EDITORIAL

SECOND VERSION OF DRAFT CODE OF CONDUCT: HITS AND MISSES

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Abstract

*On April 19, 2021, the Second Version of the Draft Code of Conduct for Adjudicators in International Investment Disputes ["**Second Version**"] was released by the United Nations Commission on International Trade Law ["**UNCITRAL**"] Working Group III ["**WG III**"]. The Second Version reflects the comments received on the First Version of the Draft Code of Conduct ["**First Version**"], which was released by the WG III on May 1, 2020. The authors, as a part of the Center for Arbitration & Research ["**CAR**"] at MNLU Mumbai, had earlier submitted comments/recommendations on the First Version to the ICSID Secretariat. In this paper, the authors add to their earlier work and conduct an analysis of the changes that have been incorporated in the Second Version, pursuant to discussions on the comments received on the First Version. Additionally, the authors provide their comments/recommendations on the Second Version.*

I. INTRODUCTION

On April 19, 2021, the Second Version of the Draft Code of Conduct for Adjudicators in International Investment Disputes ["**Second Version**"] was released by the United Nations Commission on International Trade Law ["**UNCITRAL**"] Working Group III ["**WG III**"]. The Second Version reflects the suggestions and recommendations submitted by various stakeholders including States and the academia, on the First Version of the Draft Code of Conduct ["**First Version**"], which was released by the WG III on May 1, 2020. The authors, as a part of the Center for Arbitration & Research ["**CAR**"] at MNLU Mumbai, had earlier submitted comments/recommendations on the First Version to the ICSID Secretariat.[1] In this paper, the authors add to their earlier work and conduct an analysis of the changes that have been incorporated in the Second Version, pursuant to discussions on the comments received on the First Version. Additionally, the authors provide their comments/recommendations on the Second Version.

Before delving into the contents of the Second Version, the authors deem fit to discuss the backdrop under which the WG III has endeavored to release a Code of Conduct for Adjudicators in Investor-

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[1] Centre for Arbitration and Research – MNLU Mumbai, Comments on the Draft Code of Conduct for Adjudicators in Investor-State Disputes Settlement [2020].

State Dispute Settlement ["**Code**"]. Investor State Dispute Settlement ["**ISDS**"], in its present form, has been under constant criticism due to concerns with respect to the system's transparency, independence and impartiality, due process, third party participation, and consistency and predictability.[2] While broader concerns persist, the scope of this enquiry is restricted to concerns giving birth to the Code. Serious reservations exist surrounding the independence and impartiality of arbitrators, which focus on conflict of interests and the lack of diversity in their appointments, as reports show numerous repeated appointments and a concentration of arbitrators from a certain region, age, gender and ethnicity.[3] Moreover, there are increasing concerns with regard to the ISDS community being a closed group, wherein the same group of individuals perform multiple roles, giving rise to the problem of double hatting, which further fuels the apprehensions regarding lack of independence and impartiality in the adjudication process. In the wake of such criticisms, international bodies have initiated public debates and discussions in furtherance of developing solutions for possible reform.

The UNCITRAL, at its Fiftieth Session in July 2017, gave the mandate to the WG III to contemplate and discuss possible reforms of the ISDS system.[4] Similarly, earlier in October 2016, ICSID had also advised its 153 member States that it was beginning the Rule Amendement Project, wherein the ICSID rules and regulations would be updated.[5] An aspect where a collaborative and concerted effort towards reform has been made by both UNCITRAL and ICSID is that of devising the Code for the adjudicators of ISDS.[6] The Code seeks to address criticisms of ISDS pertaining to concerns related to processes for the appointment of arbitrators, including issues associated with their conflict of interests, independence and impartiality, disclosure mandates, diversity, qualifications, and problems raised by third-party funding arrangements.[7]

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[2] Karl P. Sauvant & Federico Ortino, *Improving The International Investment Law and Policy Regime: Options for the Future* 75-85 (2013), http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf.

[3] Justine Touzet & Marine Vienot de Vaublanc, *The Investor-State Dispute Settlement System: The Road To Overcoming Criticism*, KLUWER ARBITRATION BLOG (Aug. 6, 2018), http://arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism.

[4] UNCITRAL, Rep. on the Work of its Fiftieth Session, U.N. Doc A/72/17 (2017).

[5] The ICSID Rule Amendment Project 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.

[6] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement 2 (May 1, 2020), https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

[7] *Id.*

Discussions on the Code were initiated by the WG III on the basis of a note prepared by the WG III along with ICSID, and has subsequently been supported by various stakeholders.[8] States have submitted proposals with their views on the various aspects being deliberated in the WG III, particularly on the desirability of the code and its intricacies and features.[9] Based on the inputs received and subsequent deliberations, the UNCITRAL and ICSID, on April 19, 2021, have now released the Second Version, inviting further comments and suggestions from States, the academia and other interested stakeholders. The WG III has sought to base the Code on a comparative review of standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and of international courts. The Code is intended to provide applicable principles and provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency, and civility.[10] Moreover, in addition to codifying the essential ethical duties of integrity, fairness, competence, diligence, civility and efficiency, the Code also seeks to address some long-standing and sensitive issues in ISDS such as repeat appointments, issue conflict and double hatting.[11] The Code, as conceived by the WG III, intentionally uses the word 'adjudicators' and not 'arbitrators.' The Code, therefore, applies to all kinds of adjudicators, including arbitrators, ad hoc committee members and potential candidates to become adjudicators. Moreover, the usage of the word 'adjudicator' allows the Code to be applied even to judges, in the event that systemic reforms are made to ISDS to include permanent bodies or appeal mechanisms where sitting 'judges' may be appointed. The Code also applies to adjudicators' assistants.[12]

The authors have narrowed the scope of their analysis and recommendations in this paper to four Articles of the Second Version, i.e., Articles 4, 5, 7 and 10, since the same Articles were part of the author's earlier analysis and comments, which they had conducted along with other researchers, and submitted their comments to the ICSID and UNCITRAL on behalf of the CAR. The paper has been divided into two parts. *Firstly*, the authors undertake a comparative analysis of the two Versions; and *secondly* the authors analyze the Articles of the Second Version and provide their comments and recommendations on the same.

[8] UNCITRAL WGIII, Possible reform of investor-State dispute settlement (ISDS) Background information on a code of conduct, UN Doc A/CN.9/WG.III/WP.167 (2019).

[9] UNCITRAL WGIII, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its resumed Thirty-Eighth Session, at ¶¶51, 68, UN Doc A/CN.9/1004/Add.1 (2020).

[10] Chiara Giorgetti, *The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: An Important Step Forward in the Reform Process*, EJIL: TALK (Aug. 13, 2020), https://www.ejiltalk.org/the-draft-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement-an-important-step-forward-in-the-reform-process/.

[11] *Supra* note 6, at 3.

[12] *Supra* note 6, art. 1(2).

II. COMPARATIVE ANALYSIS OF THE FIRST AND SECOND VERSION

The table below reproduces the text of the provisions (which were the subject matter of the authors' scrutiny in their Comments) in both, the First and the Second versions of the Code. As can be inferred, *prima facie*, changes have been made in the order and arrangement of the provisions. The introduction to the Second Version mentions that the re-ordering of the Code has been made to allow Article 10, i.e., the Article on disclosure (earlier Article 5) to follow the substantive requirements of the Code (Articles 3-9).[13] This section entails a comparative analysis of the First Version vis-à-vis the Second Version, while discussing the comments that the authors had submitted on the First Version of the Code.

First Version	Second Version
Article 5 [see Article 5(2)(a)(iv) and Article 5(2)(d)] **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;	**Article 10 [see Article 10(2)(a)(iv)** **Disclosure Obligations** 1. Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter. 2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information: (a) Any financial, business, professional, or personal relationship within [the past five years] with: (i) the parties, and any subsidiary, affiliate or parent entity identified by the parties; (ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID [and non-IID] proceedings;

[13] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Version 2, ¶ 2 (April 19, 2021), https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf.

(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 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. (ii) 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.	(iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and **(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;** (b) Any financial or personal interest in: (i) the proceeding or its outcome; and (ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and (c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator. 3. Adjudicators shall make any disclosures in the form of Annex 1 prior to or upon accepting appointment, and shall provide it to the parties, the other Adjudicators in the proceeding, the administering institution and any other person prescribed by the applicable rules or treaty. 4. Adjudicators shall have a continuing duty to make further disclosures based on newly discovered information as soon as they become aware of such information. 5. Adjudicators should err in favor of disclosure if they have any doubt as to whether a disclosure should be made. The fact of disclosure by an Adjudicator does not establish a breach of this Code.
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	**Article 4** **Limit on Multiple Roles** Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual

involve the same parties, [the same facts] [and/ or] [the same treaty].	background and at least one of the same parties or their subsidiary, affiliate or parent entity].
Article 8(2) **Availability, Diligence, Civility and Efficiency** 2. [Adjudicators shall refrain from serving in more than [X] pending ISDS proceedings at the same time so as to issue timely decisions.]	**Article 5** **Duty of Diligence** 1. Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner. 2. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.
Article 10 **Pre-appointment Interviews** 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.]	**Article 7** **Communications with a Party** 1. Any pre-appointment communication with a Candidate concerning a potential appointment shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding. 2. [The contents of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be fully disclosed to all parties upon appointment of the Candidate.] 3. An Adjudicator shall not have any ex parte contacts with a party concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties.

One of the principal reservations that the authors had with the First Version was that certain obligations and restrictions imposed on the adjudicators were impractical and cumbersome in nature. In order to construct a meaningful and effective code of conduct, it is essential that the Code does not render it impractical for individuals in the legal or business community to serve as arbitrators. For example, the First Version required that adjudicators to disclose all relevant publications as a part of their disclosure obligations, a provision which has now been away with in light of imposing onerous obligations. While theoretically expansive and elaborate disclosures ensure utmost transparency and eradicate the chances of actual or apparent conflicts of interest, practically, it is essential that the WG III acquires an equilibrium and balance between transparency and effectiveness. The same is essential to ensure that the Code does not act as an impediment to the freedom of the parties to choose the best qualified arbitrators. Through the changes incorporated in the Second Version, as can be seen from the above table, the WG III has attempted to make the Code a more practical document, which finds a balance between the interests of all stakeholders in ISDS. In doing so, the WG III has deleted certain portions and terms that left the scope of the Code ascertainably broad and uncertain. The authors delve deeper into the changes that have been brought to the specific Articles below.

A. Article 10(2)(a)(iv), earlier Article 5(2)(a)(iv)

Article 5 of the First Version had a very broad ambit and could possibly have led to unnecessary arbitrator challenges, which in turn would result in higher costs and delays. Moreover, there was a lack of clarity and definiteness in the provision that would act as a major impediment to the practical and strict interpretation of the Code.[14] This concern of the authors' was shared by most states and commentators in their comments to the First Version. Therefore, most of the changes that have been brought to this provision in the Second Version have been with the intention to streamline the provision and accord more practicality, precision and clarity to the disclosure mandate.

The most important change in this Article is the removal of the phrases '*direct or indirect conflict of interest*' and '*direct and indirect financial interest*'. The authors, as part of the CAR team, had voiced their concerns that bifurcation of interests into '*direct and indirect interests*' may lead to confusion on the disclosures that ought to be made by the adjudicators. The reason being that the Code did not define the term '*direct or indirect,*' and as such the scope of '*indirect interests*' in the outcome of the dispute would be ambiguous and unascertainable. The authors specifically suggested the need for a change to Article 5(2)(a)(iv) in the First Version [now Article 10(2)(a)(iv)], which governs the

[14] *Supra* note 1. The team at CAR suggested that *"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."*

adjudicator's relationship with interested third parties, such as third party funders, which may affect their ability to decide the dispute with an open mind. In this regard, Article 5(2)(1)(iv) in the First Version was guilty of imprecision and abstruseness. The First Version required adjudicators to disclose 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 proceedings. Apart from being a very broad mandate, there was no clarity, explanation or precision as to the definition of the term '*direct or indirect conflict of interest*'. In this regard, the authors had recommended that instead of using the term '*direct or indirect financial interest,*' the Code could use the term 'significant interest' and had also recommended a definition of 'significant interest'.[15] The underlying rationale behind our suggestion was the possibility that a third party having a relationship with the adjudicators might have a far-stretched, distant, inconsequential or interlinked indirect financial interest in the outcome of the dispute. Therefore, using the phrase '*direct or indirect financial interest*' would cause uncertainty and make the disclosure mandate under this provision unnecessarily broad.

The aforementioned recommendation was acknowledged by the Inter-Pacific Bar Association in its comments on Article 5 of the First Version, wherein it opined:

> "one comment suggests that, instead of "direct or indirect interest", the Draft Code should use "significant interest" defined as "interest resulting in doubts about independence, sense of fairness and impartiality of the adjudicators." We do not necessarily support requiring disclosure only of "significant" conflicts of interest, but would here rather propose specifying the meaning of "indirect interest". Alternatively, the wording could refer instead simply to "conflict of interest" and dispense with "direct or indirect" (noting that the second sentence of the existing article covers all types of interest that "could reasonably be considered" to be a conflict – whether direct or indirect)."[16]

Article 10 of the Second Version brings much needed clarity in this regard as the term '*direct or indirect financial interest*' has now been replaced by '*financial interest*,' which is more definite and straightforward in nature. This is a welcome change as it does away with the uncertainty that came with the unascertainable ambit of the term '*indirect financial interest*'. The other changes that have been brought about in this provision are that (a) the disclosure mandate has been restricted to third party funders, as against any third party; and (b) disclosure must be made in respect of the third-party funders identified by a party. The erstwhile provision provided a broader mandate and extended to any third party having a financial interest in the outcome of the proceeding. The WG III has now narrowed down the provision to only require disclosures with respect to a particular kind of third

[15] *Supra* note 1, at 8-9.
[16] UNCITRAL and ICSID, Draft Code of Conduct, Comments by State/Commenter 118 (Jan 14, 2021).

party, i.e., third party funders. Moreover, the erstwhile provision did not specify the manner in which the adjudicators would become aware of the third-party funders involved in the matters and make disclosures to that extent. It certainly could not be the case that the adjudicator would have the reasonable means to independently assess the third parties involved and ascertain facts that would warrant a disclosure. Therefore, in accordance with the change brought, the disclosure mandate of the adjudicators will be limited to only those third-party funders which have been identified by the parties themselves. The authors have some reservations and recommendations on Article 10(2)(a)(iv) of the Second Version, which has been elaborated upon in the next part of the paper.

B. Article 5(2)(d) of the First Version has not been included in the Second Version

Article 5(2)(d) of the First Version addressed the widely debated question of 'issue conflict.' Issue conflicts, in international arbitration, are argued to arise owing to past expression of views by the adjudicators that may show certain bias or prejudgment of certain issues. It should be noted that the existence of conflict of interest due to a possible issue conflict continues to be widely debated topic in ISDS and there is no consensus on its application or effectiveness. Sub-para (d) of Article 5 of the First Version required the disclosure of relevant publications that may give rise to such issue conflicts and sought comments from states and commentators on whether the disclosure mandate should extend to 'relevant public speeches' as well. While the authors, having submitted their comments from a purely academic perspective, had supported the disclosure of relevant publications and public speeches on the ground that the same might be "*manifestations of the pre-existing and core views of the adjudicators*"[17] it is understandable as to why the requirement of such disclosure has been done away with. In fact, the authors, in their comments, had highlighted that the importance of ensuring that this provision does not discourage experienced professionals from talking and sharing their experience and ideas with the community to help develop arbitration law.[18] Most states and commentators raised similar concerns, that requiring the disclosure of 'all' related publications and public speeches would put a very onerous burden on adjudicators and would impede their academic freedom.

The practical difficulties that adjudicators, who have been in practice for numerous years, may face due to the requirement to disclose all related publications and public speeches has been very aptly explained by Mr. Mark Kantor in his comment on Article 5(2)(d) of the First Version, wherein he has

[17] *Supra* note 1, at 10.

[18] *Id*. The team at CAR suggested *"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 impartiality of the adjudicators, and are 'publicly available.'"*

succinctly put forth that considering the magnitude of publications and speeches made by arbitrators, and the possible connotations that the terms publications and public speeches have, it becomes practically impossible to make disclosure of all publications and relevant public speeches.[19] The non-inclusion of Article 5(2)(d) in the Second Version manifests that the WG III has sought to find a balance between the interests of all stakeholders. It is essential that the Code which is formulated is in the best interests of both, the parties and the adjudicators. The requirement of disclosing all publications and speeches, which adjudicators have undertaken over a very long period of time, would be extremely burdensome and may open the doors for unnecessary or frivolous challenges. In this regard, it would be very helpful if the WG III releases an assessment on relevance and effectiveness of viewing issue conflicts as conflict of interests in ISDS.[20]

Finding a practical solution for issue conflicts in ISDS is a very difficult task. The reason being that issue conflicts, in its truest sense, would deal with inherent views and perspectives of adjudicators, whether or not they have been expressed in publications or speeches by the adjudicators. Adjudicators, being human beings, are susceptible to beliefs and presuppositions, and they naturally bring these with them to the arbitration. The WG III must assess the practical solutions that may prevent issue conflicts from compromising the credibility of ISDS, as a whole, and awards rendered by arbitrators. In this regard, it will be appropriate to refer to the decision in the disqualification challenge against Professor Campbell McLachlan in the case of *Urbaser SA v. Argentine Republic*. The two remaining arbitrators, while considering the question of issue conflicts, had opined that the ability to change one's mind based on new evidence or arguments is one of the main qualities of an

[19] *Supra* note 16, at 139. Mr. Mark Kantor states that "*Art. 5.2(d) requires adjudicators to disclose a list of all publications and, in brackets, their relevant public speeches. Using myself as an example (and believing that many others are similarly situated), I cannot comply with these requirements. I have been publishing for at least 42 years. I have not maintained a comprehensive list of publications for that period. Many of those publications have little to do with international investment law, investments, or indeed even law – it is hard to see how that is relevant to an assessment of my possible conflicts. Moreover, I have made many posts over the decades on listservs, social networks or similar platforms – are those publications? I do not keep a record of those posts either. As for "public speeches," I again have been giving presentations for decades. I do not keep a comprehensive record – indeed, I normally speak from handwritten notes that I discard promptly after the event. Further, what is covered – is my participation on a panel of discussants at a conference covered? As a moderator of such a panel? As a "speaker" at a program sponsored by a student group?*"

[20] The WG III may consider to undertake an assessment similar to ICCA Reports No. 3: ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/asil-icca_report_final_5_april_final_for_ridderprint.pdf. The ASIL-ICCA Task Force was composed of a diverse group of leading experts from a wide range of professional backgrounds, including arbitrators, counsel, members of arbitral institutions, and academics. The Report was intentioned to provide evaluation and practical resolution of potential challenges arising out of issue conflicts and reflecting on the fundamentals of ISDS.

academic.[21] Therefore, merely because an adjudicator has expressed a certain position in his past academic works on legal issues relevant to the arbitration should not automatically lead to the conclusion that the adjudicator has prejudged the issues and cannot decide the matter with a sense of fairness or an open mind.[22] It is unlikely that a hard and fast rule of disclosure will ably tackle the conflict of issue conflicts because the same are highly fact-dependent and need to be assessed through specific thorough enquiries. The authors have some recommendation in this regard and the same has been elaborated in the next part of the paper.

C. Article 4, earlier Article 6

As can be seen from the above table, the scope of Article 4 in the Second Version, which was Article 6 in the First Version has been streamlined. This provision is arguably the most contentious provision inserted in the Code for the reason that it seeks to regulate the practice 'double hatting', which as suggested by many scholars is a major cause of apprehension of real or apparent bias in an ISDS proceeding.[23] In the context of ISDS, double-hatting may be referred to as the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short time period.[24] It usually refers to being an arbitrator and a counsel simultaneously, but it may extend to various other roles such as an expert witness or mediator in separate ISDS proceedings.[25] Several parts of this provision had been left open for further deliberation and comments from stakeholders in the First Version. The WG III, in Article 6 in the First Version, had sought comments from all stakeholders on the appropriate way to regulate double hatting in ISDS. For the same, the WG III had provided for an alternative between (a) a blanket ban on adjudicator performing multiple roles simultaneously [within X years of] on matters that involve the same parties, [the same facts] [and/or] [the same treaty] and (b) a disclosure of the matters where adjudicators acted 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].

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[21] Urbaser S.A. v. Argentina Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 51 (Aug. 12, 2010).

[22] *Id*. at ¶45. The disqualification challenge was rejected by the remaining two arbitrators on the ground that the mere showing of an opinion, academic or otherwise, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator.

[23] Sergio Puig, *The Death of ISDS?,* KLUWER ARBITRATION BLOG (March 16, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds/. The Author states that *"While serving as arbitrators, the professionals also represent clients, thus wearing "double hats," raising challenges to their legitimacy and impartiality."*

[24] ICSID, Code of Conduct – Background Papers: Double Hatting 1, https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf.

[25] *Id.*

Article 4 in the Second Version now provides that adjudicators are required not to act as expert witness or counsel in another IID case, unless otherwise agreed between the parties. It is important to note that the WG III has limited the restriction on multiple roles only to counsel or expert witness, as opposed to an array of other roles stipulated in the First Version. The Second Version also qualifies this prohibition by the consent of parties. Therefore, if the parties give consent to other concurrent roles played by adjudicator (which he/she shall duly disclose), then the adjudicator can continue to act in these concurrent roles. The reason behind narrowing down on adjudicator on one hand and counsel/expert witness on the other hand is that "*this appears to be the overlap that most likely creates conflict, and which is of greatest concern in terms of the legitimacy of IID settlement.*"[26] It is still undecided whether this prohibition is sought to be applied absolutely or qualified by yet another criterion, i.e., the factual background or one of the parties (including its subsidiary or affiliate) being same.

The authors, along with other researchers, as part of the CAR team, had suggested that the Code should impose a mandatory disclosure regime as against a complete bar on the adjudicators to perform multiple roles.[27] The change made to this provision seems to be partially in line with the earlier recommendation of the authors when read with Article 10(2)(c) of the Second Version. Article 10(2)(c) provides that the adjudicator must disclose all IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or adjudicator.[28] Therefore, adjudicators will be required to disclosure such information and in the event that the parties do not have any reservation in that regard, the adjudicator will be permitted to continue as an adjudicator in the concerned matter. Therefore, the mandatory bar on double hatting is now qualified by party consent. The qualification introduced in the provision in the form '*unless the disputing parties agree otherwise*' is a valid introduction as it allows the disputing parties to assess the circumstances and decide if they want to continue with or challenge the concerned adjudicator.

An outright ban on multiple roles would lead to the exclusion of a greater number of professionals than necessary to avoid conflict of interest, and would impede the elementary right of the parties to choose the best suited adjudicators and counsels for their arbitrations. Moreover, an outright ban would be detrimental to young professionals, as in the early stages of their careers it would be unlikely for them to sustain themselves by exclusively performing a single role. This would be antithesis to the efforts being made by the international arbitration community to foster diversity in the system.

[26] *Supra* note 13, at ¶ 29.
[27] *Supra* note 1, at 14-15.
[28] *Supra* note 13, art. 10(2)(c).

The authors have a further recommendation in this regard and the same can found in the next part of the paper.

D. Article 5, earlier Article 8(2)

Article 8 of the First Version required adjudicators covered by the Code to meet the broader requirements of availability, diligence, civility, and efficiency at each stage of the arbitral proceedings. The general scheme of Article 8 of the First Version was to impose a positive obligation on adjudicators to maintain the highest standards of professionalism and punctuality throughout proceedings. Article 8(2) of the First Version more specifically sought to achieve the envisaged ends of availability, diligence, civility, and efficiency by seeking to cap the number of IID cases which an adjudicator adjudicated at once, leaving it open to suggestions as to what would be an objectively suitable number for setting such a cap.

Article 8, which is now Article 5 in the Second Version, has altogether done away with the requirement of capping the number of proceedings an adjudicator could adjudicate. The explanation to the Second Version states such requirement has been deleted in light of comments noting that the number of cases an adjudicator can reasonably address depends on many variable factors, including the stage of the case, its complexity, and the role of the adjudicator.[29] A salient addition to this article is the obligation upon an adjudicator to not delegate their decision-making function to an assistant or a third person. This provision was previously found in the erstwhile Article 7 but has now been assimilated into Article 5. The decision to remove the cap on the number of IID cases which an adjudicator can adjudicate at once is good. The reason being that merely because adjudicators are involved in multiple IID cases does not in itself confirm that they shall not be available to fulfil their roles in a punctual and efficient manner. It is very important to ensure that the Code does not impose unnecessary limitations on the appointment of an adjudicator as the same (a) intrudes into the freedom of parties to appoint their desired adjudicator and (b) impedes on the right of adjudicators to be appointed, particularly newer, less experienced arbitrators who may need multiple cases to make arbitration a full-time role.[30] In this regard, the authors, along with other researchers at CAR, in their comments to the ICSID Secretariat, had suggested that greater efficiency, transparency and accountability can be achieved through a disclosure mandate.[31] The disclosure mandate would require adjudicators to disclose and update the parties of their availability/available dates, such that parties could assess if the schedule of the adjudicator permits them to ensure efficient timelines for the

[29] *Supra* note 13, at ¶ 33.
[30] *Supra* note 16.
[31] *Supra* note 1, at 27-28.

arbitration. The same could enable the parties to make reasonable assumptions about the workload and ability of the adjudicator to deliver timely judgments. The title of Article 8 in the First Version was Availability, Diligence, Civility and Efficiency, and it provided additional requirements of civility, punctuality, respect, collegiality, consideration of best interests of parties. The same has been done away with by the WG III in Article 5 of the Second Version, which now has the title 'Duty of Diligence'. Instead, a separate article, i.e., Article 6 of the Second Version deals with other duties of the adjudicators, which include the duties of remaining available and treating parties with civility. The comments of the authors on Article 5 of the Second Version can be found in the next part of the paper.

E. Article 7, earlier Article 10

Article 10 of the First Version sought to regulate the manner in which pre-appointment interviews of potential candidates are taken in the ISDS regime. It provided that pre-appointment interviews be only restricted to inquiring about the availability of a candidate and not any jurisdictional, substantive or procedural questions arising out of the proceedings. Towards such an end, an option was provided for disclosure of pre-appointment interviews to disputing parties in case a formal appointment was made in furtherance of any such interviews.

The CAR, in its comments, submitted that such interviews must not touch upon substantive matters at stake and ought to be restricted to well-defined contours which include 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, i.e., whether the candidate is withheld due to the existence of a conflict.[32] It was also suggested that a provision must be made for video recording of such interviews as a check and balance mechanism to see that propriety is observed in the way these interviews are conducted.[33] Additionally, keeping in line with the 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.[34]

Article 10 in the First Version, now dealt with by Article 7 in the Second Version, has not seen a substantial change. Restriction on ex-parte communication between an adjudicator and parties concerning the proceedings, which was earlier provided for under Article 7(2) of the First Version has now been reproduced in Article 7(3) of the Second Version with a modification. Article 7(3) in the Second Version provides that "*An Adjudicator shall not have any ex parte contacts with a party*

[32] *Supra* note 1, at 32.
[33] *Supra* note 1, at 33.
[34] *Id.*

concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties."[35]

III. RECOMMENDATIONS ON THE SECOND VERSION

At the outset, the authors believe that the Second Version is a more practical and clearer version of its predecessor. The WG III has effectively incorporated the comments received from all stakeholders and also ensured that the Code is more balanced and reasonable in the obligations it imposes on the adjudicators. With respect to the five articles which form the subject of the present analysis, the authors have certain recommendations, for further clarity, and to ensure that the underlying objectives of these provisions are met. The specific suggestions for each article are discussed below.

A. Article 10(2)(a)(iv)

As commended by the authors, Article 10(2)(a)(iv) is a much more practical and streamlined version of its predecessor. The WG III has removed the phrase '*direct and indirect interest*,' and thereby has made the disclosure mandate more definite and clearer. However, there are certain aspects of the provision which could benefit from greater clarity. The recommendations are being made to address (a) the scope and (b) explanation of key terms of Article 10(2)(a)(iv).[36]

Firstly, Article 5(2)(a)(iv) in the First Version required the adjudicators to disclose if they had a professional, business and other significant relationships with **any third party**, who has a financial interest in the outcome of the proceedings. However, as evident from the text of Article 10(2)(a)(iv) reproduced above, the disclosure mandate in the Second Version has been limited to only **third-party funders**. Therefore, the adjudicators will not be required to disclose their relationship with any other type of third parties that may have a financial interest in the outcome of the proceedings. The authors are unable to agree that relationship of adjudicators only with third party funders warrant disclosure.

The probable reason why the scope this provision has been limited to only third-party funders, as against any third party, is because third party funders are most likely to be the third parties that are involved in ISDS and give rise to concerns related to conflict of interest. The authors are in consensus with the WG III that conflict of interests arising out of third-party funding is a major concern owing to the widespread and growing use of third-party funders in ISDS. However, it will be in the interest of efficiency to require disclosure of relationship with any third party that has a financial interest in

[35] *Supra* note 13, art. 7(3).

[36] *Supra* note 13, art. 10. Article 10(2)(a)(iv) states, "*2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:*
(a) Any financial, business, professional, or personal relationship within [the past five years] with:
(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party".

the outcome of the proceedings. This will ensure that if adjudicators have any relationship with third parties, other than third party funders (and those mentioned in Article 10(2)(a)(i)), the same is also disclosed by them. Other financially interested parties can include insurers, insurance companies, ultimate beneficial owners, investment banks, hedge funds, persons entitled to receive proceeds of an award under a third-party funding or other agreement, persons obligated to pay an award under an indemnification or other agreement, among others. Additionally, the WG III may consider providing an indicative list as to the types of relationships that may be covered under the term 'third party.' Requiring disclosure of relationships with other financially interested parties will not be onerous as the Second Version now requires the parties to themselves name or identity the interested third parties. Therefore, the authors propose that Article 10(2)(a)(iv) may be amended to include third parties other than third party funders. Moreover, a particular emphasis may be made on third party funders to highlight their increasing relevance in ISDS. The amended Article 10(2)(a)(iv) may take the following form: "*Any third party with a financial interest in the outcome of the proceeding, including, in particular third-party funders, that have been identified by the parties*."

Secondly, in order to accord more clarity to Article 10(2)(a)(iv), the WG III can consider providing a definition for the term 'third party funders.' Given that the WG III has rightly sought to address third party funders more narrowly and precisely, it would be appropriate to explain as to how the Code understands the term 'third party funders.' Providing a definition will allow both parties and adjudicators to adequately identify and disclose any relevant material. In order to provide the definition of 'third party funders,' the WG III may consider incorporating the language used in the draft ICSID Arbitration Rules amendments. It defines a 'third party funder' as "*any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant or in return for remuneration dependent on the outcome of the proceeding," excluding "a representative of a party.*"[37] The authors propose that incorporating similar text in the Code will further streamline Article 10(2)(a)(iv) and avoid the possibility of any confusions with respect to the disclosure mandate.

Thirdly, Article 10(2)(a)(iv), and Article 10 as a whole, has now dispersed with the phrase '*direct and indirect financial interest*' and has replaced the same with '*financial interest*'. As previously highlighted by the authors, this is a welcome change as it does away with the uncertainty that came with the same. To give further clarity to this article, the WG III may consider providing an indicative list (non-exhaustive) as to what would be considered as financial interest under this article. The same

[37] 1 ICSID, *Working Paper 4: Proposals for Amendment of the ICSID Arbitration Rules*, Rule 14 37 (2020), https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf.

need not be included in the main article and rather can be explained in the Commentary to the article. For instance, the Commentary to Article 10 in the Second Version notes, for avoidance of doubt, that the adjudicator's remuneration for work performed and reimbursement of expenses incurred in connection with the IID proceeding is not considered a financial interest for the purposes of Article 10. Similarly, a little more guidance as to what constitutes financial interest with respect to third party funders or other third parties in sub-para (iv) of Article 10(2) would be useful. The idea is to make the disclosure mandate easier by providing direction to the parties and the adjudicators, such that the same can be complied with without any hassle or confusion. It may be noted that as per Article 10(5) "*adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made*." However, a little more clarity will not harm the Code and will only make the task easier and efficient.

Fourthly, as can be seen in Article 10, 'candidates' have been excluded from the disclosure mandate under this provision. In the First Version, both candidates and adjudicators were covered by the disclosure mandate of the Code. However, the revised form of the Article in the Second Version has limited the requirement only to adjudicators. The commentary on Article 10 does not explain this change. The term 'Candidates' has been defined under Article 1(4) of the Second Version and it refers to a person who has been contacted regarding potential appointment as an adjudicator. It is unclear as to why candidates have been removed from the scope of Article 10. The timeline when the disclosure under Article 10 must be made has not been made explicit by the WG III. However, by reason of candidates being excluded from the Ambit of Article 10, it can be inferred that the disclosure under Article 10 must be made only after the adjudicator has been appointed. Importantly, Article 7 of the Second Version, which deals with pre-appointment communication between parties and the candidate, requires that discussion must include ascertaining the absence of any conflict of interest. Therefore, during the pre-appointment communications, the potential candidates must be required to make disclosures, and the same must take the form of disclosure made under Article 10. This would be in line with the IBA Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"], which require a candidate to make any disclosures "*prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them*."[38] The authors propose that the ambit Article 10 must, therefore, extend to both candidates and adjudicators, as was the position in the First Version.

Fifthly, the WG III must consider providing the timeline of making disclosures under Article 10. It is unclear when an adjudicator is required to make his/her initial disclosures under Article 10. While

[38] IBA Guidelines on Conflicts of Interest in International Arbitration, art. 3 (2014).

the same may be governed by the respective applicable arbitration rules, the Code must provide some clarity in that regard. Article 10(4) only provides that the adductors have a continuing duty but does not indicate as when does that duty begin. A reference can again be drawn to the IBA Guidelines, which provide that the disclosures made be made prior to accepting appointment or, if thereafter, as soon as he or she learns of them. Similarly, Para 4 (b) and (c) of the CPTPP Code of Conduct reads as follows:

> "(b) The disputing parties or the Secretary-General, as the appointing authority for an arbitration referred to in Article 9.22.2 (Selection of Arbitrators), will provide a candidate a copy of this Code of Conduct and the Initial Disclosure Statement set out in the Appendix to this Code of Conduct.
>
> (c) A candidate shall submit the Initial Disclosure Statement set out in the Appendix to this Code of Conduct to the disputing parties or the Secretary-General, as the appointing authority, no later than seven days after receipt of that Statement."[39]

Comments received on the First Version also pointed out this requirement, but the same was not considered by the WG III. However, to accord utmost clarity to the Code, and in line with the aforementioned, the authors propose that the WG III must consider to include a timeline for disclosures to be made under Article 10. If not a specific timeline, as seen in the CPTPP Code of Conduct, the following text may be considered: *"Disclosures must be made as soon as possible in view of the information available to the adjudicator at the time or in accordance with the applicable rules."*

Lastly, the authors propose that the WG III should consider mentioning the consequences of non-disclosure in accordance with Article 10. While the Code explicitly states that non-disclosure by an adjudicator does not in itself establish a breach of this Code, it might also be prudent to highlight (at least in the commentary) the consequences of failure to disclose a material fact in accordance with Article 10. Would the non-disclosure of a certain fact under Article 10 amount to a breach of the Code? The Commentary to Article 11 answers this question in the negative. This is in consonance with the general practice in international arbitration, which suggests that a mere non-disclosure of a certain fact would not in itself warrant the disqualification of arbitrators, unless the non-disclosure is of a fact which rises to the level of a lack of independence or impartiality under Article 3 of the Code.[40] Article 11(2) of the Second Version provides that the disqualification and removal procedures

[39] The Code of Conduct for Investor-State Dispute Settlement Under Chapter 9 Section B (Investor-State Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

[40] *See* IBA Rules of Ethics for International Arbitrators, art. 4.1 (1987); Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (2010.; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (2006); Tidewater Inc. and others

in the applicable arbitration rules shall apply to breaches of Articles 3-8 the Code. As evident, a breach of Article 10 is not covered under the ambit of Article 11(2). However, since the Code seeks to provide for effective implementation of the Code, the WG III might want to include a certain direction in this regard to give teeth to the disclosure mandate prescribed under Article 10 of the Second Version. The same can be done by mentioning in the Commentary to Article 11 that non-disclosure of a **material fact** under Article 10 might be a ground for a successful challenge under Article 11(2). Material fact can be defined as a fact which rises to the level of a lack of independence or impartiality under Article 3 of the Code.

B. Non-inclusion of Article 5 (2)(d) of the First Version

The authors highlighted that requiring the disclosure of all publications and relevant public speeches was an extremely onerous requirement, and was therefore not included in the Second Version. However, having said that, it is also important to understand that the concerns surrounding issue conflicts are not hypothetical in nature. Particularly, issue conflicts are at the heart of the debates regarding the increasing criticisms of ISDS that there is lack of objectivity in decision making. Though challenges based on the ground of issue conflicts are rarely successful, there is evidence to show that several challenges alleging 'issue conflict' have recently succeeded. One of the prime examples of the same is when the then-President of the International Court of Justice upheld a challenge on the basis of an arbitrator's "*strongly held and articulated positions*" regarding a legal issue that was significant to the concerned matter.[41] Another example where issue conflict was the ground for a successful challenge was when the President of the ICSID Administrative Council upheld a challenge against Mr. José Maria Alonso. In this case, the challenge was upheld based on the Mr. Alonso's partnership in the law firm which was representing a different claimant in a case against the same Respondent State.[42] Lastly, in a decision that was rendered by two unchallenged arbitrators, the challenge was upheld on the ground that the arbitrator had been involved in another case involving the same respondent and similar facts involving, inter alia, the same witness.[43]

There is no doubt that regulating issue conflicts is one of the most difficult tasks that is posed before the WG III. The practical problems that arise with over regulation of issue conflicts has already been

v. the Bolivarian Republic of Venezuela, ICSID Case No. ARB 10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (2010).

[41] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, ¶ 53 (Sept. 30, 2013).

[42] Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso (Nov. 12, 2013).

[43] Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

explained by the authors in the previous part of this paper. However, in light of the fact that issue conflicts are central to the concerns of lack of objectivity in ISDS, the complete absence of any mention of the same in the Second Version may be seen as questionable by several stakeholders. It is certain that Article 5(2)(d) was very broad and imposed unreasonable obligations on the adjudicators, and thus was rightly not included by the WG III in the Second Version. However, while a broad disclosure mandate is unjustified, an attempt must be made to find a balance between the best interests of both, the parties and the adjudicators. The underlying objective or purpose of disclosures under Article 10 is not to facilitate challenges but rather to anticipate and avoid them. The disputing parties have a right to assess the information disclosed and decide the course of action they want to choose. In the opinion of the authors, regulating issue conflicts is important for the perceived objectivity, legitimacy, and credibility of ISDS, even if issue conflicts can rarely be practically ascertained in reality. Therefore, we propose, that instead of a complete removal of a provision requiring disclosure of issue conflicts (manifested in form of publications and speeches), a very limited disclosure obligation can be imposed on the adjudicators, which would come into play only in extraordinary circumstances.[44] The same must require the adjudicators to disclose if they have been "***actively*** *involved in the* ***public advocacy*** *of the specific case, legal questions or facts of the matter in a manner that suggests bias or prejudgment of the case.*"

While isolated publications or speeches do not warrant disclosures (and it is not practical for adjudicators to keep a record of them), in cases where an adjudicator has been constantly and rigorously involved in public advocacy (whether through speeches or publications), the same must be made known to the parties. The word 'actively' must be given due notice as it would mean that the adjudicators have, over time, taken a certain public position on the specific case, legal questions or facts of the matter in a manner that suggests bias or prejudgment of the case. By way of example, if a certain adjudicator has constantly, through his words and works, questioned the manner in which a certain Respondent State treats its investors, the same must definitely be disclosed as it would be a *prima facie* case of issue conflict. Such a disclosure obligation would not be cumbersome, but will ensure the perceived objectivity, credibility, and legitimacy of ISDS proceedings.

[44] For instance, the Code of Conduct for arbitrators under the EU-Canada Comprehensive Economic and Trade Agreement (CETA) specifically provides that candidate arbitrators shall disclose "*public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters*." The arbitrator Codes of Conduct in CETA, the EU-Singapore Free Trade Agreement, and the EU-Vietnam Free Trade Agreement all further provide that an arbitrator "*shall not be influenced by self-interest" or use his or her position "to advance any personal or private interests*."

C. Article 4

In the authors' opinion, Article 4 of the Second Version has found a right balance between the interests of all stakeholders. An aspect that the WG III has still not conclusively decided is whether there should be a full prohibition on multiple roles or the same should apply only when the cases have the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity. The authors believe that there should not be a full prohibition under Article 4 and instead the WG III must adopt a tailored approach, imposing a restriction only where the cases involve 'the same factual background' and 'at least one of the same parties or their subsidiary, affiliate or parent entity.' There are two reasons for this recommendation:

Firstly, the authors strongly believe that a full prohibition will be detrimental to diversity in ISDS. As has been recognized by the WG III in the commentary to this article, a full prohibition will be particularly detrimental to the new entrants in the field, as they need to take up multiple roles in order to establish themselves in the field.[45] Adopting a tailored approach will not only allow new entrants the freedom to take up multiple roles in unrelated matters, but will also effectively take care of conflicts that arise when the matters are similar (either factually or by way of the parties involved).

Secondly, the tailored approach is compatible with party autonomy in appointment of arbitrators. There is no need for the Code to impose more restrictions on appointment than necessary. The only reason why there could be a full prohibition on multiple roles in unrelated matters is to ensure availability of adjudicators and the same has already been taken care of by Article 5(1) of the Code.[46] Therefore, when there is no real possibility of a conflict of interest, there is no need to unnecessarily complicate the code by providing excessive restrictions. The authors propose that the WG III should adopt the tailored approach and accordingly give examples of when concurrent cases would be considered to address the same factual context or the same party (as proposed in the Commentary). Another suggestion would be to use this opportunity (i.e., the Code) to highlight the importance of fostering diversity in ISDS. By opting for a tailored approach over a full prohibition over multiple roles, the Code would be doing the diversity discourse a favour by allowing new diverse entrants to find their feet in the field without blanket restrictions on multiple roles. Diversity has been a pressing issue in international arbitration for a long time now. While the Code does not directly seek to promote diversity in ISDS, it will naturally impact the same. Therefore, the WG III should consider mentioning

[45] *Supra* note 6, at ¶ 68.

[46] *Supra* note 13, art. 5(1). Article 5(1) states that *"Adjudicators shall perform their duties diligently throughout the proceeding and shall refuse competing obligations. They shall be reasonably available to the parties and the 8 administering institution, shall dedicate the necessary time and effort the proceeding, and shall render all decisions in a timely manner."*

(in the Commentary to Article 4) that one of the reasons for opting for a tailored approach as against full prohibition is to foster diversity in ISDS.

D. Article 5

With respect to Article 5, the authors reiterate the recommendation made earlier by the CAR team to the ICSID Secretariat. Greater efficiency, transparency and accountability can be achieved by introducing a disclosure mandate for Article 5. The disclosure mandate would require adjudicators to disclose and update the parties of their availability/available dates, such that parties can assess if the schedule of the adjudicator permits them to ensure efficient timelines for the arbitration.[47] The same would enable the parties to make reasonable assumptions about the workload and ability of the adjudicator to deliver timely judgments, thereby making the arbitral process consistent with its goals of time and cost efficiency.

E. Article 7

Insofar Article 7 is concerned, the authors recommend that the Commentary to the Code should provide an exhaustive set of criteria based on which pre-appointment interviews ought to be conducted. In this regard, the Code may draw guidance from Article 2 of the Chartered Institute of Arbitrators (CIArb) Practice Guidelines[48] or Para 49 of the International Chamber of Commerce's (ICC) Note to Parties and Arbitration Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration,[49] both of which impose positive obligations upon parties and adjudicators to only delve into certain defined aspects for the purposes of interviewing the prospective adjudicator. The Code can also accommodate a negative obligation upon parties and adjudicators to not delve into certain aspects for the purposes of interviewing the prospective adjudicator. In this regard, the Code may draw inspiration from Article 3 of CIArb's Practice Guidelines.[50] Furthermore, Article 7(2) of

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[47] *Supra* note 31.

[48] International Arbitration Practice Guideline: Interviews for Prospective Arbitrators, art. 2 (Aug. 30, 2016). Article 2 limits scope of pre-appointment discussions to "*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).*"

[49] Note to Parties and Arbitration Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ¶ 49 (Jan. 1, 2019). ¶ 49 states that *"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"*. 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"*.

[50] *Supra* note 48, art. 3. Article 3 refrains parties and arbitrator from *"discussing the specific facts or circumstances giving rise to the dispute; the positions or arguments of the parties; the merits of the case; and/or the prospective arbitrator's views on the merits, parties' arguments and/or claims"*.

the Second Version has been left bracketed, as it was in the First Version (then, Article 10(2)). Explanation to Article 7(2) states that while some comments on the First Version that "*Article 7(2) was unnecessary and could be onerous if there were multiple contacts*", others were of the opinion "*that a provision such as Article 7(2) could easily be complied with by a recording or transcript and was a useful guarantee of compliance with Article 7(1).*" [51] Authors reiterate their previous suggestions that a recorded pre-appointment interviews [**"PAI"**] with the chosen candidate must be disclosed to the other party, such recording being present in, preferably, video or otherwise audio.[52] While there may exist apprehensions that such recordings could be onerous, the opportunity cost of not having such recordings can cast serious aspersions over the integrity and fairness of the arbitral process. It is also suggested that 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. [53]

IV. CONCLUSION

The need for a uniform and well-defined mechanism such as the Code is amplified in light of the recent annulment decision in *Eiser* v. *Spain,*[54] wherein the ad hoc Committee annulled the impugned award in its entirety on the ground that claimant-appointed arbitrator had omitted to disclose a professional relationship with the claimants' damages expert. The successful annulment in this case exhibits the far-reaching consequences of non-disclosure by adjudicators. It is therefore imperative that the WG II provides a workable mechanism to regulate conflict of interests, disclosures, double hatting and other factors impacting the constitution of the tribunal. In the absence of such a mechanism, awards rendered in ISDS will be susceptible to annulment, which would not only lead to increase in time and costs, but will also hamper the credibility of ISDS in general.

Having said that, the Code should not be viewed in isolation of the policy objectives that it seeks to achieve. Discussions and deliberations on the adoption of the Code should focus on attaining an equilibrium between the interlinked policy and ethical considerations. Moreover, the Code should also not be constructed in isolation of practical considerations, of which the First Version was sadly

[51] *Supra* note 13, at ¶ 37.
[52] *Supra* note 33.
[53] *See Supra* note 48, art. 1(5). 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."*
[54] Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on Annulment (June 11, 2020).

guilty. It is essential to understand that the Code is not a mere academic or theoretical document. It is a document which is intended to be strictly implemented. Therefore, to ensure such implementation, the Code should find the right balance between factors such as (a) ethical concerns, (b) regulating conflict of interest, (c) ensuring effective disclosures, (d) fostering diversity, (e) ensuring credibility and objectivity, (f) party's autonomy to make appointments and (g) practical considerations of the adjudicators. The Second Version is much closer to achieving this balance and provides a more practical and implementable document than its predecessor. Perhaps, the most tedious task will be ensuring the smooth enforcement of the Code. The WG III is working on a separate paper that will discuss the possible methods of implementing the Code, and the same will be published separately.