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# Settlement of commercial disputes: Possible future work on ethics in international arbitration

## Note by the Secretariat

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# I. Introduction

1. At its forty-eighth session, in 2015, the Commission had before it a proposal for future work on a code of ethics for arbitrators in investment arbitration (A/CN.9/855), which suggested that work on the topic could relate to the conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.[1]

2. After discussion, the Commission requested the Secretariat to explore the topic in a broad manner, including in the field of both commercial and treaty-based investor-State arbitration, taking into account existing laws, rules and regulations, as well as any standards established by other organizations. The Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[2]

3. In accordance with that request, the purpose of this note is to explore the concept of ethics in international arbitration, to identify existing legal frameworks in the field of international commercial and treaty-based investor-State arbitration, and to raise questions with regard to the topic as an item for possible future work by the Commission.[3] This note is limited to exploring ethics of arbitrators, and does not address other participants in the arbitration process, such as counsel, experts, or third-party funders.

# II. Concept of ethics and existing legal frameworks on ethics in international arbitration

## A. Concept of ethics in international arbitration

### 1. Standard of conduct

4. The notion of legal or professional ethics refers to the norms and standards of acceptable conduct within the legal profession, involving the duties that one owes: conduct is considered unethical when it is not in conformity with moral norms and professional standards. Similarly, the concept of ethics in international arbitration usually refers to norms and standards applicable to the conduct of arbitrators as elaborated further below.

### 2. Impartiality and independence

5. Impartiality and independence are the core elements of integrity and ethical conduct of arbitrators. Arbitrators are expected to avoid direct and indirect conflicts of interest. Such conflicts usually fall in one of two categories: lack of impartiality or lack of independence. Usually impartiality and independence are distinguished on the basis of internal as opposed to external considerations. Impartiality means the absence of bias or predisposition towards a party. Lack of impartiality would arise, for instance, if an arbitrator appears to have pre-judged some matters. Independence

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 148.

[2] Ibid., para. 151.

[3] Ibid., para. 150.

usually relates to the business, financial, or personal relationship of an arbitrator with a party to the arbitration, and lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel. Standards on ethics usually provide that ethical duties remain applicable throughout the duration of the proceedings (see below, section B).

### 3. Disclosure obligations

6. The obligation of impartiality and independence is usually accompanied by the requirement that the arbitrator shall disclose circumstances, past or present, that could give rise to justifiable doubts as to his or her impartiality or independence. It is then for the arbitrator to declare that the disclosed circumstances do not affect, in his or her opinion, his or her independence and impartiality.[4]

7. Investment treaties may contain additional elements regarding disclosure, specifying, for instance, that the arbitrators shall disclose any financial interest in the proceeding or in its outcome, and in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the arbitrator is under consideration.[5]

8. Specific requirements are also sometimes found in standards on ethics, such as that a prospective arbitrator shall disclose personal or business relationships with "any person known to be a potentially important witness in the arbitration".[6]

### 4. Other obligations possibly relevant to ethics of arbitrators

9. Requirements of fairness and diligence, as well as provisions on qualifications and confidentiality can be found in national legislation and arbitration rules, which, in substance, usually provide that the arbitrator shall: (i) perform his or her duties with fairness and diligence, thoroughly and expeditiously throughout the course of the proceeding;[7] and (ii) keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others.

### 5. Challenge procedure — Non-compliance with ethical standards

10. The usual consequence of a finding of non-compliance with ethical standards after the appointment of an arbitrator is usually the resignation and replacement of

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[4] See, for instance, the model statement of independence contained in the Annex to the UNCITRAL Arbitration Rules (as revised in 2010) which gives an indication as to the elements that would be required to be disclosed: "Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances."

[5] See, for instance, Canada — European Union Comprehensive Economic and Trade Agreement (CETA).

[6] See for instance the Code of Ethics for an Arbitrator, Singapore International Arbitration Centre 2.2 (a).

[7] See, for instance, article 17 (1) of the UNCITRAL Arbitration Rules (as revised in 2010), as well as their Annex (which provides that any party may consider requesting from the arbitrator a statement confirming that "on the basis of the information presently available, that arbitrator can devote the time necessary to conduct the arbitration diligently, efficiently and in accordance with the time limits in the Rules.").

the arbitrator.[8] Almost all arbitration laws and arbitration rules contain provisions on procedures for challenging arbitrators who do not comply with ethical standards. They also include safeguards aimed at avoiding that the challenge procedures be used abusively, as dilatory tactics, by parties.

## B. Existing legal frameworks on ethics in international arbitration

11. With the expansion of international arbitration, a variety of texts on ethics have been developed by States, international organizations, arbitral institutions as well as local bar associations. Some have been formulated as a stand-alone text, while others have been included in national legislation, in arbitration rules and more recently, in treaties relating to investor-State dispute settlement (see below, para. 19). Some have a binding effect, whereas others are meant to provide general guidance. State courts' review of challenges to arbitrators as well as challenges to awards under national laws and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") often constitute a last resort review of the arbitrators' conduct.

### 1. National legislation

12. The UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration") has been enacted in a large number of jurisdictions and its articles 12 and 13 on grounds for challenge and challenge procedure shed light on the ethics expected of an arbitrator.[9] It does so by imposing on each arbitrator a continuing duty to disclose to the parties circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence.[10] The Model Law on Arbitration also makes it clear that arbitrators cannot be challenged for reasons other than those mentioned in article 12, paragraph 2.[11]

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[8] See, for instance, Rule 6 (2), ICSID Arbitration Rules which provides that: "Before or at the first session of the Tribunal, each arbitrator shall sign a declaration. […] Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned." Similarly, under the UNCITRAL Arbitration Rules, a challenge procedure is provided for in the event arbitrators would lack impartiality and independence.

[9] Jurisdictions which have enacted legislation based on the Model Law on Arbitration can be found on the Internet at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[10] Article 12(2) of the Model Law on Arbitration provides that: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made".

[11] The *travaux préparatoires* show that proposals were made to delete the word "only" in article 12(2) of the Model Law on Arbitration but it was considered preferable to retain that word to clearly emphasize that possible additional grounds for challenge provided for in domestic law should not apply in the context of international commercial arbitrations (see *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), paras. 116-119).

### 2. Guidance texts developed by international organizations and arbitral institutions

13. In line with the provisions found in national legislation and arbitration rules, professional standards addressing the question of conflict of interest generally refer to the principle that arbitrators have a continuing obligation to remain impartial and independent.[12] For example, the IBA Guidelines on Conflict of Interest contain illustrations of acceptable and prohibited relationships that bifurcate into waivable and non-waivable relationships. These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. It should be noted that during the review of the IBA Guidelines, "a consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator".[13]

### 3. Arbitration rules

14. Most arbitration rules have statements of principle rather than detailed rules on impartiality and independence of the arbitrators. They contains specific rules on the procedure for challenging an arbitrator. The UNCITRAL Arbitration Rules (as revised in 2010, and 2013), for instance, which apply to both investor-State and commercial disputes, deal with disclosure by, and challenge of, arbitrators in articles 11 to 13. In accordance with the Rules, unless the other party agrees or the arbitrator withdraws voluntarily, the decision on the challenge will be made by the appropriate appointing authority. Decisions on challenge are usually subject to review by State courts under the applicable arbitration law or within the framework of the New York Convention.

15. Arbitration rules of institutions contain similar provisions, sometimes with slight variations. For instance, some arbitration rules make reference to "justifiable doubts" as to the arbitrator's impartiality and independence while others direct the arbitrator to consider whether the questionable circumstances would cause doubts "in the eyes of the parties", or refer to "an alleged lack of impartiality or independence".

16. In the specific situation of investor-State dispute settlement, Article 14 of the ICSID Convention requires arbitrators and conciliators to be "persons of high moral character and recognized competence (…) who may be relied upon to exercise independent judgement". This requirement is supplemented by filing a declaration of independence at the beginning of the proceedings, required under Rule 6(2) of the ICSID Arbitration Rules. Article 57 of the ICSID Convention provides a mechanism by which a party may seek disqualification of an arbitrator by showing "a manifest lack of the qualities required by paragraph (1) of Article 14." Article 39 of the ICSID Convention generally provides that an arbitrator may not have the same nationality of either party.

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[12] For example, "Code of Ethics" (AAA), "Code of Professional and Ethical Conduct" (London Chartered Institute of Arbitrators), "Code of conduct" (EU), "Guidelines on Conflict of Interests" (IBA), "Ethical Arbitration Charter" (Federation of Arbitration Centre). Code of Ethics for an Arbitrator, Singapore International Arbitration Centre.

[13] IBA Guidelines on Conflict of Interests, page ii.

### 4. Case law

17. As mentioned above, the Model Law on Arbitration, including its articles 12 and 13, has been enacted in a number of jurisdictions. The Model Law, however, does not define terms such as "justifiable doubt", "impartiality", or "independence", and thus State courts have used their respective standards to interpret those notions. The Digest of Case Law on the Model Law on Arbitration provides an analysis of the relevant court decisions.[14] Courts have highlighted the mandatory nature of impartiality and independence and have analysed the arbitrator's duty to disclose. Some decisions have underlined that there should be objective circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator for a challenge to be successful.[15] For example, the notion of "justifiable doubt" has sometimes been interpreted to require a showing of objective facts that a reasonable, well-informed person would regard as constituting a bias on the part of the arbitrator. Some jurisdictions require a real manifestation of bias before an arbitrator can be removed.

18. Decisions by courts with regard to the New York Convention may also be relevant. Case law shows that there have been attempts by parties to resist enforcement of foreign arbitral awards on the basis that the arbitrators lacked independence and impartiality. While these defences to enforcement were usually presented on the basis of article V (2) (b) of the New York Convention, they have been rarely successful. Courts have underlined that the matter raised was not covered by public policy, and that the party should have raised the matter during the arbitral proceedings.[16]

### 5. Code of ethics in investment treaties

19. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement arising under a treaty.[17] Those codes usually address the standards of conduct for arbitrators (and other persons), their duties in the conduct of the arbitration, the disclosure obligations and the obligations of confidentiality.

## III. Questions in relation to possible future work

20. With the development of international arbitration and the variety of sources and texts on ethics, no guidance has been provided on which approach arbitrators should adopt, for instance whether arbitrators dealing with international arbitration should disregard their home jurisdictions' ethical rules in favour of international texts. As noted by the Commission at its forty-eighth session, arbitral tribunals could be bound by more than one standard on ethics depending on the nationality of

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[14] The Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration Available on the Internet at: www.uncitral.org/uncitral/en/case_law/digests/mal2012.html.

[15] See Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, Article 12.

[16] Available on the Internet at: www.newyorkconvention1958.org.

[17] See, for instance the EU — Singapore Free Trade Agreement, Annex 15-B, Code of Conduct for Arbitrators and Mediators.

the arbitrators, affiliation with bar associations as well as on the place of arbitration.[18] Therefore, concurrent norms may apply, without any clear indication on which one shall prevail.

21. The expansion of international arbitration has also resulted in the diversification of parties involved in the arbitration process. As such, their perspectives on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions. While there seems to be a general agreement about the fundamental ethical standards of international arbitration, in practice, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. Increased regulation of the arbitral procedure and increased transparency of the process have also an impact on parties' expectations in relation to ethical conduct of arbitrators.

22. In addition, the standards described above in section B contain statement of principles about ethical duties, and usually lack explanatory contents about their practical implications.

23. In that light, the Commission may wish to consider the following questions:

(a) Whether there is a need for a harmonized and authoritative source on ethics in international arbitration;

(b) Whether the purpose of undertaking work in the field of ethics in international arbitration would be to reduce any identified uncertainty and inconsistency in the existing ethical standards, and their application; if so, whether a new instrument should cover any or all of (i) persons concerned (in addition to the arbitrators), (ii) content of ethical standards (limited to impartiality and independence, or expanded to encompass other obligations), (iii) methods and extent of disclosure, (iv) challenge procedures, (v) effect of breach of ethical standards, (vi) enforcement mechanisms (how should ethical rules be enforced and by whom (arbitrators, parties, institutions, others))?

(c) Whether existing instruments sufficiently define the scope of disclosure and the disqualification process: what level of detail should be provided in relation to disclosure and the procedure for challenging an arbitrator? Could impartiality and independence as well as other obligations be waivable, and if so, under which conditions?

(d) Whether the consequences of non-compliance with ethical standards are addressed in sufficient detail in existing instruments.

24. It appears from the examples in section II above that ethical standards in investor-State arbitration and in commercial arbitration largely address the same obligations with some variation. The Commission may wish to consider whether any work on the topic should encompass both commercial and treaty-based

[18] Ibid., para. 150.

investor-State arbitration, or whether distinction should be made to take account the obvious differences between investor-State and commercial arbitration.