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Chiara Giorgetti

Mohammed Abdel Wahab

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A Code of Conduct for Arbitrators and Judges

Chiara Giorgetti & Mohamed S. Abdel Wahab

This paper focuses on codes of conduct for arbitrators and judges, an important issue in the discussion of ISDS reform. It also responds specifically to the UNCITRAL Working Group III's request to the Academic Forum to draft a background paper on the issue.[1]

The paper sets forth different options and proposals that are relevant to the reform process and tackles the diverse rights and obligations related to the conduct of arbitrators and judges. More specifically, it looks at three important issues. First, it provides a general overview of existing codes of ethics in several international fora to highlight the many common features. Second, it highlights salient substantive issues in a code of ethics for arbitrators and judges and possible options to address them. Third, and finally, it discusses the format and process of a possible code of ethics and provides possible options.[2]

1. Basic Ethics Standards for International Adjudicators

1. While no specific code of conduct exists in investment arbitration, there are numerous codes of ethics (i.e the moral principles that should guide how adjudicators behave) that regulate various instances of commercial arbitration, standardize specific aspects of the arbitral proceedings or are applicable in international litigation more generally.[3] However, some codes are mandatory and a movement to judicialisation of investment disputes could lead to adoption of codes of conduct in hard law, as has occurred with other international courts and tribunals.[4]

[1] See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session, 37 th session 1-5 April 2019, New York, A/CN.9/970.

[2] See generally Chiara Giorgetti and Jeffrey L. Dunoff, *Ex Pluribus Unum? On the Form and Shape of a Commons Code of Ethics in International Litigation,* 113 AJIL UNBOUND 312 (2019).

[3] See generally Jeffrey L. Dunoff and Chiara Giorgetti, *A Focus on Ethics in International Courts and Tribunals*, AJIL UNBOUND 279 (2019).

[4] See Giorgetti & Dunoff, supra at 2.

2. Code of conduct (or ethics) are enacted and drafted by bar associations, arbitral institutions and international legal societies. Several international courts and tribunals also have adopted specific codes for judges, counsel and other actors in international proceedings. Other ethics provisions are included in other applicable procedural rules and domestic norms. This is important because existing provisions may be helpful to elaborate a specific code for investment arbitration and may offer important examples. It is also important to note that ethics in international proceedings is not a new topic, rather – as it is the case for many international issues – it is a topic that has evolved in a multifaced, decentralized and fragmented way.[5]

3. Ethics codes adopted in the context of *commercial arbitration* include several codes of ethics developed by arbitral institutions. For example, the American Bar Association (ABA) originally proposed in 1977 a Code of Ethics for Arbitrators in Commercial Disputes[6] developed by a special committee of the ABA and the American Arbitration Association. The Code was revised in 2004 and supplemented in 2011 and 2013. The Code includes 10 Canons, on matters such as integrity and fairness in the arbitration process, duties of disclosure, rules related to communication with parties and the conduct of proceedings, requirements that arbitrators make decisions in a just, independent and deliberate manner, duties of confidentiality and relation of trust, standards of integrity and fairness in arranging compensation and reimbursement of expenses, provisions on advertising and promotion and provisions related to neutrality.

4. Similarly, the Singapore International Arbitration Center (SIAC) also enacted a Code of Ethics for Arbitrators, comprising seven provisions covering: appointment, disclosure, bias, communications, fees, conduct and confidentiality. Ethics Codes have also been enacted in the context of other arbitral institutions. Examples include the Code of Ethical Conduct of the Hong Kong International Arbitration Centre (HKIAC), rules of the London Court of International Arbitration and the Code of Ethics of Arbitrators of the Milan Chamber of Arbitration.

5. Ethics Codes have also been developed by several professional and learnt societies, including the International Bar Association International (IBA), and the Chartered Institute of Arbitrators (CIArb). These institutions have developed general codes, like the CIArb Code of Professional and Ethical Conduct for Members. Others have focused on specific issues, like the renowned IBA Guidelines on Conflicts of Interest in International Arbitration, and the IBA International Principles on Conduct for the Legal Profession.[7] Equally well-known are the Burgh House Principles on the Independence of the International Judiciary, which are not focused on

[5] *See* Dunoff & Giorgetti, supra at 3.

[6] *See generally* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES. (AM. ARBITRATION ASS'N 2004).

[7] INT'L PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION at 5-7 (INT'L BAR ASS'N 2011).

international arbitration but are directed all members of the international judiciary. These soft-law instruments provide important guidance to arbitrators.

6. Importantly, several international courts and tribunals have also adopted their own code of ethics, which are applicable in proceedings therein. These include the International Criminal Court (ICC), which followed in the steps of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and adopted Codes of conducts for judges, counsel and members of the Office of the Prosecutor.[8] The ICC Code of Judicial Ethics contains eleven articles and sets forth general principles of judicial independences, impartiality, integrity, confidentiality, diligence. The European Court of Human Rights also adopted a resolution on Judicial Ethics in 2008, it contains ten general ethics principles guiding actions of the members of the court, including the duties of independence and impartiality, integrity, diligence and competence and discretion.[9]

7. Codes of conduct developed by arbitral bodies, professional societies and international courts and tribunals contain several broadly similar concepts, including: independence and impartiality; diligence and integrity; and competence.

8. The duty of independence and impartiality is an essential principle found in all kinds of codification of duties of arbitrators. Although codes and conventions differ in exact wording, they seek to avoid future conflicts by imposing broad rules of impartiality at the outset of proceedings. For example, Article 14(1) of the ICSID Convention stipulates that those serving on the arbitral panel "may be relied upon to exercise independent judgment."[10] Similarly, Article 4 of the UNCITRAL Arbitration Rules and Transparency Rules (2013) provides that in making arbitrators' appointment "the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator."[11]

9. In practice, the duty of independence and impartiality is embodied in the duty by adjudicators to avoid conflicts of interest, i.e. situations that create or could create the impression that the adjudicator is partial in favour or against of the parties, or is dependent (financially or otherwise) on one of the parties. What may constitute a conflict, however, is not uniformly agreed and remains

[8] CORE ICC TEXTS, INT'L CRIM. CT. (collecting Code of Judicial Ethics, Code of Professional Conduct for Counsel, Regulations of the Office of the Prosecutor, and Regulations of the Registry) and Regulations and Policies, UN International Residual Mechanism for Criminal Tribunals (collecting codes and directives).

[9] EUROPEAN COURT OF HUMAN RIGHTS, RESOLUTION ON JUDICIAL ETHICS (2008).

[10] ICSID CONVENTION, REGULATIONS, AND RULES art. 14, APR. 10, 2006, 575 U.N.T.S. 159.

[11] UNCITRAL ARBITRATION RULES, ART. 11 (UNITED NATIONS COMMISSION ON INT'L TRADE LAW 2013).

an important issue for consideration.[12] Some guidance is found in the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration.[13] The IBA Guidelines group circumstances that could possibly be seen as creating conflicts of interests in three lists. The Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence (for example when there is an identity between the arbitrator and a party, including his or her law firm) and must be avoided. The Orange List is a non-exhaustive list of specific situations that may give rise to doubts as to the arbitrator's impartiality and independence depending on the specific facts of the case (for example if the arbitrator's law firm has acted for or against one of the parties in an unrelated matter within the past three years). The Green List is a list of specific situations where there is no appearance and no actual conflict of interest (for example when the arbitrator spoke at a conference with another arbitrator or counsel to the parties),

10. The duty of independence and impartiality is continuous. Arbitrators and judges have a continuous obligation to disclose any facts that would give rise to justifiable doubts. Generally, arbitrators are required to be free of obvious conflicts before and during proceedings, and should disclose any potential conflicts before appointment. Rules 6(2) of ICSID Arbitral Rules contains the declaration that arbitrators must sign before or at the first session of the Tribunals. The declaration requires arbitrators to provide, inter alia, "a statement of (a) [the arbitrator's] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party." By signing the declaration, arbitrators acknowledge the assumption of "a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."[14] Similarly, the European Court of Arbitration Arbitrators Code of Ethics includes the duty "to be and remain independent from the parties, their shareholders, their officers, their advisors; to be and remain impartial; and to remain neutral and unbiased."[15]

11. In order to provide guidance for international arbitrators on the concept of arbitrator neutrality, the IBA also created the Minimum Standards of Judicial Independence (1982), and laid out guidelines for the separation of the judiciary and the executive.[16] It also put forward a two-part definition of judicial independence. Article 1 provides that individual judges should enjoy "personal" and

[12] For a thoughtful appraisal, see Hélène Ruiz Fabri, *Conflicts of Interests: Navigating in the Fog*, 113 AJIL UNBOUND 307 (2019).

[13] INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICT OF INTEREST IN INTERNATIONAL ARBITRATION, adopted by resolution of the IBA Council in 2014.

[14] ICSID CONVENTION, REGULATIONS, AND RULES, RULE 6, APR. 10, 2006, 575 U.N.T.S. 159.

[15] EUROPEAN COURT OF ARBITRATION, ARBITRATORS CODE OF ETHICS.

[16] *See generally* INT'L BAR ASS'N MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE (INT'L BAR ASS'N 1982).

"substantive" independence. It further states that personal independence means that "the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control" and that substantive independence means that "in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.[17]

12. The International Chamber of Commerce's "Arbitrator Statement" requires arbitrators to "verify that they follow rules of impartiality and subjectively consider themselves impartial."[18] This bifurcation, although phrased differently from the IBA standard, evinces similar principals of impartiality relating to previous actions, character and attitudes ("subjective independence") and specific actions taken related to the proceedings at hand ("objective independence").

13. The duty of independence and impartiality is also a foundational principle in the statutes of several international courts and tribunals. The International Court of Justice, for example, addresses the independence and impartiality of its judges in Articles 2 and 20. [19] Article 2 requires judges to be independent. The International Tribunal for the Law of the Sea (ITLOS) contains an oath of impartiality in Article 5, which require members to solemnly declare that they will perform "their duties and exercise [their] powers as judge honourably, faithfully, impartially and conscientiously."[20] The Rome Statute of the International Criminal Court articulates the duty of independence in Article 40 and provides that "judges shall be independent in the performance of their functions" and that judges "shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence."[21] The Statute of the Court of Justice of the European Union (CJEU) requires judges to take an oath of impartiality to "to perform [their] duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court."[22] Article 6 of the European Convention on Human Rights states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[23]

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[17] *Id.* at art. 1.

[18] *See generally* ICC ARBITRATOR STATEMENT ACCEPTANCE, AVAILABILITY, IMPARTIALITY AND INDEPENDENCE (INT'L COURT OF ARBITRATION 2012).

[19] STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Jul. 28, 1945, 33 U.N.T.S. 993. Article 2 reads, in the relevant part that "The Court shall be composed of a body of independent judges." Article 20 provides that "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."

[20] STATUTE FOR THE INT'L TRIBUNAL OF THE LAW OF THE SEA art. 5, 1833 U.N.T.S. 3 (1982).

[21] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 40, Jul. 1, 2002, 2187 U.N.T.S. 90.

[22] STATUTE OF COURT OF JUSTICE OF THE EUROPEAN UNION, art. 2, Mar. 30, 2010.

[23] EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 6, NOV. 4, 1950, 213 U.N.T.S. 222.

14. The duty of diligence and integrity is also commonly included in most code of ethics. The duty includes the provision that arbitrators not accept appointments to which they will not be able to devote sufficient time and that they act in a timely manner at all stages of proceedings. Arbitrators must also disclose any potential conflicts of interest they may have at the outset of proceedings and continue to disclose any potential conflicts of which the arbitrator becomes aware during the course of proceedings. Arbitrators are also to act fairly as between the parties, refrain from acting unilaterally with one party, and only accept fees as prescribed by the rules agreed beforehand.

15. Several codes also require that potential arbitrators demonstrate competence in their fields. Rule 3 of the Hong Kong International Arbitration Centre Code of Ethical Conduct requires an arbitrator to "only accept an appointment if he or she has suitable experience and ability for the case and available time to proceed with the arbitration."[24] Article 17.3 of the WTO Rules requires that "[a]ll persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO."[25] The Singapore International Arbitration Center (SIAC) stipulates competency in the language of proceedings in Article 1.1 of its Code of Ethics for an Arbitrator, stating that "a prospective arbitrator shall accept an appointment only if [s/]he is fully satisfied that [s/]he is able to discharge his [or her] duties without bias, [s/]he has an adequate knowledge of the language of the arbitration, and [s/]he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.[26] Table I below provides an overview of the location of the rules of these general principles in some of the most common codes of ethics for arbitrators.

[24] HONG KONG INTERNATIONAL ARBITRATION CENTRE CODE OF ETHICAL CONDUCT at rule 3.

[25] RULES OF CONDUCT FOR THE UNDERSTANDING ON RULES AND PROCEDURES AT ART. 17.3 (WORLD TRADE ORG. 1996).

[26] CODE OF ETHICS FOR AN ARBITRATOR at 1 (SINGAPORE INT'L ARBITRATION CENTER 2015). See also CODE OF PROF'L AND ETHICAL CONDUCT FOR MEMBERS at Rule 4 (CHARTERED INST. OF ARBITRATORS 2009), providing that "a member shall accept an appointment or act only if appropriately qualified or experienced" and that 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.

Table I: Key provisions in certain specific arbitral codes and rules

	Independence and Impartiality	Diligence and Integrity	Competence
ICSID Arbitration Rules	6.2	14.1	14.1
LCIA Arbitration Rules	5.3, 5.4, 5.5, 18.4	5.4, 10.2	
HKIAC Code of Conduct	Rule 1, Rule 2	Rule 2, Rule 4, Rule 5	Rule 3
CIETAC Code of Conduct	I, II, III, V, X	II, IV, VI, VII, VIII, IX, X, XI, XIII, XV	XII, XIV
CIARB Code of Professional and Ethical Conduct	Rule 3, Rule 6	Rule 1, Rule 2, Rule 5, Rule 7, Rule 8, Rule 9	Rule 4
SIAC Code of Ethics	2.1, 2.2, 3.1, 3.2	1.2, 1.3, 4.1, 4.2, 4.3, 5.1, 5.2, 7.1	1.1, 6.1

2. Salient Substantive Issues when considering a Code of Conduct for Arbitrators in Investment Arbitration

16. As a discussion on a possible code of conduct becomes more focused, it is helpful to consider some of the more salient and core issues it could address and how they could be addressed. These are issues that are specific to ISDS and have become increasingly relevant in the reform discussion. This report is, necessarily, limited and is focused on specific facets emanating from the duty of independence and impartiality.[27]

17. As seen above, the duty of impartiality and independence is a central part of the canon of codes for all legal proceedings, including international arbitration, and it is a complex and multifaceted requirement.[28] Impartiality means not favouring one of the parties and not having inappropriate predispositions towards the issues in dispute and/or applicable legal principles.[29] Independence means adjudicators must not depend – financially or otherwise – on one of the parties. Beyond this general agreement, however, there are some important and complex issues to be considered that require further thinking. These include double hatting, issue conflict and the extent of disclosure requirements.

[27] Other important issues for considerations include issues of confidentiality, transparency, the prohibition of *ex-parte* communication and challenges procedures.

[28] THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY, para. 1.1.

[29] IBA MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE, para. G. 44.

18. A first important and salient issue in the context of ethics and ISDS reform is whether an arbitrator should be prohibited or discouraged to hold other positions while serving as an arbitrator.[30] This is the so-called issue of "double hatting" which occurs when an arbitrator wears multiple hats, as counsel, expert, adjudicator or member of an arbitral institution in other cases, while also sitting as arbitrator. The concern of double-hatting is that an arbitrator may end up favoring a position that he or she might adopt as counsel in another case, or has supported as expert or in service of his or her institution or court, or vice-versa.[31]

19. "Double hatting" has become increasingly important and has also generated much discussion. However, the phenomenon of "double hatting" is not yet clear. First, empirical data on the prevalence of "double-hatting" are still initial.[32] Further, what "double hatting" really entails is also not unanimously agreed. Should it be limited to counting the presence of an arbitrator in proceedings occurring under the same arbitral rules or administered by the same arbitral institution? As ISDS proceedings are largely similar, focusing on work in one institution does not seem sufficient. Should double hatting then include all functions an arbitrator undertakes, whether as counsel, expert or member of a court or arbitral institution, in all proceedings involving ISDS? But why stop there? The community of people working in international cases involving a State is rather small, and includes many repeat players.[33] Should "double hatting" then be understood as including all cases involving a State or all cases involving courts and tribunals? To properly deal and regulate double hatting, therefore, what the phenomenon entails must be further understood.

20. A further element for reflection is also how to regulate double-hatting. There are several approaches. First, double-hatting could be prohibited completely. A person could be required to withdraw from all, as well and decline any new, further engagements.[34] This position is, however, problematic. Most arbitrators are appointed only once, and requesting any potential arbitrator to withdraw from other cases may hinder entrance of new players in the arbitration system, and thus be an obstacle to

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[30] For a nuanced discussion of double hatting, see John Crook, *Dual Hats and Arbitrator Diversity: Goals in Tension*, 113 AJIL UNBOUND 284(2019).

[31] For a helpful description of the tensions, see Hélène Ruiz Fabri, *Conflicts of Interests: Navigating in the Fog,* 113 AJIL UNBOUND,307 (2019).

[32] For a thorough discussion of this issue and helpful statistics, see Malcolm Langford, Daniel Behn and Runar Lie, *The Ethics and Empirics of Double Hatting*, 6 ESIL REFLECTIONS 7 (2017).

[33] On this issue, see Malcolm Langford, Daniel Behn and Runar Lie, *The Revolving Door in International Investment Arbitration,* 20(2) JOURNAL OF INTERNATIONAL ECONOMIC Law 301 (2017).

[34] This is the approach taken in the EU-Canada Trade Agreement (CETA) which requires members of the Tribunal upon appointment to "refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement." Art. 8.30.1 EU-Canada Comprehensive and Economic Trade Agreement (CETA). Note that this provision would apply, once in force, to members of a *permanent* tribunal deciding ISDS cases. Text available here.

increase diversity, an important goal of ISDS reform.[35] Withdrawing from cases may also have its own ethical challenges, moreover, as it may be deontologically dubious vis-à-vis clients for a counsel to withdraw from all cases when appointed as arbitrator.

21. Alternatively, double hatting could also be regulated in terms of total number of cases in which an arbitrator can sit at one time or by considering the timeframe involved in the different proceedings. The latter is the framework used by the International Court of Justice. In its practice direction VIII, the Court asserts that "The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court" and it call the parties choosing a judge *ad hoc* to "refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination." The Court also calls on the parties to "refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court."[36]

22. It is important to consider, moreover, whether limitations on double hatting should only include cases pending within the same arbitration institutions or originating from the same treaty, or whether regulations should include all cases involving investment treaties and ISDS. The extent of the prohibition may also depend on whether an arbitrator sits in a permanent court or is only member of an arbitral tribunal.

23. A second topical issue for consideration is the so called "issue conflict", when a party believes that an arbitrator may have prejudged an issue due to a previously expressed opinion, in an award, public statement or publication.[37] The fear in this case is a lack of independence brought about by a previously held position.

24. Issue conflict has become a conundrum in international arbitration, and the extent and consequence of it are not yet clear.[38] Indeed, while on one side it is important for arbitrators to have an open mind on

[35] For a clear explanation of the tension, see John Crook, *Dual Hats and Arbitrator Diversity: Goals in Tension*, 113 AJIL UNBOUND 284(2019).

[36] ICJ Practice Directions VII, see also Practice Direction VIII stating "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court."

[37] See generally Judith Levine; *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, TDM 4 (2008), www.transnational-dispute-management.com.

[38] See, generally, Laurence Boisson de Chazournes and John Crook, *ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration* (2016).

the issues of concerns in a specific case, it is also important for them to be experts and knowledgeable about the legal issues that are relevant in an arbitration. Further, certain applicable rules may require arbitrators to be experts in specific issues.[39]

25. Moreover, regulating issue conflict may become challenging on several grounds. How and whether to prohibit or regulate issue conflict is inherently difficult. First, arbitrators can and do change their positions in light of new information and evolving circumstances once they are informed of the fact in a case. Further, regulating issue conflict may lead to a chilling effect of scholarship and advanced studies, as arbitrators may avoid tackling difficult and complex issues for the fear of being challenged. Further, it may create situations where the most experienced arbitrators become more vulnerable to challenge because of their experience. Moreover, as the definition of issue conflict and inappropriate prejudgment become clearer, difficulties remain in practice in relation to both the timing of disclosures and challenges, as often the topics that become key to resolve the conflict are not clear at the time of the appointment.

26. Finally, a further issue for consideration is the extent of the duty of disclosure. Disclosure obligations exist at all time in the proceedings. As seen above, a prospective arbitrator should disclose all circumstances that may affect his or her independence and impartiality and continue to do so once she or he is appointed.[40] The duty of disclosure should continue throughout the arbitral proceedings and should be made in writing and communicated to all parties and arbitrators.[41] However, the extent of the obligation is important to consider. While generally it includes all circumstances that may give rise to any justifiable doubts regarding the arbitrator's independence and impartiality. It is important to also detail more specifically the requirements to avoid misunderstanding.[42] For example, should the obligation include matters that are public and easily ascertainable? What is the extent of required disclosure of non-public matters? Generally, disclosure obligations may include: past and present business relationship with a party to the dispute, representative of a party or any party that potentially has a role in the arbitration; nature and duration of social relationships with a party to the dispute, representative of a party or any party that has potentially a role in the arbitration; nature of any previous relationship with other members of the tribunal; any prior knowledge of the dispute; any commitment that may affect the arbitrator's availability. An important point for consideration is also how far back the duty of disclosure applies. Should it start from the very beginning of the arbitrator's career or only include as specific period, for example three, five or ten years?

[39] *See*, for example, Art. 8.27.4 of the EU-Canada Comprehensive and Economic Trade Agreement (CETA) requiring arbitrators to "have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements." Text available here.

[40] IBA Rules of Ethics of International Arbitrators, Rule 4.1.

[41] IBA Rules of Ethics of International Arbitrators, Rule 4.3.

[42] IBA Rules of Ethics of International Arbitrators, Rule 4.2.

3. Salient Procedural Issues when considering a Code of Conduct for Arbitrators in Investment Arbitration

27. As a code of conduct is developed, it becomes important to think about procedural issues and choices that are relevant to the implementation of the code. In this section, two specific issues are considered: first, the structure of a possible code and, second, whether one or more than one codes is desirable.

28. First, it is important to consider the possible structure of the code itself. Most codes only catalogue duties and obligations of arbitrators generally and without a clear order. An alternative option could be to structure a code of conduct following the arbitral procedure. Thus, after the general principles applicable in all situations, the code of conduct could focus first on pre-appointment duties, on provisions applicable during the pendency of the case next, and finally on obligations applicable after the proceedings are ended. Pre-appointment duties would include, for example, rules applicable to pre-appointment interview and other contact between the parties and the arbitrators. Provisions related to consideration of time, competence and expertise when accepting appointments could also be included in this section. Provisions applicable during the arbitral proceedings include duties of disclosures, conflicts of interest, duties owed to the parties and the other members of the tribunal in respect of independence and impartiality, fairness, diligence and competence. These duties would also include obligations to act in a timely manner. Finally, duties that exist after the end of the proceeding will relate particularly on confidentiality issues, and specifically on the continuous duty of confidentiality.

29. While we think that following the arbitral process to structure a code of ethics is preferable and sound, there are also alternatives. For example, another way to approach the format of a code might be to focus on to whom certain obligations are due. Specifically, arbitrators have obligations towards the parties, other members of the arbitral tribunal, the institution and the secretariat. Sections of a prospective code could highlight the obligations due to each actor.

30. A final issue to explore is whether a unique code for arbitrators and judges is preferable to adopting a code that is specific for each group of actors involved in arbitration.[43] In addition to arbitrators, there are several other actors involved in arbitration whose actions would beneficially be regulated by an ethics' code. These actors include counsel, members of the arbitral institutions, such as secretariat and registrar's officials, secretaries of tribunals, and if relevant, permanent judges.

31. Several institutions have also enacted specific codes for counsel appearing in proceedings they administer or regulate. These include both arbitral institutions and international courts. For

[43] See Chiara Giorgetti and Jeffrey L. Dunoff, *Ex Pluribus Unum? On the Form and Shape of a Commons Code of Ethics in International Litigation*, 113 AJIL UNBOUND 312 (2019).

example, the LCIA's new Arbitration Rules introduce detailed guidelines on the conduct of the parties' legal representatives. Parties need to ensure that their named legal representatives agree to comply with the guidelines. The IBA also released Guidelines on Party Representation that gives parties the option to adopt a uniform standard code of conduct to govern legal representatives in international arbitration. The International Criminal Court enacted a specific Code of Conduct for Counsel. Article 6 of the Code require counsel to be independent, have integrity and freedom.[44] Other international criminal courts have also enacted special and separate codes of conduct for counsel. Given the unique and different issues codes applicable to counsel regulate, this approach seems to be the correct one.

32. Other actors that are at time regulated, fully or partially, by separate provisions include members of the secretariat and of the registrar. For example, Article 10 of the Statute of the Court of Justice of the European Union provides that "the Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice."[45]

33. Overall, practice shows that most codes of conduct provide specific regulations for a specific kind of actor involved in international litigation or arbitration. This choice seems preferable to highlight differences among obligations of different actors. Alternatively, a code of conduct for all actors in ISDS could be developed, though principles contained therein might be need to be rather general.

[44] CODE OF PROF'L CONDUCT FOR COUNSEL, art. 6 (INT'L CRIMINAL COURT 2005) ("1. Counsel shall act honourably, independently and freely. 2. Counsel shall not: (a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or (b) Do anything which may lead to any reasonable inference that his or her independence has been compromised").

[45] STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, Art. 10.