



OVERVIEW OF DRAFT CODE OF CONDUCT

UNCITRAL & ICSID SECRETARIATS

PURPOSE OF PRESENTATION



To overview the draft
Code of Conduct
released by the
UNCITRAL & ICSID
Secretariats



To provide a basis for
comment on the draft
Code by stakeholders



To encourage
stakeholders to submit
written comments

WRITTEN COMMENTS ON THE DRAFT CODE

- Should be submitted by October 15, 2020
- Will be compiled by ICSID and UNCITRAL and published on their respective websites
- Can be sent to either (or both) of :
 - UNCITRAL Secretariat (uncitral@un.org) , or
 - ICSID Secretariat (icsidsecretariat@worldbank.org)
- Will serve as a basis to prepare the working paper on the draft code of conduct for consideration by the UNCITRAL Working Group III, and ultimately for consideration of a draft Code by ICSID Member States

BACKGROUND REFERENCES

- Direction for UNCITRAL and ICSID to jointly undertake preparatory work on a Code of Conduct (A/CN.9/970, para. 84)
- Background paper (A/CN.9/WG.III/WP.167) and compilation of existing Codes of Conduct in treaties (Annex to the paper)
- Consideration of the background paper and annex by UNCITRAL Working Group III in October 2019 (A/CN.9/1004)
- Draft Code with commentary issued accordingly in May 2020 (cite)

STRUCTURE OF THE CODE

- Initial section (articles 1 and 2)
 - Definition of relevant terms (article 1) and applicability of the code (article 2)
- Overview of the obligations of adjudicators (article 3)
- Detailed provisions on principles and requirements (articles 4 to 9)
- Interviews and fees in a party-appointment system (articles 10 and 11)
- Enforcement of obligations (article 12)

BASIS FOR ITS CONTENT

- 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, as well as case law
- Complies with the requirements that the code should:
 - Be binding and contain concrete rules rather than guidelines
 - Provide applicable principles and detailed provisions allowing for flexibility to address unforeseen circumstances

ARTICLE 1 - DEFINITIONS

- Code applies to:
 - Adjudicators – includes arbitrators, annulment or appeal committees and judges on a permanent mechanism
 - Assistants – persons under direction and control of adjudicator
 - Candidates – persons proposed for appointment as adjudicator but not yet selected
 - Applies to ISDS, defined as disputes involving foreign investor and a State or REIO (or constituent subdivision thereof), arising under treaty, domestic law or contract

ARTICLE 2 - APPLICATION

- Applies to all adjudicators in ISDS
- Adjudicators are responsible for compliance by their assistants
- Candidates must comply from the time they are contacted for possible appointment
 - Candidates in international arbitration would be persons selected to possibly act as arbitrator, before their appointment
 - Candidates in a permanent body would be judges to be appointed on a panel to hear a specific case

REMARKS ON ARTICLE 2 - APPLICATION

- The Code therefore does not apply to:
 - Counsel, experts and other participants in the proceedings
 - Members of arbitral institutions, including secretariats that provide administrative and registrar functions and assist in the proceedings as part of their regular work for the institution

Separate codes would allow for a more detailed and targeted regulation of different ethical obligations

ARTICLE 3 - DUTIES AND RESPONSIBILITIES

- Provides for the basic duties of every adjudicator:
 - a) Be independent and impartial, avoid direct or indirect conflict, impropriety, bias or appearance of bias
 - b) Display highest standards of integrity fairness and competence
 - c) Be available and act diligently, in civil manner and efficiently
 - d) Comply with confidentiality and non-disclosure obligations

ARTICLE 4

- Provides for the obligation to be independent and impartial at all times
- Includes examples of independence and impartiality
 - Not to be influenced by outside considerations
 - Not to allow past or current relationships to influence conduct
 - Not to act in a way that suggests others may influence the adjudicator
 - Not to use adjudicative position to advance personal or private interest
 - Not to accept a benefit that interferes with performance of duties



ARTICLE 5 – DISCLOSURE OBLIGATIONS

- Elaborates on avoidance of conflict through broad disclosure obligations
- Must make all reasonable efforts to be aware of, and must disclose, any interest or relationship that could affect independence or impartiality
- Disclosure must be made promptly
- Err in favour of disclosure if in doubt, but need not disclose trivial interests

ARTICLE 5(2) – TYPES OF DISCLOSURE

- Inclusive but not exhaustive list of what must be disclosed
 - a) relationships in last 5 years
 - b) financial interest in outcome
 - c) service in other cases
 - d) views expressed in publications
- Application to repeat appointees
- Application to issue conflict

ARTICLE 6 – LIMIT ON MULTIPLE ROLES

- Should double-hatting be prohibited, limited or disclosed to allow parties to assess whether it raises conflict in the circumstances of the case?
 - Consider impact of prohibition on ability of new/diverse candidates to become adjudicators
- How would this apply differently in a permanent court?
- In any circumstance, how is double-hat defined? Wearing the hats:
 - At the same time or a proximate time?
 - In cases with the same parties, the same facts or legal issues?
 - In cases under the same treaty; ISDS; international (ICJ) work
 - All or some of above



ARTICLE 7 – INTEGRITY, FAIRNESS, COMPETENCE

- Integrity and fairness required – includes reasonable treatment of parties and equal opportunity to present case
- Prohibit *ex parte* contacts concerning the proceeding
- Must maintain and enhance competence
- Cannot delegate decision-making to any other person



ARTICLE 8 - AVAILABILITY, DILIGENCE, CIVILITY & EFFICIENCY

- Requires adjudicators to ensure availability before acceptance and address case with necessary expedition
- Art. 8(2) brackets hard prohibition on number of cases – appropriate number varies

ARTICLE 9 - CONFIDENTIALITY

- Codifies generally followed rules on confidentiality for adjudicators:
 - Not to disclose non-public information from proceeding
 - Not to use such information for personal advantage
 - Not to disclose contents of deliberations
 - Not to disclose contents of a ruling until it is in the public domain



ARTICLE 10 – PRE- APPOINTMENT INTERVIEWS

- Limits scope of pre-appointment interviews
- Requires their disclosure if adjudicator selected in bracketed text
- Relevance of the provision in the context of a permanent body to be considered

ARTICLE 11 – FEES & EXPENSES

- Provision mainly applicable in the context of international arbitration
- Requires discussion of fees to be concluded upon constitution
- If possible, should be done through administering entity
- Requires accurate record-keeping

ARTICLE 12 – ENFORCEMENT OF CODE

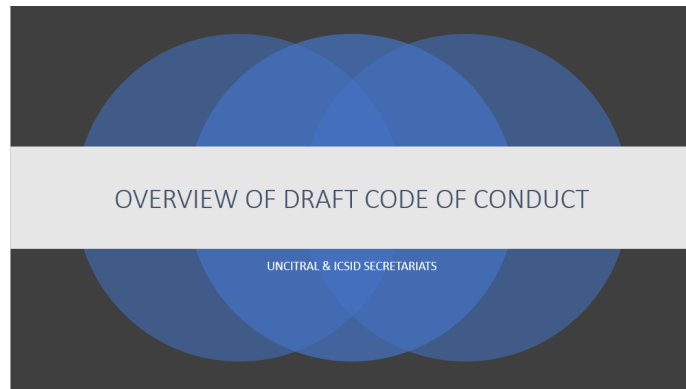
- Primary duty on adjudicators to comply with Code, including by disclosure
- Right of parties to waive or challenge in accordance with applicable procedural rules
- Other options may be available, but consider their enforceability

IMPLEMENTATION OF CODE

- Broad application will help make ethical obligations predictable and uniform
- A finalized Code could be implemented in numerous ways – eg:
 - Model for new treaties
 - Addendum to existing treaties
 - Incorporation in procedural rules
 - Incorporation into multilateral instrument on ISDS reform

IMPLEMENTATION IN ICSID RULES

- By approval of ICSID member States or by attachment to declaration template



- QUESTIONS OR COMMENTS