MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

COMMENTS ON THE DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTES SETTLEMENT

CENTRE FOR ARBITRATION AND RESEARCH

ABOUT MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

Maharashtra National Law University (MNLU) Mumbai is a premier law university situated in Mumbai, India. It is a University set up by the Government of Maharashtra with a vision to become a world-class law university committed to foster an environment of excellence in research, scholarship, education and justice.' The motto of University is Dharme Tatparta i.e. 'Preparedness to Uphold Dharma'.

The University aims to, impart legal education by nurturing diversity, equity, ethics and inclusiveness; inculcate passion for creative and critical thinking and a commitment to transformative solutions; promote and encourage service to society and lifelong learning; and adopt research strategies that promote professional skills and scholarly training.

With its vision and mission to impart justice education, a number of research centres have been established by the University. Under the able guidance of the Chancellor, Justice S.A. Bobde, Chief Justice of India, Vice-Chancellor Prof. (Dr.) Dilip Ukey and Registrar Mr. Vivek B. Gavhane (Judge), the University continues to set benchmarks for legal education across the country.

See more at http://mnlumumbai.edu.in/

ABOUT CENTRE FOR ARBITRATION AND RESEARCH

MNLU Mumbai's Centre for Arbitration and Research (CAR) seeks to carry out research in arbitration law and practice, contribute to policy discussion, and provide a platform for the training of arbitration professionals. CAR wishes to emphasise research and training in contemporary and emerging issues of arbitration law, specifically in niche practice areas, often unexplored by academia, but highly relevant for practitioners, such as construction arbitration, maritime arbitration, investment arbitration, sports arbitration, etc. CAR was founded under the patronage of Vice-Chancellor Prof. (Dr.) Dilip Ukey. CAR's Faculty Coordinator is Chirag Balyan, Assistant Professor of Law at MNLU Mumbai.

See more at http://mnlumumbai.edu.in/car.php

FOREWORD

Investment Treaty Arbitration is a rapidly growing practice area and is seen as a great catalyst for the growth of investment in developing countries. The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (Draft Code) prepared by ICSID and UNCITRAL is sure to contribute to the development of investment arbitration regime by strengthening the standards applicable to the adjudicators.

The Comments are restricted to Articles 5, 6, 8 and 10 of the Draft Code. An attempt has been made to draw a balance between the requirement of transparency and accountability on the one hand and the interest of adjudicators on the other hand. It is also considered that the language used in the Draft Code is not unnecessarily broad to allow vagueness to creep in. Ultimately, it is also considered that the standards are not too onerous to discourage adjudicators, specifically, young adjudicators. Concerns of efficiency, fairness and legitimacy are at the core of these Comments.

The Comments are the result of a combined effort of industry experts, academia and the students at MNLU Mumbai. The collaboration has complemented the exhaustive research carried out by the members of the CAR with the realities of the investment arbitration practice. I congratulate the team for their invaluable guidance and suggestions. I am sure that these comments will add academic value to the discourse around the Code of Conduct for Adjudicators.

PROF. (DR.) DILIP UKEY
Vice Chancellor,
Maharashtra National Law Universitv Mumbai

ADVISORS

Prof. Chirag Balyan
Coordinator, Centre for Arbitration & Research

Dr. Kabir Duggal
Attorney, Arnold & Porter
Lecturer, Columbia Law School

Dr. Aniruddha Rajput
Member, UN International Law Commission
Chairperson, Drafting Committee (69th Session, 2017)

RESEARCH TEAM

Sikandar Hyaat Khan
Law Graduate

Abhisar Vidyarthi
Law Graduate

Arnav Maru
Student

Parina Muchhala
Student

Yagnesh Sharma
Student

Publication Design: Anushka Rungta

TABLE OF CONTENTS

INTRODUCTION

The Investor-State Dispute Settlement **(ISDS)** regime has been subjected to criticism due to 'concerns about the "process" and "outcome" of investment arbitration,' with respect to the system's transparency, independence and impartiality, due process, third party participation, and consistency and predictability.[1] These concerns have set in motion a process of reforms within the United Nations Commission on International Trade Law **(UNCITRAL)** and the International Centre for Settlement of Investment Disputes **(ICSID)**.

In October 2016, ICSID advised its 153 member States that it was beginning the process to further update the ICSID rules and regulations.[2] The Rule Amendment Project of the ICSID is premised upon a three-fold end. First, is the modernization of rules based on case law jurisprudence of the ICSID. Second, is to make the ISDS model time and cost effective while balancing due process considerations and making ISDS more equitable for investors and States. Third, is to make ISDS an environmentally friendly process.[3]

On the other hand, the UNCITRAL, at its Fiftieth Session in July 2017, gave mandate to Working Group III (WGIII) to contemplate and discuss possible reforms of the ISDS system.[4] WG III has, thereafter, heard proposals and alternatives from member states and observer states to the UNICTRAL as well as observer international and non-governmental organizations on issues associated with the duration and cost of investor-State arbitration proceedings and related issues such as security for costs; issues of predictability and consistency between arbitral decisions; concerns related to processes for the appointment of arbitrators, including issues associated with their independence, diversity, and qualifications; and problems raised by third-party funding arrangements.[5]

---

[1] Karl P. Sauvant and Federico Ortino, 'Improving The International Investment Law and Policy Regime: Options for the Future' <http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf> accessed 7 March 2020, 75-85.

[2] The ICSID Rules Amendment Process <https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf>

[3] Ibid.

[4] UNCITRAL, 'Report of the United Nations Commission on International Trade Law', Fiftieth Session (3-21 July 2017), UN Doc A/72/17.

[5] Ibid.

One aspect in which the secretariats of both ICSID and UNCITRAL have acted in concert to work on reform is with respect to a code of conduct for arbitrators and adjudicators of investment disputes. On May 1, 2020, the 'Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement' (hereinafter, Draft Code) was made available to the public. The Draft Code, through 12 different articles, tries to comprehensively cover and regulate the various facets of an arbitrator/adjudicator's role and responsibility towards parties and vice versa, in ISDS, ranging from disclosure obligations to ex-parte communication with parties to even pre-appointment interviews. The respective secretariats have invited comments from interested members of the legal fraternity on the draft code of comments.

The Centre for Arbitration Research at Maharashtra National Law University Mumbai has prepared a report which seeks to analyze the provisions of the Draft Code and provide its inputs for the due consideration of the ICSID and UNCITRAL secretariats. As identified by the ICSID itself, the ISDS process ought to be cost and time effective but also maintain its legitimacy by accommodating due process concerns. The suggestions in this report are aimed towards the end of eradicating vagueness from these provisions to prevent any loopholes in the framework governing arbitrator/adjudicator conduct. These comments seek to advance the growth of the arbitration framework and thereby make a positive contribution to the international economic law regime at large. The Centre has tried to narrow down on certain provisions which present scope for a substantial discussion and analysis.

EXECUTIVE SUMMARY

I. Article 5

i. Article 5(2)(a)(iv)

- Article 5(2)(a)(iv) seeks disclosure of any professional, business and other significant relationships, within the past five years with any third party with a '*direct or indirect financial*' interest in the outcome of the proceeding. The inclusion of this provision is warranted as the adjudicator's relationship with interested third parties such as third-party funders may affect their ability to decide the dispute with an open mind. However, instead of using the phrase '*direct or indirect interest*,' the code must use '*significant interest*,' in order to ensure clarity in the disclosure mandate. The code must define '*significant interest*' as interest resulting into doubts about independence, sense of fairness and impartiality of the adjudicators. '*Significant interest*' in the outcome is an effective threshold, and can include (a) ultimate beneficial owners; (b) persons obligated to pay an award under an indemnification or other agreement; (c) persons entitled to receive proceeds of an award under a third-party-funding or other agreement; and (d) ultimate parent companies of a party (not exhaustive).

- The bifurcation of interests of third parties into 'direct and indirect interests' will result into vagueness as the term 'indirect interest' is difficult to define. It is suggested that the threshold should be the 'significance of interest' and its implication on the independence and impartiality of the adjudicators

ii. Article 5(2)(d)

- Article 5(2)(d) of the Draft Code addresses the widely debated question of '*issue conflict*'. Issue conflicts may arise owing to past expression of views by the adjudicators that may show certain bias or prejudgment of certain issues. In consequence, Subparagraph (d) includes disclosure of relevant publications that may give rise to such issue conflicts. However, it hasn't conclusively included the disclosure of '*relevant public speeches*'.

- The ambit of disclosure required under this provision must be extended to include '*relevant public speeches*' of the adjudicators. Public speeches and statements might be manifestations of the pre-existing and core views of the adjudicators, and excluding them from the ambit of disclosures may be antithesis to the purpose of Article 5. That said, in order to ensure that adjudicators are not discouraged to share their ideas and participate in development of arbitration law, the phrase '*relevant public speeches*' must be understood as speech that relates to fact in issue or some other relevant fact connected to the fact in issue, and which reflects the pre-disposition or conviction of the adjudicator. The ambit of disclosure must be limited to 'publicly available' speeches. The published summary of the privately made speech shall not fall under this clause unless the same is vetted by the person who made the speech.

II. Article 6

- This article discusses the prevalent practice of 'double hatting', and how it may cause apprehension of real or apparent bias in an ISDS proceeding.

- The definition of double hatting does not have a uniform consensus and is widely debated and discussed by scholars. The comment on the article is divided into three separate parts, each dealing with an unsettled position in the article.

- The first part argues that a disclosure-based approach is preferable to total prohibition. The second part discusses the temporal limit that should be observed in case of assumption of multiple roles. Lastly, the third part addresses the strict limits that double hatting regulation must function within. The underlying tone in the comment is one that favours party autonomy in determining the course of the proceedings. The comment ends by suggesting that disclosure must be opted in favour of refrain. Assuming that the Code chooses refrain, it is suggested that the temporal restriction on such refrain be kept to a minimum. Issue conflicts should be dealt via a mandatory disclosure regime and avoid blanket prohibition, with a reduction in the standard to challenge the arbitrator under the ICSID Convention.

III. Article 8(2)

- Article 8 forms part of the general obligations of adjudicators, being availability, diligence, civility and efficiency that must underlie each stage of the arbitral proceedings. This is to impose a positive obligation on adjudicators to maintain the highest standards of professionalism and punctuality throughout proceedings.

- Article 8(2) lays down disclosure requirements with respect to the availability of adjudicator. It is suggested that there shall be maximum disclosure to ensure transparency and accountability through disclosure of objective data by adjudicators. Such disclosure shall include sharing of data including, the existing commitments as well as past record with respect to delivery of award. The parties on the basis of such data on the availability and past performance of adjudicator will therefore be able to objectively assess appointing of adjudicator.

- The responsibility to weigh the existing workload with the commitments involved in the new matter also vests with adjudicator. Thus, it is also suggested that the Code may consider mechanisms such as financial cuts on adjudicators to ensure punctuality and availability. Lastly, the removal of an absolute ban on limitation will ensure that adjudicators' experiences and judgment with respect to availability are given equal consideration at the appointment stage.

IV. Article 10

- Article 10 seeks to regulate the manner in which pre-appointment interviews of potential candidates are taken in the ISDS regime. Pre-appointment interviews serve as means of ensuring the suitability of a candidate by checking for any prima facie conflict of interest that the candidate might have.

- However, such interviews must not touch upon substantive matters at stake and a party should in no way solicit the views of the candidate on such matters in event of their selection.

- To prevent the possibility of such a malpractice, it is important the provision restricts the scope of such interviews by laying down certain strict criteria beyond which questions ought not to be asked. Provision must be made for recording of such interviews as a check and balance mechanism to see that propriety is observed in the manner these interviews are

conducted. Additionally, keeping in line with principle of independence, a provision should be added to the effect that such interviews should not be compensated except for any travel or transportation costs incurred by the candidate.

ARTICLE 5

Conflicts of Interest: Disclosure Obligations

1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality. To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.

2. Disclosures made pursuant to paragraph (1) shall include the following:

(a) Any professional, business and other significant relationships, within the past [five] years with:

(i) The parties [and any subsidiaries, parent-companies or agencies related to the parties];

(ii) The parties' counsel;

(iii) Any present or past adjudicators or experts in the proceeding;

(iv) [Any third party with a direct or indirect financial interest in the outcome of the proceeding];

(b) Any direct or indirect financial interest in:

(i) The proceeding or in its outcome; and

(ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding;

(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and

(d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.

4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.

1. Article 5(2)(a)(iv)

1.1 Ambiguously defined terminology: 'Direct or indirect'

Article 5(2)(a)(iv) is a valid inclusion in the Draft Code. The inclusion of the provision is warranted as the relationship of adjudicators with interested third parties such as third-party funders may affect their ability to decide the dispute with an open mind.[6] However, instead of using the phrase '*direct or indirect interest*,' the code could use '*significant interest*,' in order to ensure clarity in the disclosure mandate. **The code must define the scope of '*significant interest*' as interest resulting into doubts over independence, sense of fairness and impartiality of the adjudicators**.

1.2 Delineating the scope of third-party interest

To define the scope of **'*significant interest,*'** a reference may be drawn to the recently adopted SCC Policy on Conduct of Arbitrators (2019), which provides a similar threshold for disclosure with reference to third party interests.

The text of the same has been replicated below:

> *"Each party is encouraged to disclose, in its first written submission in an SCC arbitration, the identity of any third party with a* ***significant interest in the outcome of the dispute****, including but not limited to funders, parent companies, and ultimate beneficial owners. Prospective or appointed adjudicators shall take the information disclosed into account in making any disclosure or statement of independence and impartiality pursuant to Article 18 of the SCC Rules. Parties are further encouraged, during the course of the arbitration, promptly to disclose the identity of any third party who acquires a significant interest in the outcome of the dispute."*[7]

As evident from the aforementioned, '*significant interest*' in the outcome is an effective threshold, and includes (a) ultimate beneficial owners; (b) persons obligated to pay an award under an indemnification or other agreement; (c) persons entitled to receive proceeds of an award under a third-party-funding or other agreement; and (d) ultimate parent companies of a party (**not exhaustive**).

---

[6] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 13 of February 21, 2013; Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Procedural Order No. 3 of June 12, 2015; South American Silver v. Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 of January 11, 2016).

[7] SCC Policy Disclosure of Third Parties with an interest in the Outcome of the Dispute, adopted by the SCC Board on 11 September 2019.

1.3 Adopting the 'significant interest' standard for disclosure

A similar standard of '*significant interest*' can be adopted by the Code to provide a clearer and more effective threshold for disclosure of third party relationships of the adjudicators. Such a standard will avoid the bifurcation of interests of third parties into '*direct and indirect interests,*' as the same may lead to uncertainty on the disclosures that ought to be made by the adjudicators. The scope of '*indirect interests*' that third parties might have in the outcome of the dispute may be unlimited. It is possible that a third party, having a relationship with the adjudicators, might have a far-stretched, distant or interlinked indirect financial interest in the outcome of the dispute. In such cases, it must be imperative for the adjudicators to disclose even a small shareholding or interest, though indirect, only if the same is significant i.e. it raises questions over the standard of fairness/impartiality/independence of the adjudicators. Incidentally, adopting the '*significant interests*' standard will also avoid any potential misuse of non-disclosures by the adjudicators of third party relationships with inconsequential or insignificant '*indirect interests*' in the outcome of the dispute.

Therefore, as the purpose of the disclosure is to allow the parties to make informed and effective decisions, the standard for disclosure under Article 5(2)(a)(iv) must be based upon the **significance** of the interest involved, rather than its directness or the indirectness.

SUMMARY OF RECOMMENDATION

Instead of using the phrase 'direct or indirect interest,' the code could use 'significant interest,' in order to ensure clarity in the disclosure mandate. The significance of the interest involved must be the standard for disclosure, and not its directness or indirectness.

2. Article 5 (2)(d)

2.1 Public speech and Issue Conflicts

Article 5 (2)(d) mandate disclosures pertaining to the '*issue conflicts*'[8] that may exist owing to past expression of views by the adjudicators that may show certain bias or prejudgment of certain issues. Such expression of views may be done through different means such as publications, past decisions,

[8] ASIL-ICCA Report 2016 - *Issue conflicts refer to the situation of "alleged" predisposition or prejudgement involving 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 article, and giving interviews or other public expressions of views*

public statements or public speeches, etc. The purpose of warranting such disclosures is to provide the parties with the necessary knowledge of opinions or works of a nominated/prospective adjudicators, such that they are able to make an informed decision as to appointment of an adjudicator. Though applicable to the State appointed Judges, a reference may be made to the Resolution on Judicial Ethics of the ECHR, which requires the judges to refrain from making public statements or remarks that may give rise to reasonable doubt as to their impartiality.[9]

2.2 Disclosure of past awards

Article 5(2)(d) includes disclosure of all 'publications' of the adjudicators. In this regard, the code must clarify if the ambit of 'publications' of the adjudicators would include the past awards/decisions rendered by them. As previously rendered awards/decisions, and positions taken during previous arbitrations, on a particular subject matter, might also manifest prejudgment of certain issues, they must be disclosed by adjudicators. Moreover, the code must consider if the disclosure of such awards must be limited to 'publicly available' awards or it must also extend to awards that have remained confidential.

2.2 Public speech that is 'relevant'

While Article 5(2)(d) includes disclosure of all publications, it hasn't conclusively included the disclosure of '*relevant public speeches*'. Commentary to the Draft Code highlights that though disclosure of '*relevant public speeches*' may allow fuller assessment of the possible existence of issue conflict, it may also create a significant burden for prospective adjudicators. However, public speeches and statements might be manifestations of the pre-existing and core views of the adjudicators, and excluding them from the ambit of disclosures may be anti-thesis to the purpose of Article 5. Moreover, often the views expressed in such public speeches are in turn later published by the adjudicators. Therefore, excluding such views merely because they haven't been published is not congruent with the need for extensive disclosures.

It is also important to ensure that this provision does not discourage adjudicators from talking and sharing ideas with the community to help develop arbitration law. Therefore, '*relevant public speeches*' must be defined as only those speeches that raise doubts over standard of fairness or

[9] European Court of Human Rights, Resolution on Judicial Ethics, Rule VI.

impartiality of the adjudicators, and are '*publicly available*'. The ambit of disclosures under this provision must exclude the recorded summaries of the speeches by third persons, as the same may not be accurate. A reference can be made to the orange list in the IBA Guidelines on Conflict of Interest, which provides for the disclosure of '*public speeches*'. The orange list provides situations that ordinarily do not mandate disclosure, and must be considered on a case-to-case basis by the adjudicators. Article 3.5.2 of the IBA Guidelines provides:

> "*The arbitrator has publicly advocated a position on the case, whether in a published paper, or* ***speech****, or otherwise.*"

Therefore, under the IBA guidelines, while there is no strict mandate to disclose public speeches, the same does arise if the speech gives rise to justifiable doubts regarding the impartiality of the arbitrator. Similarly, the use of the word '*relevant*' in Article 5 (2)(d) of the Draft Code can be understood to mean the need for disclosure of those public speeches that give rise to justifiable doubts regarding the impartiality or standard of fairness of the adjudicators. The definition of '*relevant public speech*' can be as follows:

> "*A public speech is relevant if it relates to fact in issue or some other relevant fact connected to the fact in issue and which reflects the pre-disposition or conviction of the adjudicator. Such speech must be 'publicly available'. The published summary of the privately made speech shall not fall under this clause unless the same has been vetted by the person who made the speech.*" In turn, the adjudicators must disclose those public speeches which may give rise to doubts as to the adjudicators' impartiality or sense of fairness.[10]

The importance of requiring '*relevant public speeches*' to be disclosed is evident from few cases in which it has been discussed. For instance, in *Confor Corporation v United States of America*, a challenge was proposed to the Secretary General of ICSID against the claimant arbitrator on account of his speech to a Canadian government council.[11] The case concerned the validity of the countervailing duty and anti-dumping measures adopted by the United States in relation to Canadian Softwood lumber products. The challenge was raised as in the speech to the Canadian government council, the arbitrator had described US government measures on softwood lumber as '*harassment*'. Therefore, as the legitimacy and effect of the US government software lumber policy was central and live in the dispute, the US challenge was acknowledged by the Secretary General of ICSID. It

[10] Article 11(2) of the ICC Rules of Arbitration, 2017.
[11] Confor Corporation v United States of America, August 12, 2005.

was conveyed to the arbitrator by the Secretary General of ICSID that if he didn't resign, an order upholding the US challenge would be issued. In consequence, the arbitrator had resigned.

Similarly, in the context of the ICJ, Judge Buergenthal, in his Dissenting Opinion in the *Israel Wall*, stated:

> *A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that [...] he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done.*[12]

Therefore, '*relevant public speeches*' might be important determinants of potential issue conflicts, and their disclosure shall allow the parties to make to make informed decisions as to the impartiality of an adjudicator. Moreover, the disclosure of only '*relevant public speeches*' mitigates the burden that these disclosures may impose of the adjudicators, and allows them to indulge in the development of arbitration law. The importance of '*relevancy*' and '*material proximity*' of '*issue conflicts*' to the dispute is evidenced in the fact that challenges of adjudicators based on alleged '*issue conflict*' have rarely been accepted.[13] Therefore, the adjudicators must disclose the '*relevant public speeches*' as it has material bearing on the intended objective of Article 5 of the Draft Code

SUMMARY OF RECOMMENDATION

The ambit of disclosure required under this provision must be extended to include 'relevant public speeches' of the adjudicators. Public speeches and statements might be manifestations of the pre-existing and core views of the adjudicators, and excluding them from the ambit of disclosures may be antithesis to the purpose of Article 5.

[12] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Proceedings, Order of 30 January 2004, Dissenting Opinion of Judge Buergenthal, at para. 12.
[13] Draft Code, para 59.

ARTICLE 6

Limit on Multiple Roles

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

---

1. Prohibition v. Disclosure

1.1 Implications of Complete Prohibition

The commentary to the Draft Code raises various questions that arise from the need to regulate double hatting. A major concern, as identified in the commentary, is the manner of regulation of this phenomenon. The two possible routes touted in the code are that of either prohibiting double hatting in its entirety or creating requirements of disclosure for the arbitrators. It is submitted that the blanket prohibition of the assumption of dual roles by arbitrators is inherently problematic and an impractical alternative.

Comment 66 of the Draft Code of Conduct defines double-hatting as "*the practice by which one individual acts simultaneously as an international arbitrator and as a counsel in separate ISDS proceedings.*"[14] The prohibition of double hatting as a whole would essentially require persons to remove themselves from all ongoing engagements, as well as reject any new engagement. The option of prohibition presents itself as an easier alternative, as mentioned in Comment 67 of the Draft Code, to the creation of guidelines and rules for the disclosure requirements.[15] However, the blanket prohibition of double hatting is inherently problematic on account of many reasons.

[14] Draft Article 6, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, (1 May 2020), 66.
[15] Draft Article 6, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, (1 May 2020), 67.

First, the prohibition of double hatting in its entirety would lead to a reduction in the overall pool of available arbitrators.[16]A very limited number of new counsel get the opportunity to act as arbitrators, that too in a very small number of cases. A complete prohibition on double hatting would lead to further consolidation of the field in the hands of the renowned arbitrators who have monopolized the field, thus diminishing the little hope new counsel may have of entering the profession.

Secondly, in recent times, various international investment arbitration bodies including ICSID have pushed towards a more inclusive and diverse group of arbitrators.[17] The general aim of creating a more inclusive group with a greater representation of females and a culturally diverse group of arbitrators would be thwarted by the prohibition of dual roles or double hatting.[18] The phenomenon of double hatting seems to be rather high in a select group of persons who have a stellar reputation in the field while outside of this small percentage of all arbitrators who are offered multiple roles, many proceedings consist of one-off arbitrators.[19] A prohibition on acting as a counsel and any other role for these arbitrators would be detrimental towards the end of a more inclusive body of arbitrators, as it restricts the sources of income and will thus hinder the goal of increasing diversity within the pool of arbitrators.[20]

Prohibition could be deemed to be an employable solution if the arbitrators were to be appointed from a very select group of individuals as these limited individuals would , thereby guaranteeing a consistent source of income. However, this is inherently problematic with regard to ICSID. The ICSID allows the parties to choose their arbitrators as per Article 37 of the ICSID Convention.[21] This is outside of the panel of arbitrators in which every state has the right to appoint four arbitrators of their choosing. Further, there are 154 contracting states to the ICSID. Even if the arbitrators were to be selected exclusively from the panel as per Article 40(1) of the ICSID Convention,[22] there would be close to 600 possible choices for the panel.

---

[16] Dennis H. Hranitzky and Eduardo Silva Romero, *The 'Double Hat' Debate in International Arbitration*, NY Law J. (2010).
[17] Chiara Giorgetti and Mohammed Wahab, *A Code of Conduct for Arbitrators and Judges*, Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019.
[18] Chiara Giorgetti et al., *'Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options*, Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020
[19] Malcolm Langford et al., 'The Revolving Door in International Investment Arbitration', 20(2) *Journal of International Economic Law* 301 (2017)
[20] Ibid
[21] Article 37, ICSID Convention, Regulations and Rules. Washington, D.C.: International Centre for Settlement of Investment Disputes, 2003.
[22] Article 40(1), ICSID Convention, Regulations and Rules. Washington, D.C.: International Centre for Settlement of Investment Disputes, 2003.

This defeats the logic that has been employed in the argument for prohibition concerning a consistent income.

A prohibition on the appointment of any arbitrator engaged in another role in a different proceeding in the past or present will cause a hindrance to the freedom of appointment of arbitrators by parties. Parties may choose to appoint arbitrators who were involved in other capacities in different proceedings due to their expertise and knowledge of the relevant issues in the present matter. Both parties may want to appoint arbitrators who would be assuming a position of multiple roles, but with the consent of both the parties the appointment should not act as a hindrance to the proceedings. Imposing a blanket prohibition on the appointment of such persons would limit the choices available to the parties and will infringe upon the freedom of the parties to appoint arbitrators of their choosing.

1.2 Institutional Rules vis-à-vis Double Hatting

In recent years, certain institutions have imposed rules instituting a prohibition on double hatting as a whole, such as the Court of Arbitration for Sport. As per the CAS, no arbitrator may represent any party as counsel before the CAS.[23] This restriction may work for the CAS as it has an exhaustive list of 150 pre-decided arbitrators from which it may choose the tribunal.[24] The prohibition under CAS only covers the parallel role of a counsel, and only before the CAS.
The Canada-EU Comprehensive Economic and Trade Agreement stipulates that all members of the tribunal once appointed will refrain from acting as a counsel, party-appointed expert, or witness under CETA or any other international agreement.[25] However, under the CETA a minimum of 15 members are to be appointed to the tribunal by the parties,[26] safeguarding the economic interests of the arbitrators and thus not putting their livelihoods at stake.
The Hague Rules on Business and Humans Rights Arbitration's Code of Conduct consists of certain ex-ante situations in which restrictions will apply, such as the participation of an arbitrator as a counsel in a parallel proceeding where the counsel in the present dispute serves as an arbitrator.[27] This can be recognized as a concurrent ban, applying only to the extent of parallel proceedings which create an extreme situation of conflict due to double hatting.

[23] S18, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, 2019.
[24] S13, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, 2019.
[25] Article 8.30(1), EU-Canada Comprehensive and Economic Trade Agreement (CETA).
[26] Article 29, EU-Canada Comprehensive and Economic Trade Agreement (CETA).
[27] Article 4.2, Hague Rules on Business and Human Right Arbitration, Code of Conduct.

The United States-Mexico-Canada Agreement of 2018 that replaced the NAFTA also provides for an investor-state dispute settlement mechanism. This agreement deals with the phenomenon of double hatting by prohibiting the arbitrators from undertaking the roles of counsels, party experts, or witnesses in any other USMCA or its predecessor NAFTA's cases for the duration of the proceedings, thereby restricting double hatting by concurrent bans.[28] The manner of identifying conflicts is reliant on the IBA Guidelines on Conflicts of Interest in International Arbitration.

Another suggested method has been of imposing temporary bans. In this system, counsels appointed as arbitrators would undergo a temporary ban and if no new opportunities are presented to such new arbitrators, the arbitrator could start practicing as a counsel once again. This suggestion has been put forth by Judge Thomas Buergenthal of the International Court of Justice.[29]

1.3 Disclosure and Imposition of Concurrent Bans

The submissions made with regard to the question of prohibition and the analysis of various treaties lead to the conclusion that the imposition of a blanket ban is rather detrimental to the proceedings at ICSID. Prohibitions on the entry for new arbitrators would be to the effect of reducing the scope for increasing diversity within the arbitrator pool, consolidating the field in the hands of the pre-dominant arbitrators by acting as a bar to arbitrators who receive a small number of appointments throughout their careers and will hinder the freedom of the parties in appointing the arbitrators of their choice.

From the analysis of the pre-existing conventions and agreements, the two possible methods of prohibitions are temporary bans and concurrent bans. Temporary bans necessitate a gap between the appointment of a counsel as an arbitrator and the return to counsel practice, contingent on no new arbitrator opportunities coming their way. A concurrent ban prohibits a person from participating in another proceeding while engaging in another role in a different proceedin

In light of the arguments submitted and the analysis made, the most effective solution to the extent of solving the dilemma within the code is via the adoption of the stance of disclosure, solidified by the imposition of concurrent bans. The model best suited for such a regime is that of the Hague Rules on Business ad Human Rights Arbitration, which will have identified certain situations in

[28] Daniel Garcia-Barragan et al., *The New NAFTA: Scaled Back Arbitration in the USMCA*, Journal of International Arbitration Vol. 36 No. 6 (2019).
[29] Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, ICSID Review Vol. 21 No.1 (2006).

which prohibition will be mandatory, whereas in other situations disclosure will be sufficient. This would ensure the continuing independence and impartiality of arbitrators, resolving any possible conflict of interest. This model would stipulate a mandatory disclosure regime, with prohibition of appointment of arbitrators in situations of heavy conflict, that would affect the independence and impartiality of the arbitrators. To this extent, the Code should add rules of disclosure based on pre-existing soft laws such as IBA Guidelines on Conflicts of Interest in International Arbitration[30] to identify possible situations of conflict. The Code can then identify certain situations that necessitate a blanket prohibition on double hatting by the imposition of a concurrent ban which is lifted as soon as the end of the proceedings. The code should classify the necessity of disclosure based on the seriousness of the conflict.

In such a manner, the necessary prohibitions on double hatting are effectively imposed and the problems created via a temporary or permanent prohibition are also avoided. The disclosure requirements would differ from the IBA Guidelines to the extent that these would be rules, that is, mandatory. Such tailor-made requirements of disclosure with an identified set of situations that necessitate bans would maintain party autonomy, the push in the direction of diversity, and maintain a high number of available arbitrators for parties to choose from.

A recent push for big data solutions also creates the possibility of AI-based arbitrator appointment systems. These systems would investigate the level and intensity of double hatting and the groups of individuals who assume dual roles often and quantifying the degree of double hatting through the investment arbitration community.[31] This would provide the parties to arbitration the ability to make a more informed choice by considering the prior and present commitments of their choice of arbitrators. This system would equip the parties with better information while the parties exercise their freedom in the appointment of arbitrators.

2. Temporal Requirement

The above discussion, as well as the Draft Code and its commentary on the Article, show glaring areas of uncertainty. In such a scenario, it may be difficult to gather consensus on a definitive formula to impose a prohibition. Similarly, it is submitted that having a temporal requirement runs

[30] IBA Guidelines on Conflicts of Interest in International Arbitration, 2014.
[31] Wolfgang Alschner et al., *The Data-Driven Future of International Economic Law,* Journal of International Economic Law Vol. 20 Issue 2 (2017).

contrary to the suggestion of leaning towards a disclosure based system. The commentary in the Draft Code poses the following question with regard to the temporality:

> *Would a prohibition on double-hatting be limited to simultaneously playing the inconsistent roles, or would the limitation be based on having played such roles within a certain time period, for example within the past 2 years?*[32]

The first sentence itself tells us that any discussion of temporality will have to preceded by the determination that double hatting is prohibited. Since, we have advocated against that stance, the following discussion will assume the premise of prohibition, rather than disclosure, and will argue that even in instances of prohibition, placing a temporal requirement that exceeds concurrent assumption of roles is counterintuitive. As a measure of clarity, it is submitted that if the article leans in favor of disclosure, the optimum way to proceed will be to do away with any temporal ban post the completion of one role, in favor of disclosure of ALL possible roles held by arbitrators in the past.

Before addressing the question of whether the prohibition must limit itself to simultaneous double hatting or extend to a certain time before a second role can be taken, there are two primary arguments for dispensing with the concept altogether. First, as discussed above, party autonomy, one of the key tenets of arbitration, is given primacy by allowing even simultaneous double hatting. Second, since double hatting may include a host of roles including mediators or experts, it would be an impossible task to define conclusive points of the beginning and end of such roles in an arbitration.

In any event, an extended temporal requirement of refrain, if necessitated in case of a prohibition on double hatting, should be limited to simultaneous assumption of roles only. The comparative advantage of such a limit over, say, a two year ban, needs to be assessed. Existing examples of imposing a minimum temporal limit may be assessed to gauge the current practice. The recent Dutch model BIT,[33] that has received much applause from the practitioners community for making strides in Investment Treaty Regime[34] embodies one such provision.

---

[32] Draft Article 6, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, (1 May 2020), 71.

[33] Netherlands model Investment Agreement, 22 March 2019, available at: https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden

[34] Marike R. P. Paulsson, *The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI*, Kluwer Arbitration Blog, 18 May 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/?doing_wp_cron=1591360037.0754339694976806640625.

> *"Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement. (Article 20(5))"*

There is a five-year ban imposed on double hatting. However, a strict definition of double hatting ('shall not have acted as a legal counsel') precedes the same, limiting the scope to an arbitrator having acted as a counsel to either party. Further, since the clause in question is from a BIT, the scope of the restriction for practitioners is limited to disputes between investors of two countries. The Code of Conduct will be applicable to all ICSID arbitrations and therefore cannot employ such a restrictive definition. As has been in commentary on the subject, the extent of the prohibition should hinge on, in part, on the whether the concerned arbitrator is a member of permanent court or is only member of an arbitral tribunal.[35]

The IBA Guidelines[36] give out exhaustive lists as per the level of perceived conflict, and divide these into 'non-waivable red', 'waivable red', 'orange' and 'green' with a decreasing level of severity of possibility and perception of conflict. The two red lists only contain the extreme cases of double hatting where the arbitrator currently or regularly represents one of the parties as a counsel. The orange list is of significance here, as it talks about a temporal limit by stating in clause 3.1.1:

> *The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.*

Again, the definition employs a restrictive and specific definition of double-hatting. The orange list, further, only mandates disclosure and creates no obvious or apparent conflict.

The argument advanced is that only a restricted definition of double hatting, in a limited treaty, can suitably accommodate a time limit on double hatting. Since the Draft Code, on the contrary, uses a rather open definition of double hatting, it would be counter-intuitive to introduce a temporal requirement, even one as low as two years.

---

[35] Chiara Giorgetti and Mohammed Wahab, *A Code of Conduct for Arbitrators and Judges* , Academic Forum on ISDS Concept Paper 2019/12, 13 October 2019.
[36] IBA Guidelines on Conflicts of Interest in International Arbitration, 2014.

3. Same Facts and Double Hatting

There is scarce literature that critically discusses multi-fora disputes with similar fact situations, and the various implications.[37] The broader context within which disputes pertaining to the same facts are discussed is that of *res judicata* or *lis pendence.*[38]. Since a repeat litigation is barred under international investment law,[39] the same will fall outside the scope of the present discussion. When Article 6 of the Draft Code talks about double hatting, it leaves scope to prevent double hatting in disputes arising out of the same factual situations. It is submitted that drawing this distinction adds redundancy to the provision, and leaves ambiguity for the possibility of complications during the proceedings.

As stated, the issue of similar facts in disputes usually arise in cases of multi-fora litigation, different stages of the same dispute, or cases of treaty shopping.[40] The inference, usually, is that this multi-fora litigation is being fought between the same parties but arising out of a liability or a right in a different agreement. Facts of a case, by themselves, do not bring in an appearance of a bias. It is only when they are viewed in consonance with the parties involved and the issues arising out of the facts that there might arise an appearance of bias. The word 'fact' by itself is meant to exclude any element of subjectivity or perception. The larger point being, rarely will there ever be a situation where the parties are different, the issue being adjudicated upon is different, but the facts giving rise to the dispute between the parties is the same as another proceeding. The inclusion of 'same parties' and 'same treaty' and the inclusion of issue conflict into double-hatting renders the inclusion of 'same facts' redundant.

Moreover, it would be a painstakingly difficult task to establish the limits and boundaries on 'same facts'. The ambiguity may be exploited from either side, terming only a tangentially related factual matrix as 'same facts', or, trying to preclude effectively the same factual matrix based on a want for identical facts. Inclusion of the phrase therefore exposes a fair proceeding more than it protects an illegitimate one.[41] The Draft Code can therefore benefit from exclusion of the phrase 'same facts' in favor of a provision regulating issue conflict and litigation under the same treaty between the same parties, as has been discussed below.

---

[37] Michael E Schneider, *Multi-Fora Disputes*, ARB. INT'L Vol. 6 No. 2 (1990).
[38] Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, AFR. J. INT'L & COMP. L. Vol. 8 (1996).
[39] *Amco v. Indonesia, Resubmission: Jurisdiction,* 89 International Law Reports 552 at 560.
[40] Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Bus. L.J. 225 (2015).
[41] Lowe, *supra* note 26.

4. Issue conflict and Double Hatting

The Code looks to address the question of prohibition on double hatting with regard to the existence of an issue conflict, as per Comment 73.[42] Issue conflict can emerge while the arbitrator was acting as a counsel or in any other capacity in a case as well with regard to the relevant legal issue. The conflict can arise from the views expressed in publications and speeches as well. Issue conflict is closely related to the issue of double hatting as a whole, and is sometimes even considered its sibling[43].

Emphasis is on the fact that the expertise or prior experience of arbitrators is a crucial factor leading to their appointment in the first place.[44] Issue conflict pitches this same experience against their appointment, demanding a careful balance to be struck between the positions. Investment arbitration, being a relatively new body of law with a small set of litigants with similar issues, forces certain legal issues to repeat themselves.[45] Most experienced arbitrators would therefore have some kind of experience in the past on such issues and would seldom lead to an overlap with issues of the present case.

Therefore, the blanket prohibition of the participation of arbitrators due to their prior experience is an undue and rather unnecessary route to take. The sensible option would be to follow the practice of disclosure, as in Article 5. The ICSID should supplement its Code of Conduct with a precise list of conflict situations, on the lines of the IBA Guidelines.[46] The rules would also enunciate the conflict situations on the basis of intensity and possibility of lack of independence. Certain situations such as concurrent involvement in a different proceeding with the same legal issue as that of the present matter would warrant a strict bar on appointment. Furthermore, the recommendations in the supra sections in the area of disclosure recommend a concurrent ban on involvement. This would ensure any new conflict from arising than those that could possibly exist prior to the commencement of proceedings.

---

[42] Draft Article 6, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, (1 May 2020), 73.
[43] Philippe Sands, *Conflict of Interest for Arbitrators and/or Counsel*, in Meg Kinnear , Geraldine R. Fischer , et al. (eds), Kluwer Law International, *Building International Investment Law: The First 50 Years of ICSID* (2016).
[44] Raphaël de Vietri and Kanaga Dharmananda, *Impartiality and the Issue of Repeat Arbitrators*, Journal of International Arbitration Vol. 28 Issue 3 (2011).
[45] Phillipe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel,' in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (New York: Brill, 2012)
[46] IBA Guidelines on Conflicts of Interest in International Arbitration, 2014.

Article 14(1) of the ICSID convention generally addresses the qualifications of an arbitrator, those being a high moral character and recognized competence.[47] Further, Article 57[48] provides for the ability to challenge an arbitrator by a party on the grounds of a manifest lack of qualities as per Article 14(1). Arbitrators can therefore be disqualified on the basis of a manifest lack of high moral character or manifest lack of ability to be independent in their judgment. The challenge for issue conflict would fall under the latter. The disqualification under ICSID can only take place when the situation is manifestly clear, a standard differing from the likes of UNCITRAL,[49] which only requires justifiable doubts as a challenge to the arbitrator by the parties.

As recognized in case law and commentary,[50] this threshold is rather high. Therefore, the requirement of a manifest bias would thwart the logic to the creation of the rules recommended above that would stipulate situations of issue conflict. The situations listed outside of the list of bar of appointment would require a higher level of proof for the removal of an arbitrator upon the challenge by a party. As in the IBA Guidelines, these graded issue conflict situations would inherently highlight the intensity of the situation and would help the panel adjudicating upon the challenge to understand the veracity of the challenge being held. If, however, a high conflict situation residing outside of the list of conflict leading to a bar on appointment would require the party to present proof of manifest bias, it would defeat the purpose of the rules. The recommendation would be to move from the high threshold of manifest lack of independence to one of justifiable doubts. Lastly, the addition of punitive measures against arbitrators for non-disclosure would lead to an enhanced degree of transparency on the side of arbitrators.

[47] Article 14(1), ICSID Convention, Regulations and Rules. Washington, D.C.:International Centre for Settlement of Investment Disputes, 2003.
[48] Article 57, ICSID Convention, Regulations and Rules. Washington, D.C. :International Centre for Settlement of Investment Disputes, 2003.
[49] Chiara Giorgetti et al., *'Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options*, Academic Forum on ISDS Concept Paper 2020/1, 21 January 2020.
[50] *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (Nov. 12, 2013).

SUMMARY OF RECOMMENDATIONS

1. The Code should impose a mandatory disclosure regime, with the adoption of enforceable guidelines on the lines of the IBA Guidelines to demarcate situations which create a conflict and necessitate a prohibition on double hatting, with the other situations restricted to disclosure requirements.
2. In the event that the Code opts for a refrain based approach, no temporal restriction should be imposed. The restriction on double hatting must be limited to assumption of concurrent roles.
3. The restriction on double hatting in cases with 'same facts' can be omitted in favour of one regulating issue conflict.
4. In case of an issue conflict, blanket prohibition should be avoided and a disclosure based system should be adopted, with a reduction in the standard to challenge an arbitrator under ICSID.

ARTICLE 8

Availability, Diligence, Civility and Efficiency

1. *Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently and expeditiously throughout the proceeding. Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.*

2. *[Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]*

3. *Adjudicators shall be punctual in the exercise of their functions.*

4. *Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.*

---

1. Availability of arbitrators and the ability to issue timely decisions

The commentary to Article 8 generally states that "*Article 8 requires candidates to ensure their availability, and if selected, to act in a diligent and punctual manner throughout the proceeding.*"[51] The specific commentary to paragraph 2, which "*addresses the possibility of an absolute limitation*"[52] to the number of cases that an adjudicator can participate in simultaneously, also states that "*the idea is based on the concern that an adjudicator may not be able to dedicate the necessary time when working on many cases.*"[53]

The ability to render a timely decision, among other things, favours the policy of arbitration as a means for speedy resolution of disputes.[54] Disclosures on availability equip parties with the ability

[51] Draft Article 8, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement" (1 May 2020), 20.
[52] Ibid, at 21.
[53] Ibid, at 21.
[54] Alan E. Seneczko, "Arbitration - Arbitrator Potentially Liable for Failure to Render a Decision. Baar v. Tigerman, 140 Cal. App. 3d 979, 189 Cal. Rptr. 834 (1983)", 67 MARQ. L. REV. 147 (1983).

to encourage adjudicators to issue timely decisions, for they are aware of the commitments of the adjudicator.[55]

Availability is broadly to be assessed depending on adjudicator availability to hear the case and the ability to issue timely decisions,[56] more specifically in time-consuming processes like investment arbitration.[57] The disclosures made under Article 6 with respect to the roles assumed by adjudicators in pending arbitrations assist parties to assess their current workload. But, by itself, this does not demonstrate an adjudicator's ability to issue timely decisions. Article 8.2's possibility of limiting simultaneous proceedings undertaken by an adjudicator is one manner to address this concern. However, the Code itself acknowledges the presence of multiple moving factors that make it controversial to demarcate a numerical value to these proceedings.[58] Article 10 further supplements this by bestowing parties with the ability to question potential candidates about their "*availability to accept the appointment*" during pre-appointment interviews.[59] It is therefore observed that these possibilities do not adequately equip parties to gauge an adjudicator's ability to issue timely decisions. They also do not incentivise adjudicators to actively work towards issuance of timely decisions.

Disclosure of additional objective data available with an adjudicator, regardless of pre-appointment interviews, and *in addition* to existing disclosure obligations, will aid parties to objectively assess an adjudicator's ability to issue timely decisions. The Code must endeavour to expressly specify the contents of such objective data that can be submitted to parties in disclosures. It can also mandate arbitrators to ensure that they issue timely decisions with respect to the arbitration proceedings.

The intent to include the possibility of a limitation on the number of cases an adjudicator can simultaneously hear in Article 8.2 is an attempt towards ensuring that adjudicators "*issue timely decisions.*"[60] However, the presence of numerous externalities (that the Commentary subsequently acknowledges) can neither be adequately accounted for nor can guarantee that a timely decision will be rendered in all cases. Therefore, it is not necessary to impute a numerical value to the number of cases that an adjudicator may simultaneously hear. This Comment acknowledges the importance of an adjudicator's independent ability to assess his availability as well. Thus, the aforementioned suggestion will lead to a more balanced alternative: while parties will be able to assess the potential availability of the adjudicator through the disclosure of objective data during

[55] Jan Paulsson & Georgios Petrochilos, "UNCITRAL Arbitration," Kluwer Law International (2018).
[56] Draft Article 8.1, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement" (1 May 2020), 20.
[57] Chiara Giorgetti, "The Arbitral Tribunal: Selection and Replacement of Arbitrators" Litigating International Investment Disputes: A Practitioner's Guide 143-172 (2014).
[58] Ibid.
[59] Ibid.
[60] Draft Article 8.2, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement" (1 May 2020), 20.

the pre-appointment stage and otherwise, the adjudicator will also continue to possess an independent ability to assess his own commitments before taking up a new case.

2. Institutional rules on the issuance of timely decisions

As part of the updated 2017 Arbitration Rules, the International Chamber of Commerce (ICC) mandates arbitrators to fill up and sign a 'Statement of Acceptance, Availability, Impartiality and Independence'[61] before deciding their appointment.[62] This form requires arbitrators to agree to "*complete the arbitration as promptly as reasonably practicable*"[63] and "*in accordance with the time limits prescribed in the Rules.*"[64] They also agree to their fees being fixed by the ICC Court based on the "*duration and conduct*" of the proceedings.[65] In a recent press release, the ICC further announced that draft awards were to be delivered within three months from the date of the last substantive hearing for multi-arbitrator tribunals, and two months for sole arbitrator tribunals.[66] If found unjustifiable, the delay would amount to reduction in the arbitrator's fees.[67]

The Stockholm Chamber of Commerce (SCC) Rules also mandates arbitrators to fill a form of availability and impartiality that is circulated to both parties.[68] This requires arbitrators to confirm that they will put in the time necessary "*for the case to be settled in the most expeditious and practical manner possible.*"[69] If this is in the nature of a disclosure, parties are given discretion to assess its significance for the purposes of a challenge to the arbitrator.[70]

---

[61] Article 11.2, "International Chamber of Commerce Arbitration Rules 2017" (1 March 2017).
[62] Anne Marie Whitesell, "Independence In ICC Arbitration: ICC Court Practice Concerning Appointment, Confirmation, Challenges And Replacement of Arbitrators," The Independence of Arbitrators ICC, International Court of Arbitration Bulletin 7 (Spec. Supp., 2008).
[63] International Chamber of Commerce, "ICC Arbitration Statement Acceptance, Availability, Impartiality and Independence" <https://cdn.iccwbo.org/content/uploads/sites/3/2016/06/ICC-Arbitrator-Statement-Acceptance-Availability-Impartiality-and-Independence-Arbitration-Rules-ENGLISH.pdf> accessed on 9 June 2020.
[64] Ibid.
[65] Ibid.
[66] International Chamber of Commerce, "ICC Court announces new policies to foster transparency and ensure greater efficiency" <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/#:~:text=ICC%20Court%20announces%20new%20policies%20to%20foster%20transparency%20and%20ensure%20greater%20efficiency,-News%20%E2%80%A2%20Paris&text=The%20International%20Chamber%20of%20Commerce,transparency%20of%20ICC%20arbitration%20proceedings.> accessed on 9 June 2020.
[67] Ibid.
[68] Article 18.3, "Stockholm Chamber of Commerce Arbitration Rules 2017" (1 January 2017).
[69] Niklas Lindstrom, "Challenges to Arbitrators – Decisions by the SCC Board during 2008-2010" <https://sccinstitute.com/media/93825/challenges-to-arbitrators-decisions-by-the-scc-board-during-2008.pdf> accessed on 8 June 2020.
[70] Ibid.

The Model Additional Statement of the Permanent Court of Arbitration (PCA) Rules 2012 has also been similarly worded. It requires arbitrators to affirm that they can "*devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules*."[71] Commentators note that this underscores the importance of commitment and availability of an arbitrator to a dispute.[72]

The American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes requires arbitrators to "*uphold the integrity and fairness of the arbitration process*"[73] by accepting an appointment only if "*fully satisfied*" that "*he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.*"[74] Additionally, they are required to "*make all reasonable efforts to prevent delaying tactics,*"[75] which would include ensuring timely issuance of orders since the ethical obligations of this Code "*continue throughout all stages of the proceeding.*"[76] Furthermore, the corollary obligation of adjudicator diligence is also a widely recognised ethic applicable *during* proceedings.[77]

A perusal of these institutional rules reveals an overall intent towards encouraging party and adjudicator due diligence towards ensuring availability at the appointment and challenge stage, insofar as they also provide for availability-centric disclosures. Notably, the declaration form signed by the arbitrator under ICSID Arbitration Rules does not require them to guarantee issuing timely decisions and is only a declaration of independence and impartiality.[78]

3. Recommendations

3.1 Disclosure of Additional Objective Data

The Code can elaborately demarcate additional objective data to be submitted to parties by adjudicators during pre-appointment interviews or as a part of disclosures made under Articles 5 and 6 of the Code to further determine adjudicator availability. An adjudicator's calendar, listing

---

[71] Permanent Court of Arbitration, "Model Additional Statement for Arbitrators" (17 December 2012), <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> accessed 9 July 2020.
[72] Loretta Malintoppi and Alvin Yap, "Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?" < https://www.arbitration-icca.org/media/11/54458074457604/loretta_malintoppi.pdf> accessed 9 July 2020.
[73] Canon 1, "American Bar Association Code of Ethics for Arbitrators in Commercial Disputes 2004" (1 March 2004).
[74] Ibid, Canon 1 (B) (4).
[75] Ibid, Canon 1 (F).
[76] Ibid, Canon 1 (G).
[77] Chiara Giorgetti & Mohammed Abdel Wahab, "A Code of Conduct for Arbitrators and Judges," Academic Forum on ISDS Concept Paper 2019/8 <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/giorgetti-wahab-code-of-conduct-af-isds-paper-8-final~14-oct-2019-1.pdf> accessed 9 June 2020.
[78] Rule 6.2, Chapter I, "International Centre for Settlement of Investment Disputes Arbitration Rules 2006" (10 April 2006).

down his professional commitments over the upcoming year can be given to parties to assess their availability more precisely.[79] This calendar can include the dates blocked by the adjudicator for his pending cases (without listing the case name or details), the nature of the commitment (hearing, evidentiary statements, etc.) and deadlines with respect to writing awards for these cases.[80] This can help parties assess the adjudicator's availability more holistically and increase overall transparency in the arbitration process,[81] as they can juxtapose this information with the role of the adjudicator in these proceedings to ascertain objective workload of the arbitrator. Such disclosure can also go a long way towards ascertaining plausible "*punctuality*" of an adjudicator envisaged in Article 8.3.[82]

Additional disclosures of an adjudicator's past record in terms of time taken to deliver final awards and the overall time to conduct previous arbitrations can also help parties draw patterns to reasonably assess the possibility of an adjudicator issuing timely decisions.[83] In the event of past delays in issuance of awards, the same can be explained by the adjudicator during the pre-appointment interview or within the disclosure statement itself to ensure maximum transparency.

Alternatively, the Code can consider incorporating a provision for probable fee cuts for the adjudicator in case of untimely delay in issuing the final award. This may aid in influencing arbitrators to issue timely orders and awards. This being a Code of Ethics, the provision must be of a recommendatory nature, and not mandatory, to provide precedence to institutional rules on this topic, and, in their absence, party autonomy.

Therefore, additional disclosures will ensure that the parties and adjudicators are duly diligent. Such balance will aid the overall "*availability, diligence, civility and efficiency*" of adjudicators.

3.2 Removal of the Possibility of an Absolute Limitation

Paragraph 80 addresses the possibility of an absolute limitation on the number of cases an arbitrator may serve in simultaneously. The size and nature of arbitrations that an adjudicator simultaneously

---

[79] Lucy Reed & Noiana Marigo, "Availability of Arbitrators: What about the other objective data?", Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2010/05/11/availability-of-arbitrators-what-about-the-other-objective-data/?doing_wp_cron=1591530213.4749219417572021484375> accessed 7 June 2020.
[80] Ibid.
[81] Doak Bishop & Lucy Reed, "Practical Guidelines for Interviewing Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" <https://a.storyblok.com/f/46533/x/e0b264283e/practical-guidelines-f-interviewing-selecting-challenging-party-appointed-arbitrators-intl-commercial-arb-doak-bishop-lucy-reed.pdf> accessed 9 June 2020.
[82] Draft Article 8.3, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement" (1 May 2020), 21.
[83] Lucy Reed & Noiana Marigo, "Availability of Arbitrators: What about the other objective data?", Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2010/05/11/availability-of-arbitrators-what-about-the-other-objective-data/?doing_wp_cron=1591530213.4749219417572021484375> accessed 7 June 2020.

hears differ on a case-to-case basis, making it difficult to impute any numerical value for individual cases even if parties are in agreement. The objective disclosures mentioned above go a long way towards assisting parties, at the pre-appointment stage and otherwise, to understand the arbitrator's workload and availability. On the other hand, a blanket numerical value decided by parties may undermine the adjudicator's independent ability to assess their own availability and refuse newer opportunities.[84] This may be the case because these values often do not account for numerous other factors such as the dedication of an adjudicator, the amount of after-work hours spent on the dispute, etc.[85] Furthermore, since the parties are also not privy to details concerning the intricacies of pending disputes with the adjudicator, the adjudicator may sometimes be best placed to make a final decision with respect to his availability for an arbitration.

Thus, the Code can consider removal of Article 8.2 *and* simultaneously mandating the disclosure of objective data to maintain a balance between the parties' and adjudicators' simultaneous ability to assess availability.

SUMMARY OF RECOMMENDATIONS

1. The Code can consider mandating disclosure of additional objective data by arbitrators during their selection, to aid parties make objective assessments as to their availability. This can include a rough calendar outlining the frequency of the arbitrator's commitments, without specifying confidential details related to these commitments.
2. The Code can also consider incorporating a recommendatory provision for probable fee cuts for arbitrators in case of untimely issue of decisions in this respect. On the other hand, the possibility of an absolute limitation on the number of cases taken simultaneously (Article 8.2) must not be left to the parties to allow arbitrators to reflect on their availability as well.

[84] Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides, "REDFERN AND HUNTER ON ARBITRATION" (Oxford University Press, 2009).
[85] Ibid.

ARTICLE 10

Pre-appointment Interview (hereinafter, PAI)

1. Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings.

2. [If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]

---

1. Substantive matters and issue conflict

The commentary to paragraph 1 states that PAIs "*should not touch upon substantive matters at stake in the case, nor should they be addressed to the views the potential adjudicator would take if selected.*"[86] The scope of PAIs has been limited to two aspects, i.e. they "*should only address availability to accept the appointment and conflict of interest.*"[87]

Conflict of interest includes issue conflict, which may be defined as "*the existence of actual or apparent bias on the part of the arbitrator stemming from his or her previously expressed views on a question that goes to the very outcome of the case to be decided. It denotes the arbitrator's relationship to the subject matter of the dispute, and his or her perceived capacity to adjudicate with an open mind*".[88]

To address conflict of interest (which includes issue conflict), a party will have to discuss, to a certain extent, the issues involved in the dispute and such issues may be indicative of the outcome-determinative substantive matters of the proceedings. This gives rise to a clash between Paragraph 1 Line 1 and Paragraph 1 Line 2. In its current form, Article 10(1) is vague and leaves behind an exploitable grey area. The Code must therefore focus on demarcating the extent to which a discussion on issues may take place in order to ascertain issue conflict.

---

[86] Draft Article 10, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement "(1 May 2020), 83.
[87] Ibid.
[88] Anthony Sinclair and Matthew Gearing, "Partiality and Issue Conflicts," Transnational Dispute Management, Vol. 5, Issue 4 (July 2008).

2. Institutional Rules on PAIs

The IBA Guidelines of Conflict of Interest, in its Green List, provide that a conflict of interest does not interest exist and the candidate has no duty to disclose a situation when "*the arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.*"[89]

The IBA Guidelines on Party Representation in International Arbitration provide that *"[I]t is not improper for a Party Representative to have Ex-Parte Communications in the following circumstances a Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest*".[90] It goes on further to elaborate that *"[W]hile communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute*".[91]

The Chartered Institute of Arbitrators (CIArb) has an extensive practice guideline for PAIs. Article 2 of the Guideline lays down limitations on the scope of discussions during PAIs to the following aspect;

- *past experience in international arbitration and attitudes to the general conduct of arbitral proceedings.*
- *expertise in the subject matter of the dispute;*
- *availability, including the expected timetable of the proceedings and estimated timings and length of a hearing; and/or*
- *in ad hoc arbitrations, the prospective arbitrator's reasonable fees and other terms of appointment, to the extent permissible under the applicable rules and/or law(s).*[92]

[89] Guideline 4.4.1, "IBA Guidelines on Conflict of Interest in International Arbitration", (22 May 2004); See also, Guideline B.1., "Association of Maritime Arbitrators Acting under Schedule "D" of AMAC Rules", (6 June 2001), which on similar lines, states *"Before accepting an appointment, the arbitrator should make general enquiries of the lawyer or other representative of the appointing party as to the nature of the dispute(s) and the names and affiliations of the parties. But great care must be taken to avoid any discussion of the substance of the dispute or of the appointing party's position".*
[90] Guideline 8(a), "IBA Guidelines on Party Representation in International Arbitration", (25 May 2013).
[91] Guideline 8(d), "IBA Guidelines on Party Representation in International Arbitration", (25 May 2013).
[92] Article 2, "International Arbitration Practice Guideline: Interviews for Prospective Arbitrators", (30 August 2016).

Article 3 of the Guideline goes a step ahead to provide an exhaustive list of matters that are barred from discussion both directly and indirectly. These include;

i. *the specific facts or circumstances giving rise to the dispute;*
ii. *the positions or arguments of the parties;*
iii. *the merits of the case; and/or*
iv. *the prospective arbitrator's views on the merits, parties' arguments and/or claims.*[93]

The International Chamber of Commerce in its Note to Parties and Arbitration Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, under the broader category of ex-parte communications, governs the conduct of pre-appointment interviews as well. It mandates that a "prospective arbitrator may communicate with a party or party representative on an ex parte basis to determine his or her expertise, experience, skills, availability, acceptance and the existence of potential conflicts of interest".[94] As per clause (c), "in all such ex parte communications, an arbitrator or prospective arbitrator shall refrain from expressing any views on the substance of the dispute".[95]

3. Recommendations

3.1 Defined contours for questioning

To this end, the Code may be more elaborate and categorically limit the scope of PAIs to certain well-defined contours in order to check conflicts. These contours could be names of the parties in dispute and any third parties, general nature of the case to allow assessment whether candidate feels competent to hear the case, that is whether the candidate is withheld due to the existence of a conflict.[96]

In interests of integrity of the arbitral process, parties and their counsel must avoid any discussion of the merits of the case beyond what is necessary for the candidate to ascertain his or her

[93] Article 3, "International Arbitration Practice Guideline: Interviews for Prospective Arbitrators", (30 August 2016).
[94] Paragraph 49, "Note to Parties and Arbitration Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration" (1 January 2019).
[95] Ibid.
[96] Dr. Jeorg Risse and Thomas Kilch, "How much is too much? Rules for pre-appointment interviews between a party and a potential arbitrator", Global Arbitration News, (23 November 2015) <https://globalarbitrationnews.com/how-much-is-too-much-rules-for-pre-appointment-interviews-between-a-party-and-a-potential-arbitrator-20151116/> accessed on 8 May 2020.

competence, potential conflicts of interests and availability to hear the dispute.[97] Hypothetical questions about potential arguments and counter-arguments on issues of law and fact should also be avoided.[98] While this is easier said than done, the rule of thumb is that when in doubt, don't ask the question.[99]

3.2 Recording PAIs

In furtherance of Paragraph 1, Paragraph 2 must be included as an enforcement mechanism. A recorded PAI with the chosen candidate must be disclosed to the other party. As rightly stated, this would "*ensure that the interview stays within the proper scope and would reinforce confidence of all parties that no inappropriate information was shared with a candidate*".[100]

Additionally, the article must also incorporate a clause to the effect that such pre-appointment Interviews must not be remunerated or compensated in any manner except travel expenses of the candidate (if the venue of the meeting is outside an office), which ought to be reimbursed.[101]

SUMMARY OF RECOMMENDATIONS

1. The scope of PAIs must be restricted to the:
   (a) names of the parties in dispute and any third parties
   (b) general nature of the case to allow assessment on whether the candidate feels competent to hear the case
   (c)discussion of merits beyond what is necessary for the candidate to ascertain his/her competence must be avoided
2. Video recording of PAI with chosen candidate ought to be disclosed to the other party
3. Candidates must not be remunerated for PAIs except for any travel expenses that may have been incurred by them for the PAI, if any.

[97] Kabir Singh and Elan Krishna, "Interviewing Prospective Arbitrators", Kluwer Arbitration Blog, (29 September 2015), <http://arbitrationblog.kluwerarbitration.com/2015/09/29/interviewing-prospective-arbitrators/> accessed on 9 May 2020.
[98] Ibid.
[99] Ibid.
[100] Draft Article 10, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement "(1 May 2020), 84.
[101] See, Article 1(5), "International Arbitration Practice Guideline: Interviews for Prospective Arbitrators", (30 August 2016). Commentary to the Article elaborates: "*If the interview takes place in a business location other than the prospective arbitrator's office and they have to travel to the meeting, they may be reimbursed for their reasonable travel expenses or, if it takes place by telephone and/or videoconference, they may be reimbursed for any reasonable communication expenses.*"