United Nations A/CN.9/WG.III/WP.209

General Assembly

Distr.: Limited
15 September 2021

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Forty-first session
Vienna, online, 15–19 November 2021

Possible reform of investor-State dispute settlement (ISDS)

Draft Code of Conduct

Note by the Secretariat

Contents

V.21-06811 (E)

I. Introduction

1. This note includes a draft code of conduct ("Code of Conduct" or "Code") for adjudicators, prepared jointly by the Secretariats of the International Centre for Settlement of Investment Disputes (ICSID or the "Centre") and UNCITRAL.

2. By way of background, ICSID 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. At UNCITRAL, Working Group III (ISDS Reform) 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 was to 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 topic of a code of conduct 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*, para. 51). Proposals for reform have been submitted by Governments in preparation for the deliberations on the development of reform options, and many of these proposals included comments on a code of conduct.

5. 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 prior 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). The Code seeks to reflect comments made on preliminary drafts of the Code, including during the joint informal meetings organized by the Secretariats ICSID and UNCITRAL. The Secretariats have prepared a joint document that includes detailed explanations of such comments and how they have been addressed.[1]

6. The Code also reflects the deliberations of Working Group III to date that the Code should be binding and contain concrete rules rather than guidelines (A/CN.9/1004*, paras. 52 and 68). It aims at providing a uniform approach to requirements applicable to adjudicators handling international investment disputes (IID) and at giving more concrete content to broad ethical notions and standards found in the applicable instruments. It contains applicable principles and detailed provisions, while providing for flexibility to address unforeseen circumstances (A/CN.9/1004*, paras. 56 and 68). As urged by numerous commentators, the Code below seeks to create a "balanced, realistic and workable" document.

7. 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*, para. 55). For this purpose, the comprehensive term "adjudicator" is used to ensure its application to all those who adjudicate IID cases, regardless of whether they are arbitrators, members of annulment committees, members of an appeal mechanism or judges on a bilateral or standing multilateral mechanism.

8. The Working Group may wish to consider that the Code will be accompanied by a commentary ("Commentary"). It is contemplated that the Commentary would aim at clarifying the content of each provision, including the relationship between the obligations of adjudicators and the disclosures required, discussing practical implications, and providing examples.

[1] Available at https://uncitral.un.org/en/codeofconduct.

II. Draft Code of Conduct

A. Definitions (article 1)

9. The Working Group may wish to consider article 1, as follows:

Article 1 – Definitions

For the purposes of this Code:

1. "Adjudicator" means Arbitrator and Judge;

2. "Arbitrator" means a member of an arbitral tribunal, or a member of an ICSID ad hoc Committee, who is appointed to resolve an "International Investment Dispute" (IID);

3. "Assistant" means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, as agreed with the disputing parties;

4. "Candidate" means a person who has been contacted regarding potential appointment as an Arbitrator, or who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role;

5. "International Investment Dispute" (IID) means a dispute arising pursuant to the investment promotion and protection provisions in an international treaty;

6. "Judge" means a person appointed as a member of a standing mechanism for IID settlement;

7. "Treaty Party" means a State or Regional Economic Integration Organization (REIO) that is a Party to the treaty upon which consent to adjudicate is based.

Comments

10. The Working Group may wish to note that article 1 defines certain terms that are used throughout the text.

11. Article 1(1) refers to Adjudicator as a generic term covering both arbitrators and judges.

12. Article 1(2) defines "Arbitrators". It includes a reference to "member of an ICSID ad hoc Committee" to identify this role precisely. It does not include counsel, witnesses, or other participants in the process. Nonetheless, treaty parties and disputing parties would remain free to agree to apply the Code mutatis mutandis to such persons. Article 1(2) also does not include conciliators, fact finders or mediators.

13. Article 1(3) defines "Assistant". This term does not include the staff of arbitral institutions or of standing multilateral mechanisms as these persons are employed by the institution/court seized of the dispute. They do not work under the direction or control of the adjudicator in the same manner as an assistant and they are governed by institution or court-specific ethical and contractual obligations. The term "Assistant" does not include tribunal-appointed experts. It is intended to apply to persons under the direction and control of the Adjudicator, with case-related tasks as defined in Article 1(3). The Commentary could clarify this and also indicate that it could be recommended that adjudicators discuss the profile, tasks, hearing attendance, and fees and expenses of the assistant with the parties at the start of the proceeding.

14. Article 1(4) defines "Candidate" as a person not yet appointed as an arbitrator and a person proposed but not yet confirmed as a judge of a standing multilateral mechanism. The application of the Code to "Candidates" is addressed in article 2(3).

15. Article 1(5) defines “International Investment Dispute” (“IID”) because the Code applies to both State-State and investor-State disputes arising from international investment treaties. This definition of IID would exclude coverage of contractual and foreign investment law. Nonetheless, treaty parties and disputing parties would remain free to agree to apply the Code in a contract- or foreign investment law-based investment dispute. If the Working Group were to decide that IID based on investment contracts and foreign investment law should be included, additional language would be required addressing the source of the disputes (contract or domestic law) and the potential parties (foreign investor and regional economic integration organizations/State or sub-national entities).

16. Article 1(6) defines “Judge” as a judge appointed to a standing multilateral mechanism for IID. This is to clarify those obligations that are applicable only to judges but not arbitrators.

17. Article 1(7) defines “Treaty Party”. This allows the Code to distinguish between the disputing parties, on the one hand, and the State or regional economic integration organisation that is acting as a non-disputing treaty Party in the proceedings.

Questions for consideration

18. The Working Group may wish to consider:

- Whether the Code should cover additional categories of persons involved in ISDS;
- Whether the obligations applicable to members of a standing multilateral mechanism should be addressed in a separate code, given that obligations in respect to members of a standing multilateral mechanism must take into account the specific context of their employment and appointment which may already include restrictions that limit the risk of conflicts;[2]
- Whether the term “IID” should be limited to treaty-based disputes, or also cover disputes arising from contractual and foreign investment law;
- Whether the term “Assistant” should include other persons, such as tribunal-appointed experts, tribunal secretaries, and registries; and
- Whether any other terms require a definition.

B. Application of the Code (article 2)

19. The Working Group may wish to consider article 2 as follows:

Article 2 – Application of the Code

1. *Articles 3 to 5, 6(1) and 7 to 11 of this Code apply to Adjudicators in IID.*

2. Adjudicators shall take reasonable steps to ensure that their Assistants are aware of, and comply with, the Code.

3. Articles 6(2), 7, 8(1), 8(3), 8(4), 10 and 11 of this Code apply to Candidates from the date they are first contacted concerning a possible appointment.

[2] Different proposals were made in this respect in the comments received: some comments noted the specific distinctions required in each article to reflect attributes of a standing multilateral mechanism as compared to *ad hoc* arbitration; others proposed drafting a separate code applicable to members of a standing multilateral mechanism; by contrast, some comments stated that it was premature to draft separate codes for a standing multilateral mechanism and for arbitral tribunals; similarly, others proposed to delete the definition of “Judges” in the Code and other provisions relevant to judges, as these might prejudge the outcome of a discussion on a standing multilateral mechanism.

4. Option 1: *[This Code shall not apply if the treaty upon which consent to adjudicate is based contains a code of conduct for IID pursuant to that treaty, unless [and to the extent that] the Treaty Parties [or disputing parties] agree otherwise.]* Option 2: *[This Code shall apply unless otherwise modified by provisions in a code of conduct for IID [or other ethical obligations] for Adjudicators included in the treaty upon which consent to adjudicate is based.]*

Comments

20. The Working Group may wish to note that article 2 is a general provision on the application of the Code. It lists the provisions applicable to adjudicators and candidates.

21. Article 2(2) clarifies that an assistant does not have direct obligations under the Code; rather, the adjudicator assigning the tasks to the assistant must take reasonable steps to ensure that the assistant knows of, and complies with, the Code. Theoretically, an adjudicator could be challenged for failure to take such reasonable steps. However, in practical terms, parties would likely ask for the assistant to be removed if they had concerns. Where secretariat personnel of an institution act as tribunal secretary or assistant, the relevant institution would usually maintain sufficient safeguards.

22. Article 2(4) addresses the interplay of this Code with any treaty-specific code of conduct and provides that the latter would, to some extent, supersede this Code. It is bracketed with options for further consideration, including considerations arising from the implementation method ultimately adopted for the Code (see document A/CN.9/WG.III/WP.208). A reference to "IID" has been added in article 2(4) to ensure that the rule of precedence for treaty-specific codes of conduct is not construed as including codes designed for State-State disputes that are not based on investment obligations. The Code also provides that parties may "agree otherwise" on the precedence of a treaty-specific code of conduct over this Code. It should be considered whether the ability to "agree otherwise" is limited to agreement between the treaty Parties (expressed in the treaty) or whether disputing parties should be able to "agree otherwise" on a case-by-case basis.

23. The Working Group may wish to consider:

- Whether the reference to the relevant articles is correct, noting that certain duties are inappropriate for a judge who might be appointed to a future standing multilateral mechanism, depending on how the judges would be selected;[3]
- Whether article 2, paragraphs 1 and 3 are necessary given that the respective articles in the Code already clarify whether they apply to adjudicators, judges and/or candidates;
- Whether the Code should apply directly to assistants and if so, which Code obligations should apply to assistants, how would a breach be determined, and how would a breach be sanctioned? If not, which obligations would they be expected to comply with, how would failure to comply be addressed, and how would they be sanctioned for non-compliance? In addressing this issue in the Code, the differences between adjudicators and assistants should be considered, including that assistants: (i) are not the decision-makers in a case; (ii) are not "appointed" to a case; (iii) do not exercise discretionary powers; (iv) are not authorized to discharge core tasks of the adjudicator such as convening a hearing, questioning witnesses, or issuing an award; (v) act on instructions from and under the control of an adjudicator; (vi) are not subject to formal challenge or other sanction; and (vii) can be removed by direction of the adjudicators;
- Whether the treaty-specific code of conduct would supersede this Code as this would enable treaty Parties to adopt different obligations in their treaty-specific codes or whether this Code should supersede the treaty-specific code of conduct,

[3] This matter is also under consideration by the Working Group (see documents A/CN.9/WG.III/169 and A/CN.9/WG.III/203).

with the objective of promoting harmonization in the ethical standards applying to adjudicators in IIDs; in considering this issue, it should be considered whether the approaches in option 1 or 2 could render the Code difficult to apply in practice;[4] and

- Whether article 2 should expressly deal with the temporal application of the Code.

C. Independence and Impartiality (article 3)

24. The Working Group may wish to consider article 3, as follows:

Article 3 – Independence and Impartiality

1. Adjudicators shall be independent and impartial.

2. Article 3(1) encompasses the obligation not to:

(a) [Be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour;]

(b) Be influenced by loyalty to a Treaty Party, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the IID;

(c) Take instruction from any organization, government or individual regarding the matters addressed in the IID;

(d) Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgement;

(e) Use their position to advance any personal or private interest; or

(f) Assume an obligation or accept a benefit that could interfere with the performance of their duties.

Comments

25. The Working Group may wish to note that article 3 sets out the fundamental obligations of independence and impartiality, along with the related obligations. As noted in document A/CN.9/WG.III/WP.167, paras. 15–28, independence and impartiality are key elements of any system of justice and they are meant to ensure a fair trial and compliance with due process requirements.

26. Article 3(2) expands on article 3(1) by giving examples in a non-exhaustive manner. Article 3(2)(a) is in brackets for further discussion as concerns had been raised about the subjective nature of the criteria, which could lead to frivolous challenges.

27. The Commentary could give examples of conduct falling within article 3(1). Any example should be caveated with the fact that a determination of whether there is a breach of the Code is highly fact dependent. The IBA Guidelines on Conflicts of Interest contain many examples of common situations which could be used for this purpose. The Commentary could refer to the Guidelines and add specific examples relevant to IID.

Question for consideration

28. The Working Group may wish to consider whether to add an obligation concerning the “appearance” of independence and impartiality in article 3(1). In this

[4] For example, the following points could be considered: how a potential adjudicator would know which of two potentially applicable codes must be complied with when considering an offer of appointment and drafting a declaration as to impartiality; similarly, how disputing parties would know whether a treaty-based code has effectively modified this Code when formulating a challenge to the adjudicator.

respect, the distinction between the adjudicators' ethical duty to be independent and impartial and the threshold for disqualification should be considered: (i) the ethical duty is to be independent and impartial; (ii) the standard of appearance is applicable to disqualification proposals, i.e. the arbitrator can be disqualified if a reasonable third person consider that there is an appearance of lack of independence and impartiality; (iii) article 3 does not establish a standard of disqualification. It sets out the primary ethical duty for adjudicators. The commonly accepted standard for disqualification is an objective standard, based on a reasonable evaluation by a third party of the relevant facts and circumstances.[5]

D. Limit on Multiple Roles (article 4)

29. The Working Group may wish to consider article 4, as follows:

Article 4 – Limit on multiple roles

Option 1: "Full prohibition"

An Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID case [or in any other proceeding relating to the application or interpretation of [an] [the same] investment treaty] unless the disputing parties agree otherwise.

Option 2: "Modified prohibition"

Unless the disputing parties agree otherwise, an Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID [or other proceeding] involving:

(a) The same measures;

(b) [Substantially] the same legal issues;

(c) One of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise; or [and]

(d) [The same treaty].

Option 3: "Full disclosure" (with option to challenge)

Adjudicators shall disclose whether they concurrently act as a legal representative, expert, or in any other role on cases involving the same or related parties, the same measures, or [substantially] the same legal issues as are at issue in the IID.

Comments

30. The Working Group may wish to note that article 4 addresses the question of double hatting, and the options seek to reflect the various views expressed on this topic. It is very likely that judges would not be permitted to play multiple roles concurrently under the terms of their appointment, so the application of the provision to judges would require further consideration. The various options refer to adjudicators acting as legal representatives and expert witnesses only. While other categories could be added, the draft proposes to address only legal representatives and expert witnesses as these are the most relevant situations.

31. Option 1 provides for an absolute prohibition of double hatting. The policy rationale for option 1 as underlined by commentators is that: (i) it is a bright-line rule that can easily be applied by adjudicators and disputing parties; and (ii) it best preserves the legitimacy of IID settlement. The full prohibition of double hatting is extended to acting as a legal representative or expert witness in both IID and in

[5] See the approach adopted in the ICSID Arbitration Rules, UNCITRAL Arbitration Rules, and the IBA Guidelines on Conflicts of Interest.

non-IID cases in which the application or interpretation of investment treaties are at issue. This is reflected in the brackets to option 1 ("[or in any proceeding relating to the application or interpretation of [an][the same] investment treaty],"). This is also reflected in option 2 ("IID [or other] proceeding)".

32. Option 2 provides for certain limitations on double hatting based on specific criteria. The policy rationale for option 2 as underlined by commentators is that it achieves the objectives of a prohibition but with fewer adverse consequences on diversity and party freedom of adjudicator selection. In particular, commentators mentioned that: (i) it better targets those appointments that raise actual conflicts compared to when a broad category of adjudicators are generally excluded ex ante; (ii) it gives parties greater freedom of choice to select among potential candidates; (iii) it would exclude fewer qualified adjudicators; (iv) it would reduce the likelihood of repeat appointment; (iv) it is less likely to create barriers to new entrants to the field; and (v) by creating fewer barriers to entry, it encourages diversity of adjudicators.

33. If the approach in option 2 were to be taken, further consideration should be given to the meaning of each of the listed conditions (a) to (d). For example, what types of cases raise "substantially the same legal issues"? Would this be triggered simply by concurrent cases considering a breach of an expropriation obligation in a treaty, or would it require greater similarity between the cases? Further consideration of option 2 should also address whether conditions (a) to (d) are cumulative ("and") or whether the presence of any one of them ("or") is sufficient to exclude an adjudicator under article 4.

34. Option 3 reflects the approach that double hatting should be addressed by extensive disclosure of the concurrent roles combined with the possibility of challenge, rather than through an ex-ante prohibition. The policy rationale for option 3 as underlined by commentators is close to that of option 2, and is that: (i) it allows assessment of situations most likely to cause conflict and better targets those appointments that raise actual conflict rather than simply excluding a broad category of adjudicators ex ante; (ii) it is based on specific facts rather than an ex-ante limit defined by the role played; (iii) it best supports party autonomy in appointment; (iv) it does not constrain the development of new entrants in the field; (v) it would minimize the risk of unintended consequences; (vi) it would prevent an increase in repeat appointment; and (vii) it would avoid the potential adverse effect on diversity caused by a prohibition.

Questions for consideration

35. The Working Group may wish to decide which option should be retained. It may also wish to consider:

- Whether the disputing parties should be entitled to consent to an adjudicator concurrently acting in multiple roles; and
- Whether article 4 should be expressly linked to article 10 of the Code to ensure that consent to double hatting is an informed one; in that respect, it may be noted that as article 10 is mandatory and serves multiple purposes, there might be no need for such a link in the text.

E. Duty of Diligence (article 5)

36. The Working Group may wish to consider article 5, as follows:

Article 5 – Duty of diligence

1. Adjudicators shall perform their duties diligently throughout the proceeding. They shall be reasonably available to the disputing parties and the administering institution, dedicate the necessary time and effort to the proceeding, and render all decisions in a timely manner.

2. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.

Comments

37. The Working Group may wish to note that article 5(1) reflects the duty to be available for the proceeding. It applies to adjudicators and complements requirements to act diligently and expeditiously in certain arbitral rules or the likely terms of appointment of judges. The Working Group may wish to note that article 5 does not contain specific limitations on the number of cases that adjudicators could concurrently handle in light of the fact that that number depends on many variable factors, including the stage of the case, its complexity, and the role of the adjudicator (whether presiding or not).

38. The Commentary could clarify that competing obligations include taking on new cases or responsibilities that prevent or unduly delay the adjudicator's ability to fulfil its duties with respect to existing proceedings. The Commentary could also address the implications of the duty of diligence in terms of potential limits to resignations from existing cases. For example, resignations should be in good faith and justifiable and the adjudicator should consider the effect of the resignation on the proceedings. This would parallel and complement article 6(2) that provides that candidates should not accept appointments if they believe they do not have the availability to fulfil their duties.

F. Other Duties (article 6)

39. The Working Group may wish to consider article 6, as follows:

Article 6 – Other duties

1. Adjudicators shall:

(a) Display high standards of integrity, fairness, and competence; and

(b) Treat all participants in the proceeding with civility.

2. Candidates shall decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfil their duties.

Comments

40. The Working Group may wish to note that article 6(1) incorporates necessary attributes of adjudicators. The duties described therein are commonly used in dispute settlement mechanisms and fall within generally accepted concepts (e.g. Article 14 of the ICSID Convention 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.")

G. Ex parte communications (article 7)

41. The Working Group may wish to consider article 7, as follows:

Article 7 – Ex parte communication of a Candidate or an Adjudicator

1. *A Candidate or Adjudicator shall not have any ex parte communication concerning the IID [during the proceeding], except as follows:*

(a) To determine a Candidate's expertise, experience, ability, availability, and the existence of any potential conflicts of interest;

(b) To determine the expertise, experience, ability, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Adjudicator, if both disputing parties so agree;

(c) As otherwise permitted by the applicable rules or treaty or agreed by the disputing parties.

2. Communications permitted by Article 7(1) shall not address any issues pertaining to [the merits of the case, including] jurisdictional, procedural, or substantive issues that the Candidate or Adjudicator reasonably anticipates could arise in the IID.

3. "Ex parte communication" means any oral or written communication between a Candidate or Adjudicator and a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the opposing disputing party.

Comments

42. The Working Group may wish note that article 7 addresses ex parte contacts in the pre-appointment stage and borrows substantially from the IBA Guidelines on Party Representation in International Arbitration.

43. Article 7(1) would apply to judges in the selection process stage, and likely would be supplemented by rules governing selection to a standing multilateral mechanism. The Commentary could confirm that article 7(1) and (2) would not apply once the judge is appointed to a standing multilateral mechanism and is no longer a candidate.

44. It may be noted that article 7 applies to communications between candidates/adjudicators and disputing parties, and article 8 addresses confidentiality more generally, including with respect to persons other than the disputing parties.

45. Article 7(3) defines "ex parte communication". It could be placed in article 1 (definitions), but is inserted in article 7 for reader convenience, as this is the only provision where the term "ex parte" is used.

Question for consideration

46. The Working Group may wish to consider whether the prohibition on ex parte communication should survive the proceeding, i.e., retaining the words"[during the proceeding]" in article 7(1). Suggestions were made to permit communications about the case between a disputing party and the adjudicator after the case had concluded as the transparency and conflict concerns motivating the provision would no longer apply at this point.

H. Confidentiality (article 8)

47. The Working Group may wish to consider article 8, as follows:

Article 8 – Confidentiality

1. Candidates and Adjudicators shall not:

(a) Disclose or use any information concerning, or acquired in connection with, an IID except for the purposes of that proceeding or in accordance with Article 8(2)[or article 8(4)];

(b) [Disclose or use any information concerning or acquired in connection with an IID to gain personal advantage, advantage for others, or to adversely affect the interests of others.]

2. Adjudicators shall not:

(a) Disclose the contents of deliberations or any view expressed by an Adjudicator during the deliberation;

(b) Disclose any draft of a decision, order or award to the disputing [and non-disputing] parties prior to rendering it, unless the applicable rules or treaty so permit or the disputing parties agree otherwise;

(c) Disclose any decision, order or award they have rendered, except in accordance with the applicable rules or treaty or with consent of the disputing parties;

(d) [Comment on any decision, order or award in which they participated [unless that decision, order or award is public.]]

3. The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.

4. [The obligations in Article 8 shall not apply to the extent that that a Candidate or Adjudicator is legally compelled to disclose confidential information in a court or other competent body or must disclose such information to protect his or her rights in a court or other competent body].

Comments

48. The Working Group may wish to note that draft article 8(1) imposes a general duty not to use information obtained in respect of a proceeding except for the purposes of that proceeding. This obligation applies to candidates and adjudicators, and it applies indefinitely, including after the proceeding has concluded or a person ceases to be a candidate or adjudicator (see article 8(3)).

49. Article 8(2) applies only to adjudicators as it relates to information that a candidate would not acquire. It also applies indefinitely according to article 8(3). Article 8(2)(b) would allow adjudicators to circulate a draft ruling for comment to the disputing parties if permitted by the relevant rules or treaty, or with party consent. This could specifically be noted in the Commentary. Article 8(2)(c) underlines that adjudicators must not disclose a decision, ruling or award unless it is in the public domain in accordance with the relevant rules on publication of such materials. This would prohibit verbal or written comment on such rulings until they are in the public domain. Potentially, a party could advise a relevant bar or professional association of the breach of the confidentiality provisions after the conclusion of the proceeding.

50. Article 8(4) provides as an exception that the confidentiality obligation should not apply to the extent that an adjudicator is legally compelled by a competent body to disclose information or must do so to protect his or her rights in a legal action.

Questions for consideration

51. The Working Group may wish to consider whether, given the broad scope of article 8(1)(a), article 8(1)(b) is redundant.

I. Fees and expenses (article 9)

52. The Working Group may wish to consider article 9, as follows:

Article 9 – Fees and expenses

1. Unless otherwise regulated by the applicable rules or treaty, any discussion concerning fees or expenses shall be concluded before or immediately upon constitution of the adjudicatory body.

2. Any discussion concerning fees or expenses shall be communicated to the disputing parties through the entity administering the proceeding, or by the presiding Arbitrator if there is no administering institution.

3. Adjudicators shall keep an accurate record of their time and expenses attributable to the IID, as well as the time and expenses of any Assistant.

Comments

53. The Working Group may wish to note that article 9 applies to adjudicators. This provision also aims at avoiding situations in which adjudicators accept an appointment and request different fees than those initially anticipated once the tribunal is formed thus disrupting the process and creating a difficult situation for the parties. Each adjudicator shall keep a record and render a final account of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant. To the extent that judges are salaried, there would be no discussion concerning fees with the disputing parties, and hence the provision could be inapplicable or apply only to expenses.

54. Article 9(1) reflects the fact that discussions on fees or expenses might not be able to be addressed until the adjudicatory body has been constituted. The entity administering the proceeding referred to in article 9(2) could be an arbitral institution or the administrative arm of a standing multilateral mechanism. Article 9(3) applies to all forms of remuneration of adjudicators (i.e., whether salaried or paid based on time spent, an institutional formula, or other formula) to reflect the importance of transparency and accountability for remuneration.

J. Disclosure Obligations (article 10)

55. The Working Group may wish to consider article 10, as follows:

Article 10 – Disclosure obligations

1. Candidates and Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.

2. Candidates and Adjudicators shall include the following information in their disclosures:

(a) Any financial, business, professional, or personal relationship within [the past five/ten years] with:

(i) The disputing parties, and any subsidiary, affiliate, parent entity, State agency or State-owned enterprise identified by the disputing parties;

(ii) The legal representatives of either disputing party;

(iii) The other Adjudicators and expert witnesses in the IID; and

(iv) Any third-party funder with a financial interest in the outcome of the IID and identified by a disputing party;

(b) Any financial or personal interest in:

(i) The IID or its outcome;

(ii) Any other proceeding involving the same measures as the IID; and

(iii) Any other proceeding involving at least one of the same disputing parties or entities identified pursuant to Article 10(2)(a)(i);

(c) All IID [and all related proceedings] in which the Candidate or Adjudicator has been involved in the past [five/ten] years or is currently involved in as a legal representative, expert witness, or Adjudicator; and

(d) Their appointments as legal representative, expert witness, or Adjudicator made by either disputing party or its legal representative in an IID [and non-IID] in the past [five/ten] years.

3. Candidates and Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the

disputing parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty.

4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information.

5. Candidates and Adjudicators shall err in favour of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure or failure to disclose does not by itself establish a breach of this Code.

6. [Following disclosure], disputing parties may agree to waive any potential non-compliance with this Code, unless the applicable rules or treaty provide otherwise.

Comments

56. The Working Group may wish to note that article 10 of the Code addresses the disclosure obligations. It applies to candidates and adjudicators. Candidates who become adjudicators have a continuing duty to make disclosures pursuant to article 10(4). While judges may have few disclosures to make due to the standing nature of the mechanism and any relevant pre-selection process, it is possible that they may be required to make a disclosure in connection with a specific case. Article 10 plays a central role as the disclosure obligations would ensure compliance with the Code and transparency of the process.

57. It may be noted that a distinction is made between the formal standard for disclosure in the adjudicator's declaration ("in the eyes of the disputing parties") and the standard for disqualification of the adjudicator. The Code also keeps the broad standard for disclosure separate from the standard for disqualification and clarifies the matters to be disclosed.

58. The standard for disclosure is intentionally made broad to enhance transparency and to provide the disputing parties the opportunity to assess a conflict of interest or raise any concerns. This standard is complemented by article 10(5), which directs candidates and adjudicators to err in favour of disclosure if they have any doubt and article 10(2), which provides guidance on matters that they should disclose. In addition, the Commentary could include examples that provide further guidance.

59. The standard for a successful challenge will depend on the applicable rules and will likely be more restrictive than the standard for disclosure. If adjudicators conclude that a matter does affect their independence or impartiality, they should not accept the appointment or should resign. Alternatively, the parties could in certain circumstances waive the conflict of interest that would have otherwise disqualified the arbitrator.

60. Article 10(2) includes a list of matters that should be disclosed, either because they might raise doubts as to independence and impartiality under article 10(1) or to enhance transparency. Among other things, it allows candidates and adjudicators to reflect on their availability for the case and potential conflicts of interest, and allows parties to ask follow-up questions or raise concerns, for instance with regard to potential issue conflicts. The list in article 10(2) is not exhaustive, as there may be matters that are not listed but would be encompassed by article 10(1). Conversely, not all matters listed in article 10(2) must be disclosed in accordance with article 10(1).

61. A candidate/adjudicator would have a general obligation to make reasonable efforts to become aware of any interest, relationship or matter pursuant to article 10(1), which includes relationships with the disputing parties and potential third-party funders. If a candidate/adjudicator knows or becomes aware of any entity related to the disputing parties or third-party funder that were not identified by the parties, this should be disclosed pursuant to article 10(1). However, it might be too onerous to require candidates/adjudicators to research all potential entities related to the parties and third-party funders involved. The parties may be better positioned to

assist the candidate/adjudicator with the conflict check by providing the names of the relevant entities and third-party funders.

62. Article 10(5) states that "the fact of disclosure or failure to disclose does not by itself establish a breach of this Code." A failure to disclose must be assessed in its context and the circumstances of each case, depending on whether the information that was not disclosed would raise doubts as to the independence or impartiality of the adjudicator.

63. Article 10(6) provides that the parties may waive any conflict of interest, similar to standard 4(c)(ii) of the IBA Guidelines. Any waiver of lack of independence or impartiality would need to be expressed and made having full knowledge of the relevant facts and circumstances based on the candidate's/adjudicator's disclosure. The possibility of a waiver would also be subject to the applicable rules or treaty. For example, a waiver of the qualities required of an arbitrator pursuant to Article 14(1) of the ICSID Convention would not be possible, but the parties may agree that a certain matter does not affect their reliance upon the arbitrator to exercise independent judgment.

K. Compliance with the Code of Conduct and enforcement (article 11)

64. The Working Group may wish to consider article 11, as follows:

Article 11 – Compliance with the Code of Conduct

1. Every Adjudicator and Candidate shall comply with the applicable provisions of this Code.

2. The disqualification and removal procedures in the applicable rules or treaties shall apply to this Code.

3. [Other options based on means of implementation of the Code.]

Comments

65. The heading of article 11 reflects the expectation that the primary method of implementing the Code will be through voluntary compliance.

66. It may be noted that the availability of disqualification and removal procedures will depend on the rules or treaties applicable to the IID. Accordingly, article 11(2) does not create additional grounds for disqualification or removal under the applicable rules or treaties, including under mandatory domestic laws applicable in ad hoc arbitrations. For example, under the UNCITRAL Arbitration Rules (2013), an arbitrator could only be disqualified "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence." Similarly, in ICSID arbitration proceedings, an arbitrator could only be challenged for manifest lack of the qualities referred to in article 14(1) of the Convention or because the person was ineligible for appointment.

67. A related issue concerns a failure to disclose pursuant to article 10 of the Code. Article 10(5) provides that "the fact of disclosure or failure to disclose does not by itself establish a breach of this Code." Various views were insofar expressed. Some comments noted that a failure to disclose is not in itself a ground for disqualification, but that it could be factually relevant to establishing a breach of the Code. Other comments suggested that a "serious," "repeated" or "wilful disregard" of the disclosure obligation should be subject to article 11(2) or could give rise to doubts about an adjudicator's independence and impartiality. The importance of any omission to disclose matters giving rise to a conflict depends on the circumstances of the case.

68. Article 11(3) remains bracketed for further consideration of possible sanctions.

69. The Working Group may wish to consider document A/CN.9/WG.III/WP.208 regarding the means of implementation of the Code and the possible sanctions.

L. Annex 1 to the Code of Conduct

70. The Working Group may wish to note that the Code of Conduct contains a standard form for "Declaration, Disclosures and Background Information", which reads as follows:

"*1. I acknowledge having received a copy of the Code of Conduct (attached) for this proceeding. I have read and understood this Code of Conduct and I undertake to comply with it.*

2. To the best of my knowledge, there is no reason why I should not serve as Arbitrator/Judge in this proceeding. I am impartial and independent and have no impediment referred to in the Code of Conduct.

3. I understand that I have a continuing obligation to make further disclosures based on newly discovered information as soon as I become aware of such information in accordance with Article 10 of the Code of Conduct.

4. I attach my current curriculum vitae to this declaration.

5. In accordance with Article 10 of the Code of Conduct, I wish to make the following disclosures and/or provide the following information:

a. [INSERT AS RELEVANT] or

b. [STATE NO ADDITIONAL DISCLOSURE OR INFORMATION TO BE PROVIDED AS OF THE DATE OF THE DECLARATION]".