



The UNCITRAL Code of Conduct

for Adjudicators in International Investment Disputes

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An aerial photograph of a port facility. In the foreground, a yellow loader is positioned on a dark, textured surface, possibly a conveyor belt or a large pile of material. To its right, a small white truck is visible. Further right, a long, narrow stone breakwater extends into the ocean. The water is a deep blue, and white waves are breaking against the breakwater. The overall scene depicts a busy industrial or maritime environment.

The 3rd Draft Code of Conduct

Overview of the Initiative

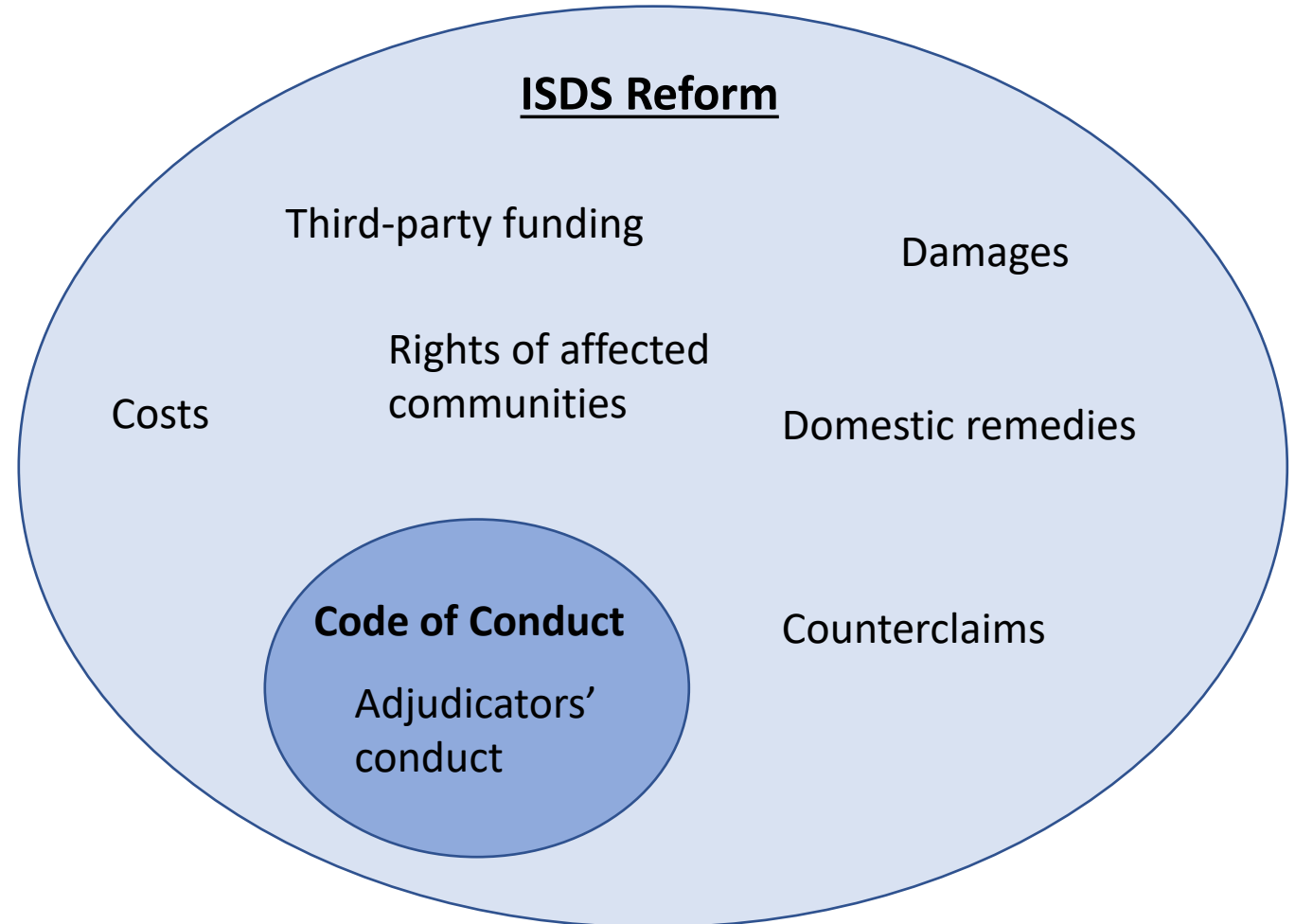
The Working Group's fastest product

- In April 2019, UNCITRAL member states suggested that the Secretariat prepare a draft Code of Conduct together with ICSID (parallel to ICSID rules revision)
- **Swift progress** of the initiative since then: first draft circulated in November 2020 – second revised draft circulated in April 2021 – third and current draft circulated in September 2021
- Comments provided by member states on each draft were implemented
- **Means of Implementation and Enforcement** proposed by Secretariat and ICSID in September; final version to be accompanied by official commentary
- Code of Conduct & Means of Implementation and Enforcement **to be discussed at the Working Group session on November 15 to 19**

The Code of Conduct in the Context of ISDS Reform

What it does & doesn't do:

- The Code addresses concerns relating to the conduct of adjudicators of international investment disputes
- Similar to existing voluntary standards like the IBA Guidelines on Conflicts of Interest in International Arbitration
- **Contributes little to overarching ISDS reform**



Content of the 3rd draft

General structure

- **11 articles & 1 annex** → structure of previous drafts maintained; some articles renamed
 - Definitions of key terminology
 - Application of the Code
 - Substantive provisions
 - Rule on compliance
 - Annexed disclosure form for adjudicators
- **Means of Implementation and Enforcement** suggested in a separate document
- **Refers to arbitrators and judges of a possible MIC jointly as „adjudicators“** → drafted in an open-ended way to apply to ISDS and/or possible MIC

Content of the 3rd draft

Definitions and scope

ARTICLE 1 - Definitions

- **Narrow definition of adjudicator** – includes arbitrators (and MIC judges), excludes mediators, conciliators, fact finders, and staff of arbitral institutions;
- **Frequent distinction between candidate and adjudicator** – clarifies duration of application
- **Contract- and law-based disputes not covered**
- **New definition of “Treaty Party”** – clarifies distinction between disputing parties and State parties to the treaty; does not define state agencies, branches or entities at subnational level

ARTICLE 2 – Application of the Code

- **No direct application to assistants** – application to be guaranteed by adjudicators
- **Clarifies relationship with other Codes of Conduct** – two options: (1) no application if existing code, or (2) application unless otherwise modified by existing code

Content of the 3rd draft

Independence and Impartiality

ARTICLE 3 – Independence and Impartiality

- Article 3(1): *"Adjudicators shall be independent and impartial."*
- Independence and impartiality are now framed as a standalone principle of article 3 – reinforces central importance of concepts; independent of whom?
- Secretariat: difference between the two concepts to be further fleshed out in the Commentary with reference to the rule in Suez v. Argentina:

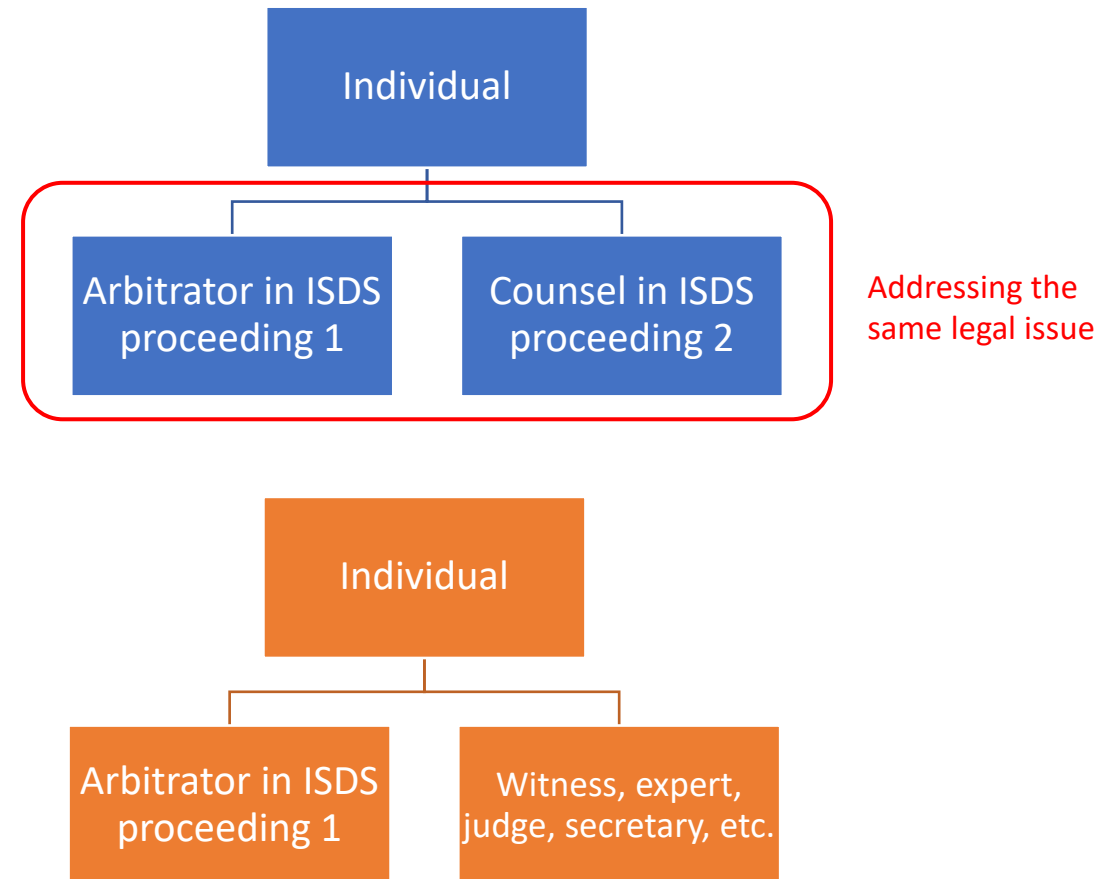
"[I]ndependence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties" (para 29)

Content of the 3rd draft

Problematic issue: double (or multiple) hatting

ARTICLE 4 – Limit on Multiple Roles

- **Double hatting:** One individual acting as adjudicator & in at least one different role in separate proceedings sequentially or simultaneously; calls into question adjudicator's impartiality and independence
- **3 Options – (1) full prohibition, (2) modified prohibition, and (3) full disclosure**
 - Only outright ban addresses concerns
 - Proposals remain less detailed than IBA Guidelines



Content of the 3rd draft

Ex parte communication

ARTICLE 7 – *Ex parte* communication

- General prohibition of *ex parte* communication, unless specified in the article
 - Exceptions for search for suitable candidates in pre-constitution phase and contrary agreements or rules
 - BUT: article does not specify which communication between disputing parties and candidates is permitted;
 - Broad definition covering candidates and adjudicators; does not expressly mention third-party funders
- **Concerns:** Unclear whether the article sufficiently reigns in *ex parte* communication with candidates; text fails to specifically mention third-party funders, communication with which is particularly problematic

Means of Implementation and Enforcement

Implementation of the Code of Conduct

The Secretariat proposes 3 means of implementation that are not mutually exclusive

Incorporation in a treaty	Integration into disputing parties' agreement	Implementation in other rules
<ul style="list-style-type: none">• Incorporation in new multilateral treaty - ensures binding character and coherent application• Incorporation in existing IIAs - ensures binding character but lacks coherence and requires piecemeal treaty reform	<ul style="list-style-type: none">• Requires consent of disputing parties; subject to negotiation - difficult to attain in litigious context• Does not guarantee coherent application	<ul style="list-style-type: none">• E.g.: procedural rules of arbitral institutions, disclosure forms, court rules and regulations of a future MIC• Except for MIC – no coherent or binding application in all investment disputes
Requires individual negotiations	Piecemeal, depends on consent	Piecemeal, depends on consent

→ Code alone will do little; its effectiveness depends on the means of implementation

Means of Implementation and Enforcement

Enforcement of the Code of Conduct

The Secretariat also addresses possible means of enforcement in its Note:

- Proposal remains vague; simply recalls that States have called for sanctions in the Code to be *“sufficiently strict to have a deterrent effect.”*
- **Apply existing sanctions** in procedural rules, e.g., challenge of adjudicators
- **Supplement with additional sanctions**, such as reduced remuneration or disciplinary measures

Key concerns

- Without strong enforcement, Code is little different from existing standards (e.g., IBA Guidelines)
- Legal link between the Code and sanctions in existing procedural rules remains unclear
- Unclear how supplementary sanctions would be achieved

The Code of Conduct as Part of ISDS reform

Recap

Opportunities	Concerns
<ul style="list-style-type: none">• Possibility to address problematic adjudicator conduct, including double hatting, <i>ex parte</i> communication, and conflicts of interest• Subject to broad implementation and strong enforcement, could harmonize existing voluntary standards & ensure greater coherence	<ul style="list-style-type: none">• Success depends on means of implementation and enforcement, which remain unclear• Disclosure obligation insufficient to address double hatting• <i>Ex parte</i> communication at pre-constitution phase not sufficiently regulated• Broad confidentiality provision thwarts efforts for greater transparency• Distraction? - Contributes little to overarching ISDS reform, particularly pressing concerns incl. damages, costs, counterclaims, domestic remedies etc.

Thank You!

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