TO DOMESTICATE CREATURES OF CONTRACTS: DECRYPTING THE FIRST DRAFT OF CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT

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There is little to no uniformity that exists in the procedural law governing arbitrations. It is the easiest to fathom the magnitude of this impact when the stakes are the highest and the asymmetry is the most prominent, that is, in Investor-State Dispute Settlement. On May 1, 2020, the secretariats of ICSID and UNCITRAL released the first draft of a Code of Conduct for Adjudicators to create uniformity. This instrument proposes, inter alia, classifications and standards along with general and specific reforms to the procedure governing Investor-State Dispute Settlement. This could be a probabilistic solution to certain dissonance overflowing in the jurisprudence regarding issues like independence, impartiality, disclosure obligations, double hatting, delegation of authority and confidentiality. Alternatively, this could be the opening of a Pandora's box plagued with its very own new and unseen version of dissonance along with other mishaps. Either way, it does not need to be anything more than what it is, as it is only the start. This may either end up being a draft that is retained verbatim or become the one with provisions that are completely let go of by the final draft. However, we think that this is somewhere in between. Therefore, this is the opportunity to make a value judgement on the draft. At the outset, the paper primarily provides comparative analysis with other standards for procedural law in Investor-State Dispute Settlement. Additionally, the most relevant issues in procedural law are analysed against the provisions provided under the draft. At the end, it intends to provide a comprehensive evaluation of the draft's instrumentality. Furthermore, it recommends changes and modifications to aspects ranging from the terminology used to the fabric of the draft.

***Keywords**: compliance, confidentiality, disclosure, influence, representation.*

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I. INTRODUCTION

Arbitrations are built upon the bedrock of consent, as creatures of contracts. In the absence of absolute and informed consent, arbitrations will always stand on an unsteady foundation. Procedural law fundamentally exists to safeguard the agency of parties to make a choice by attempting to fix its deterioration. However, the dimensions of procedure in Investor-State Dispute Settlement ("**ISDS**") have always been plagued with contradictions, power asymmetry and most commonly, silence.[1] The cause of these contradictions is the individualistic approach that comes with arbitrations operating through contracts and the rise of arbitral institutions with their own rules. A microcosm for this disequilibrium is the

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[1] These contradictions arise out of the inconsistency in the interpretation of standards for ISDS. For example, as expanded upon *infra* (refer to Part V), the standard for disqualification is conditional upon the terms used to define independence and impartiality and their interpretation by the Tribunal. This standard has always been inconsistently applied in ISDS, especially the ICSID. *See* Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill 2017) 32-49.

International Centre for Settlement of Investment Disputes ('ICSID') where the polarity in the approaches to procedure through treaty interpretation creates an element of uncertainty in every dispute.

The IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') that come out of interpreting the United Nations Commission on International Trade Law ('UNCITRAL') model law are strict and specific. As stated earlier, comparatively, the standard under ICSID Convention for assessing conflict of interest is so autonomous, that it can create a separate microcosm of this dissonance in procedural law by itself. It is also pertinent to understand that the most uncertain actor involved in this process, the arbitrator, creates most of this procedural dissonance. These processes differ from one another from the standpoint of their approach *vis-à-vis* the arbitrator, specifically their conduct. According to an entire section of institutions and academicians, there is no objective way to assess an arbitrator. On the other hand, according to another section of institutions and academicians, subjectivity is set to fail. However, the interesting aspect of this division is that not even the objective side agrees to a common standard of objectivity, and subjectivity has made jurisprudence confusing.[2] Therefore, it is not an understatement to claim that uniformity, be it subjective or objective or a mixture of both, is perhaps, the only way to prevent arbitration from flying too close to the sun.

The Secretariats of ICSID and UNCITRAL released the first draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement ("Draft Code") to universalize standards and to fix the aforementioned procedural dissonance. The UNCITRAL Working Group III ("WGIII") has been working towards this goal for years now and this draft is a realisation of the fruits of their labour, as it addresses the concerns WGIII had put forth, and even uses the recommendations made by them. It is evident from a preliminary reading itself of the Commentary to the Draft Code ("Commentary") that there are two primary sources that it is inspired from, namely, reports of the WGIII and the Comprehensive Economic and Trade Agreement Code of Conduct ("CETA COC"). It incessantly refers to the former, while it picks up clauses verbatim from the latter. This Draft Code could be the future of procedural law in ISDS, or it could be just another monotonously unimportant addition to the arbitral jurisprudence; the purpose of this paper is to contribute to this assessment.

This paper utilises a juxtaposition of the needs of ISDS that are manifested through academia, intuitional interpretation of standards, the WGIII's report, and the Commentary with the reality of the Draft Code to assess its inherent value. This paper assesses the 12 Articles that make up the Draft Code, individually and independently. Parts II and III address the relevance of the groundwork laid by the Draft Code in the form of definitions and the scope of application. Part IV evaluates the necessity of duties and responsibilities of adjudicators. Parts V and VI analyse the feasibility of independence and impartiality along with disclosure obligations. Part VII discusses the practicality of double hatting. Parts VIII and IX pertains to the application of the qualities prescribed for adjudicators. Parts X and XI actualise the utility of prescribed conduct of adjudicators *pre*, during and *post* arbitration. Parts XII and XIII deconstruct the fee structure and compliance to ascertain how adjudicators

[2] Charles H Brower II, 'Politics, Reason, and the Trajectory of Investor-State Dispute Settlement' (2017) 49(2) Loyola University Chicago L J 283-306; Julian Arato et al, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21(2-3) The J of World Investment & Trade 336–373.

are expected to react to the Draft Code. This paper is a critique of the Draft Code that aspires to be constructive in its nature to the next and/or the final code for Adjudicators in ISDS.

II. DEFINITIONS

The Draft Code starts out with defining four key terms — "adjudicator", "assistants", "candidates" and "Investor-State Dispute Settlement". This Clause seems to borrow from some other Codes of Conduct discussed below.

"Adjudicators" is a term used in place of the general term "arbitrator" usually present in other instruments like the UNCITRAL Model Law,[3] ICSID Convention[4] as well as other conduct guidelines.[5] Adjudicator is a wider term used in the Draft Code and signals that it includes anyone adjudicating ISDS proceedings on both *ad hoc* committees set up under an agreement and permanent mechanisms like CETA International Investment Court.[6] It also includes individuals on annulment and appeal committees. The closest term to this would be the use of the term "member" observed in the EU-Singapore Investment Protection Agreement ('EU-Singapore IPA') and the EU-Vietnam Investment Protection Agreement ('EU-Vietnam IPA'). In that context, the term "member" is understood to cover any individual appointed to any Tribunal, including an Appeal Tribunal.[7] Pertinently, the Draft Code is the first instance of the term adjudicator appearing in any arbitration code.

Since the Draft Code uses the broader term "adjudicators" unlike most of the ISDS rules, regulations and jurisprudence that uses the term "arbitrator", this paper uses the two terms interchangeably. While referring to or interpreting from the Draft Code, it uses the term "adjudicator". However, while taking from, referring to or interpreting from other ISDS sources, this paper uses "arbitrator".

Second, the term "assistants" is defined to include those individuals who assist adjudicators on their cases, *i.e.*, legal or research assistants. Other instruments that include definitions of the term are CETA, The North American Free Trade Agreement ('NAFTA'), EU-Vietnam IPA, *etc*.[8] It is important for the Draft Code to be applicable to assistants as they are deeply involved within the adjudication process. They ensure an expedient and efficient dispute resolution process. They increase the efficiency of the arbitration proceedings by supplementing the arbitrators during the arbitral process, by being the primary manpower behind drafting, streamlining texts, and ensuring the smooth availability and filing of documents. Moreover, they give room for arbitrators to focus on deliberating on the merits,

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[3] UNGA "Report of the United Nations Commission on International Trade Law on the work of its eighteenth session" UNCITRAL Supp No 17 (1985) 40th Session UN Doc A/40/17, Annex I ("UNCITRAL Model Law").
[4] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ("ICSID Convention").
[5] IBA Guidelines on Conflicts of Interest in International Arbitration (23 October 2014) ("IBA Guidelines"); AAA/ABA The Code of Ethics for Arbitrators in Commercial Disputes (1978).
[6] Comprehensive Economic and Trade Agreement (Canada-European Union) (signed 30 October 2016 and provisionally applied since 21 September 2017) Official Journal of European Union L 11/4 14 January 2017, Annex 29B ("CETA").
[7] The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part (adopted December 2015, entry into force in 2018) art 1 ("EU- Vietnam IPA"); The Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part (adopted 30 June 2019, entry into force in 2020) art 1 ("EU-Singapore IPA").
[8] North American Free Trade Agreement (U.S.-Canada- Mexico) (17 December 1992) 32 ILM 289, art 1.

and enable them to decide the cases expediently, as seen in *Caratube International Oil Company LLP v Republic of Kazakhstan*.[9] Hence, it is prudent to hold adjudicators responsible for ensuring that their assistants comply with the Draft Code.

Additionally, the term “Candidates” included in the Draft Code is intended to include any prospective adjudicator or anyone who is likely to be an adjudicator but has not been confirmed in their role yet. This provision seems to be the closest to the EU-Vietnam IPA where “candidate” is defined as an “*individual who is under consideration for selection as a Member of the Tribunal or a Member of the Appeal Tribunal*”.[10] The incorporation of the words “not confirmed yet in their role” in the Draft Code may draw an additional distinction between the term Adjudicator and Candidate depending on where in the process they are located.

The Draft Code defines ISDS succinctly by outlining the parties and source of disputes.[11] The parties are clearly identified as foreign investors on one hand, and nation states or Regional Economic Integration Organizations (‘REIO’) on the other, keeping the term “State” broadly defined. The term “Investors” is also usually understood to have a broad meaning, and includes anyone who holds shares in a company in the host state, be it a minority or majority shareholder.[12] The clear difference in the Draft Code and other ISDS codes of conduct is how other codes usually have an implicitly defined ISDS as “Resolution of Disputes between Investors and Parties”.[13] IBA Guidelines also specify explicitly that they apply to investment arbitrations:

> “*Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in the light of comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).*”[14]

The Draft Code also addresses that the disputes can be governed by investment treaties (multilateral like NAFTA, CETA or bilateral like the EU-Singapore IPA, domestic laws or any other agreement between the parties).

III. APPLICATION

The Draft Code specifies that the entire code and responsibilities listed in it apply to adjudicators, both prospective and current.[15] It additionally applies a high threshold for adjudicators to ensure not just their own compliance, but also that of their assistants. Due to the afore-highlighted role of assistants, their compliance with the Draft Code is essential.

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[9] *Caratube Int’l Oil Co. LLP & Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014) (“*Caratube*”).
[10] EU-Vietnam IPA, art 1.
[11] Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (“Draft Code”) (May 1, 2020).
[12] United Nations Conference on Trade and Development Series on Issues in International Investment Agreements II” (January 2011) UN Doc UNCTAD/DIAE/IA/2010/2 13.
[13] EU-Singapore IPA, Annex 7 art 1.
[14] IBA Guidelines 3.
[15] Commentary to the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (“Commentary”), para 19 (May 1, 2020).

It is observed that the Draft Code follows an explicit approach in demarcating its scope, as clarified in its preparatory work as well.[16] This can be seen by contrasting its scope against that of two existing codes, the Australia Japan EPA and the CPTPP Code of Conduct.

A similar explicit demarcation of the scope done in the Draft Code can be seen in the Australia Japan EPA that clearly delineates the scope of the Draft Code by defining "covered persons":

> "*This Code of Conduct shall apply to each person serving as an arbitrator, arbitrator's assistant or administration personnel involved in the proceedings of an arbitral tribunal (hereinafter referred to as "covered person") established under Article 19.6 (Establishment and Composition of Arbitral Tribunals) of the Agreement*."[17]

The relevance of such clear terms may be better understood when juxtaposed against a more implicit approach towards defining the scope of a draft code, as seen in the CPTPP Code of Conduct which provides that every candidate, arbitrator and former arbitrator shall avoid impropriety, so that the integrity and impartiality of the dispute settlement process is preserved.[18]

IV. DUTIES AND RESPONSIBILITIES

Article 3 provides an overview of the "adjudicators" duties and responsibilities, which are then further elaborated upon in Articles 4 to 9.

Essentially, an adjudicator has a responsibility not only to the parties but also to the process of arbitration itself, and must therefore observe the highest standards of conduct so that the integrity and fairness of the process is always preserved. A fundamentally important aspect of an arbitration is the adjudicator's ability to be independent and impartial. They are required to avoid indirect or direct conflict of interest and are prohibited from engaging in impropriety, bias or even an appearance of basis.

The entirety of the Draft Code is based on safeguarding these essential qualities of the adjudicators. Article 4 deals with an adjudicator's ability to be independent and impartial. Article 5 sets forth disclosure obligations to avoid conflict of interest, and Article 6 further addresses issues for avoiding bias or appearance of bias. The requirement that adjudicators display the highest standards of integrity, fairness and competence, are further developed in Article 7. Article 8 deals with the adjudicator's availability and his/her diligence with regard to the case. Article 9 expands on the duty to comply with confidentiality obligations.

V. INDEPENDENCE AND IMPARTIALITY

Article 4 states that adjudicators must remain independent and impartial at all times.[19] It may be said that the framing of the first clause is intentionally generic in nature. The

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[16] Commentary (n 15).

[17] Japan–Australia Economic Partnership Agreement (Rules of Procedure of Arbitral Tribunals) (15 January 2015), 6.

[18] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018 and entered into force 30 December 2018) <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf>. Chapter 9, Section B, art 2.

[19] Draft Code art 4 (1).

standard for independence and impartiality has been propounded over, developed and criticised since the inception of the disqualification process under arbitration.

The Commentary refers to "independence and impartiality" as "core elements of ethical conduct" along with calling them "key elements of any system of justice".[20] It also cites the ICSID decision in *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales de Agua S.A.* v. *Argentine Republic*, specifically to define these terms.[21] Although Article 14 of the English version of the ICSID Convention only prescribes for independence,[22] the Spanish version prescribes impartiality.[23] Since both the versions are considered authentic, both standards apply to the ICSID Convention.[24] Therefore, the reference is well-placed since there is a decade's worth of judicial progression upon the interpretation of these terms and most of those actively refer to *Suez* v. *Argentina* to interpret the terms generally.[25] However, it is interesting to note that the standard for disqualification deviates from the decision, on a case-to-case basis.[26] Notwithstanding this, the relevant part of the decision generally clarifies that independence is about "influence" and impartiality is about "bias".[27] The relevance of this is apparent in the particulars provided in Clause 2 of the Article,[28] as most of them flow from this classification of independence and impartiality.

Therefore, the succeeding segment of this paper primarily assesses the particulars presented in the second Clause of Article 4 against the standards developed under the ICSID Convention. Thereafter, their consistency is assessed against the standards developed under the IBA Guidelines. However, this part of the paper exclusively deals with the provisions under Article 4. It is understood that other provisions, like Articles 10 and 11 also contribute towards ensuring independence and impartiality, however; their contribution is dealt with separately.

A. THE SUBJECTIVE ICSID THRESHOLD FOR INDEPENDENCE AND IMPARTIALITY

Prior to expanding over the criteria under the Draft Code, it is important to understand the subjectivity of the threshold for disqualification under the ICSID Convention and how this Article relates to parts of it.

The phrase "manifest lack of" under Article 57 of the ICSID Convention has been interpreted in different ways to create varying tests to disqualify arbitrators, which create the

[20] Commentary (n 15) para 33.
[21] Commentary (n 15) para 34; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal ("*Suez v Argentina*").
[22] ICSID Convention, art 14(1).
[23] ICSID Convention, art 14 (1) (Spanish Language Version).
[24] ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules") (April 2006), r 56.
[25] *Suez v Argentina*, para 13.
[26] *See* Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1201-1202.
[27] *Suez v Argentina*, para 13-14.
[28] Draft Code, art 4 (2).

differential in the threshold for assessing whether an arbitrator is independent and impartial.[29] The first threshold was set in *Amco Asia Corporation and others* v. *Republic of Indonesia*. Here, the term "manifest" was considered "highly probable", not just "possible" or "*quasi*-certain".[30] This was interpreted as a threshold that creates a necessity of obtaining evidence that is objective in nature and not merely speculative.[31] This standard is by far the strictest imposed by ICSID.

The second and more commonly applied standard is the one under the "reasonable doubts" test. However, even under this standard, there are two separate thresholds. The first threshold comes with the inception of the test in *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*. Here, the term "manifest" was construed as "*circumstances actually established* (and not merely supposed or inferred) *must negate or place in clear doubt the appearance of impartiality*".[32] This was interpreted as "*a reasonable third person, with knowledge of all the facts, would conclude, on an objective basis, that the arbitrator is manifestly lacking in the ability to act impartially*".[33] However, deviating from the previous two thresholds insofar as the "requirement of evidence" is concerned, *Repsol, S.A. and Repsol Butano, S.A.* v. *Argentine Republic* decreased the burden of proof significantly. Here, the term "manifest" was construed as "*sufficient to establish the appearance of dependence or bias*".[34]

Therefore, there is no concrete definition for the term "manifest" that has been uniformly agreed upon in the ICSID jurisprudence. This lack of clarity makes it difficult to classify who can be considered an independent and impartial arbitrator according to the ICSID Convention, because the definition of "manifest" ultimately delimits the indeterminate contours of "independence and impartiality".

B. THE OBJECTIVE IBA CLASSIFICATION FOR INDEPENDENCE AND IMPARTIALITY

Similar to Article 14 of the ICSID Convention, Article 12 of UNCITRAL Model Law also imposes a standard for independence and impartiality upon arbitrators.[35] This is where the IBA Guidelines factor in. Similar to some interpretations of the "reasonable doubts" test, the IBA Guidelines also have a "third person" assessment test called the "justifiable doubts" test.[36] However, it is interesting to note that neither the Draft Code, nor the Commentary ever

[29] Article 57 of the ICSID Convention empowers parties to propose to a Tribunal the disqualification of any of its members on account of any fact indicating a "manifest lack" of the qualities required by paragraph (1) of Article 14. *See* ICSID Convention, art 57; *See also* ICSID Convention, art 14 (1).

[30] *Amco Asia Corporation and others v Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (24 June 1982) ("*Amco Asia v Indonesia"*).

[31] *Universal Compression International Holdings, S.L.U. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal, (20 May 2011) para 77 ("*Universal Compression v Venezuela*").

[32] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge to the President of the Committee, (24 September 2001), para 25.

[33] *ConocoPhillips Petrozuata B.V, ConocoPhillips Hamaca B.V and ConocoPhillips Gulf of Paria B.V v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (15 December 2015), para 40.

[34] *Repsol, S.A. and RepsolButano, S.A. v Argentine Republic (Repsol),* ICSID Case No. ARB/12/38, Decision on the Proposal for the Disqualification of a Majority of the Tribunal (13 December 2013), para 45.

[35] UNCITRAL, art 12 (1).

[36] IBA Guidelines, 6.

refer to these guidelines. Although the notes referred to by the Commentary refer to the IBA Guidelines, but only as an example.[37] Even ICSID has referred to these guidelines as "useful", but only of an indicative value.[38]

The Draft Code attempts to codify circumstances and provide its own threshold to assess independence and impartiality. However, interestingly, it tries to replicate the standards set by the IBA Guidelines in one key aspect. Prior to understanding these similarities, it is pertinent to understand how the IBA Guidelines operate and how the "justifiable doubts" test assesses independence and impartiality. There are four lists of circumstances that impact an arbitrator provided under the IBA Guidelines. The Non-Waivable Red List provides for circumstances where an arbitrator is not permitted to arbitrate, even if they disclose the circumstances prior to appointment. For example, no one must be a judge in their own cause, since a relationship cannot prevail between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.[39] The Waivable Red List includes circumstances where an arbitrator is not permitted to arbitrate, unless they disclose the circumstances and the parties expressly consent.[40] For example, the arbitrator having given legal advice or an expert opinion on the dispute to a party or an affiliate of a party.[41] The Orange List encompasses circumstances where an arbitrator is encouraged to disclose, but permitted to arbitrate even in the absence of disclosure, unless there is a timely objection.[42] For example, the arbitrator, serving as counsel against one of the parties in an unrelated matter within three years.[43] The Green List includes circumstances where it is not necessary for an arbitrator to disclose.[44] For example, the arbitrator having a relationship with one of the parties through a social media network. Therefore, while ICSID jurisprudence is unclear on the modes for assessing independence and impartiality, IBA Guidelines are clear on the mode for assessing the same.

C. INDEPENDENCE AND IMPARTIALITY UNDER ARTICLE 4

Article 4(2) of the Draft Code presents a peculiarity that affords consideration. Both the UNCITRAL Model Law and the ICSID Convention only mention independence and impartiality while leaving the interpretation up to jurisprudence. However, similar to the IBA Guidelines, the Draft Code provides for instances which must be refrained from to ensure independence and impartiality. Most of the circumstances provided are picked up *verbatim* from the CETA COC, which is cited in the Commentary.[45] However, these terms are not defined in either the CETA COC or the Commentary. Further, they also hint at the mechanisms used to assess independence and impartiality out of certain circumstances in the

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[37] UNGA 'Possible reform of investor-State dispute settlement (ISDS) Background information on a code of conduct Note by the Secretariat' UNCITRAL 38th Session UN Doc A/CN.9/WG.III/WP.167 ("A/CN.9/WG.III/WP.167), para 51; UNGA 'Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS Note by the Secretariat' UNCITRAL 36th Session UN Doc A/CN.9/WG.III/WP.151 ("A/CN.9/WG.III/WP.151"), para 18.

[38] *Participaciones Inversiones Portuarias Sàrl v Gabonese Republic*, ICSID Case No ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator (12 November 2009), para 6.

[39] IBA Guidelines 6.

[40] IBA Guidelines 17.

[41] IBA Guidelines 20.

[42] IBA Guidelines 18.

[43]IBA Guidelines 22.

[44] IBA Guidelines 19.

[45] CETA, Code of Conduct, art 11-15.

most subtle manner, in the terminology. Therefore, this paper assesses each sub-clause specifically against the ICSID threshold and the IBA classifications.

A) Influence akin to impartiality and the threshold implied in Article 4(2)(a)

This sub-clause is about the types of influences an adjudicator is prohibited from. These influences are "self-interest", "outside pressure", "political considerations", "public clamour", "loyalty to a party to the proceedings", and "fear of criticism".[46] However, these influences are more akin to biases, except "self-interest" which will be dealt with separately.

Influences like "outside pressure, political considerations, public clamour, loyalty to a party, to the proceedings, or fear of criticism" are all biases or predispositions. None of this is encompassed within the IBA Guidelines, with the exception of "self-interest" which simultaneously possesses a dimension of independence and impartiality. However, there is a separate clause addressing the advancement of personal interests, as expanded upon *infra* (refer to VC. 4). This too exclusively deals with impartiality. Even the standard in the IBA Guidelines largely only speaks of advancing interests and about family members. Therefore, even the standard for self-interest here is particularly about notions that may not affect the adjudicator directly or indirectly, but something they are interested-in nonetheless. It is still unclear from the sub-clause and the Commentary what "self-interest" here then means. It may be in terms of scholarly or professional views. However, those have been relegated to the Green List under the IBA Guidelines.[47] Other than this, in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoav Argentine Republic,* it was held that these views could indicate a lack of independence or impartiality even with objective evidence, as professional views are subject to change unlike personal views.[48] Therefore, this "self-interest" may very well be the notion of personal views. However, there is no real specification on what this personal bias looks like, except the circumstances already provided in the sub-clause. Even the notes cited in the Commentary specify "self-interest",[49] but just like this sub-clause, these notes never define it either. The threshold here has to one that is more objective than the one demanded under sub-clause (c), as this does not speak about the existence of this bias, but about the ability of that bias to influence the adjudicator. Therefore, the threshold would be similar to the "reasonable doubts" test, under which these factors and their impact on the adjudicator could be assessed, even without objective evidence.

B) Influence akin to independence and the threshold implied in Article 4(2)(b)50

This sub-clause talks about the types of influences an adjudicator is prohibited from, as well. However, these influences relate to associations. Relationships like "*financial, business, professional, family or social*"[51] are all present in the IBA Guidelines. However, what is important in this sub-clause is how it exists to holistically deal with all relationships that an adjudicator may have. Again, similar to sub-clause (a), this sub-clause does not

[46] Draft Code, art 4 (2) (a).
[47] IBA Guidelines 25.
[48] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia urPartzuergoa v Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010), para 44 ("*Urbaser*").
[49] A/CN.9/WG.III/WP.167, para 31; A/CN.9/WG.III/WP.151, para 62.
[50] Draft Code, art 4 (2) (b).
[51] Draft Code, art 4 (2) (b).

prohibit the existence of these relationships. Instead, it too is about the ability of these relationships to influence the adjudicator. Therefore, since this is also about a subjective standard, the threshold has to be similar to the "reasonable doubts" test here as well.

C) Impression of influence and the threshold implied in Article 4(2)(c)

This sub-clause also specifically deals with influences, but it omits according any definition to the same.[52] Therefore, it may be reasonable to assume that these are the same influences provided in sub-clause (a) and (b). However, the second part of the Clause is "*the impression that others are in a position to influence*". It implies that these influences may exist in the appearances only. This may connect it more to sub-clause (b) than sub-clause (a), as it very specifically deals with influences that come from people, instead of more abstract factors. This sub-clause deviates from the previous two, as it is not about those influences existing, but only an impression of those influences existing. Therefore, this is more akin to the standard set by *Repsol, S.A. and Repsol Butano, S.A. v Argentine Republic* where only an appearance of lacking independence and impartiality was required. This sub-clause too uses the lowest threshold for what it means to be independent and impartial, unlike sub-clauses (a) and (b).

D) Advancing interest and the threshold implied in Article 4(2)(d)53

This sub-clause deviates from the previous three, as it is not particularly about variables that influence the adjudicator, but about the autonomy of the adjudicator using their power to advance their own personal or private interest.[54] This is significantly more objective than influence, as it is possible to assess whether or not an adjudicator's own interests are being furthered by their position. This can only be through the submission of objective evidence pertaining to the circumstances that led to the adjudicator's interest being advanced through their position. For example, if the concern is regarding financial interests of the adjudicators, their bank statements could prove to be objective evidence of an increase in material wealth. This does not insinuate assessing anything abstract. Therefore, the threshold here would be similar to the one from *Amco Asia Corporation and others v Republic of Indonesia* where the Tribunal held that the challenging party must not only prove facts indicating the lack of independence, but also that the lack should be 'manifest' or 'highly probable', and not just 'possible' or 'quasi-certain.[55] Both of these thresholds would require objective evidence, instead of mere appearances.

E) Incurring obligations/accepting benefits and the threshold implied in Article 4(2)(e)[56]

This sub-clause is about receiving obligations and benefits.[57] The coercive ability these obligations and benefits have may lead to adverse implications on the performance of an adjudicator. The threshold here is significantly lower, as it encompasses everything in the previous sections. Similar to sub-clauses (a) and (b), this deals with the influence these obligations and benefits would have on the duties of an adjudicator. Similar to sub-clause (c),

[52] Draft Code, art 4 (2) (c).
[53] Draft Code, art 4 (2) (d).
[54] Draft Code, art 4 (2) (d).
[55] *Amco Asia v Indonesia*; *See also Suez v Argentina,* para 41.
[56] Draft Code, art 4 (2) (e).
[57] Draft Code, art 4 (2) (e).

this also deals with the appearance of influence. Similar to sub-clause (d), it also deals with the autonomy of an adjudicator to incur these obligations or to accept the benefits. However, it is not restricted to autonomy, due to the terms "directly or indirectly". This would also extend to benefits and harms that are received indirectly. Therefore, each of the previously provided standards may be applied to this sub-clause on a case-to-case basis.

D. THE BEST OF BOTH WORLDS OR SOMEWHERE IN BETWEEN

Article 4 is ambitious in its attempt to achieve specificity. Its purpose it is to protect the parties and maintain fairness in arbitration. However, it is not without problems. Parts of the Article are vague and lack the necessary depth to be interpreted meaningfully in their present condition. In the Draft Code's present condition, the terms "influence" and "self-interest" lack the necessary depth to be interpreted meaningfully. The solution to this issue is simply defining these terms. This definition can appear through two distinct methods. First, it could be provided for within the body of the Article itself. This makes the process of interpretation more specific. Second, it could be developed over time in jurisprudence. This would make the process of interpretation less specific, as the sheer quantity of the opinions of academicians, practitioners and Judges would make the definition more subjective.

VI. CONFLICTS OF INTEREST: DISCLOSURE OBLIGATIONS

As highlighted in the preceding segment of this paper, the backbone of a procedural process is the independence and impartiality of its decision maker. The conception of impartiality and independence is subject to interpretation. Therefore, the adjudicator has the duty to disclose information to satisfy the party appointing him/her of his independence and impartiality. Addressing this aspect, the disclosure obligations under Article 5 help the parties to select an appropriate adjudicator so that they avoid direct or indirect conflicts of interest.

A. DISCLOSURE TO MAINTAIN INDEPENDENCE AND IMPARTIALITY

Article 5(1) obligates the adjudicator to disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality.[58] The terms "any interest, relationship or matter" set a comprehensive standard. It requires disclosure of any interest (financial or otherwise) and relationship between the adjudicator and parties, irrespective of the nature of the relationship - professional, business, personal or familial, irrespective of the time when the relationship occurred and irrespective of the significance of the relationship (trivial or relevant). The Commentary provides that any interest or relationships which can reasonably affect their independence and impartiality comes within the purview of this Article.[59] In addition to any interest and relationship, Article 5(1) provides for the requirement of disclosure of any "matter", which refers to any other matter than the interest and relationship of the adjudicator with the parties. It includes but does not limit to relationships of the adjudicator with co-adjudicators or expert witnesses appearing in the matter.[60] It also includes any sort of interest, direct or indirect, of the adjudicator in the outcome of the dispute.[61] For example, this relationship can arise from the adjudicator's

[58] Draft Code, art 5(1).
[59] Commentary (n 15) para 44.
[60] Draft Code art 5(2)(b)(i).
[61] Draft Code art 5(2)(c).

partner being an employee of one of the parties. All of these matters may fall within the scope of disclosure.

This article adopts an objective standard by applying the "reasonable doubts" test. This test is determined by the whether a claim can be raised by a reasonable third party. Essentially, the disclosure is required of any interest, relationship or matter that "could" give rise to reasonable consideration. If there is a possibility of perception of the relationship or matter affecting their independence and impartiality, then the disclosure is warranted. The word "could" has not been used in any other arbitration rules and hence, never been interpreted in this context. Different words have been used in place of "could" in different arbitration rules. There is a difference between circumstances that "might" give rise to doubts and circumstances that are "likely" to give rise to doubts. "Likely" provides for an increased possibility in comparison to "might". The UNCITRAL Rules which use the word "likely" appear to set a higher threshold for the arbitrator's duty to disclose than the ICSID Rules, which utilizes the word "might". Since, the word "could" suggests an increased possibility in comparison to "might", the threshold for disclosure in the Draft Code is higher than in the ICSID Rules.

It is also essential to reaffirm that the fact of requiring disclosure or making a disclosure does not imply the admission of conflict of interest.[62] It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the adjudicator and proceeding further. Thus, the burden is on the adjudicator to provide an extensive disclosure. The duty to disclose applies to information that is known by the candidate or adjudicator. Nevertheless, it is the duty of the adjudicator to make reasonable efforts to become aware of interests, relationships or matters that can create a conflict or question their ability to be independent and impartial.[63]

B. SPECIFIC DISCLOSURES

Article 5(2)(a) opts for a framework which requires disclosure of any professional, business and other significant relationships with the parties including any subsidiaries, parent-companies or agencies related to the parties, with the parties' counsel, any present or past adjudicators or experts in the proceeding and any third party with a direct or indirect financial interest in the outcome of the proceeding. Professional relationships include relationships of the adjudicator as counsel, employee, consultant etc. Business relationships may arise out of conducting business with the party, parties' counsel, co-adjudicators (past or present), fact witnesses and experts appearing in the case. The use of the word "significant" subsequent to "other" needs to be particularly noted. This entails a *de minimis* test according to which only relations of some significance to the dispute need to be highlighted.

Under this approach, insignificant relationships would not be a matter of disclosure. In *EDF International* v. *Argentine Republic*, the arbitrator's appointment was challenged on account of her Board membership at UBS, a major Swiss commercial bank that was holding shares in the claimant.[64] The test of "*de minimis"* was laid down in the case. According to this test, an insignificant interest in the outcome of the case cannot serve as the basis for

[62] Commentary (n 15) para 42.
[63] Draft Code art 5(1).
[64] *EDF International S.A., SAUR International S.A. and León Participaciones S.A. v Argentina*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, para 74.

disqualification. The arbitrators qualified the interest of UBS in EDF as *de minimis* and thus consequently, it was ruled that the challenged arbitrator was not required to disclose her board membership.

Furthermore, like the Orange List in the IBA Guidelines, the Draft Code favours a cut-off date, thus, information must only be disclosed if it occurred in the past five years. According to the Commentary, the existence of relationships at earlier times is presumed to be too remote to create a conflict.[65]

C. DISCLOSURE OF DIRECT OR INDIRECT FINANCIAL INTEREST

Further, under Article 5(2)(b), the adjudicator has an obligation to disclose if they have a direct or indirect financial interest in the outcome of the case or in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding. The rationale for this clause may be rooted in the fact that one of the fundamental indicators for finding a lack of independence and impartiality in an adjudicator is if it effectively involves an adjudicator acting as a judge in his/her own case. Similarly, the same may be evidenced if the adjudicator has material financial benefit in the outcome of the arbitration. This includes cases where the adjudicator or his close family members has ownership in a party to the arbitration or would profit from the outcome of the arbitration.

The words "direct or indirect financial interest" also include within its ambit, insignificant financial interest. As mentioned above, in the case of *EDF International* v. *Argentine Republic,* negligible or insignificant interest is not a cause for disclosure. Thus, instead of using "direct or indirect financial interest" in the Draft Code, it could use the term "significant financial interest", in order to narrow disclosure and avoid subsequent disqualification proceedings. The term "significant" shall include within its ambit, direct and indirect financial interest, even if the interest is proximate or remote, as long as the concern of "material interest" is covered. The requirement of disclosure and subsequent removal of arbitrators on such grounds would damage the efficiency and further, increase the costs of arbitral proceedings. Further, since the standard for disclosure of any professional, business and other significant relationships with the parties eliminates the disclosure of insignificant relationships, it would be preferable to provide consistency amongst the disclosure obligations and provide for a congruous approach.

The issue of an arbitrator holding a financial interest in a party also appears in the IBA Guidelines. The arbitrator holding a significant financial interest in a party or in the outcome of the case is a Non-Waivable Red situation. It is a Waivable Red List situation if such an interest is held by a close family member of the arbitrator. Where the arbitrator holds shares, either directly or indirectly, in a party (or an affiliate of a party), the issue is Waivable Red if the party is privately held, Orange if the party is publicly held and the shareholding is material, or Green if the party is publicly held and the shareholding is insignificant.

A reference can be made to SCC Policy on Conduct of Arbitrators (2019) to define the scope of "significant interest" which means any third party with a significant interest in the outcome of the dispute including but does not limited to funders, parent companies, and

[65] Commentary (n 15) para 48.

ultimate beneficial owners.[66] Such a standard can be adopted by the Draft Code to avoid uncertainty and to also help adjudicators differentiate between "significant" and "trivial" financial interests' disclosures.

D. DISCLOSURE OF PAST EMPLOYMENTS

Importantly, Article 5(2)(c) as stated in the Commentary is an innovative clause. It requires the disclosure of the adjudicator's participation in ISDS and other international proceedings or related domestic arbitrations, whether as a counsel, arbitrator, annulment committee member, expert, conciliator or mediator. This disclosure allows for an evaluation of any possible conflict of interest with the adjudicator by the party. Additionally, it also makes it easier for parties to assess whether the adjudicator has sufficient time to dedicate to the matter, which is further discussed in Article 8.

The greatest problem of the disclosure requirement of all other arbitration proceedings relates to the duty of confidentiality that an arbitrator owes to his prior proceedings. Most ICSID decisions have been made public and no duty of confidentiality exists to prohibit an arbitrator from disclosing his prior engagements. However, in commercial arbitration, most parties do not wish to disclose their prior proceedings. As a result, if a disclosure requirement is to work, rules on confidentiality may need to carve out an exception allowing an arbitrator to disclose prior appointments.

E. SHOULD WE JUDGE AN ADJUDICATOR BY THEIR REPEAT APPOINTMENTS?

Repeat appointments refer to an adjudicator who is repeatedly appointed by the same party or counsel or an adjudicator appointed to decide identical or similar claims. They may lead to questions over an arbitrator's independence and impartiality.

Most critics argue that owing to repeated appointments, the adjudicator may become financially dependent or loyal or even a professional relationship may develop between them. Such adjudicators can aid their appointer by ruling in their favour, by refusing to sign the award or by influencing the majority and reducing the award.[67] Thus, there may be a rationale for potential conflict of interest that may arise from repeat appointments, as there might be a prospect and incentives to secure re-employment. It is also argued that adjudicators that repeatedly deal with similar facts and legal issues may be predisposed to a set of views. The prevalence of repeat appointments is seen as a barrier to new entrants and even diverse adjudicators in the arbitration community. The Orange List of the IBA Guidelines recommends disclosing circumstances in which the arbitrator "*currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties*".[68] The IBA Guidelines establish a limit to the number of occasions when an arbitrator has been appointed repeatedly i.e., two or more occasions when the arbitrator has been appointed by a party, and more than three appointments when the appointment is received by the same counsel or law firm.

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[66] SCC Policy Disclosure of Third Parties with an interest in the Outcome of the Dispute (11 September 2019); SCC Arbitration Rules, art 18 (1 January 2010); Abhisar Vidyarthi et al, 'Comments on the Draft Code of Conduct for Adjudicators in Investor-State Disputes Settlement' [2020] Centre for Arbitration and Research – MNLU Mumbai 1, 8.

[67] Alan Scott Rau, 'On Integrity in Private Judging' (1998) 14(2) Arb. Int'l 115.

[68] IBA Guidelines, art. 3.1.5.

Nevertheless, there also prevail arguments made in favour of repeat appointments. Understanding that the number of experienced and skilled arbitrators are limited, such appointments might be essential. The ban on repeat appointments would constrain their right to select. Further, most appointers are reluctant to select someone they do not trust to have the expertise to rule an important claim.[69] Thus, the two conflicting arguments have led to create a balanced framework of disclosure. This draft takes it up a notch and burdens the adjudicator to not only disclose repeat appointments, but also disclose all the arbitral proceedings s/he has been a part of, even if it is as a witness or an expert.

Caratube case is one of the rare cases in which an arbitrator was disqualified in light of his previous service on a tribunal that dismissed a claim against Kazakhstan, which was based on similar facts. The other members of the tribunal held that the arbitrator's participation in the prior award created a risk that the arbitrator may make a determination that could be based on such external knowledge.[70]

While the Draft Code merely addresses the problems caused by repeat appointments namely— causing the lack of diversity in the pool of adjudicators and creating barrier to new entrants in the arbitration community, the disappointing part is that it does not address any effective solution for the same. It considers extensive disclosure as a balance among these concerns.[71] While these disclosures can serve as a solution theoretically, the Draft Code fails to take into account that the standard of disqualifications set by precedents and case laws is high. Even after disclosure of such repeat appointments, many challenges for disqualifications have failed. No challenges have been successful since the *Caratube* decision, though there have been several attempts at disqualification. Thus, parties are not dissuaded from choosing the same arbitrators again and again. Some examples of disqualification(s) failing despite repeat appointments of arbitrators are mentioned below.

In the decision of *Universal Compression* v. *Venezuela*,[72] the Chairperson of the Administrative Council rejected a challenge to Professor Stern based on her multiple appointments by Venezuela, noting that there was "no objective fact" to suggest that her independence or impartiality would be manifestly impacted by the multiple appointments.

In *St. Gobain Performance Plastics Europe* v. *The Bolivarian Republic of Venezuela*, the Respondent-appointed arbitrator was challenged on the ground that "*there is a danger that the challenged arbitrator will decide a certain issue in favor of Venezuela because he has argued the same, or similar, issues in favor of Argentina in the past and potentially in the future*".[73] The Arbitral Tribunal did not find that claimant's arguments supported a case of a "manifest" danger in that regard.[74] Similarly, the arbitrator's previous decisions do not *per se* suggest that his independence or impartiality has been affected.

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[69] Houchih Kuo, 'The Issue of Repeat Arbitrators: Is it a Problem and How Should the Arbitration Institutions Respond?' (2011) 4(2) Contemp. Asia Arb J 247.
[70] Caratube (n 9) para 100-110.
[71] Commentary (n 15) para 58.
[72] *Universal Compression v Venezuela* ICSID Case No Arb/10/9 paras 86-88.
[73] *St. Gobain Performance Plastics v Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013) para 77.("*St. Gobain Performance Plastics v Venezuela"*).
[74] *St Gobain Performance Plastics v Venezuela*, paras 80-81.

In the *CC/Devas* v. *India* case,[75] the presiding arbitrator was challenged on the ground that he and his co-arbitrator had in two other cases together decided the legal interpretation of a similar nature. The fact that the presiding arbitrator had twice decided the issue was held to be insufficient to sustain the challenge.

F. RELEVANCE OF PAST PUBLIC STATEMENTS AND LEGAL OPINIONS

According to the IBA Guidelines, an arbitrator need not necessarily disclose instances in which they have "*previously expressed a legal opinion* (such as in a law review article or public lecture) *concerning an issue that also arises in the arbitration* (but this opinion is not focused on the case)".[76] However, the Draft Code imposes a heavy burden on the adjudicator and candidates to disclose a list of all publications by them and their "relevant" public speeches. The word "relevant" preceding public speeches limits the disclosure to public speeches of some significance to the dispute. This article refers to only those academic writings or other relevant public speeches that may be a predisposed opinion or prejudgment of issues at hand. In practice, disqualifications on the grounds of prejudgment have been rare.

In *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoav The Argentine Republi*c,[77] the claimants proposed the disqualification of Professor Campbell McLachlan based on his views on issues that were considered critical to the case. Professor Campbell, in his defence, pertinently stated that his task as an arbitrator is completely different from that of a legal scholar. For the reason that in an arbitration, an arbitrator's duty is to judge the case fairly on the basis of specific evidence, applicable law and submission of both parties and he would be prepared to reconsider his views in the light of arguments and developments in law.

The co-arbitrators considered that the opinions expressed need to be, in the eyes of a third reasonable party, specific and clear enough for the arbitrator to rely on them without taking into consideration the facts and arguments of the case.[78] Thus, they concluded that his opinions were those of an academic. In *Canfor* v. *US*, the arbitrator disclosed that, one and a half years before his appointment, he had given a speech in which he had described the US government's anti-dumping measures on softwood lumber and its subsequent challenges a harassment. The matter before the tribunal was the legitimacy of the US' softwood lumber policy. The arbitrator was advised to resign, lest the challenge would be upheld.[79]

What is important to note is that no arbitrator is, in absolute terms, independent and impartial, as "*every individual is conveying ideas and opinions based on its morals, cultural, and professional education and experience*."[80] Most parties choose their arbitrators due to their special knowledge of their trade or industry or profession, and public speeches and

[75] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd*., and *Telecom Devas Mauritius Ltd. v Republic of India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (30 September 2013) *("CC/Devas v India")*.
[76] IBA Guidelines, art. 4.1.1.
[77] *Urbaser*, para 20.
[78] *Urbaser*, para 44.
[79] *Canfor v US*, Challenge Decision of March 2003.
[80] *Urbaser*, para 40.

writings demonstrate such expertise comprehensively.[81] If every adjudicator is imposed to disclose their public speeches, they would refrain from making public speeches altogether.

Thus, arbitrators should be obligated to disclosed relevant public speeches and opinions, but for a challenge of disqualification to sustain, such public speeches and opinions need to be asserted and supported with claims of a direct or indirect interest in the outcome of the dispute or by a relationship with any party or any other person involved in the proceeding.

G. CONTINUOUS DISCLOSURE

Article 5(3) provides that the duty of disclosure is a continuous one and adjudicators should disclose all necessary information throughout the proceedings. Thus, this duty is not a one-time disclosure at the beginning of the proceedings and continues throughout all stages of the arbitration.

H. TO DISCLOSE OR NOT TO DISCLOSE?

By adoption of Article 5(4), these disclosure obligations essentially follow the principle of "in case, doubt, disclose". They state that in case of doubt, candidates and adjudicators should tend to disclose. This Draft Code supports more rather than less disclosure.

However, disclosure of trivial matters is not required. Such disclosures would prove burdensome to parties and arbitrators, which will unnecessarily circumscribe the freedom of choice in the selection of adjudicators and will encourage frivolous challenges. An adjudicator's unnecessary disclosure can provide for a plausible challenge and, whether or not the challenge succeeds, that would inadvertently complicate and delay the arbitration proceedings.

Since the standard of disclosure only includes relationships and circumstances that an adjudicator reasonably believes would cause their independent judgment to be questioned by a reasonable third party,[82] arbitrators are safe from disqualification due to non-disclosure of trivial matters. However, in *Universal Compression v Venezuela*, the deciding co-arbitrators required the arbitrator to disclose any professional relationship with counsel of the parties, even if the arbitrator considered the relationship to be *de minimis.*[83] Thus, precedents like these could confuse the adjudicator as to what "trivial" could connote, since the Draft Code does not define the matters that would constitute as "trivial". Moreover, the circumstances that may appear trivial to the arbitrators that are deciding a challenge, may not seem insignificant to the party and the average person. Thus, the Draft Code could be further comprehensive in this aspect.

VII. LIMIT ON MULTIPLE SIMULTANEOUS ROLES

Article 6 of the Draft Code concerns the controversial yet popular practice of "double hatting" in investment arbitration. It is the phenomenon of adjudicators donning most commonly the hat of a counsel or arbitrator, but less often also that of a witness or expert in a

[81] Commentary (n 15) para 59.
[82] Draft Code art 5(1).
[83] *Universal Compression v Venezuela* ICSID Case No Arb/10/9.

proceeding running parallel or simultaneous to theirs.[84] There has been no consolidated definition of what constitutes double hatting,[85] hence the Draft Code does not limit itself to the four specific circumstances mentioned and rather, expands the scope with the words "any other relevant role". The Article specifies that it applies to situations when the parties or facts are the same, during or around the same time period. These situations can apply individually— similar facts but not the same parties; or jointly— both facts and parties being the same.

The question that presents itself is that of the prevalence of the practice within investment arbitration in *status quo.* For the longest time this was unanswerable, even by critics claiming the practice was widespread. However, recently PluriCourts[86] developed an Investment Treaty Arbitration Database for all investment arbitrations along with ICSID annulment proceedings, where it was discovered that in up to 47% cases, at least one arbitrator performed the role of a counsel in another case, along with 11% cases having counsels donning other hats.[87]

A. LACK OF IMPARTIALITY WHEN PRACTICING DOUBLE HATTING

The admonition of the practice is due to the threat to independence and impartiality it poses. It is unreasonable to expect an adjudicator to approach a case with a clean slate if they have ruled on similar facts, and/or dealt with the same parties. This provision mirrors and runs parallel to the intention set out in Article 5. Professor Philippe Sands, the most vocal critic of the practice of double hatting states that, it is unreasonable for a lawyer who spends a morning drafting an arbitral award to address a similar contentious legal issue as a counsel in a different case, in the afternoon.[88] He thus casts light onto the perceivable shadow of partiality that double hatting can cause in adjudicators. The disclosure obligations align with the justifiable doubt standard as in the UNCITRAL Arbitration Rules adopted in 1976, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.[89] As a consequence, the standard is not simply whether the adjudicator thinks they can be impartial, but whether a reasonable observer would so conclude.[90]

Existing frameworks have had broadly framed ethical obligations of independence and impartiality, which have been interpreted to include double hatting in various cases discussed ahead. Article 14 read with 40(2) of the ICSID Convention, says arbitrators "*shall be persons of high moral character and recognized competence… who may be relied upon to exercise independent judgment*".[91] Rule 6(2) of ICSID's Arbitration Rules requires that arbitrators provide a statement of past and professional business and other relationships "that might cause their reliability for independent judgment to be questioned," and it imposes a

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[84] Commentary (n 15) para 67.
[85] Commentary (n 15) para 67.
[86] PluriCourts is an organisation that studies the legitimacy of international courts and tribunals (ICs) from legal, political science and philosophical perspectives. The centre explores the normative, legal and empirical soundness of charges of illegitimacy, to understand and assess how ICs do, could and should respond.
[87] Malcolm Langford et al., 'The Ethics and Empirics of Double Hatting' (2017) 6(7) ESIL Reflection 3.
[88] Philippe Sands, 'Reflections on International Judicialization' (2017) 27 EJIL 885.
[89] UNCITRAL Arbitration Rules ("UNCITRAL Arbitration Rules") (12 July 2010), art 12(2).
[90] Challenge Decision of 11 January 1995, 1997 XXII YB Comm Arb 227, paras. 24, 30-31.
[91] ICSID Convention, art 14(1).

continuing disclosure requirement.[92] IBA Guidelines also address dual hatting in their lists,[93]which will be discussed in the subsequent section of this paper.

These broad obligations when applied stringently can be seen as a good starting point to deal with the issue of double hatting, however the new Draft Code not only fills the lacuna in situations where soft law like IBA Guidelines seem to not be applicable as agreed to by the parties, but also logically extends on the existing ICSID provisions by providing specific obligations adding to existing general ones.

B. THE VARYING STANDARDS FOR DOUBLE HATTING

Double hatting encompasses different scenarios which the Draft Code lists out— for instance, overlaps between being an adjudicator in two cases, or being a counsel and adjudicator in separate but related cases, etc. However, it does not differentiate between these instances in applying different standards of disclosure or refusal, within the draft code itself.

The first distinction is based on whether two roles are played by the arbitrator concurrently (at the same time) or consequently (within a span of some years). The other distinction that is absent in the Draft Code, but has been made in jurisprudence, is based on how likely it is to jeopardise the independence and impartiality of the arbitrator. For instance, an adjudicator that has represented one of the parties in the recent past is perceived to be lacking independence and impartiality in a manner different from a situation when they have espoused certain views relating to facts of the dispute in the past. These standards are analysed differently in the existing framework of IBA Guidelines, as well as jurisprudence relating to disqualification of arbitrators. Hence, this Draft Code is likely to be interpreted in consonance with these existing standards analysed below since it does not attempt to create its own separate regime, as has been done in this paper subsequently.

Applying these different standards, double hatting can be classified into— double hatting as Arbitrator and Counsel, and Arbitrator and Arbitrator.

A) Arbitrator and Counsel

Tension lies in an arbitrator's independence when they have been involved with one of the parties either in the past or simultaneously with the current proceeding, and to their impartiality when they have articulated and argued for a view as counsel even for a different party. The former has been used as grounds for disqualification,[94] however, tribunals are unconvinced with disqualifying arbitrators for the latter.[95] Even in case of the same parties, concurrent representation is seen as more problematic.[96]

[92] ICSID Arbitration Rules, r 6(2).
[93] IBA Guidelines 21.
[94] *Telekom Malaysia Berhadv The Republic of Ghana,* PCA, Case No HA/RK 2004.788 (5 November 2004), *Consortium R.F.C.C. v Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003), *Blue Bank International & Trust (Barbados) v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso (12 November 2013).
[95] *St. Gobain Performance Plastics v* Venezuela ICSID Case No ARB/12/13. paras 77, 80-81.
[96] Professor Philippe Sands and others have urged that persons should not serve as both counsel and as arbitrator. See, Philippe Sands, *Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel, Evolution in Investment Treaty Law and Arbitration*(Chester Brown and Kate Miles eds., 2011) 19.

If the arbitrator is a counsel of one of the parties in a separate proceeding at the time of the matter, i.e. concurrent representation, such an instance falls under the Waivable Red List[97] of the IBA Guidelines. Hence, depending on the parties' consent, they can choose to not recuse the arbitrator after disclosure of relevant information. Such a case led to a tension in *Telekom Malaysia Berhadv Ghana.*[98] The arbitrator in the case was simultaneously serving as counsel for the petitioner in the annulment proceedings of *RFCC v Morocco*,[99]an award upon which Ghana relied in the *Telekom Malaysia* case. Upon review, he was only allowed to occupy the position on the tribunal after he resigned as counsel in the RFCC case. The disqualification in the *Blue Bank*[100] case had similar reasoning.

When the time period in question is altered, the standard changes. In the earlier circumstance, if an arbitrator has performed as counsel for either party in the past three years (i.e. consequent representation), the situation falls under the Orange List of the IBA Guidelines. In the latter case, the arbitrator must disclose such fact, and if parties do not raise an objection within 30 days, the objection is said to have been waived.[101] There have been no disqualifications yet based on sequential representation of a party (disqualification was rejected in *St. Gobain Performance Plastics v Venezuela*),[102] however disclosure of such facts are necessitated even under the Draft Code.[103]

B) Arbitrator and Arbitrator

Arbitrators serving on panels that have ruled on similar circumstances are seen to approach a case with pre-existing notions. Although not clearly defined, such a situation has been covered under the Orange List of the IBA Guidelines where the arbitrator has an obligation to disclose if he currently serves, or has served on a panel in the past three years that has covered a related issue, concerning the parties.[104] Even if it doesn't involve the same parties, justifiable doubts are created over the arbitrator's predisposition regarding the issue. This position has been affirmed by *Caratube* case[105] and *CC/Devas* case,[106] that have been previously discussed in this paper. The test also includes how generic or specific (similar to the current case) the issue dealt with previously was.[107] Hence, double hatting as previous panel is only seen as problematic when they apply similar facts, not when they simply address similar legal questions.[108]

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[97] IBA Guidelines, art 2.3.

[98] *Telekom Malaysia Berhad v The Republic of Ghana,* PCA, Case No HA/RK 2004.788 (5 November 2004).

[99] *Consortium RFCC v Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003).Ghana's counsel did not challenge the appointment of the tribunal chairman, Albert Jan van den Berg, although he had disclosed that his partner, Bernard Hanotiau, was serving as arbitrator on the RFCC v Morocco annulment panel.

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

[101] IBA Guidelines art 3.1.1, General Standard 3(a).

[102] *St. Gobain Performance Plastics v* Venezuela ICSID Case No ARB/12/13 paras 77, 80-81.

[103] Draft Code, art 6.

[104] IBA Guidelines, art 3.1.5.

[105] *Caratube* (n 9).

[106] *CC/Devas v India* (n 75).

[107] *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America,* NAFTA, Order of the Consolidation Tribunal (7 September 2005).

[108] *İçkaleİnşaat Limited Şirketi v Turkmenistan,* ICSID Case No ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands (11 July 2014), para 120.

C. HOW ARTICLE 6 ADDRESSES THE CONCERN

Relatively few bodies have approached the problem of double hatting with the solution of completely barring the process like the CETA International Investment Court.[109] The reason why this is possible is due to the nature of the court — it has a permanent judge pool, with a fixed tenure accompanied with fixed remuneration. This is largely not the case with ISDS, which is usually *ad hoc*, or has a lack of fixed work even when institutional.[110] Hence, the "revolving door policy" has benefits for the professionals involved, by providing them with an ability to stay employed when not serving on panels, which extends over longer durations.[111]

A second problem with an outright ban is the barrier to entry of new arbitrators. Arbitrators are often individuals that have stayed within the investment arbitration field as counsels or serve on smaller panels for long enough to grasp the nuances of investor-state relationships and dynamics. New arbitrators cannot give up their counsel practice, until they have secured enough repute to maintain a permanent seat on institutional boards. Prohibiting counsel work would be severely detrimental to the entry of new people into the field.

Third, it possibly hampers the ability to make the field more diverse.[112] Currently, the biggest critique of the demographical division of major players in the arbitration game is that they are old, white, cis-males.[113] Most women and minority individuals that can potentially join the ranks of the major players are currently partners or practicing counsels.[114] When individuals who are non-white or non-male want to enter the industry, they would be burdened to give up counsel practice with no monetary safety net. This would deeply discourage new entrants into the field required to make it more gender and race diverse.[115]

The Draft Code takes the best median approach to this issue, by not disallowing such arbitrators on panels. The duty of disclosure necessitates adjudicators to bring parties' notice to any potential dual hatting scenarios that is likely to cause justifiable doubts to their independence and impartiality. However, it is subjective as to whether parties take a challenge to such an adjudicator, and whether such challenge is upheld in consonance with current practice and existing regulations read with the Draft Code.

VIII. INTEGRITY, FAIRNESS AND COMPETENCE

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[109] CETA, Annex 29-B.
[110] Commentary (n 15) para 68.
[111] Commentary (n 15) para 68.
[112] Crook JR, 'Dual Hats and Arbitrator Diversity: Goals in Tension' (2019) 113 AJIL Unbound 284.
[113] Michael D. Goldhaber 'Madame La Presidente, -A Woman Who Sits as President of a Major Arbitral Tribunal is a Rare Creature. Why?', (2004) 1(3) TDMwww.transnational-dispute-management.com/article.asp?key=158> accessed 28 July 2020.
[114] VaninaSucharitkul,'ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal' (KLUWER ARBITRATION BLOG, 20 June 2020), <http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/> accessed 28 July 2020.
[115] ibid.

Article 7 states that adjudicators must have the highest degrees of integrity and fairness.[116] It also states that adjudicators must only accept appointments for which they are competent.[117] Prior to expounding on any of the substantive material provided in the Article, it is important to realise that much like other parts of the Draft Code, even the majority of this article has been picked from the CETA COC.[118]

According to the Commentary, this degree of integrity and fairness is rooted in the requirement to treat parties equally and to provide them with the opportunity to present their case.[119] Therefore, all an adjudicator has to do here is to not be prejudiced towards a side which is something already covered in Article 4. What is interesting about Article 7(1) is that even though the Report of WGIII cited in the Commentary mentions the term "accountability" along with integrity when talking about the key qualifications and requirements,[120] the term is absent from Article 7 and even from the rest of the Draft Code. This may be because standards for accountability already exist in the form of the disqualification processes under various rules like the ICSID Convention and IBA Guidelines that this Draft Code does not claim to supersede. Further, this logic is substantiated by the fact that the Report of WGIII also fails to define accountability. However, some of the Articles in the Draft Code are already vague and undefined. For example, the terms "integrity and fairness" cannot be interpreted without looking at the Commentary, but even more so the term "self-interest" in Article 4 is not defined even in the Commentary. Therefore, it is a bit perplexing that the term "accountability" is not mentioned anywhere in the Draft Code, as it could have been interpreted using jurisprudence. This part of the paper is simple, since most of the material in this Article is general, whether each aspect of it is necessary or not is all that is assessed. However, the answer to general necessity here is in the affirmative. Thus, the concern assessed here is pertaining to the necessity of the terminology used for these aspects specifically.

A. PROHIBITION ON EX PARTE COMMUNICATION

Article 7 prohibits adjudicators from engaging in *ex parte* contacts concerning the proceeding, under Clause 2.[121] This is the logical extension of Clause 1 where adjudicators are duty-bound to listen to both the parties and to treat them equally. It would be unfair to a party, if the other were permitted to present their case without having the ability to present their own.

There are conflicting decisions on *ex parte* communication in arbitrations. For an example, the Swiss Federal Supreme Court rejected a challenge to annul an ICC award made based on *ex parte* communication. It held that such communication does not call into question the independence or impartiality of the party-appointed arbitrator concerned.[122] On the contrary, the Court of Appeal for British Columbia held that arbitration proceedings are

[116] Draft Code, art 7 (1).
[117] Draft Code, art 7 (3).
[118] CETA Code of Conduct, art 2, 7, 8, 9, 10.
[119] Commentary, para 74.
[120] UNGA, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session' UNCITRAL Resumed 38th Session UN Doc A/CN.9/1004/Add.1 ("A/CN.9/1004/Add.1") para 96.
[121] Draft Code, art 7 (2).
[122] *See* Bundesgericht [BGer] [Federal Supreme Court] Nov 13, 2019, 294, Entscheidungen des schweizerischen Bundesgerichts at para 4.1.

modelled on a judicial proceeding.[123] Accordingly, *ex parte* communication would be prohibited, as it creates an apprehension of bias.[124] This Article supports the latter.

B. A NECESSARY DUTY TO ENHANCE KNOWLEDGE, SKILL AND QUALITIES

Article 7 mandates adjudicators to take reasonable steps to maintain and enhance knowledge, skill and qualities that they require to discharge their duty, under Clause 3.[125] This Clause creates the bedrock for an adjudicator's competence. According to the Report of the WGIII, this knowledge includes an understanding of "international investment law, international arbitration, public international law, international trade and investment law, and private international law". Therefore, the logical connection to International Investment Dispute Settlement for these subjects is clear.[126] However, connection to other topics mentioned like "sustainable development and how governments operate" are a bit unclear.[127] Even the report itself omits comments on why these subjects are necessary.[128] The Commentary even speaks of industry specific standards among other things. However, the issue with this Clause is that the terminology does not reflect, as to what this knowledge, skill or qualities are. This Clause could benefit from either more specific terminology for what constitutes knowledge, skill and the other qualities prescribed that are required to discharge an adjudicator's duty with some examples being provided. Although the Commentary and even the Report of the WGIII both assume for certain topics to be inferred from this Clause, that inference seems unlikely without more clarity.

C. AN EXPLICIT PROHIBITION ON THE FOURTH ARBITRATOR?

This Article prohibits adjudicators from delegating their decision-making function to any other person, under Clause 4.[129] Generally, it is intuitive to assume that an adjudicator will not let somebody else make decisions on their behalf. Additionally, the standards for confidentiality and independence also become relevant for this standard. However, what is more interesting is how this Clause affects assistants and tribunal secretaries. Therefore, this part's assessment is limited to the impact on tribunal assistants and secretaries. The propensity for tribunal assistants and secretaries to become the "fourth arbitrator" is very real and this Clause seems to be this Draft Code's attempt to deter that propensity.

A) Yukos award and the notion of the "fourth arbitrator"

The reason assistants and secretaries have been occupying space in recent academic discourse pertaining to an arbitrator's ability to delegate is the challenge of the Yukos award and the notion of the "fourth arbitrator" underlying it. In 2015, the Russian Federation filed three writs with the Hague District Court that sought to annul the Yukos Award.[130] The part

[123] See *Hunt v The Owners*, Strata Plan LMS 2556, 2018 BCCA 159.
[124]ibid [75]; *See also Refrigeration Workers Union, Local 516 v Labour Relations Board of British Columbia*, (1986), 27 DLR (4th) 676 at 681 (BCCA).
[125] Draft Code, art 7 (3).
[126] Commentary, para 77.
[127] Commentary, para 77.
[128] A/CN.9/1004/Add.1, para 97.
[129] Draft Code art 7 (4).
[130] Dmytro Galagan, Patricia Živković, 'The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal"s Mandate?' (*Kluwer Arbitration Blog*, 27 February 2015) <http://arbitrationblog.kluwerarbitration.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-

of the claim that concerns this paper is that according to the Russian Federation, the tribunal's assistant played a significant role in analysing the merits of the legal claims in the deliberation and drafting of the award.[131] This leads to a concept significantly older than the Yukos award, the notion of the "fourth arbitrator".

In *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, Professor Jan Hendrik Dalhuisen authored an additional opinion pertaining to the role of a Tribunal Secretary in ICSID arbitration resembling that of a fourth arbitrator, rather than that of just aiding in "administration and support".[132] A significant part of academia also supports the notion that assistants and secretaries may hold decision-making power through their position and that the power may become disproportionate to their duties.[133] This notion exists as condemnation to what is an assault upon the parties' rights to select their own judges that forms the foundation of arbitration.[134]

Therefore, there is no uniformity or in some institutions, any classification on what the duty of an assistant or secretary entails and because of this, there is always the propensity for an assistant or a secretary to act as the fourth arbitrator.

B) Assistants and secretaries in ISDS

In *status quo*, arbitrators enlist help from assistants and secretaries. However, the scope of this help differs from institution to institution. For example, the ICSID Administrative and Financial Regulations provide that a secretary shall be appointed to each ICSID tribunal.[135] However, this issue is still unclear, even under ICSID, as explained *supra*. This help is termed as "logistical assistance" by tribunals like the ICSID tribunal in the *Caratube* case,[136] but the meaning of "logistical help" is never defined. Institutions like the Arbitration Institute of the Stockholm Chamber of Commerce, Netherlands Arbitration Institute, Swiss Chambers' Arbitration Institution, Cairo Regional Centre for International Commercial Arbitration, among others never even define the role.[137] This dissonance on this issue is evident by how the role of the assistants and secretaries are never defined effectively.

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by-someone-else-a-violation-of-the-tribunals-mandate/?doing_wp_cron=1594594384.7785480022430419921875> accessed 29 July 2020.

[131] *The Russian Federation v Yukos Universal Limited*, (2016) C/09/477162 / HA ZA 15-2 (Hague District Court) para 4.2 (3).

[132] *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Annulment Proceeding, Additional Opinion of Professor JH Dalhuisen under Art 48(4) of the ICSID Convention, (30 July 2010) para 3, 21.

[133] David Zaslowsky and Grant Hanessian 'The Fourth Arbitrator: Contrasting Guidelines on Use Of Law Secretaries' (LEXOLOGY, 14 January 2013) <https://www.lexology.com/library/detail.aspx?g=e7826e7b-0a84-409d-9ebb-af84ad6d1d3f> accessed 28 July 2020.

[134] Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration.' (2002) 18(2) Arb Int'l 147.

[135] ICSID Administrative and Financial Regulations (April 2006), r 25.

[136] *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012).

[137] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (1 January 2017), Netherlands Arbitration Institute Arbitration Rules (1 January 2015), Swiss Rules of International Arbitration of the Swiss Chambers" Arbitration Institution (1 June 2012), Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration (1 March 2011).

C) The inadequacy present in Article 7(4)

Prior to dealing with why Clause 4 is inadequate, it is acknowledged that "Assistants" have been defined in Article 1(2). However, the term "other relevant assignments" creates a lacuna in terms of what their duties can extend to. Therefore, there is vagueness in terms of what these positions are to be. The disappointment with Article 7(4) comes from its missed potential to classify these positions in detail in the Draft Code.

Since the ICSID Convention, most other rules and jurisprudence is either silent or vaguely define the role and the duties of assistants and secretaries under international arbitration, there is no overlap in the classification this Article could provide. An opportunity to deal with the notion of the "fourth arbitrator" exists and to not seize it would be a disservice to the fabric of arbitration, as the objective of this Draft Code with its underlying principles of integrity, fairness, competence, independence and impartiality is to preserve the parties' agency to make a choice. Arbitrations are creatures of contracts and the notion of the "fourth arbitration" takes consent out of this contract.

IX. AVAILABILITY, CIVILITY DILIGENCE AND EFFICIENCY

Article 8 clubs two obligations— to work in a timely manner to ensure efficient arbitrations and the duty to be civil and couth towards parties and fellow arbitrators, as well as anyone else involved in the process. This paper analyses both the obligations separately.

A. AVAILABILITY, DILIGENCE AND EFFICIENCY

Across codes and regulations, an arbitrator's duty to be available is stated under the broader duty of efficiency and diligence,[138] akin to the Draft Code. Specific to investment arbitration, the NAFTA Code paved the way for the duty of diligence, part of which seems to be replicated in paragraph 1 of this Article.[139]

The Draft Code divides the arbitrator's obligations in the pre-appointment and post-appointment stages. Before appointment, the arbitrator must ensure their availability and not take up more than a quantified number of pending proceedings (mentioning a precise number is likely to be problematic according to the Commentary).[140] The post appointment duties involve ensuring availability to perform duties expeditiously, diligently, avoiding unnecessary delays, and staying punctual in performance of their duties. These duties also align with the duty to not cause unnecessary expenses.[141]

B. THE PROBLEM HIGHLIGHTED IN ARTICLE 8 (1)

The Article can be lauded for recognising the importance of efficient progression of proceedings in alignment with existing codes. The problem of having a small pool of "well established arbitrators" causes significant crowding of cases with a few,[142] causing unavailability of arbitrators on time, leading to delayed disposal of cases.

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[138] Katia Fach Gómez, *Key Duties of International Investment Arbitrators* (Springer 2019) 140 ("Gómez").
[139] The 1994 NAFTA Code of Conduct, Part III.
[140] Commentary (n 15) para 80.
[141] Gómez (n 138) 147.
[142] Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration' (2015) 31 Arbitration International 413.

However, Article 8(2) to (3) merely create a duty without any means to ensure compliance when read on its own. They solely depend on the adjudicator to not take up more than a certain number of cases and to ensure timely progress of proceedings. Albeit this obligation being linked to the mechanism of pre-appointment interviews in Article 10, it is likely to address the issue in only when read with Article 5,imposing an obligation to disclose prior appointments. This problem may be less potent when the Draft Code is applied to institutional proceedings that have their own rules when it comes to arbitrator's timely performance of duties, along with compliance measures like dismissing the arbitrator on failure of performance of said duty.[143]

Hence, a solution may lie in applying disclosure obligations to the duties under Article 8 in order to track the compliance of the same, which could be ensured by reading Article 8 with Article 5 and applying them together, and if required, allowing parties to dismiss arbitrators in the absence of compliance. This model is not a new one, it can be seen in the International Chamber of Commerce ('ICC') and Singapore International Arbitration Chambers ('SIAC') Rules among others. The ICC requires a declaration from all candidates disclosing the number of cases they are currently sitting in as co-arbitrator or chairman, along with a statement of acceptance, availability, impartiality and independence.[144] The parties can then make objections based on if they perceive any lack of availability. The ICSID rules involve a declaration of availability as well, along with similar disclosure obligations under the SIAC rules.[145] Requiring arbitrators to disclose their commitments and declaring commitment to efficiency and diligence allows for a greater accountability of arbitrators that is currently absent in the Draft Code.

C. CIVILITY

Arbitrators have a duty under Article 8(4) to act with civility and respect towards fellow arbitrators, the parties and further the best interests of the parties. Professor Donald Campbell studied what the term civility includes, and a comprehensive definition includes four essentials.[146] First, recognising the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions. Second, being respectful and acting in a courteous, cordial, and civil manner. Third, being prompt, punctual, and prepared. Last, maintaining honesty and personal integrity.[147] The understanding that civility must not end at parties but extend to fellow arbitrators is stressed-on in other instruments as well. In doing so, we recognise the importance of appropriate behaviour by arbitrators— where Park has stated "*integrity is to arbitration what location is to the price of the real state: without it, other things do not matter all that much*".[148]

This canon may be carried by almost every investment arbitration code, however, policing this behaviour and ensuring compliance is still a mammoth task.[149] On this limb,

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[143] Singapore International Arbitration Chamber Code of Ethics for an Arbitrator ("SIAC Code") (2015), art 1.2
[144] International Chamber of Commerce Arbitration Rules (2017), art 11(2).
[145] SIAC Code art 1.2.
[146] Donald E. Campbell, 'Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility', (2012) 47 Gonz L Rev 99, 141–42.
[147] ibid.
[148] WW Park, 'Investment Claims and Arbitrator Comportment' (2012) TDM 1<www.transnational-dispute-management.com/article.asp?key=1788> accessed 28 July 2020.
[149] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID REV. 339.

disqualifications or any other enforcement mechanism have also been considered unimportant by the arbitration community. This is evidenced by the failure of the challenge in *RSM* v. *Saint Lucia*, in which the arbitrator described third-party funders as "*mercantile adventurers*" along with other statements to negatively connotate the Claimant's use of third-party funding.[150]The Claimants considered the arbitrator' language radical in tone and negative. However, the disqualification panel considered that even though language was uncivil, it did not warrant disqualification.[151] Another such case was adjudged in the Permanent Court of Arbitration under UNCITRAL rules, where an arbitrator was not disqualified when he was said to make sarcastic comments and ridicule counsel for respondent, conduct himself intemperately and insensitively, among other transgressions.[152]

The Draft Code suffers from the same problem as earlier instruments insofar as it urges civility of arbitrators, without prescribing any enforcement mechanism and/or penalty for digressing from the same.

X. CONFIDENTIALITY

Article 9 adopts generally accepted rules of confidentiality for adjudicators. Clause 1 provides that they shall not disclose or use confidential information for their personal advantage to which they have access by virtue of their role as arbitrator. Clause 2 prohibits disclosure of any decision, ruling or award to the parties prior to delivering it to them and further to the public, until it is in the public domain.

XI. PRE-APPOINTMENT INTERVIEWS

Article 10 sets restrictions and disclosure obligations upon pre-appointment interviews with adjudicators.[153] These differ from the disclosure obligations under Article 5, as these are specific towards just the pre-appointment and Article 5 obligations only exist towards conflict of interests. According to the Commentary, the disclosure would require parties to record or make notes of the interview.[154] Under Clause 1, such interview should only pertain to "availability of the adjudicator and absence of conflict".[155] These are essential is figuring out the duration of the arbitral process along with the independence and impartiality of the adjudicator. There is also a very specific prohibition on discussing any issues pertaining to jurisdictional, procedural or substantive that may arise in the proceeding.[156] This too sounds rational, as these interviews could then be used to assess whether an adjudicator would be favourable or not, violating impartiality and independence, as the party would then be seeking a very specific type of bias in their adjudicators.

XII. FEES AND EXPENSES

[150] *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith, QC (23 October 2014).
[151] ibid.
[152] Judith Levine, 'Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes' (2017) 1 TDM, <www.transnational-dispute-management.com/article.asp?key=2428> accessed 28 July 2020.
[153] Draft Code art 10.
[154] Commentary (n 15) para 84.
[155] Draft Code art 10 (1).
[156] Draft Code art 10 (1).

Article 11 provides that any discussion relating to adjudicator fees shall be concluded immediately upon constitution of the adjudicatory body and shall be communicated through the administering entity. This facilitates early discussion of the rate and enables parties to replace adjudicators early if they cannot agree to the rate requested. It also aims to avoid any situation where adjudicators accept an appointment and request different fees once the tribunal is formed.

Article 11 further provides that adjudicators shall keep an accurate and documented record of the time devoted to the procedure and their expenses, as well as the time and expenses of their assistant.

XIII. ENFORCEMENT OF THE CODE OF CONDUCT

Article 12 addresses the modes of enforcement, resolving overlaps and general implementation.[157] In Clause 1, it speaks of how every adjudicator and candidate for adjudication are obligated to follow the rules.[158] In Clause 2, it stipulates how this Draft Code does not supersede disqualification processes.[159] Clause 3 is left comparatively vague since it merely states "other options based on means of implementation of the code".[160]

However, none of these are as relevant to the spirit of this Article and its purpose, as what is instead discussed in the Commentary, *i.e.* compliance. Therefore, instead of assessing the present Article which in theory looks acceptable, this paper chooses to assess the modes of compliance proposed in the Commentary along with the probability of success before assessing the methods of implementation provided and lastly, the probability of a multilateral instrument on ISDS reform. It is understood that this Draft Code is not enforceable *per se*. However, this may form the foundation of a final code. Therefore, this part assumes that this Draft Code is final and assess enforceability and implementation. The purpose of this is to assess the flaws in Article 12 and propose changes required to enhance the functionality of a final code. Therefore, for the duration of this part the term "Prospective Code" refers to a hypothetical final code of conduct for adjudicators in ISDS.

A. VOLUNTARY COMPLIANCE

Although WGIII stipulated that it was not "prudent" to rely upon voluntary compliance,[161] it is still pertinent to assess how voluntary compliance would work. This method of compliance primarily relies on Clause 1 obligation. However, with no real consequence presented, this can, at best, serve merely as a request and not a command. Therefore, it is unlikely to provide any real compliance in cases where adjudicators have the incentives to defy the Prospective Code. Furthermore, acts like advancing their own interests provided under Article 4 clearly have benefits that an adjudicator can accrue, in a case where

[157] Draft Code art 12.
[158] Draft Code art 12 (1).
[159] Draft Code art 12 (2).
[160] Draft Code art 12 (3).
[161] UNGA 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)' UNCITRAL 53rd Session UN Doc A/CN.9/1004 ("UN Doc A/CN.9/1004"), para 6.

they defy the Prospective Code. Thus, voluntary compliance does not seem to be the most efficient way to enforce the Prospective Code, according to the Commentary and WGIII.[162]

However, what both WGIII and the Commentary ignore are alternatives for voluntary compliance, i.e. incentives. Surely, there can be incentive structures created to opt-into these, in terms of modifying this Draft Code into having provisions that also help or benefit the adjudicators. These benefits could include a better rating on a system for adjudicators through new and pre-existing repositories. Alternatively, there is always the option to just wait and watch, just because an instrument is indicative, it does not mean that it is never complied with. The IBA Guidelines are also merely indicative and not binding, but they are used frequently in ISDS. Further, the IBA Guidelines have also been significantly mirrored in the Schedules to the Indian Arbitration and Conciliation Act 1996 through amendments.[163] Such an indirect effect is also possible, if the Prospective Code is substantive and promoted well-enough.

Therefore, it is disappointing that both the Commentary and the report of WGIII fail to discuss the permeation of the Prospective Code in ways akin to those mentioned above and seemingly surrender on the notion of voluntary compliance.

B. INVOLUNTARY COMPLIANCE

Involuntary compliance does not suffer from the issue of redundancy like voluntary compliance, but from feasibility. Involuntary compliance emanates from the fear of the repercussions that non-compliance creates. Both the Commentary and WGIII agree to this being a very unclear model for change. While a few measures are recommended by both the Commentary and WGIII, even those are discredited as inviable instantaneously.[164]

The first repercussion is the use of “sanctions linked to remuneration”. The Commentary simply asserts that these are difficult to implement, but provides no reason for this difficulty. The second repercussion is the use of “Disciplinary measures”. The Commentary is silent on what these measures look like, what their scope could be and how it could ensure compliance. The third repercussion is the use of “Reputational sanctions”. Again, the Commentary says that these two are difficult to implement. However, unlike the first repercussion, it provides an image of what this could look like, where a list of violators may be curated by different institutions. However, the Commentary itself raises the question on who would be responsible to administrate, collect and verify the information pertaining to the violations. The fourth repercussion is the use of “Notifications to professional associations”. The Commentary does not extend upon this measure’s feasibility. However, it is intuitive to see that this would be similar to the standard for reputational sanctions. The last repercussion is primarily a model that can be used to implement other measures, i.e. the creation of a “standing body or mechanism”. According to the Commentary, the power to enforce the Prospective Code could adversely impact the ability to impartially represent and advise its beneficiaries held by such advisory bodies. However, the Commentary also

[162] Commentary (n 15) para 90; A/CN.9/1004 para 63.

[163] Shweta Sahu et al, ‘Legitimacy of Arbitral Appointments in India’ (*Kluwer Arbitration Blog*, 3 November 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/03/legitimacy-arbitral-appointments-india/?doing_wp_cron=1595608923.9262440204620361328125> accessed 28 July 2020.

[164] Commentary (n 15) paras 91-96; A/CN.9/1004, para 63.

propounds over how this ability to implement the Prospective Code could be provided to its registrar or to the court in its plenary.

In our view, this model sounds divorced from reality. There are four concerns that arise out of this material. First, in line with the WGIII, the introduction of such standards and their strict enforcement might entail consequences towards an individual's intention to opt-in. For instance, an individual may hesitate to undertake the role of an arbitrator. Second, the power the concerned standing body or mechanism may hold towards adjudicators may become disproportionate. Third, this is an assault upon the basic nature of arbitral procedure and how it is meant to be only indicative, for the most part. Last, the Commentary or WGIII fails to deal with the ethical and moral implications involuntary compliance has upon ISDS to begin with. Further, this notion has the ability to warp consent by ensuring that certain adjudicators are never appointed even if the parties to the dispute agree upon them.

C. METHODS FOR IMPLEMENTATION

There are a few methods for the implementation provided by the WGIII and in the Commentary[165] which at the off-set sound rational. However, there are a few issues with the comments made by WGIII.

The first method presented is "to incorporate the Prospective Code into investment treaties and other instruments of consent". Although the notion sounds logical, the report additionally assumes that the scope could be increased to encompass other actors in ISDS, if this were to be implemented into investment treaties and other instruments of consent.[166] This is ignorant of the fact that most of the material in this Draft Code cannot symmetrically apply to all actors since it is specifically calibrated to adjudicators which merely refers to arbitrators, members of international *ad hoc*, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State dispute. However, perhaps the next or the final draft can be a more general code of conduct applicable to all actors in ISDS.

The second method presented is "to have disputing parties agree to its application at the inception of each case". This is the most traditional approach and upholds consent to the fullest. This method is also the same as the one used by the IBA Guidelines and the primary approach for ensuring voluntary compliance. The third method presented is "to append it to the disclosure declaration that adjudicators must file upon acceptance of nomination". This method leaves the implementation on arbitral institutions and merely upholds consent as another voluntary method. The last method presented is "to incorporate the Prospective Code into applicable procedural rules". Similar to the last method, this method too leaves implementation to institutions and upholds consent as another voluntary method. However, it may be significantly more inclusive than the other methods, as institutions have the ability to modify parts of the Prospective Code in ways that fits their functioning better. Surely, this will not deal with the lack of uniformity in the best way, but this can be the way to ensure the most opt-ins and the flexibility can pave the way for a more uniform tomorrow.

D. MULTILATERAL INSTRUMENT ON ISDS REFORM?

[165] Commentary (n 15) para 97.

[166] United Nations General Assembly, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019) A/CN.9/1004, para 54.

Towards the culmination of the Commentary, it mentions that the Prospective Code could be part of a multilateral instrument on ISDS reform in an almost throwaway manner.[167] The assessment of implementation through a multilateral instrument on ISDS reform is not very different from the assessment made in the previous part about other methods of implementation. However, its difference from other measures is in the fact that it stops being individualistic to the Prospective Code. There will be other reforms that this will be bundled up with, making it less likely for there to be opt-ins. The multilateral instrument on ISDS reform generally does not contribute much to the Prospective Code, as the supporters of the Prospective Code would opt-in even without the multilateral instrument. On the contrary, if there are significant reforms imbibed in the multilateral instrument, it may deter opt-ins for the Prospective Code. However, this is to say that the final code of conduct should not exclusively be a part of the multilateral instrument, it can be released individually along with being incorporated with the instrument. This part exists as a clarification, as the intent of the Commentary with the multilateral instrument is not discernible.

XIV. CONCLUSION

The importance of a code of conduct for adjudicators in ISDS is well documented and agreed upon by the dispute resolution community. This Draft Code brings us one step closer to envisaging a better application of the same.

Since this Draft Code has the privilege of hindsight, having considered pre-existing codes and regulations, it has incorporated comparative analysis and directly implemented segments of other models in creating this Draft Code. We have addressed through this paper how several issues plaguing the ISDS regime have better resolutions through the Draft Code compared to pre-existing guidelines. We observe that it fills many lacunae— in Article 1 and 2. The specific language used along with broad terms like "adjudicator" make the Draft Code widely applicable. Further, explicit demarcation of who the Draft Code applies to brings clarity. In Article 4, the independence and impartiality standard is applied in an optimal manner, absorbing benefits of both ICSID's subjective and IBA Guidelines' objective pre-existing standards (being akin to the median "reasonable doubts standard"). Article 5 in the same limb, ensures strict standards of disclosure as obligations rather than being mere guidelines along with Article 6 ensuring an optimal solution to double hatting by applying both disclosure and disqualification standards varying based on the situation. An additional factor contributing to the benefit of this Draft Code is the release of a comprehensive Commentary to help understand the considerations and intentions WGIII had while drafting the Draft Code, along with highlighting the reasoning behind the choice of language used. It also analyses each Article in comparison to other regulations and existing practice. This allows readers and those applying this Draft Code to get a better understanding thereof, culminating in a better application of this Draft Code.

Despite all these positives in place, this Draft Code still has some gaping holes in its provisions. At the outset, most crucial terms used in this Draft Code remain undefined by both the Draft Code and its Commentary. Article 1 fails at providing a comprehensive definition of Assistants in Article 1(2). This becomes important when interpreting Article 7(4) that calls for non-delegation of duties of an arbitrator. Since major critique already exists that tribunal secretaries and assistants are likely to act as "fourth arbitrator" in arbitration

[167] Commentary (n 15) para 97.

proceedings, and assistants are only defined in Article 1(2) without being extended to arbitral secretariats and staff or properly defining their role in a proceeding, an incomprehensive definition of the term jeopardises the application of Article 7(4). Post that, Article 4, addressing the most important role of an adjudicator, i.e. the maintenance of independence and impartiality, does not define either of those terms, or their underlying criteria— like the term self-interest, which can be understood either broadly or narrowly, depending on a case to case basis.

This vagueness causes an inability to succinctly grasp the standards this Draft Code wishes to adhere to in assessing independence and impartiality. In Article 6, there is a lack of clarity and distinction between different situations of double hatting. The Draft Code nor its Commentary addresses how tribunals would be likely to apply different standards to each of these situations where some may incur no penalty but some may lead to disqualification of arbitrators. In Article 8, there is no measure to ensure compliance with the duties listed therein, i.e. maintaining civility and ensuring availability, as there are no disclosure obligations attached to them. Last, there is also a lack of foresight displayed as to how enforcement under Article 12 is likely to be implemented in real time, as no clarity is provided as to how the sanctions envisaged by the regime are likely to be put in place. These doubts primarily arise from the fact that the Commentary itself addresses that implementation of methods of enforcement are likely to be difficult.

With all these criticisms existing, there is massive room for further discussion and deliberation by UNCITRAL and ICSID secretariats to polish this Draft Code and add the layers of nuance required for a better universal code of conduct for adjudicators. At the end of the day, it is beneficial to ISDS to have a Code of Conduct for Adjudicators especially when this is one that is drafted by the two entities that have been at the forefront of ISDS practice, making it likelier for this Draft Code to be adopted in an expanse of ISDS proceedings.