

22. The Working Group may wish to consider the degree of detail that should be provided in a code of conduct on the requirements of independence and impartiality. For instance, arbitrators and adjudicators are usually required not to allow any financial, business, professional, family or social relationships or responsibilities to influence their conduct.

23. In addition to conflicts of interest revolving around relationships between an arbitrator or an adjudicator and a disputing party, counsel or the dispute, the Working Group may wish to consider two specific questions: issue conflicts and double-hatting.

(i) International arbitration

24. Issue conflicts refer to the situation of "alleged predisposition or prejudgment involv[ing] an arbitrator's purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as an arbitrator, as counsel, writing scholarly articles, and giving interviews or other public expressions of views".[18] Addressing issue conflicts in a code of conduct might entail the determination in the code of what constitutes an issue conflict, and the effect of an expression of views in publications, in other judgments and prior awards.

25. Double-hatting was considered by the Working Group at its thirty-sixth session, where it was said that this practice raised concerns in that arbitrators had the possibility of deciding on, or appearing to decide on, an issue in one manner to benefit a party that they represented in another dispute. The Working Group was presented with statistics on this practice (A/CN.9/964, para. 72).[19] The Working Group may wish to consider how to address double-hatting, whether to ban or seek to regulate the practice. In that context, it may wish to consider the effect of double-hatting on

---

[15] Statute of the International Court of Justice, Article 2: "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." Article 20: "Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.".

[16] Rome Statute of the International Criminal Court, Article 40, which provides as follows: "The judges shall be independent in the performance of their functions; Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence; Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature; Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges; Where any such question concerns an individual judge, that judge shall not take part in the decision."

[17] Article 5 of the Rules of the Tribunal provides as follows: "The solemn declaration to be made by every Member in accordance with Article 11 of the Statute shall be as follows: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously".

[18] ASIL-ICCA (2016), Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration ("ASIL-ICCA Report 2016"), ICCA Reports No. 3 (17 March 2016), para. 2 ("Arbitral institutions face a growing number of challenges to disqualify arbitrators on the ground of 'issue conflict,' an allegation that an arbitrator is biased towards a particular view of certain issues or has already prejudged them. The alleged predisposition or prejudgment involves an arbitrator's purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as an arbitrator, as counsel, writing scholarly articles, and giving interviews or other public expressions of views").

[19] See data available at https://esil-sedi.eu/post_name-118/.

arbitral independence and impartiality, on arbitral diversity and the effect of any prohibition of double-hatting on parties' right of appointment.

26. Provisions in a code of conduct[20] could possibly cover the scope and definition of double-hatting, for instance, whether it means acting as arbitrator, counsel, expert witness, judge or in other roles in the same or similar case and simultaneously, as well as how similar and how close in time the cases must be.

(ii) Full-time adjudicators in a standing mechanism

27. In a standing mechanism, an issue conflict might originate from the fact that an adjudicator would not approach a legal issue arising in the dispute concerned with an open mind because she or he had ruled on that issue in another case. However, as consistency and coherence across different treaties with the same or similar language is precisely one of the goals pursued through the institution of a standing body, and as adjudicators would not be chosen by the disputing parties, it is less likely that issue conflicts would arise in that context.[21]

28. Double-hatting issues are also less likely in standing mechanism as the statutes of the institutions or their working practices usually determine incompatibility rules, and incompatibility rules are designed so as to avoid double-hatting.[22]

B. Integrity

1. Existing framework

(i) International arbitration

29. Arbitrators are usually required to act fairly and without favour as between the parties. To this end, they should avoid dealing with a party unilaterally, and should not accept fees from the parties without tribunal approval. Under Rule 6 of the ICSID Convention, arbitrators must undertake to "judge fairly as between the parties, according to the applicable law."[23] Under article 17(1) of the UNCITRAL Arbitration Rules, arbitrators shall treat parties with equality.

(ii) Full-time adjudicators in a standing mechanism

30. Full-time adjudicators are usually required to conduct themselves with probity and integrity in order to enhance public confidence in the judiciary. Provisions on the matter usually require that adjudicators should not directly or indirectly accept any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions. They also often

[20] By way of background, very few standards on ethics directly discuss the permissibility or impermissibility of multi-roles (see also document A/CN.9/WG.III/WP.151, paras. 25–34).

[21] See CIDS Supplemental Report, para. 100.

[22] For instance, Article 16 of the ICJ Statute bans members of the tribunal from obtaining and acting in certain functions, such as political or administrative functions or engage in any other occupation of a professional nature; they may not act as an agent, counsel or advocate in any case; similarly, the Statute of the International Tribunal for the Law of the Sea, article 7 provides that: "1. No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed. 2. No member of the Tribunal may act as agent, counsel or advocate in any case. 3. Any doubt on these points shall be resolved by decision of the majority of the other members of the Tribunal present."

[23] The proposed amended ICSID Rules also incorporate a duty on arbitrators to conduct the proceeding in good faith, in an expeditious and cost-effective manner, to treat the parties equally and to provide each party a reasonable opportunity to present its case (proposed Rule 11), see "Proposals for Amendment of the ICSID Rules" prepared by the ICSID Secretariat, dated 2 August 2018, including a new chapter for optional expedited arbitration in Rules 73–84 (Additional Facility Arbitration Rules, Rules 77–86) available at https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf and https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf.

require that the adjudicators should perform their duties without consideration of any personal or national interest.[24]

2. Possible aspects to be covered in a code of conduct

31. The Working Group may wish to consider how integrity should be addressed in a code of conduct, and the elements that it could cover. For instance, the following could be considered: (i) the arbitrators and adjudicators should not use their position to advance any personal or private interests; (ii) they should not be influenced by self-interest, outside pressure, and political considerations; and (iii) they should not accept any benefit that would in any way interfere with the performance of their duties.

C. Diligence and efficiency

1. Existing framework

(i) International arbitration

32. Requirements of diligence and efficiency are commonly found in national legislation and arbitration rules which, in substance, usually require arbitrators to perform their duties with diligence, thoroughly and expeditiously during the course of the proceeding. Arbitrators must not take an appointment if they will not have time to carry out their duties promptly.[25]

33. The proposed amendments to the ICSID Rules include a draft form of declaration whereby the arbitrator declares that she/he has the time required to devote to the case and will not accept any new commitments that would conflict or interfere with their capacity to act in the proceeding. A general duty of arbitrators to treat the parties equally and conduct a proceeding in an expeditious and cost-effective manner is also proposed (proposed Rule 11).[26]

34. In accordance with article 17(1) of the UNCITRAL Arbitration Rules, "[t]he arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." The Annex to the Rules contains a model declaration whereby the arbitrator declares that she or he can devote the time necessary to conduct the arbitration diligently, efficiently and in accordance with the time limits in the Rules."

(ii) Full-time adjudicators in a standing mechanism

35. It may be noted that requirements for full-time adjudicators also include the duty to act diligently in the exercise of their duties and to deliver their decisions and any other rulings without undue delay.[27]

---

[24] See, for instance Article 3 of the Code of Conduct for Members and former Members of the Court of Justice of the European Union; See also Article 4 of the "Rules of Court" of the International Court of Justice (ICJ), declaration to be made by members of the court: "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously"; See also Canadian Judicial Council, Ethical Principles for Judges, 3. Integrity: "Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary".

[25] See *The Revolving Door in International Investment Arbitration,* Malcom Langford, Daniel Behn, Runar Hilleren Lie, Journal of International Economic Law, Volume 20, Issue 2, June 2017, pages 301–332, that provides a preliminary assessment of the network of actors in the international investment arbitration, available at https://doi.org/10.1093/jiel/jgx018.

[26] "Proposals for Amendment of the ICSID Rules" prepared by the ICSID Secretariat, dated 2 August 2018, including a new chapter for optional expedited arbitration in Rules 73–84 (Additional Facility Arbitration Rules, Rules 77–86) available at https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf and https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf.

[27] See, for instance, article 7 of the Code of Judicial Ethics at the International Criminal Court.

2. Possible aspects to be covered in a code of conduct

36. The Working Group may wish to consider how the requirement to act with diligence and efficiency should be addressed and regulated. It usually includes the following duties: (i) to act expeditiously and diligently; (ii) to dedicate time and effort to the proceeding and refuse competing obligations; and (iii) to participate constructively in deliberations.

D. Confidentiality

1. Existing framework

37. Provisions on confidentiality are found in national legislation and arbitration rules which, in substance, usually require the arbitrator to keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others.

38. The same requirements are commonly found for adjudicators in international courts, where judges are required to respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations.[28]

2. Possible aspects to be covered in a code of conduct

39. A code of conduct could determine the confidentiality obligations of arbitrators or adjudicators, and indicate how long these obligations should remain effective, in particular, whether they would survive the termination of the proceedings. This should remain consistent with the requirements on transparency, including the framework set-up under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and relevant investment treaty provisions on the matter.

E. Competence

1. Existing framework

(i) International arbitration

40. It may be noted that professional qualifications are also sometimes mentioned as part of requirements. For example, Article 14(1) of the ICSID Convention states that arbitrators shall be persons of (…) recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

41. The Code of Professional and Ethical Conduct for Members (2009) of the Chartered Institute of Arbitrators (CIArb) contains a concise provision for competence, and notably includes a clause on misrepresentation.[29]

(ii) Full-time adjudicators in a standing mechanism

42. Competence requirements for adjudicators are also found in rules and procedures of permanent bodies. For instance, Article 17.3 of the World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes requires that "[a]ll persons serving on the Appellate Body shall (...) stay abreast of dispute settlement activities and other relevant activities of the WTO."

[28] See, for instance, article 6 of the Code of Judicial Ethics at the International Criminal Court.

[29] The provision states as follows: "A member shall accept an appointment or act only if appropriately qualified or experienced. A member shall not make or allow to be made on the member's behalf any representation about the member's experience or expertise which is misleading or deceptive or likely to mislead or deceive."

43. Similarly, the Code of Judicial Ethics at the International Criminal Court provides that judges shall take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.[30]

2. Possible aspects to be covered in a code of conduct

44. The Working Group may wish to consider whether competence requirements should be part of a code of conduct and, if so, what elements should be reflected (for instance, a reference to an obligation of continued education or regular training). Emphasis could be placed on the candidates' competence rather than on a specific prior professional activity so as to also ensure diversity in professional backgrounds.

F. General disclosure obligations

1. Existing framework

(i) International arbitration

45. The obligations contained in a code of conduct, and in particular those relating to impartiality and independence, are usually accompanied by a requirement that the arbitrator shall disclose circumstances, past or present, that could give rise to justifiable doubts as to her or his impartiality or independence. It is then for the arbitrator to declare that the disclosed circumstances do not affect, in her or his opinion, her or his independence and impartiality. Most national laws and arbitral rules have adopted objective standards for disclosure.

46. By way of background, Rule 6 of the ICSID Arbitration Rules requires all arbitrators to sign a declaration before or at the first session disclosing potential conflicts. The declaration requires the arbitrator to attach a statement disclosing any past and present professional, business, or other relationship with the parties that might cause their reliability for independent judgment to be questioned by a party. In signing the declaration, the arbitrators acknowledge that their duty of disclosure is ongoing throughout the course of proceedings. While the rule is not expanded upon any further, arbitral tribunals have provided guidance on the meaning of the terms used in the rules. Tribunals have decided that the duty to disclose only extends to relationships and circumstances that an arbitrator reasonably believes would cause her or his reliability for independent judgment to be questioned by a reasonable person. Certain information need not be disclosed if it is irrelevant.[31]

47. Article 11 of the UNCITRAL Arbitration Rules provides that when a person is approached in connection with her or his possible appointment as an arbitrator, she or he shall disclose any circumstances likely to give rise to justifiable doubts as to her or his impartiality or independence. An arbitrator, from the time of her or his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by her or him of these circumstances.[32] Breach of disclosure obligations have given rise to case law under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"). For instance, courts have found a breach of procedural public policy

[30] See, for instance, Code of Judicial Ethics at the International Criminal Court, article 7.

[31] For example, in the ICSID case *Alpha Projektholding GmbH v. Ukraine*, the tribunal decided that an arbitrator was not obligated to disclose that the counsel of a party had long ago been a classmate; see *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Proposal for Disqualification of an Arbitrator (19 March 2010), available on the Internet at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/16.

[32] 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."

where arbitrators have acted in a manner that breaches the principles of independence and impartiality. [33]

48. 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.

49. Specific requirements are also sometimes found in guidance texts on ethics, 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".[34]

50. The extent to which arbitrators have a duty to investigate potential conflicts of interest is debated and may depend on the wording of the applicable ethical guidelines.

51. Disclosure standards and disqualification standards should be distinguished. 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. The disqualification standards provide a basis to determine whether an arbitrator is not sufficiently impartial to serve in a dispute. For example, the Model Law on International Commercial Arbitration makes a distinction between information that must be disclosed and facts that may give rise to disqualification. Article 12(1) on disclosure provides 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.[35]

(ii) Full-time adjudicators in a standing mechanism

52. The World Trade Organization (WTO) Working Procedures for Appellate Review, while not designed as a code of ethics for arbitrators, contain a provision that is noteworthy. Rule VI of these procedures states that disclosure of matters whose relevance to the issues in the proceedings would be insignificant is not required of the judges. It further provides that the privacy of the judges is to be taken into account in deciding which disclosures are required and a statement that the disclosure requirements should not be so administratively burdensome as to prevent otherwise qualified people from serving on a panel.[36] This rule essentially creates a sliding scale

---

[33] For example, in a dispute involving two parallel arbitrations between the same parties, one of the arbitrators, who was sitting in both panels, provided false information to one tribunal about the other arbitration which had an impact on that tribunal's decision regarding its jurisdiction (See Soc. Excelsior Film TV v. Soc. UGC-PH, Court of Cassation, France, 24 March 1998), see UNCITRAL Secretariat Guide on the New York Convention, available at http://newyorkconvention1958.org.

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

[35] In the same vein, the explanation to the IBA Guidelines on Conflicts of Interest in International Arbitration provides 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." An arbitrator must disclose "facts or circumstances exist that may*, in the eyes of the parties,* give rise to doubts as to the arbitrator's impartiality or independence" (IBA Guidelines, General Standard 3(a)). By contrast, the point of view for disqualification is that of a "*reasonable third person* having knowledge of the relevant facts and circumstances" (see IBA Guidelines, General Standard, 2(b)). In other words, "the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a '*reasonable third person test*')." (IBA Guidelines, Explanation to General Standard 2(b)).

[36] See the Working Procedures for Appellate Review, Rule VI.

wherein the importance of disclosure is weighed against competing factors in deciding whether a matter must be disclosed. However, the rule also contains a provision similar to that found in most of the other codes that any doubt ought to be resolved in favour of disclosure.

2. Possible aspects to be covered in a code of conduct

53. The Working Group may wish to determine which aspects relating to disclosure obligations should be covered in a code of conduct, for instance: (i) the scope of disclosure; (ii) due diligence with respect to disclosure; (iii) the extent of obligation of the potential arbitrator and of the disputing parties to investigate potential conflict; (iv) the obligation to disclose facts in the public domain; (v) the method of disclosure; (vi) the timing for disclosure; and (vii) continuing obligation. The Working Group may wish to also consider whether a vetting procedure regarding disclosures should be under the control of a central mechanism instead of resting with the arbitrator/adjudicator.

G. Additional matters

54. The Working Group may wish to consider whether the conduct of the proceedings should be addressed in a code, covering for instance, behaviour in the conduct of the proceedings, in questioning of witnesses, and the need to give special attention to the right of participants to the proceedings to equal protection and benefit of the law.

55. The Working Group may wish to consider whether the following aspects might be relevant to a code of conduct for arbitrators:

- Pre-appointment contact with the appointing party, in particular:
    - Prior appointment by the same party or its counsel, and whether there should be a limit;
    - Whether pre-appointment interview is an acceptable practice and, if so, what topics it can cover (for instance, availability, conflict of interest, role in selection of a presiding arbitrator) and what topics should be avoided (for instance, facts and possible outcome of the case or applicable law);[37] whether the interviews should be recorded and whether it should be disclosed to other party, other tribunal members and/or administering institution;
    - Permissibility and scope of ex parte communications prior to appointment as well as the rules surrounding consultation with party-appointed arbitrator on selection of presiding arbitrator.
- The obligations in relation to the remuneration of arbitrators and the reimbursement of expenses, such as:
    - Parity of fees among arbitrators;
    - Setting fees;
    - Requesting increases during the proceeding; and
    - Reimbursement of expenses incurred or per diem arrangements.

56. The Working Group may wish to consider whether the questions of public expression and association, mainly relevant for adjudicators, should be addressed in

[37] Only a few professional ethics codes contain rules which directly regulate the pre-appointment interview, such as the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration, and the Chartered Institute of Arbitrators (CIArb) Practice Guideline 16 “The interviewing of prospective arbitrators”; the American Arbitration Association (AAA) “Code of Ethics” Cannon III (Discussing the Duty of Impropriety) addresses what a potential arbitrator should not discuss when being considered.

a code of conduct; this could cover limitations to the freedom of expression and association, participation in public debate on matters pertaining to legal subjects, and prohibition from comment on pending cases.

IV. Related matters for further consideration

A. Consequences of failure to meet the obligations of the code of conduct

1. Existing framework

57. Usually codes of conduct are enforced through voluntary compliance, with declarations by arbitrators or adjudicators to the effect that they are aware of, understand and undertake to meet the obligations at the start of the case, based on their assessment and understanding of applicable rules and standards and on a continuing basis during case proceedings or during the term of their appointment as adjudicator in a standing mechanism.

(i) International arbitration

58. The typical measure to address non-compliance with ethical standards after the appointment of an arbitrator is the disqualification, which may result in the replacement of the arbitrator (see also document A/CN.9/WG.III/WP.151, paras. 49–67). Almost all national arbitration laws and arbitration rules contain 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. Generally, parties have to challenge an arbitrator as soon as they become aware of relevant information. If a party fails to raise a challenge within a stipulated period of time, then the party is deemed to have waived the right to challenge.

59. Under the ICSID Rules, if the challenge relates to a sole arbitrator or to the majority of an arbitral tribunal, it will be decided by the Chairman of the ICSID Administrative Council, who *ipso jure* is the President of the World Bank. However, if the challenge is directed at one (or at a minority) of arbitrators, it will be decided by the majority. Under the UNCITRAL Rules, the challenge will be decided by the appointing authority if all parties do not agree to the challenge or the challenged arbitrator does not withdraw (see article 13).

60. It may also be noted that, although rarely used, institutional rules typically provide for the power of the institution to revoke an arbitrator who is unwilling or unable to discharge her or his duties in accordance with the rules. In addition, after termination of an arbitration, the ICSID Convention and national arbitration laws provide for post-award remedies, such as annulment for lack of impartiality of a tribunal member (for instance, Article 52(1)(a) ICSID Convention and procedures for the revision of an arbitral award under certain conditions under national laws). Finally, the New York Convention provides grounds for non-enforcement of the award, which may cover matters falling within the scope of the code of conduct.

61. In relation to the challenge procedure, the Working Group may wish to recall its decision that the development of reforms by UNCITRAL was desirable to address concerns relating to the adequacy, effectiveness and transparency of the challenge mechanisms, in addition to disclosure, available under many existing treaties and arbitration rules (A/CN.9/964, para. 90). The Working Group may wish to note that that matter may not necessarily be part of a code of conduct, but that the challenge procedure, including who decides on a challenge, the standard of proof and threshold for disqualification, would require careful consideration as part of the reform options.

(ii) Full-time adjudicators in a standing mechanism

62. In addition to the possibility to disqualify adjudicators who do not comply with the requirements and obligations, the provision for disciplinary power over adjudicators and related sanctions are usually provided in standing mechanisms and would have the effect of increasing the accountability of the adjudicatory body.

B. Remarks on the implementation of the reform option

63. For a code of conduct developed on a multilateral basis to become applicable, its relationship with other relevant laws and rules must be established. Arbitration is primarily governed, in order of priority, by (i) a treaty for ICSID arbitration and national arbitration legislation (as interpreted by the relevant domestic courts) of the seat for non-ICSID investment arbitrations (and New York Convention at the enforcement stage); (ii) arbitration rules (be they institutional arbitration rules or the UNCITRAL Arbitration Rules); and (iii) provided they are within the scope of the procedural autonomy granted to the disputing parties in the law referred to in (i), other rules on which the disputing parties may agree.

64. A code of conduct could be a soft law instrument which may guide the interpretation of duties provided in other sources. It could also become binding law if contracting States incorporate it into a treaty or if disputing parties agree on its application.